2022–2023–2024

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

TREASURY LAWS AMENDMENT BILL 2024: ENHANCED DISCLOSURE OF OWNERSHIP OF LISTED ENTITIES

EXPOSURE DRAFT EXPLANATORY MATERIALS

Glossary

This Explanatory Memorandum uses the following abbreviations and acronyms.

Abbreviation	***Definition***
ASIC	Australian Securities and Investments Commission
ASIC Act	*Australian Securities and Investments Commission Act 2001*
Corporations Act	*Corporations Act 2001*
Corporations Regulations	*Corporations Regulations 2001*

Chapter 1: Enhanced disclosure of ownership of listed entities

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Outline of chapter

1.1 The Bill amends Chapters 6 and 6C of the Corporations Act to enhance the substantial holding and tracing notice regimes, which, amongst other things, govern the disclosure of beneficial ownership for listed entities.

1.2 The Bill includes amendments intended to:

- bring equity derivatives into fuller view of the Chapter 6C disclosure regime and ensure they are captured by other requirements in the Corporations Act that target ‘relevant interests’;

- expand the definition of 'relevant interest' to capture a greater array of instruments and arrangements that may give a person and their associates material influence over securities, and potentially in turn, over an entity's future direction;
- clarify when disclosure requirements crystallise;
- require foreign-registered entities listed on Australia's financial markets and their shareholders to disclose interests in securities to the same standard as Australian-registered listed entities and their shareholders;
- improve access to, and usability of, existing registers of information about relevant interests in listed entities collected via tracing notices; and
- confer on ASIC appropriate powers to incentivise and enforce compliance with the amended disclosure regime and to protect market participants.

1.3 The amendments are consistent with the Government's 2022 election commitment to introduce reforms in relation to beneficial ownership.

1.4 All legislative references in this Chapter are to the Corporations Act unless otherwise specified.

Context of amendments

1.5 The Government announced a multinational tax integrity package to address tax avoidance and improve corporate transparency as part of its 2022 election platform. As part of this package, the Government announced that it would implement a public registry of beneficial ownership to show who ultimately owns or controls companies and legal vehicles in Australia.

1.6 Increasing the availability of companies' beneficial ownership information is intended to discourage the use of complex structures to obscure tax liabilities and facilitate financial crimes. Greater levels of transparency will also increase the tools available to regulators and law enforcement in performing their functions and powers (including, for example, the assessment of foreign investment applications and the enforcement of sanctions).

1.7 It will also support transparency by providing greater access to information to interested members of the public, such as journalists and academics, who play a key role in initiating and encouraging public debate.

1.8 Access to beneficial ownership information supports the efficient operation of financial markets by improving the information available to persons making investment decisions and their ability to conduct due diligence on prospective acquisitions, ultimately supporting more efficient resource allocation.

1.9 As a first step, the Government is seeking to enhance the beneficial ownership disclosure obligations that already apply to listed entities under Chapter 6C of

the Corporations Act. In particular, these amendments enhance the substantial holding and tracing notice regimes, including by bringing aspects of Australia's market transparency requirements into line with comparable jurisdictions.

1.10 In concert with proposals to expand anti-money laundering and counter-terrorism financing obligations and to introduce beneficial ownership reforms in relation to unlisted companies, this Bill aims to materially improve Australia's compliance with Financial Action Task Force recommendations relating to beneficial ownership of companies.[1]

1.11 Existing Part 6C.1 of the Corporations Act obliges a person with a substantial holding in a listed company[2] to provide to the company and the relevant market operator their name and address, as well as various details of their own and their associates' relevant interests. More specifically, this obligation applies where:

- the person begins to have, or ceases to have, a substantial holding in the company;
- the person has a substantial holding in the company and there is a movement of at least 1% in their holding; or
- the person makes a takeover bid for securities of the company.

1.12 The Bill's extension of disclosure requirements, while consistent with the approach outlined in Takeovers Panel Guidance Note 20, operates more broadly to cover market disclosures beyond the remit of the Takeovers Panel's guidance. Bringing all equity derivatives within the disclosure regime in Chapter 6C means that:

- disclosures of substantial holdings involving equity derivatives can be standardised and streamlined in a single integrated substantial holding notice, potentially improving data quality over time;
- ASIC will be able to seek penalties for failures to disclose interests arising under equity derivates, consistent with the current position for other interests that should be disclosed under the substantial holding disclosure requirements (this will supplement the current (non-punitive) administrative remedies available to the Takeovers Panel if non-compliance is found to give rise to unacceptable circumstances); and

[1] The Financial Action Task Force (FATF) is an international organisation that sets financial crime-fighting standards for adoption by member states. In 2015, the FATF found that, despite Australia's mature regime for combating money laundering and terrorism financing, certain key areas remained unaddressed.

[2] Chapter 6C also applies to relevant interests in securities in listed registered managed investment schemes, listed notified foreign passport funds and other listed bodies that are not companies but are incorporated or formed in Australia. Where this Explanatory Memorandum refers to, and gives examples about, the operation of Chapter 6C in relation to companies, it should be taken to also apply to these other entities, unless the context suggests otherwise.

- interests arising under equity derivatives will come within the scope of the tracing notice provisions.

1.13 Other enhancements to beneficial ownership transparency included in the Bill, such as ASIC's expanded tracing notice power and new freezing order power, will apply to interests arising under equity derivatives. Existing Part 6C.2 of the Corporations Act empowers listed companies and ASIC to direct a member of the company to disclose full details of their own relevant interest in the company's shares and the names and addresses of others who have a relevant interest in, or have given instructions about, any of the shares. These directions are commonly known as 'tracing notices.'

1.14 Part 6C.2 also obliges listed entities to keep a register of information that they receive through the tracing notices they have issued, or that ASIC has passed on from information obtained via ASIC-issued tracing notices. The register must be open for inspection by any member of the company without charge, and by any other person (though this can be for a fee).

1.15 Existing sections 655A and 673 empower ASIC to exempt from and modify Chapter 6 (including the provisions governing 'relevant interests') and Chapter 6C, and several modifying instruments are currently in force.

Summary of new law

1.16 The changes to Chapters 6 and 6C of the Corporations Act proposed to be made by this Bill improve the beneficial ownership disclosure regime for listed entities by increasing transparency and supporting stronger enforcement.

1.17 The Bill requires holders to disclose the following derivative-based interests to the market, in the same way as they would disclose any other interests that form part of a substantial holding:

- interests arising from physically settleable derivatives, regardless of whether the counterparty has a relevant interest in the underlying securities;
- interests arising from non-physically settleable derivatives.

1.18 The Bill also clarifies that a person must disclose a substantial holding in an entity at the time that it initially lists on a financial market.

1.19 The amendments provide ASIC with enhanced powers relating to the format of substantial holding notices and tracing notices. This promotes consistency, standardisation, and continuous improvement to the information available to the public.

1.20 The amendments both widen and refine the application of disclosure requirements, including by:

- aligning the information required under an ASIC-issued tracing notice with the information required under substantial holding notices;
- imposing disclosure requirements on entities incorporated or formed outside Australia and listed on a financial market operated in Australia; and
- expanding the class of persons who can be the subject of a tracing notice to include persons reasonably suspected of having certain kinds of involvement with listed entities, or of being associates of such persons or of other persons already subject to disclosure requirements.

1.21 The amendments require affected entities to allow journalists and academics to inspect their tracing notice registers free of charge.

1.22 They also give ASIC new powers to make freezing orders in relation to failures to comply with substantial holding and tracing notice requirements.

1.23 The amendments double the maximum penalties for all the offences in Chapter 6C.

Comparison of key features of new law and current law

Table 1.1 Comparison of new law and current law

New law	***Current law***
Interests in equity derivatives are included in the calculation of a person's holding, irrespective of the settlement method or whether the counterparty has a relevant interest in the underlying securities.	Only relevant interests in physically settled equity derivatives are included in the calculation of a person's substantial holding, and only to the extent that the counterparty to the derivative has a relevant interest in securities underlying the derivative.
Changes in the nature of a person's interest arising under equity derivatives must be disclosed when there is a greater than 1% change in any of the following categories (irrespective of whether a person's and their associates' total relevant interests change): • interests referable to the holding of a counterparty under a physically	Changes in interests arising from equity derivatives only need to be disclosed by a substantial holder where a change occurs that results in a person's and their associates' total relevant interests increasing or decreasing by 1% or more.

New law	***Current law***
settleable derivative under subsection 608(8); • interests deemed to arise under a physically settleable derivative not covered by subsection 608(8); • interests arising from a non-physically settleable derivative.	
A person needs to disclose their substantial holdings in a listed entity when the entity becomes a Chapter 6C body – i.e. when the entity first lists.	A person needs to disclose new substantial holdings when they begin to hold them. Disclosure obligations for interests already held in newly listed entities are unclear.
ASIC and entities can issue tracing notices to: • members of the entities; • persons named in previous disclosures made in response to tracing notices as having relevant interests in, or having given instructions about, securities; and • persons suspected on reasonable grounds of having relevant interests in, or having given instructions, about securities (ASIC may also issue notices to associates of such persons).	ASIC and entities can issue tracing notices to: • members of the entities; and • persons named in previous disclosures made in response to tracing notices as having relevant interests in, or having given instructions about, securities.
ASIC and entities can issue tracing notices. ASIC can ask for more information than an entity can ask for. Entities must base their reasonable suspicion on information already disclosed under Chapter 6C. This limitation does not apply to ASIC. Information that must be given in response to a tracing notice issued by ASIC is aligned with the information required by a substantial holding notice (unless ASIC dispenses with the need to provide particular information or documents).	ASIC and entities can issue tracing notices asking for the same information. Part 6C.2 of the Corporations Act specifies information that must be given in response to a tracing notice, but there are differences between this information and that required by a substantial holding notice.

New law	***Current law***
Chapter 6C disclosure requirements apply to entities incorporated or formed outside Australia that are listed on an Australian market. ASIC can exempt holders of interests in a foreign entity from substantial holding disclosure requirements by declaring that the entity is subject to equivalent disclosure requirements in its jurisdiction.	Chapter 6C disclosure requirements do not apply to entities incorporated or formed outside Australia.
An entity's tracing notice register must be open to inspection by any member of the entity, an academic or a journalist, without charge.	An entity's tracing notice register must be open to inspection by any member of the entity, without charge.
ASIC can make freezing orders in relation to disclosable securities in listed entities if a person fails to comply with substantial holding and tracing notice requirements.	ASIC has freezing order powers under the ASIC Act to restrain dealings in securities, in order to assist an ASIC investigation. These are enlivened if a person has failed to comply with a requirement made under Part 3 of that Act.

Detailed explanation of new law

Requiring disclosure of more kinds of relevant interests arising from equity derivatives

1.24 The central aim of these reforms is to close existing loopholes in the disclosure regime in order to ensure greater transparency for investors and the market, particularly in relation to equity derivatives.

1.25 Under the existing disclosure obligations in the Corporations Act, persons with relevant interests in voting shares of an entity amounting to 5% or more of the total votes that may be cast must disclose that they have a 'substantial holding'. Substantial holders must then report any subsequent movements in their interests of 1 percentage point or more.

1.26 The economic interest in securities underlying a physically settled equity derivative is already recognised as part of a person's relevant interest in an entity, but only to the extent that the counterparty to the derivative has a relevant interest in those underlying securities.

1.27 The Bill expands the meaning of a 'relevant interest' in securities to cover interests arising under equity derivatives irrespective of how the derivative is

to be settled, and regardless of whether the counterparty has a relevant interest at any particular time in any of the underlying securities required to meet their obligations at settlement or upon exercise.

1.28 This extension is a key reform, which improves market efficiency, competition and transparency, giving market participants better and more timely access to information on the accumulation of substantial interests in listed entities and the dealings and influence of persons who may impact such entities' future directions.

1.29 Equity derivatives generally create an economic incentive for a party to the derivative to acquire and/or maintain a holding of underlying securities as a hedge against their exposure. Even if the equity derivative is not physically settleable, the creation and control of this inherent incentive gives rise to a level of influence over those underlying securities that warrants disclosure to the market (and that is comparable to the influence over securities arising from many other arrangements and agreements that are already required to be disclosed under Chapter 6C).[3]

1.30 Parties with what is called a 'long economic exposure' under an equity derivative are in a unique position of proximity to any underlying securities held as a hedge, given they can generally influence when the equity derivative is 'unwound' (as well as when the incentive to maintain a holding of the underlying securities ceases). This means that, even in the absence of any formal arrangement or rights in relation to a particular holding of underlying securities, the party in the 'bought position' will often have both a positional and informational advantage in relation to any potential dealings in those securities; for example, in negotiating a right to acquire them at settlement or as part of unwinding the derivative.

1.31 Takeovers Panel Guidance Note 20: *Equity Derivatives* recognises that the influence arising under equity derivatives is particularly relevant to the market given its potential to impact the availability and pricing of the underlying securities.[4]

1.32 As a result of the Bill, the influence arising from equity derivatives will also be recognised for other Corporations Act purposes, including the director disclosure requirements in section 205G and subsections 300(11) and (12) and the takeover provisions in Chapter 6.

[3] This is reflected in the expansive definition in existing subsection 608(2) which, in ASIC's view, is derived from a concern to ensure that the objectives of the various regulatory regimes relying on the meaning of 'relevant interest' are not circumvented: see ASIC *Regulatory Guide 5: Relevant interests and substantial holding notices* at RG 5.27.

[4] Takeovers Panel Guidance Note 20: *Equity Derivatives*, paragraph 7.

1.33 Any change in a director's relevant interests that results from the changes introduced in this Bill will be a reportable change in the director's interests for section 205G purposes.
[Schedule 1, item 68, subsection 1710H(3) of the Corporations Act]

1.34 This will ensure consistency between directors' substantial holding-related and other disclosure obligations.

1.35 In relation to the takeover provisions, the effect of these amendments is that influence arising from equity derivative interests must be taken into account, including when entering into agreements or arrangements that may result in a person acquiring or increasing control of an entity. It is appropriate that equity derivative arrangements that result in a person's economic exposure to, and influence over, securities increasing to a level that may impact control over such an entity are required to comply with the requirements of Chapter 6. This is also consistent with existing Takeovers Panel guidance which notes that the acquisition of interests under equity derivatives that would otherwise be prohibited if the underlying securities were directly held may give rise to unacceptable circumstances: see Takeovers Panel Guidance Note 20: *Equity Derivatives,* paragraph 19.

Background on equity derivatives

Key concepts

1.36 'Equity derivatives' are financial arrangements pursuant to which the value of the arrangement, or the consideration that must or may be provided at a future date, is at least partly derived from one or more underlying equity securities. Equity derivatives may include swaps, forwards, futures and options.

1.37 Typically, equity derivatives are either:

- physically settled (meaning that one party has a right to receive the actual underlying securities); or
- cash settled (meaning that one party is entitled to receive a cash payment in lieu of the underlying securities).

1.38 A more comprehensive distinction is that between physically settled and non-physically settled derivatives. This is because equity derivatives could be non-physically settled other than by means of cash (for example, by cryptocurrency).

1.39 Equity derivatives are often created to meet the needs of the clients of investment banks. In this context, the investment bank is generally the 'writer' of the equity derivative and 'sells' or 'grants' the derivative by entering into the derivative contract in exchange for a fee or premium. The 'taker' of the equity derivative 'buys' or 'holds' the derivative and is typically the party for whose benefit the principal right under the derivative (to receive the underlying securities, or an equivalent cash payment) was created.

1.40 Either the writer or the taker of an equity derivative can be in the 'bought position' or the 'sold position' under the terms of the derivative. The relevant position reflects the outcome for the party at performance or settlement (or upon exercise, in the case of an option). For example, under a relatively simple long forward contract, the writer agrees to give the taker a fixed number of securities at a fixed future date.[5] In this case:

- the writer is in the sold position (and typically benefits if the price of the underlying securities decreases after the derivative arrangement is entered into); and
- the taker is in the bought position (and typically benefits if the price of the underlying securities increases after the derivative arrangement is entered into).

1.41 As equity derivatives are arrangements between private parties, their terms can vary widely. Some have standardised terms and can be traded on financial markets. Others can be very complex, meaning that some of the terms referenced above may not necessarily apply.

1.42 To aid comprehension in this Explanatory Memorandum, a reference to a term in the first column of the below table should be taken to have the meaning outlined in the second column, unless otherwise indicated.[6]

Table 1.2

Term	**Meaning**
Taker or holder of the derivative	Person in the bought position
Writer of the derivative	Person in the sold position
Counterparty	Person in the sold position

Existing requirements applicable to equity derivatives

1.43 The concept of a 'relevant interest' in Chapter 6 of the Corporations Act is fundamental to delimiting the scope of a number of requirements and rights relating to the disclosure of interests in an entity and the acquisition of control over an entity, including:

- the substantial holding disclosure and tracing notice requirements in Chapter 6C;
- the director disclosure requirements in section 205G and subsections 300(11) and (12);

[5] The holder of a 'long position' will generally benefit if the price of the underlying security increases.

[6] These references would be reversed in the case of put options, for example.

- the takeover requirements in Chapter 6; and
- compulsory acquisition and buyout rights in Chapter 6A.

1.44 The existing relevant interest rules in sections 608 to 609B of the Corporations Act capture the economic interests arising from equity derivatives in some, but not all, circumstances, meaning that equity derivatives are only partially covered by key market integrity requirements under the Corporations Act.

1.45 Under the existing provisions, the party to a physically settleable equity derivative arrangement that is in the bought position has a relevant interest in the securities in which the counterparty to the derivative has a relevant interest, in certain circumstances. This includes where the equity derivative remains subject to future settlement, the satisfaction of conditions or the exercise of a right under an option: see subsection 608(8).

1.46 Subsection 608(8) applies where the party in the bought position would, upon settlement or exercise, have a relevant interest in securities in which the counterparty has a relevant interest: see paragraph 608(8)(c). In this way, the relevant interest arising under the derivative is linked to a relevant interest of another person, which in turn is generally able to be related to identifiable parcel(s) of underlying securities held by one or more persons on the relevant register of securities.

1.47 As ASIC observes in *Regulatory Guide 5: Relevant interests and substantial holding notices*, the operation of this provision is not intended to be limited to arrangements citing designated parcels of underlying securities (for example, a parcel specifically set aside by the party in the 'sold' position to satisfy their obligation to physically settle the derivative). Where a counterparty's relevant interests in underlying securities are less than what would be required to satisfy their obligations under the arrangement, the party in the bought position is taken to have correspondingly lower relevant interests. The latter's interests will vary based on changes in the counterparty's holding: see ASIC *Regulatory Guide 5*, RG 5.163 and 5.166.

1.48 The Bill defines relevant interests in derivatives under the existing law as the discloser's 'relatable derivative-based holding percentage'. The word 'relatable' refers to the fact that the relevant interest is *relatable to* a particular holding, being the holding in which the counterparty has a relevant interest. ***[Schedule 1, items 40 and 41 section 9 and subsection 671BD(1) of the Corporations Act]***

1.49 The Bill adjusts existing subsection 608(8) to prevent the new extensions explained below factoring into the calculation of relatable derivative-based interests.
[Schedule 1, item 3, paragraphs 608(8)(a) and (c) of the Corporations Act]

Effect of the amendments

1.50 The Bill does not affect the current operation of the relevant interest provisions in Chapter 6C of the Corporations Act in so far as they already cover equity derivatives. Rather, it expands on them by deeming a person in the bought position to have a relevant interest in a number of securities equivalent to:

- the number that they would have at the time of settlement of a physically settled equity derivative (or a derivative with an option to settle physically), excluding the number that they already have under subsection 608(8); and
  [Schedule 1, item 5, section 608A of the Corporations Act]
- in the case of an equity derivative that is not physically settleable (such as a cash settled derivative) the number specified, or the number calculated in accordance with a method specified, in a determination made by ASIC.
  [Schedule 1, item 5, section 608B of the Corporations Act]

1.51 Unlike relevant interests arising under the existing provisions, the relevant interests that are deemed to arise under the new provisions are not necessarily relatable to any particular underlying security holding.

1.52 Table 1.3 summarises how the relevant interest provisions will apply to the party to an equity derivative in the bought position, once the amendments proposed in the Bill come into effect.

Table 1.3 Summary of the extended relevant interest definition

<table>
<tr><th></th><th colspan="3">**Relevant interests arising from the derivative**
(for party in the bought position)</th></tr>
<tr><th></th><th>**Relatable**
Generally relatable to an identifiable security holding</th><th colspan="2">**Deemed**
Not related to an identifiable security holding (i.e. taken to have a relevant interest in a theoretical security holding)</th></tr>
<tr><th>**Sold position party's interests in underlying securities** \ **Settlement terms under the derivative**</th><th>Physical settlement (or includes an option for physical settlement)</th><th>Physical settlement (or includes an option for physical settlement)</th><th>No physical settlement option (e.g. cash settlement)</th></tr>
<tr><td>Relevant interest in underlying securities matches or exceeds economic interest under derivative (e.g. fully hedged)</td><td>The existing provision will continue to apply. The bought position party will have the relevant interest in the securities that they would have if the derivative was physically settled (by delivery of securities in which the sold position party has a relevant interest)</td><td>Not applicable</td><td rowspan="3">The bought position party will be deemed to have a relevant interest in the number of underlying securities that is equal to the economic exposure created by the derivative (irrespective of the sold position party's relevant interests in underlying securities). The Bill empowers ASIC to determine the number or calculation method to represent that economic exposure</td></tr>
<tr><td>Relevant interest in underlying securities is less than economic interest under the derivative (e.g. partly hedged)</td><td>The existing provision will continue to apply. The bought position party will have a relevant interest in the number of underlying securities in which the sold position party has a relevant interest from time to time</td><td rowspan="2">The new provision will deem the bought position party to also have a relevant interest in the number of underlying securities they would have under the existing provisions if the sold position party presently had sufficient relevant interests in the underlying securities to effect physical settlement. This bridges the gap between the economic interest arising under the derivative and the relevant interests of the sold position party from time to time</td></tr>
<tr><td>No relevant interest in any underlying securities</td><td>Not applicable</td></tr>
</table>

Deemed physically settleable derivative-based interests in securities

1.53 The Bill deems a person in the bought position to have a relevant interest in a number of securities equivalent to the number that they would have at the time of settlement of a physically settled equity derivative, excluding the number that they already have under subsection 608(8).

1.54 In other words, the Bill gives the person a relevant interest in a theoretical holding of shares underlying their derivative representing the portion of their economic interest which is not reflected in any holding in which the counterparty has a relevant interest (and which the counterparty may be holding as a hedge).

1.55 The Bill refers to these theoretical holdings as 'deemed physically settleable derivative-based interests in securities'. In a disclosure context, the Bill defines a person's 'deemed physically settleable derivative-based holding percentage'. ***[Schedule 1, items 40 and 41, section 9 and subsection 671BD(1) of the Corporations Act]***

Rationale for extension to deemed physically settleable derivatives

1.56 The objective of this extension is to ensure recognition and disclosure of the full extent of the economic interests held by the person in the bought position at the time the derivative is entered into and irrespective of their knowledge of the person in the sold position's holding.

1.57 Under the existing provisions, the person in the bought position may not need to disclose the existence of the equity derivative unless and until the counterparty has a relevant interest in a certain number of underlying securities and the person becomes aware of that holding (for example, by the counterparty filing a substantial holding notice). The extension ensures full disclosure of the person in the bought position's deemed relevant interest in a holding, reflecting the person's full economic exposure to the underlying securities arising from the equity derivative.

1.58 As information about changes to the counterparty's holding becomes available, the relative proportion of the economic exposure reflected by relevant interests arising under subsection 608(8) and the new provision dealing with deemed physically settleable derivatives will change.

1.59 This approach also ensures that the market has the same information as the person in the bought position about how much of the incentive created by the equity derivative for the counterparty to acquire, or otherwise obtain, exposure to underlying securities remains unaddressed. It allows the market to ascertain (to the extent to which the holder is aware):

- what proportion the counterparty has bought; and
- what proportion the counterparty has not yet bought, but might.

Other features of the extension to deemed physically settleable derivatives

1.60 Importantly, this extension also applies to a derivative that, on its terms, can be settled either physically or non-physically. This ensures that where a derivative has a physical and non-physical settlement option, the relevant interest that is deemed to arise under the combination of subsection 608(8) and the new provision is equivalent to the maximum number that would be received at settlement, rather than a number based on the non-physical consideration alone.

1.61 The Bill also ensures that there is no 'double counting' in this context. To the extent that a derivative gives rise to a relevant interest in underlying shares in which the counterparty already has a relevant interest, the person is not deemed to also have a relevant interest under the new provision.

1.62 However, the extension to deemed physically settleable derivative-based interests in securities does not cover an arrangement resulting in the creation of new underlying securities in an entity. An example is a performance right where a company agrees with one of its directors to issue them a certain number of new shares in the company at a later date, upon achievement of a performance target. The Bill seeks to address this scenario by excluding securities that would be newly issued as part of the counterparty's consideration. In the case of the example, the director would only obtain a relevant interest upon actually receiving the shares.
[Schedule 1, item 5, paragraph 608A(2)(b) of the Corporations Act]

1.63 This is consistent with the existing provisions of Chapters 6 and 6C, which regulate takeovers and calculate substantial holdings and voting power by reference to 'issued' securities, and recognises that the creation of new underlying securities in an entity changes the denominator in the substantial holding calculation (that is, the total voting shares) in a way that may be impossible for other shareholders to know; they cannot accurately report their holding percentage if a private contract between the entity and an unknown person changes the total number of shares in the entity. For more information, see ASIC *Regulatory Guide 5: Relevant interests and substantial holding notices*, RG 5.152-5.156.

Deemed non-physically settleable derivative-based interests in securities

1.64 The Bill deems certain parties to an equity derivative that references underlying securities in a class on issue, but which is not physically settleable, to have a relevant interest in a number of securities in that class. The number is to be specified, or calculated in accordance with a method specified, in a determination made by ASIC. This applies irrespective of whether the counterparty has relevant interests in any issued securities in the class of underlying securities.

1.65 The Bill refers to these interests as 'deemed non-physically settleable derivative-based interests in securities'. In a disclosure context, the Bill defines

a person's 'deemed non-physically settleable derivative-based holding percentage'.
[Schedule 1, items 40 and 41, section 9 and subsection 671BD(1) of the Corporations Act]

1.66 This new category will typically result in the person in the bought position in relation to a cash settled equity derivative (who will generally receive a cash pay-off referable to the value of underlying securities, but has no express right or option to receive the underlying securities themselves at settlement) acquiring a deemed relevant interest in a theoretical holding of underlying securities in the relevant class.

1.67 The category identifies the party to the derivative in the bought position by applying the deemed relevant interest holding to the person who, under the derivative:

- obtains, in economic substance, the financial benefits of holding, for a period, securities in a class of securities (being the securities that the derivative references); or
- might otherwise benefit if the value of the securities referenced by the derivative references increases (typically, this person would benefit by being in the equivalent of the long position in relation to the derivative).

Rationale for the extension to deemed non-physically settleable derivatives

1.68 Cash settled equity derivatives are sometimes used by investors to gain exposure to the economic performance of a particular security without the need to acquire the underlying physical security.

1.69 These derivatives are generally not captured by the existing relevant interest provisions as, at least on their terms, they do not generally require either party to hold, vote or dispose of any underlying securities.[7]

1.70 As noted above, the party to a cash settled equity derivative in the sold position will often acquire the underlying security as a hedge against their exposure to increases in the price of the underlying securities after entering into the derivative arrangement.

1.71 While holding a cash settled derivative may not confer any express rights over underlying securities, the inherent incentive that the arrangement creates for a counterparty to hedge their exposure gives the person in the bought position a proximity and influence in relation to those securities that is relevant to the market.

1.72 For example, the holder of the derivative may take advantage of commercial incentives that underpin the derivative. If the holder chooses to unwind the

[7] It is possible for such a derivative to fall within the scope of the existing provisions in certain circumstances, for example, if the parties have an agreement, arrangement or understanding in relation to voting or disposal of underlying securities acquired as a hedge.

derivative (by exiting the arrangement or choosing not to exercise an option), the counterparty will, in normal market practice, unwind their own position by selling their hedge position.

1.73 In this way, the investor can influence the timing of the derivative's unwind, and thereby have advanced notice of when a significant parcel of shares is about to come onto the market. This gives the holder an informational advantage to position themselves to acquire the disposed shares (or to negotiate to change the derivative to a physical settlement option).

1.74 The extension will bring cash settled equity derivative positions into the existing disclosure requirements in recognition that these positions allow participants to exert influence over underlying securities and, in turn, over relevant entities. Appropriate disclosure of this influence is necessary to ensure the transparency of Australia's financial markets.

1.75 Stronger provisions for the disclosure of cash settled equity derivative positions may also improve transparency for the purposes of other regulatory regimes that impose ownership thresholds of listed entities, such as media ownership limits under the *Broadcast Services Act 1992* and foreign investment applications under the *Foreign Acquisitions and Takeovers Act 1975*.

1.76 Substantial holding disclosure regimes in a number of comparable jurisdictions, such as Hong Kong, New Zealand, Switzerland, the United Kingdom and various members of the European Union, currently take into account, and require disclosure of, interests under cash settled equity derivatives that do not include an express right or option to acquire underlying securities.

Other features of the extension to deemed non-physically settleable derivatives

1.77 The Bill includes a provision to prevent double counting under this second extension, by expressly excluding from the scope of the deeming exercise interests arising from a derivative to the extent that the derivative already results in a person having a relatable derivative-based interest or a deemed physically settleable derivative-based interest.

1.78 In this way, subsection 608(8) and the two new provisions operate together to ensure that the total economic interests arising under the equity derivatives to which a person is a party are reflected in the total relevant interests arising, or deemed to arise, under the three provisions.

1.79 Under these provisions, if a derivative allows for cash settlement but also contains an option for the person in the sold position to physically settle, then the deemed physically settleable derivative-based category takes precedence over the non-physically settleable derivative-based category. In turn, if the person in the sold position has relevant interests in a number of underlying securities sufficient to fully satisfy their obligation at settlement, the relevant interests in those securities arising under the derivative by virtue of

subsection 608(8) would mean that no deemed interest arises under the new provision dealing with deemed physically settleable derivatives.
[Schedule 1, item 5, subsection 608B(2) of the Corporations Act]

1.80 Conferring power on ASIC to prescribe the reportable number of securities, or the methods available to calculate the reportable number, reflects that there may be both linear (such as in a forward contract) and non-linear (such as with options) relationships between the consideration or value of the derivative and the value of the underlying securities. In turn, this reflects the fact that different types of derivatives can give rise to different levels of exposure on the part of the counterparty and different incentives to hedge the underlying securities.

1.81 It will also allow ASIC to effectively exempt certain derivatives from the regime by assigning them a value of 'zero'. For example, ASIC may consider it appropriate to assign a value of zero to certain cash-settled derivatives held by a long position holder and referencing an index or other basket of securities, because the derivatives do not make up a sufficiently large component of, or otherwise give rise to a sufficient level of influence over, any individual class of security to warrant recognition of a relevant interest.
[Schedule 1, item 5, subsection 608B(3) of the Corporations Act]

1.82 As with the deemed physically settleable derivative-based category, the holding or calculation prescribed is not intended to represent relevant interests referable to a specific parcel of shares. Rather, it is intended to effectively deem the bought position holder to have relevant interests in the number of securities in the class of underlying shares to which that derivative is referable.

1.83 Given the variety of derivatives to which the provision will potentially apply, the power for ASIC to prescribe calculation methods is intended to provide flexibility for ASIC to reference commonly accepted industry methods and potentially allow holders to choose between more than one method.

1.84 ASIC may prescribe a method that involves the person in the bought position needing to recalculate the number of their interests from time to time during the life of the derivative. This additional flexibility will allow ASIC to tailor how often disclosures will need to be updated, having regard to the value of such disclosures to the market. It will also provide certainty to market participants on the timing of recalculations.

1.85 This is not intended to require the person to retrospectively correct a prior disclosure. A recalculation would trigger a disclosable movement if it meets the 1 percentage point threshold, but this is intended to be a fresh disclosure rather than a retrospective correction.
[Schedule 1, item 5, paragraph 608B(4)(b) of the Corporations Act]

1.86 Where recalculations cause an increase in the number of securities, the Bill deems this to constitute an acquisition via a transaction, as an anti-avoidance measure. This would engage the acquisition prohibition in section 606 of the Corporations Act if a recalculation caused a person's voting power to increase above the 20% threshold. This will require holders to ensure that they consider

the impact that the equity derivative could potentially have on their voting power in the entity at the time they enter into the derivative and to take steps necessary to ensure they do not exceed allowable limits, particularly when their holdings are near or over the takeover threshold in Chapter 6.
[Schedule 1, item 5, subsections 608B(5) and (6) of the Corporations Act]

Interaction with post-bid compulsory acquisition provisions

1.87 The Bill provides that relevant interests gained by means of both deemed physically and non-physically settleable derivatives are not taken into account in the calculation relating to achieving the necessary threshold for compulsorily acquiring securities following a takeover bid.
[Schedule 1, item 6, subsection 661A(2) of the Corporations Act]

1.88 As with the existing exclusion in subsection 661A(2)[8] for relevant interests arising under paragraph 608(3)(a), it may be artificial to count deemed relevant interest holdings under the extended derivative provisions for the purposes of determining whether a bidder has acquired overwhelming ownership of the target: see ASIC *Regulatory Guide 10: Compulsory acquisitions and buyouts* at RG 10.44.

Disclosure obligations

1.89 The amendments in the Bill will result in a party to a derivative in the bought position having to consider their relevant interests in each of the following categories in order to calculate whether they have a substantial holding in the listed entity:

- relatable derivative-based interests;
- deemed physically settleable derivative-based interests;
- deemed non-physically settleable derivative-based interests.

1.90 If the party's and their associates' total interests across all three categories, combined with any non-derivative based relevant interests in the listed entity, reach the 5% threshold for a substantial holding, they must disclose the holding by setting out the following breakdown in their substantial holding notice:

- their relatable derivative-based holding percentage;
- their deemed physically settleable derivative-based holding percentage;
- their deemed non-physically settleable derivative-based holding percentage;
- the aggregate percentage across these three categories of derivatives, known as their 'derivative-based holding percentage';

[8] Note that this subsection is modified by *ASIC Corporations (Compulsory Acquisitions and Buyouts) Instrument 2023/684*.

- their aggregate percentage across derivative-based and non-derivative-based holdings, known as their 'holding percentage'.

[Schedule 1, items 40 and 41, section 9 and paragraphs 671B(1)(a) and 671BA(1)(b) of the Corporations Act]

1.91 At every point when disclosure is required, the holder must report each of these percentages, even if the figure is 0%.

[Schedule 1, item 41, subparagraph 671BA(1)(b)(ii) and section 671BD of the Corporations Act]

1.92 Requiring separate disclosure of these categories in a substantial holding notice will ensure the market is able to:

- clearly distinguish between relevant interests that are referable to particular holdings of securities and those deemed to exist in relation to theoretical holdings (noting that the level of influence and potential impact on the market arising from different interests may be perceived differently by the market); and
- easily understand when an update is given as a result of a change in a party's total relevant interests or when it involves a change in the nature of relevant interests under a derivative (for example, because a counterparty acquires underlying securities as a hedge).

Disclosures triggered by movements in derivative-based holdings

1.93 A party to a derivative in the bought position must count their relevant interests in all three categories in calculating whether there is a movement in their total holding in the listed entity that they need to disclose.
[Schedule 1, items 40 and 41, definition of 'disclosable movement' in section 9, and paragraphs 671B(1)(c) and 671BC(1)(a) of the Corporations Act]

1.94 Additionally, a person must disclose when their derivative-based holding percentage in the listed entity moves by 1 or more percentage points, even if their overall holdings in the listed entity have moved by less than 1 percentage point. This requirement is intended to increase market knowledge and promote transparency, preventing any information asymmetry between parties to a derivative and other market participants.
[Schedule 1, item 41, paragraphs 671B(1)(c) and 671BC(1)(a) of the Corporations Act]

1.95 For example, suppose that a shareholder is the outright owner of voting shares amounting to 8% of the voting rights in a listed company. Suppose the holder decides to sell shares equalling 1% of all shares, but then enters into a cash-settled derivative with the person they sold the shares to that provides economic exposure equivalent to holding that same quantity of shares. Their overall holding percentage in the company is unchanged, but they will still

need to disclose the 1 percentage point increase in their derivative-based holding percentage and the reduction in their outright holding percentage.

1.96 Further, a party must disclose any shifts in the internal composition of their derivative-based holding percentage of 1 percentage point or greater. That is, they must disclose when their holding percentage in any of the three derivative categories moves by 1 or more percentage points.

1.97 This new requirement ensures that material changes in the nature of interests arising under equity derivatives are disclosed at the time the change occurs. For example, if a cash settled equity derivative is amended to allow for physical settlement, this change would require disclosure at the time of the amendment, including by providing the market with a copy of the relevant amending documentation.[9]
[Schedule 1, item 41, paragraphs 671B(1)(c) and 671BC(1)(b) of the Corporations Act]

1.98 The Bill includes an anti-avoidance provision that is intended to ensure relevant interest-holders cannot avoid the obligation to disclose subsequent movements by failing to comply on a prior occasion.
[Schedule 1, item 41, subsection 671BC(2) of the Corporations Act]

Example 1.1

A company has 100 million ordinary shares on issue, being the only class of issued shares, all of which carry equal voting rights. An investor buys 6 million shares. They disclose a substantial holding under section 671B and report their 'holding percentage' as 6%.

The investor then enters into a derivative with an investment bank under which the investment bank agrees to provide the investor with 9 million shares in the company in three months' time. The investment bank's most recent substantial holding disclosure indicates that it holds 5 million shares in the company. The investment bank immediately buys 2 million shares as a partial hedge.

Under existing subsection 608(8), the investor would have only disclosed a 7 percentage point movement in their holding.

Under the expanded disclosure regime, the investor must disclose a 9 percentage point increase in their holding percentage and that they have:

- a 15% holding percentage;

[9] This requirement addresses issues recently raised before the Takeovers Panel in *Pacific Smiles Group Limited* [2024] ATP 12.

- a 9% derivative-based holding percentage;
- a 7% relatable derivative-based holding percentage;
- a 2% deemed physically settleable derivative-based holding percentage; and
- a 0% deemed non-physically settleable derivative-based holding percentage.

Suppose the investment bank buys an additional 2 million shares as a hedge, one month later. The investor must disclose:

- a 2 percentage point increase in their relatable derivative-based holding percentage;
- a 2 percentage point decrease in their deemed physically settleable derivative-based holding percentage;
- that they still have a 15% holding percentage;
- that they still have a 9% derivative-based holding percentage;
- that they have a 9% relatable derivative-based holding percentage;
- that they have a 0% deemed physically settleable derivative-based holding percentage; and
- that they still have a 0% deemed non-physically settleable derivative-based holding percentage.

The investor and the investment bank subsequently vary the derivative at the two-month mark to reduce the number of shares subject to physical settlement, with the bank instead agreeing to provide the investor with 4 million shares in the company and the cash value equivalent to 5 million shares at the end of the period (i.e. one month later). Assuming ASIC has allowed a linear calculation to be applied to the cash settled derivative component of the arrangement in these circumstances, the investor must disclose:

- a 5 percentage point decrease in their relatable derivative-based holding percentage;
- a 5 percentage point increase in their deemed non-physically settleable derivative-based holding percentage;
- that they still have a 15% holding percentage;
- that they still have a 9% derivative-based holding percentage;

- that they have a 4% relatable derivative-based holding percentage;
- that they have a 5% deemed non-physically settleable derivative-based holding percentage; and
- that they still have a 0% deemed physically settleable derivative-based holding percentage.

1.99 This requirement to disclose intra-derivative movements means that the market can understand the full extent and nature of the investor's relevant interests and the incentives they create.

Other changes to the relevant interest provisions

1.100 The Bill removes the existing exclusion from the relevant interest provisions for market-traded options and rights to acquire securities given by derivatives. The effect of this exclusion is to delay the time at which a relevant interest is recognised until the obligation to make or take delivery under the option or derivative arises.

1.101 Treasury believes that the exclusion is no longer appropriate in the context of a regime where the influence arising from both physically and non-physically settled derivatives is recognised as giving rise to a relevant interest, irrespective of the holding of the counterparty.

1.102 This change will not affect existing substantial holding disclosure obligations because paragraph 671B(7)(a) and subparagraph (a)(ii) of the definition of 'substantial holding' in section 9 already negates the exclusion for Chapter 6C purposes. However, for other Corporations Act purposes (such as the takeover provisions in Chapter 6), parties to a derivative will have to take into account the impact of the derivative in determining their obligations.
[Schedule 1, item 67, subsection 609(6) of the Corporations Act]

1.103 The Bill retains the exclusions from the relevant interest provisions for the following matters, along with the proviso that negates the exclusions for the purposes of the substantial holding disclosure obligations under Chapter 6C:

- conditional agreements;
- securities escrowed under the listing rules; and
- securities subject to an escrow agreement in connection with initial public offer etc.

[Schedule 1, item 44, section 671D of the Corporations Act]

1.104 The Bill incorporates the new extensions into the calculation of whether a body corporate has a relevant interest in its own securities. That is, relatable derivate-based interests, deemed physically settleable derivative-based interests, and deemed non-physically settleable derivative-based interests are all to be aggregated for this calculation.
[Schedule 1, item 4, subsection 608(9) of the Corporations Act]

Disclosing a substantial holding at time of listing

1.105 Under existing subsection 671B(1) of the Corporations Act, a person's obligation to disclose a substantial holding is triggered when the person 'begins to have' a substantial holding, or if they have a substantial holding and there is a 'movement of at least 1%' in their holding. Disclosure is also required when the person ceases to have a substantial holding.

1.106 The definition of 'substantial holding' in section 9 states that a person 'has' a substantial holding if the securities in which they or their associates have relevant interests carry 5% or more of the votes in the entity.

1.107 Therefore, where a person already 'has' a substantial holding in an entity immediately before it lists, it could be argued that they do not 'begin to have' the substantial holding when the entity lists. This creates uncertainty about whether they are required to disclose their substantial holding at the time the entity first lists.

1.108 The Bill clarifies that a person with a substantial holding needs to disclose their holdings at the point in time when the entity becomes a 'Chapter 6C body', that is, at the time when the entity becomes 'listed' on a declared financial market: see the definition of 'listed' in section 9 of the Corporations Act. ***[Schedule 1, item 41, paragraph 671B(1)(b) of the Corporations Act]***

Information in and format of disclosures

Aligning information captured in substantial holding notices and ASIC-issued tracing notices

1.109 The Bill requires a person (the 'discloser') who receives an ASIC-issued tracing notice to provide the following information:

- full details of the discloser's relevant interest in voting shares in the company (or interests in the registered scheme etc.), including details of any relevant agreement through which they would have such an interest;
- the name of each of the discloser's associates in relation to the entity, and details of the nature of the discloser's association with the associates;
- the name and address of each other person who has a relevant interest in any of the discloser's securities that ASIC specifically identifies in its notice, and details of that interest;
- the name and address of each person who has instructed the discloser about the acquisition or disposal of the discloser's securities, or about exercising voting rights or any other matter relating to the securities, as well as details of those instructions;

- any other particulars prescribed in regulations.

[Schedule 1, item 48, subsection 672BA(1) of the Corporations Act]

1.110 The Bill also allows ASIC to obtain copies of certain relevant supporting documentation from the discloser or a statement by the discloser giving details of certain contracts, schemes or arrangements.
[Schedule 1, item 48, subsections 672BA(4) and (5) of the Corporations Acts]

1.111 There is significant, but not complete, alignment between the existing requirements for information that must be disclosed in a substantial holding notice and in response to a tracing notice. For example, under existing settings for tracing notices, there is no requirement to provide details of all associates of a recipient of the notice or details of agreements that may be relevant to understanding the nature of the beneficial interests held by persons who may have a substantial holding in a listed entity.

1.112 Aligning the information that a holder must provide in a substantial holding notice and in response to an ASIC-issued tracing notice will assist with ASIC's ability to pursue full compliance with the substantial holding disclosure obligations.

1.113 The intention is to empower ASIC to use this information to uncover undisclosed information, particularly information relating to overseas holders. Limiting this power to ASIC (as opposed to providing it to both ASIC and listed entities) minimises both potential additional regulatory burden and privacy concerns arising from additional disclosure requirements.

1.114 As is already the case under existing settings, information about other persons with relevant interests, or who have given instructions to the discloser, need only be disclosed to the extent that information is known to the discloser. A discloser seeking to rely on this provision bears the burden of proof.
[Schedule 1, item 48, paragraph 672BA(2)(a) of the Corporations Act]

1.115 It is appropriate to reverse the burden of proof in this instance because the discloser's state of knowledge is a matter peculiarly within the knowledge of the discloser.

1.116 The new provisions also introduce an express power for the issuer of a notice to limit what disclosures are required. This will ensure that ASIC and listed entities can more specifically target the information they are seeking under tracing notices (within the scope of the categories of responses required) and reduce the overall burden of their information requests where appropriate.
[Schedule 1, item 48, paragraph 672BA(2)(b) of the Corporations Act]

Giving substantial holding notices

Manner and form of substantial holding notices

1.117 The Bill removes the requirement that substantial holding notices be given in the prescribed form, and instead, allows ASIC to approve the manner and form in which the notices must be given.
[Schedule 1, item 41, subsection 671BA(3) of the Corporations Act]

1.118 This will allow ASIC to impose requirements about the manner in which substantial holding notices are given, and the format of such notices. For example, in future, ASIC could require notices to be given in a machine-readable form.

1.119 Ensuring a consistent reporting method that can be more easily collated (for example, through machine readability) will benefit regulators, market participants and engaged third parties and achieve greater levels of transparency. Allowing the regulator to issue the requirements will ensure adaptability over time as technology develops.

Specifying additional items of information

1.120 The Bill empowers ASIC to specify (by legislative instrument) other particulars that must be provided in a substantial holding notice, instead of requiring them to be prescribed in regulations.
[Schedule 1, item 41, paragraph 671BA(1)(g) and subsection 671BA(2) of the Corporations Act]

1.121 This is an appropriate delegation to ASIC because it supports the making of the prescribed form that ASIC will issue. Additionally, ASIC's role as regulator positions it to adapt the disclosure requirements over time in response to observed market practices and any compliance concerns, contributing to the effective operation of Australia's financial markets.

Timing and trigger for substantial holding notices

1.122 The Bill retains the existing deadline for giving substantial holding notices, being within two business days in most cases. In the case of a takeover bid, the deadline remains 9.30 am on the next trading day.
[Schedule 1, item 41, section 671BB of the Corporations Act]

1.123 Under the existing provision, the clock starts running when the person becomes aware of the 'information'. The Bill adjusts this to refer to a person becoming aware of the 'situation' that gives rise to their disclosure obligation. This adjustment corrects a minor logical problem: namely, in the case of information such as a person's name and address, the person plainly becomes aware of that information long before undertaking their recent investment activities.

1.124 The Bill also strengthens the disclosure obligation by extending it to a person who ought reasonably to have been aware of a situation (the existing obligation only applies if the person is actually aware). This ensures that persons cannot avoid their disclosure obligations by remaining wilfully unaware of triggering situations or by failing to maintain adequate systems to identify changes in their relevant interests, associations and other circumstances.
[Schedule 1, item 41, subsection 671BB(2) of the Corporations Act]

Consequences for contravention

1.125 The Bill preserves the fault-based and strict liability offences for failing to comply with the requirement to give a substantial holding notice.
[Schedule 1, items 41, 45 and 46, subsections 671B(4) and (5) of, and Schedule 3 to, the Corporations Act]

1.126 The existing law provides that a person who contravenes the substantial holding notice obligations is civilly liable for any loss or damage suffered. The Bill tightens the existing defence to require that:

- where a person contravenes the notice requirement by inadvertence or mistake, that inadvertence or mistake must have been 'reasonable in all the circumstances'; and
- where a person contravened because they were not aware of a relevant fact or occurrence, the fact or occurrence was not one of which the person ought reasonably to have been aware.

[Schedule 1, items 42 and 43, subsection 671C(2) of the Corporations Act]

Standardising form of tracing notice register information

1.127 The Bill clarifies that listed entities must keep a register of information provided in response to a tracing notice in the form approved by ASIC, where ASIC has approved such a form. In addition, the register must contain, in relation to each item of information entered in the register, the date on which it was so entered.
[Schedule 1, item 53, subsection 672DA(6) of the Corporations Act]

1.128 Standardising the format for tracing notice registers is intended to improve their usability and to streamline enforcement action taken by ASIC.

Issuing tracing notices to wider class of known underlying owners and interest holders

1.129 Existing section 672A of the Corporations Act provides that ASIC, a listed company, the responsible entity for a listed registered scheme or the operator of a listed notified foreign passport fund may issue a tracing notice to a

member of the entity or a person named in a previous tracing notice response as having a relevant interest in, or having given instructions about, voting shares in the company, interests in the scheme or interests in the fund. Section 672B sets out the information that must be disclosed.

1.130 However, this does not necessarily cover the full range of underlying beneficial owners of securities that may be known to the notice issuer. In a situation where previous disclosures in a substantial holding notice indicate that a person may be a beneficial owner of securities, neither ASIC nor a listed entity can issue a tracing notice to that individual unless they are a member or they have been named through a previous tracing notice. This unnecessarily delays the discovery of more information about the known or suspected owner's interest as the tracing must commence from the registered owner of the relevant securities.

1.131 Additionally, with the introduction of deemed relevant interests arising from equity derivatives, there may be no registered holding from which tracing can commence.

1.132 The Bill repeals sections 672A and 672B. The successor provisions widen the class of tracing notice recipients, differentiate between ASIC's power to issue a tracing notice and the power for a listed entity to do so, and stipulate when notices are taken to have been received and when information must be given.

1.133 The new definitions of a 'Chapter 6C body' and a 'key person' for a Chapter 6C body are relevant to this undertaking. Chapter 6C bodies, and their respective key persons, are as follows:

- a listed company (key person is the company);
- a listed registered scheme and its responsible entity;
- a listed notified foreign passport fund and its operator;
- other listed bodies incorporated or formed in Australia (key person is the body);
- other listed bodies not incorporated or formed in Australia (key person is the body).

[Schedule 1, items 7 and 11, definitions of 'Chapter 6C body' and 'key person' in section 9 and subsection 671A(1) of the Corporations Act]

1.134 The Bill provides that ASIC may issue tracing notices to existing recipients, and to persons that ASIC suspects, on reasonable grounds, of:

- having a relevant interest in voting shares or interests in a Chapter 6C body;
- having given instructions about acquisitions, disposals, exercising of rights, or any other matter relating to voting shares or interests in a Chapter 6C body; or

- being an associate, in relation to the same entity, of somebody eligible to receive a tracing notice under the existing law.

[Schedule 1, item 48, subsection 672A(1) of the Corporations Act]

1.135 The Bill retains the mechanism requiring ASIC to exercise its tracing notice power in relation to a Chapter 6C body if a member of that body requests it to do so. ASIC may, however, refuse to do so if it considers that complying with the request would be unreasonable. For example, ASIC may consider that actioning the request would be an unreasonable diversion of ASIC's resources. ***[Schedule 1, item 48, subsection 672A(2) of the Corporations Act]***

1.136 The amended power for key persons for Chapter 6C bodies to issue tracing notices is identical to ASIC's, except that key persons:

- may not issue notices to suspected associates of members or suspected associates of persons named in previous tracing notices; and
- must base their reasonable suspicion, wholly or partly, on information already disclosed under Chapter 6C (i.e. substantial holding notices and responses to tracing notices).

[Schedule 1, item 48, subsections 672A(3) and (4) of the Corporations Act]

1.137 There could be situations in which it is not clear from a previous substantial holding notice whether a person is or is not a beneficial owner. In such cases, in order for the key person's suspicion to be on reasonable grounds, the person would likely need to be able to document their suspicion.

1.138 The standard of suspicion on reasonable grounds corresponds to the standard set out in key provisions in the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*.

1.139 The higher standard for listed entities compared to ASIC (that is, needing to have formed the suspicion at least in part on prior Chapter 6C disclosures) strikes a balance between streamlining the tracing notice process and preventing use of the tracing notice power for improper purposes.

1.140 A failure to comply with a tracing notice remains an offence of strict liability. However, the Bill also retains the provision that a person need not comply with a notice issued by a key person for a Chapter 6C body if the person can prove that it is vexatious.
[Schedule 1, items 48 and 50, section 672B of, and Schedule 3 to, the Corporations Act]

Service of ASIC-issued tracing notices

1.141 The Bill provides that ASIC may send a tracing notice by pre-paid post or courier service to an address it is reasonable to use, or email it to an email address it is reasonable to use. If ASIC receives no response to the notice, the

intended recipient (whether within or outside Australia) will be deemed to have received it at either of the following times:

- if the notice is sent by post or courier and specifies a way for the person to confirm receipt—21 days after the day that ASIC posts it or gives it to the courier (unless ASIC proves earlier receipt); or
- if the notice is sent by email and specifies a way to confirm receipt—7 days after the day that ASIC sends it by email (unless ASIC proves earlier receipt).

[Schedule 1, item 48, section 672AA of the Corporations Act]

This amendment ensures that ASIC is able to take action in response to a failure to respond to a tracing notice despite difficulties in proving service, particularly where delivery by pre-paid post or courier in a foreign jurisdiction cannot be confirmed. The amendment will not affect the timeline for disclosure in cases where receipt can be proved.

Extension of the disclosure regime to foreign listed bodies

1.142 The purpose of the substantial holding and tracing notice regimes is to underpin the integrity of markets for quoted securities. The aim is to ensure that investors and other market participants are generally informed about the existence and dealings of persons who may have substantial influence over the entities in which they are investing, and about arrangements that may be relevant to their investment decisions. This objective is relevant for any entity listed on an Australian market, regardless of whether that entity is registered in another jurisdiction.

1.143 To support this purpose, the Bill extends the application of Chapter 6C of the Corporations Act to entities incorporated or formed outside Australia and listed on a relevant market operated in Australia. Under the existing regime, holders of interests in these entities do not have disclosure obligations.

1.144 To this end, listed entities that are not incorporated or formed in Australia are included in the definition of 'Chapter 6C bodies'.
[Schedule 1, item 11, section 671A of the Corporations Act]

1.145 There may be cases where a foreign jurisdiction, or a market operated in a foreign jurisdiction, imposes equivalent obligations to those in Chapter 6C. A holder of interests in an Australian-listed entity incorporated or formed in such a jurisdiction will not have to comply with substantial holding notice obligations if ASIC has declared that the relevant foreign requirements are equivalent to the requirements of Part 6C.1, and the holder:

- is subject to those equivalent requirements; and

- has given the information mandated by those requirements to the person they stipulate as the recipient.

[Schedule 1, item 11, subsections 671A(2) to (5) of the Corporations Act]

1.146 This carve-out prevents the duplication of reporting requirements in respect of holdings in Australian-listed entities that are subject to equivalent foreign disclosure requirements. It will reduce the time, effort and compliance costs for holders of relevant interests without affecting the integrity of the disclosure regimes.

1.147 ASIC may only declare foreign requirements by legislative instrument if satisfied that they are equivalent to those in Part 6C.1.
[Schedule 1, item 11, subsection 671A(5) of the Corporations Act]

1.148 If a holder of relevant interests in an Australian-listed foreign entity is exempted from compliance with Part 6C.1, the foreign entity itself must give the information provided by the holder under the foreign requirements to the operator of each Australian market on which it is listed. The Bill introduces a penalty of 600 penalty units for non-compliance with this obligation.
[Schedule 1, items 11 and 38, subsection 671A(4) of, and Schedule 3 to, the Corporations Act]

1.149 The requirement to pass on information received under equivalent overseas obligations aligns with the continuous disclosure provisions under Chapter 3 of the ASX Listing Rules, as referenced under Chapter 6CA.

Fees for inspections and copies of tracing notice registers

1.150 The Bill extends the fee-free inspection of tracing notice registers to journalists and academics without altering any other settings, such as the ability for entities to charge fees for copies of the register.
[Schedule 1, item 54, paragraph 672DA(7)(aa) of the Corporations Act]

1.151 To this end, it defines ‘journalist’ and ‘academic’ by means of an employment-based, rather than an activities-based, test. The existing definition of ‘journalist’ in Part 9.4AAA of the Corporations Act has been extended to apply across the whole Act.
[Schedule 1, items 51 and 55, section 9 and subsection 1317AAD(3) of the Corporations Act]

1.152 This approach balances the advantages of fee-free access to information with the costs that entities incur in providing copies. It allows journalists and academics to identify which registers, or parts of registers, are of interest before they decide whether to pay for copies, while ensuring that entities do not receive excessive requests for copies.

Enforcement

Freezing orders

1.153 ASIC has broad powers to aid its oversight, investigation and enforcement activities. Sections 72 and 73 of the ASIC Act allow ASIC to make a freezing order to restrain dealings and rights in relation to securities, financial products and trust property where:

- in ASIC's opinion, information about specified matters needs to be obtained for the purposes of investigation and information-gathering under Part 3 of the ASIC Act; but
- ASIC cannot access that information because of the failure of relevant persons to comply with requirements under that Part.

1.154 The Bill amends Chapter 6C of the Corporations Act to empower ASIC to make freezing orders in relation to specified disclosable securities in Chapter 6C bodies in response to contraventions of the substantial holding and tracing notice provisions. These powers largely replicate section 72 of the ASIC Act, with an additional power (relating to the disposal of specified derivatives) drawn from section 73 of that Act.
[Schedule 1, item 57, subsection 673A(1) of the Corporations Act]

1.155 The Bill defines a 'disclosable security' as a share in a listed company, an interest in a listed registered scheme, an interest in a listed notified foreign passport fund, and a share in other listed bodies. That is, the shares or interests in question are not limited to voting shares or voting interests.
[Schedule 1, items 7 and 11, definitions of 'voting share/interest' and 'disclosable security' in section 9 and subsection 671A(1) of the Corporations Act]

1.156 The precondition for the exercise of these new powers is that, in ASIC's opinion, a person has failed to comply with substantial holding notice or tracing notice obligations.

1.157 This is intended as an additional administrative mechanism allowing ASIC to act quickly to:

- preserve the status quo while ASIC is conducting enquiries into underlying ownership (including to avoid an undisclosed beneficial owner taking steps to further conceal their interest);
- protect market participants from the impacts of non-disclosure; and
- incentivise compliance with the disclosure regimes.

1.158 As in the ASIC Act model, an order made by ASIC under these powers does not prejudice or otherwise affect the rights of an operator of a financial market

or clearing and settlement facility in relation to closing out or registering derivatives.

[Schedule 1, item 57, subsection 673A(2) of the Corporations Act]

1.159 ASIC may vary or revoke a freezing order made under these powers. The Bill expressly confirms that ASIC is not *required* to revoke an order if a person belatedly complies by providing information that, in ASIC's view, differs from the information the person would have provided within the prescribed timeframe (for example, because they altered their affairs or arrangements in relation to the holding after ASIC's inquiries commenced or a freezing order was made to avoid disclosing an interest they had at the time). This clarification is not intended to imply that ASIC is under an obligation to revoke or vary an order in any other circumstances.

[Schedule 1, item 57, section 673B of the Corporations Act]

1.160 The Bill imposes certain procedural requirements on the making of freezing orders. ASIC must make an order by notifiable instrument, and must give a copy of the order, and any related orders, to the person to whom the order is directed.

[Schedule 1, item 57, section 673C of the Corporations Act]

1.161 In order to encourage transparency and full compliance, the Bill does not prescribe any general limits on ASIC's power to make an order by reference to the impact the order might have on particular persons interested in the securities in question. Given the variety of persons who may be interested in the same parcel of securities, it is important that ASIC can impose a freezing order even if doing so would affect the rights or interests of third parties who were not responsible for, or were not involved in, the failure to comply with the substantial holding or tracing notice requirement. Given the nature of the provisions this power is intended to support (which seek to uncover what may be deliberately concealed interests in securities), there is a risk that persons who assert an innocent interest may be involved in the concealment. Giving ASIC this unfettered power is intended to ensure that those concealing their true beneficial ownership of a parcel of securities find it harder to benefit from their concealment. It will incentivise third parties with whom a person may contract in relation to the parcel (for example, as security for a loan) to avoid entering into such an agreement if their dealings indicate the person may be avoiding their disclosure obligations (given the risks of being impacted by a freezing order). In this way, ensuring that ASIC's use of the power is sufficiently unencumbered will contribute to better practice as market participants will be less inclined to be wilfully ignorant of clear disclosure breaches.

1.162 Failure to comply with a freezing order is an offence of strict liability and could incur a penalty of 60 penalty units for an individual. This is appropriate as a freezing order is a necessary enforcement tool to ensure that the disclosure of ownership interests in Chapter 6C bodies is accurate and timely, ultimately leading to more transparent and efficient markets. Parties trying to avoid disclosure of interests can impact transactions and weaken the effectiveness of

corporate regulation. It is key that timely regulatory action be taken as many circumstances involve time-sensitive transactions.
[Schedule 1, items 57 and 58, section 673D of, and Schedule 3 to, the Corporations Act]

Increased penalties

1.163 The Bill doubles the maximum penalties for existing offences in Chapter 6C, as follows:

- Four years' imprisonment for the fault-based offence of failing to give the information required in a substantial holding notice (4,800 penalty units in the case of a body corporate);
- 120 penalty units for the strict liability offence of failing to give the information required in a substantial holding notice (1,200 penalty units in the case of a body corporate);
- 120 penalty units for failing to give the information required in response to a tracing notice (1,200 penalty units in the case of a body corporate);
- 60 penalty units for failing to keep a tracing notice register (600 penalty units in the case of a body corporate);
- 40 penalty units for breach of obligations relating to where the tracing notice register is kept (400 penalty units in the case of a body corporate); and
- 60 penalty units for breach of other tracing noting register-related obligations concerning content, inspection, copies and timing of entries (600 penalty units in the case of a body corporate).

[Schedule 1, items 59 to 64, Schedule 3 to the Corporations Act]

1.164 These penalty increases align offence provisions for the disclosure regime with similar existing offence provisions in the Corporations Act. For example:

- the offence of failure to comply with a direction by ASIC to submit additional information to allow ASIC to decide whether to register a document on a register kept by ASIC (subsection 1274(9)); and
- the offence of failure by a person included on a register kept by ASIC to comply with a direction by ASIC to provide information about the person of a kind included on that register (subsection 1274(16)).

1.165 Setting the maximum penalties for these breaches among the higher range for non-custodial Corporations Act offences reflects the market-sensitive nature of the information provided under the disclosure regime.

1.166 For a failure to provide a copy of a tracing notice register, this change would increase the penalty above the level currently applied to a failure to provide a

copy of a member register. Again, this reflects the market-sensitive nature of the information contained in a tracing notice register.

Minor amendments

1.167 The Bill makes minor amendments to the Corporations Act to ensure consistency of references, improve readability, and avoid duplication.

1.168 The Bill repeals note 1 to the definition of 'substantial holding' because it does not accurately reference all of the provisions about 'relevant interests', and there are no other notes in section 9 pointing out that an expression is defined elsewhere in section 9.
[Schedule 1, items 1 and 2, notes 1 and 2 to the definition of 'substantial holding' in section 9 of the Corporations Act]

1.169 The Bill replaces various references to listed companies, listed registered schemes and listed notified foreign passport funds with references to 'Chapter 6C bodies'. The definition of 'Chapter 6C body' covers listed companies, listed registered schemes, listed notified foreign passport funds, and other listed bodies.
[Schedule 1, items 7, 8, 9, 11, 14, 16 and 25, definition of 'Chapter 6C body' in section 9, note 1A to subsection 168(1), Chapter 6C (heading), column 1 of the table in subsection 671A(1), subsection 672D(1), section 672DA (heading) and paragraph 672DA(7)(a) of the Corporations Act]

1.170 The Bill consolidates three subsections specifying where a register of information received under Part 6C.2 must be kept by listed companies, registered schemes and notified foreign passport funds into a single subsection referencing Chapter 6C bodies.
[Schedule 1, items 20, 24 and 39, subsections 672DA(2) and (5) of, and Schedule 3 to, the Corporations Act]

1.171 The Bill replaces references to 'shares in a company, interests in a listed registered scheme or interests in a listed notified foreign passport fund' with references to 'disclosable securities in a Chapter 6C body'.
[Schedule 1, items 7, 11, 12, 19 and 37, definition of 'disclosable security' in section 9, column 4 of the table in subsection 671A(1), section 672C, paragraphs 672DA(1)(a) to (d) and section 672E of the Corporations Act]

1.172 The Bill replaces various references to a company, responsible entity or operator with references to 'key person'.
[Schedule 1, items 7, 11, 13 to 15, 17, 18, 21 to 23 and 26 to 36, definition of 'key person' in section 9, column 2 of the table in subsection 671A(1), paragraph 672C(a), subsections 672D(1) and (2), subsections 672DA(1) and (4), subsections 672DA(7) to (9) and section 672E of the Corporations Act]

1.173 The Bill adds headings where appropriate.
[Schedule 1, items 10, 47, 49, 52, 56, headings to Part 6C.1A, Division 1 of

Part 6C.2, Division 2 of Part 6C.2, Division 3 of Part 6C.2 and Division 1 of Part 6C.3 of the Corporations Act]

1.174 The Bill removes provisions made redundant by its amendments.
[Schedule 1, items 65 and 66, definition of 'substantial holding' in section 9 and note to subsection 608(8) of the Corporations Act]

Commencement, application and transitional provisions

1.175 If passed by the Parliament, the Bill would commence 6 months after receiving Royal Assent.

1.176 The Bill includes application provisions to ensure that a person will not breach the Corporations Act because of certain actions taken prior to the commencement of the Bill, and to manage other aspects of the changes.

1.177 The Bill exempts a person who gains a relevant interest on commencement because they hold derivatives of a type captured by the new provisions from breaching the prohibition on acquiring relevant interests in voting shares under section 606.
[Schedule 1, item 68, subsections 1710(1) and (2) of the Corporations Act]

1.178 However, a derivative holder in this situation will be taken to begin to have the relevant interest on commencement for the purposes of substantial holding notice and tracing notice obligations.
[Schedule 1, item 68, subsection 1710(3) of the Corporations Act]

1.179 Where a person has a substantial holding in a foreign listed body at commencement, the Bill provides that they will be taken to begin to have that substantial holding on commencement.
[Schedule 1, item 68, sections 1710A and 1710B of the Corporations Act]

1.180 The Bill preserves approvals of places for the keeping of tracing notice registers that ASIC makes before commencement. These approvals will be taken to have been made under the amended provision to ensure they do not have to be re-made by ASIC.
[Schedule 1, item 68, sections 1710A and 1710C of the Corporations Act]

1.181 The Bill ensures that only situations that arise on or after its commencement will be subject to the amended substantial holding notice regime, subject to certain circumstances set out in the relevant application provisions.

[Schedule 1, item 68, sections 1710A and 1710D of the Corporations Act]

1.182 For the most part, the new derivative-based holding disclosure requirements will apply only to situations that arise after the commencement of the Bill. However, pre-commencement actual or required disclosures of derivative-based holding percentages that are not mandated by the amended regime are

preserved by being taken to be made under the amended regime upon commencement. This creates a baseline for the making of future disclosures, ensuring that subsequent disclosable movements in holdings will trigger disclosure obligations. A note explains that the relevant percentages can be nil.
[Schedule 1, item 68, section 1710E of the Corporations Act]

1.183 The amended tracing notice regime will only apply to tracing notices issued on or after commencement of the Bill. However, ASIC and the key person for a Chapter 6C body will be able to issue a tracing notice to a person named in a pre-commencement response to an earlier tracing notice.
[Schedule 1, item 68, sections 1710A and 1710F of the Corporations Act]

1.184 The Bill provides that carveouts from the relevant interest provisions for market traded options and for rights to acquire securities given by derivatives (for purposes outside Chapter 6C) will still apply if the relevant option or right to acquire securities was granted or entered into before the commencement of the Bill.
[Schedule 1, item 68, sections 1710G and 1710H of the Corporations Act]