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CORPORATE GOVERNANCE UPDATE

SUBSTANTIAL HOLDER NOTICES - SOME RECENT DEVELOPMENTS

SUMMARY: Substantial holder notices¹ are essential for the existence of an informed market². As reiterated by the Takeovers Panel (**Panel**) in the recent *Northern Iron Ltd [2014]* ATP 11 (**Northern Iron**) decision:

"the broadly cast requirements of s671B(4)³ contribute to ensuring that the market is fully aware of the nature of, and details concerning, the substantial holder and their associates' interest and the potential impact of the terms of any relevant agreement...⁴".

As a consequence then, a material failure to comply with the substantial holder provisions may warrant enforcement action by ASIC and / or give rise to a declaration of unacceptable circumstances and orders by the Panel.

In this corporate governance update we:

- provide a brief overview of the substantial holder notice regime under Chapter 6C of the *Corporations Act (Cth) 2001 (Act)*;
- highlight areas of focus for ASIC; and
- highlight, by reference to the recent Panel decision in *Northern Iron*, some potential consequences of material non-compliance.

¹ ASIC Form 603 (notice of initial substantial holder), Form 604 (notice of change of interests of substantial holder) & Form 605 (notice of ceasing to be substantial holder)

² *National Can Industries Limited 01[2003]* ATP 35 at [62(a)]

³ s671B(4) of the *Corporations Act (Cth) 2001*

⁴ *Northern Iron Ltd [2014]* ATP 11 at [42]

THE LEGAL ISSUE

In broad terms, a person has a substantial holding in a listed entity when they hold or control 5% or more of the total number of votes attached to voting shares or voting interests in that listed entity.⁵

If a person:

- (a) begins to have, or ceases to have, a substantial holding; or
- (b) has a substantial holding and there is a movement of at least 1% in their holding; or
- (c) makes a takeover bid,

in respect of a listed entity, then certain prescribed information must be given to the listed entity for disclosure to the market. That information must be given within two business days of the person becoming aware of it, or in the context of a takeover bid, by 9.30am on the next trading day.

Failure to comply with the substantial shareholding disclosure requirements under Chapter 6C is a contravention of the Act capable of enforcement by ASIC, and can potentially give rise to a declaration of unacceptable circumstances and orders by the Panel.

KEY ASIC FINDINGS

In Regulatory Guide 5 (Relevant interests and substantial holding notices), ASIC explains the requirement for a person to disclose the relevant interest in voting shares and voting interests that they and their associates have when they acquire or maintain a substantial holding in a listed company, body or managed investment scheme.

Key points⁶ include:

"The requirement to disclose details of substantial holdings in listed entities is designed to ensure that investors have access to information about the identity, interests and dealings of persons who may be in a position to influence or control the destiny of an entity.

A person who gives a substantial holding notice must give full rather than minimal or technical

⁵ A substantial holding also arises where a person makes a takeover bid for voting shares in the body or voting interest in the scheme and the bid period has stated and not yet ended.

⁶ ASIC RG 5: Relevant interests and substantial holding notices, at Part G [page 65]

disclosure. This includes details of net movements and a full explanation of the basis and nature of any relevant interests or associations comprising the person's voting power.

A substantial holding notice must be accompanied by documents, in writing and readily available, setting out the terms of any relevant agreement contributing to the situation giving rise to the need for substantial holding disclosure. A statement giving details of any contract, scheme or arrangement, which is not in writing and readily available, must also be provided. A substantial holder cannot avoid giving relevant details of an overall arrangement by separating them out into a later agreement subject to finalisation."

Readers should note that ASIC:

- is currently applying a heightened focus on takeovers issues arising in its surveillance and monitoring of transactions;
- is particularly interested⁷ in:
 - the quality and timeliness of substantial holding disclosure; and
 - disclosure of the nature of a person's relevant interest in the securities, which is especially important where a person holds its relevant interests in a number of different capacities⁸;
- has indicated that a re-write of the substantial holder statutory forms is on its agenda; and
- is considering matters that may warrant enforcement action in the substantial holding space.

RECENT TAKEOVERS PANEL DECISIONS

On 20 June 2014, the Panel made a declaration of unacceptable circumstances and final orders in relation to the affairs of Northern Iron Limited (**Northern Iron**)⁹. The application related to material non-compliance with the substantial holder

⁷ ASIC Corporate Finance Liaison Meeting November 2013 Minutes: [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/CFLM-Meeting-November-2013-Minutes.pdf/\\$file/CFLM-Meeting-November-2013-Minutes.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/CFLM-Meeting-November-2013-Minutes.pdf/$file/CFLM-Meeting-November-2013-Minutes.pdf)

⁸ Where this is the case, ASIC consider the disclosure must include a detailed breakdown of each portion of the overall holding by reference to each nature of relevant interest in order to provide meaningful information about the nature and extent of a substantial holder's relevant interests in, and influence over, the securities forming part of the substantial holding.

⁹ In the matter of *Northern Iron Limited (2014) ATP 11*,

notice (and tracing notice) provisions of the Act by Dalnor Assets Ltd (**Dalnor**). In particular, Dalnor (who at the time the application was lodged had a relevant interest in Northern Iron of approximately 19.5%) lodged an incomplete substantial holder notice, failed to comply with a tracing notice, then lodged further substantial holding notices that:

- did not identify every person who had a relevant interest in the disclosed substantial holding;
- did not contain details of relevant agreements through which the parties disclosed in the notices had a relevant interest; and
- did not annexe copies of relevant documents,

and accordingly were deficient.

The Panel:

- agreed with ASIC's submission that:
"...the broadly cast requirements of s671B(4) contributed to ensuring that the market is fully aware of the nature of, and details concerning, the substantial holder and their associates' interests and the potential impact of the terms of any relevant agreement..,"
- noted its decision rested on the policy that adequate and timely disclosure under substantial notice and tracing notice provisions is important to the objectives of section 602, and its concern was with the effect of the circumstances, not simply the contravention of the Act; and
- concluded that:
 - the acquisition of control over voting shares in Northern Iron had not taken place in an efficient, competitive and informed market; and
 - the holders of Northern Iron shares, the board of Northern Iron and the market in general had not known the identity of a person who was proposing to acquire, and had acquired a substantial interest in Northern Iron.

Significantly, the orders made did not simply require corrective disclosure but also included:

- a restriction on allowing Dalnor to use the 'creep' exception¹⁰ for a period of 6 months after the required disclosure had been made; and
- a costs order in respect of both ASIC's costs and part of Northern Iron's costs.

In an entirely separate matter, on 15 August 2014 the Panel made a declaration of unacceptable circumstances and final orders in relation to the affairs of Gondwana Resources Limited (**Gondwana**)¹¹. While the reasons for decision are not yet available, one of the basis mentioned by the Panel for its declaration and orders was that a substantial holder had:

- initially failed to disclose his substantial holding; then
- made incomplete disclosure,

and, as a consequence of those failings Gondwana's shareholders and the market did not know the identity of a person who had acquired a substantial interest in the company.

These decisions serve as a prescient reminder of the difficulties a material failure to comply with the substantial holder provisions can give rise to in a control context.

KEY TAKEAWAY

A person who gives a substantial holding notice must give full rather than minimal or technical disclosure. This includes details of net movements and a full explanation of the basis and nature of any relevant interests or associations comprising the persons disclosed voting power. The substantial holding notice must be accompanied by either:

- documents, in writing and readily available, setting out the terms of any relevant agreement contributing to the situation giving rise to the need for substantial holding disclosure; and/or
- a statement giving details of any contract, scheme or arrangement, which is not in writing and readily available.

Failure to make proper and timely disclosure regarding substantial holdings may result in ASIC action and, as demonstrated by the Panel decision

¹⁰ Item 9 of section 611

¹¹ Takeovers Panel Media Release No: TP14/68. The Panel's reasons for decision are not yet available.

in Northern Iron, result in a declaration of unacceptable circumstances and orders. Any factual matrix involving:

- a long period of non-disclosure;
- multiple contraventions; or
- a number of deficient substantial holder notices with steadily increasing (but still incomplete) information disclosed,

is likely to be problematic, particularly where complete disclosure has not been made at the time an application to the Panel is made.

DLA Piper can assist with reviewing key procedures (or establishing procedures) to ensure sufficient and timely disclosure of substantial holding information to the market.

MORE INFORMATION



David Ryan
Partner
T +61 2 9286 8674
david.ryan@dlapiper.com



Mark Burger
Partner
T +61 3 9274 5586
mark.burger@dlapiper.com



Lyndon Masters
Partner
T +61 7 3246 4007
Lyndon.masters@dlapiper.com



Andrew Crean
Special Counsel
T +61 8 6467 6148
andrew.crean@dlapiper.com

CONTACT YOUR NEAREST DLA PIPER OFFICE:

BRISBANE

Level 28, Waterfront Place
1 Eagle Street
Brisbane QLD 4000
T +61 7 3246 4000
F +61 7 3229 4077
brisbane@dlapiper.com

CANBERRA

Level 3, 55 Wentworth Avenue
Kingston ACT 2604
T +61 2 6201 8787
F +61 2 6230 7848
canberra@dlapiper.com

MELBOURNE

Level 21, 140 William Street
Melbourne VIC 3000
T +61 3 9274 5000
F +61 3 9274 5111
melbourne@dlapiper.com

PERTH

Level 31, Central Park
152–158 St Georges Terrace
Perth WA 6000
T +61 8 6467 6000
F +61 8 6467 6001
perth@dlapiper.com

SYDNEY

Level 22, No.1 Martin Place
Sydney NSW 2000
T +61 2 9286 8000
F +61 2 9286 8007
sydney@dlapiper.com

www.dlapiper.com

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