

Ministry of **Economic
Development**



M a n a t ū Ō h a n g a

Substantial Security Holder Disclosure

Discussion Document

November 2002

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Summary of Questions for Submission

1. Is the current definition of “relevant interest” appropriate? Is an approach focused on control of voting rights more appropriate?
2. Can section 6 (concerning when a relevant interest can be disregarded) be improved?
3. Should section 6(1) be amended so as to include similar categories to those in section 609 of the Corporations Act that do not already have corresponding provisions in section 6(1) of the Amendment Act? Should the Securities Commission’s power of designation be continued or should there simply be a list of exemptions?
4. Should the reference to convertible securities in the definition of “voting security” in section 2 of the Securities Amendment Act be removed or amended?
5. If so, what should it be replaced with? Do you favour one of the options identified or something else?
6. Should the substantial security holder disclosure regime apply to collective investment schemes?
7. What changes should be made to the Amendment Act to reflect your answer to the previous question?
8. Is the 5% threshold figure for the substantial security holder disclosure regime still appropriate?
9. Should the threshold figure for collective investment schemes be the same as for other substantial security holders?
10. Should the definition of “substantial security holder” be amended so as to provide for situations involving differential voting rights?
11. If so, should the replacement definition be a relevant interest in any class of voting securities issued by the public issuer or body, or a relevant interest in the total voting rights in the public issuer?
12. Should the requirement for a person to give notice that they are a substantial security holder arise only when they have actual knowledge of that fact or when they ought to have had knowledge of that fact? Or should the existing reference to constructive knowledge be removed so that the regime is silent on this issue and subject to common law and therefore consistent with Part I of the Amendment Act and the new continuous disclosure provisions proposed by the SMIB? Should the legislation provide guidance as to when a company has knowledge?
13. Should the Act require notice to be given “immediately” or should a particular time period be specified? How long should that time period be and why?

14. Should there be a different designated time period for officials of collective investment schemes to give notice?
15. Should non-compliance with substantial security holder obligations be a criminal offence?
16. Should civil penalties be imposed in cases of non-compliance with the obligations?
17. If so, what should the maximum penalty be that the High Court could impose?
18. Should the Securities Commission be given the power to impose administrative financial penalties? If so, what should the maximum penalty be?
19. Should the Securities Commission be given the power to make orders requiring disclosure of information?
20. Should section 32 of the Amendment Act be amended to allow the High Court to make an order requiring securities to be vested in the Securities Commission or an order requiring a body corporate to repeal or modify its constitution?
21. Should the standard of proof in section 30 of the Amendment Act be changed or should the "reasonable grounds to suspect" test be retained? If the standard of proof should be changed, what should it be changed to?
22. Do changes need to be made to the Securities (Substantial Security Holders) Regulations 1997 to make disclosure easier and reduce compliance costs? If so, what changes do you suggest?
23. Should the possibility of mutual recognition of substantial security holder notices in New Zealand and Australia be considered?
24. Do you have comments on any other aspects of the substantial security holder disclosure regime?

Background Information

Process

This discussion paper has been prepared by the Ministry of Economic Development following consultation with other government officials and agencies. Written submissions on the issues raised in the discussion paper are invited from all interested parties. The closing date for submissions is 20 December 2002. After receipt of submissions they will be evaluated and further comments sought as required before the Ministry develops recommendations for the government to consider.

Submissions should be sent by e-mail in Microsoft Word 2000 format or a lower version of Microsoft Word to dean.seymour@med.govt.nz or in hard copy to:

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Official Information and Privacy Act Requirements

Please note that the contents of submissions provided to the Ministry in response to this discussion paper will be subject to the Official Information Act 1982 and the Privacy Act 1993. If the Ministry receives a request for information contained in a submission, it would be required to consider release of the submission, in whole or in part, in terms of the criteria set out in these Acts.

In providing your submission, please advise if you have any objections to the release of any information contained in your submission, and, if you do object, the parts of your submission you would wish withheld, and the grounds for withholding.

Disclaimer

Any statements made or views expressed in this discussion paper are the preliminary views of the Ministry of Economic Development and do not reflect official government policy.

Readers are advised to seek specific advice from a qualified professional before undertaking any action in reliance on the contents of this discussion paper. While every effort has been taken to ensure that the information set out in this paper is accurate, the Crown does not accept any responsibility whether in contract, tort, equity or otherwise for any action taken, or reliance placed on, any part, or all, of the information in this paper or for any error in or omission from this paper.

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Introduction

Reform of Securities Law

1. The Government has identified as one of its key objectives promoting confidence in the New Zealand market. This objective involves increasing the certainty for market participants in relation to the integrity of the market and the mechanisms for implementing the law. A number of factors can influence the level of confidence both domestic and international investors have in the New Zealand market. The regulatory framework is one of these factors.

2. The Government is in the process of implementing a number of reforms designed to improve confidence in the market. This discussion document is part of the broad programme of reforms aimed at strengthening the regulatory framework for securities markets in order to encourage investment and enhance the performance of New Zealand markets.

3. The Government's securities law reform programme includes:

- The introduction of the Takeovers Code;
- The Securities Markets and Institutions Bill (*“the SMIB”*); and
- A review of securities trading law.

4. The first part of this law reform package has been completed with the introduction of the Takeovers Code 2001.

5. The second part of the law reform programme is near completion with the Securities Markets and Institutions Bill reported back to the House of Representatives by the Finance and Expenditure Select Committee in June 2002. This Bill contains reforms designed to improve the enforcement, prevention and detection of insider trading in New Zealand. In addition, the Bill contains reforms designed to ensure that the Securities Commission and Takeovers Panel have sufficient powers to adequately enforce the law, and will provide a Securities Commission capable of enforcing insider trading, continuous disclosure and potentially market manipulation law. The Bill provides greater supervision of securities exchanges and implements a mechanism for mutual or unilateral recognition of overseas offering documents.

Review of Securities Trading Law

6. The third part of the programme was commenced with the release of three discussion documents in May 2002 which focus on improving securities trading law. The topics of these documents include:

- A review which considers whether more comprehensive market manipulation law should be implemented in New Zealand;

- A review of which financial products and entities should be covered by New Zealand securities trading law and what improvements could be made to penalties and remedies; and
- A first principles review of insider trading law.

7. The closing date for submissions on these three documents was 30 August 2002. The overall goal in the release of those three discussion documents is to seek the views of the public and market participants on how to minimise market abuse in New Zealand and improve confidence in our market for both New Zealand and international investors.

Problem Definition: Review of Substantial Security Holder Disclosure

8. The substantial security holder disclosure regime which is found in Part II of the Securities Amendment Act 1988 has been in force for 13 years. Since the time of its inception a number of problems have been identified with the regime.

9. Submissions from the public in response to a Securities Commission discussion document on the regime, released in 1994, indicated that there were some concerns with the disclosure regime. These included, among other things, concerns about the way in which the regime deals with different classes and types of securities, the form of the notices that had to be given, and whether or not the regime applied to collective investment schemes. There is also anecdotal evidence that suggests that there may be other concerns with the effectiveness of the regime (e.g. that disclosure under the regime is not being made immediately).

10. The review of securities trading law and the Securities Markets and Institutions Bill will make significant amendments to the Securities Amendment Act 1988.¹ As the rest of the Act is under review this provides an appropriate opportunity to review the substantial security holder regime in order to resolve any problems identified with the effectiveness of the regime and to enable a consistent approach to be taken, where advisable, across all areas of securities trading law.

11. In addition, as the regime has been in force for some time, it is useful to evaluate whether there could be a reduction in the compliance costs involved in providing disclosure, and to seek comment from the public as to whether any other improvements could be made to the regime.

12. In view of the Memorandum of Understanding on Business Law Co-ordination between New Zealand and Australia and the advantages of co-ordinating New Zealand and Australian securities law (i.e. – minimising the costs for substantial security holders in having to comply with two different sets of criteria), the Ministry has given particular attention to Australian law when considering the issues in this paper.

¹ Under the SMIB, the Securities Amendment Act 1988 would become the Securities Markets Act 1988.

Framework for Submissions

13. When answering the questions raised in this discussion document, we request that submitters bear in mind and, where appropriate, reflect in their answers the following considerations:

- What are the benefits of the proposal?
- Does the proposal impose any additional compliance costs or reduce compliance costs?
- If it does impose additional compliance costs who will have to bear these costs?
- What is the estimated compliance cost?
- Are there any longer term implications of the compliance costs involved?
- What steps could be taken to minimise compliance costs in relation to the proposal?
- Are there any other costs involved that are not compliance costs borne by market participants?
- Do the benefits of the proposal outweigh any of the costs involved, or vice versa, and why?
- Are there any other options that could better achieve the objective?

Summary

Part I: Policy Justification for Disclosure of Substantial Security Holders

14. Part one discusses the policy justification for having a substantial security holder disclosure regime. It outlines the objectives of substantial security holder disclosure regimes, such as promoting open dealings and ensuring that public issuers and the market are kept informed of the ownership of significant holdings of shares.

Part II: Securities Amendment Act 1988

15. Part two outlines the current disclosure regime set out in part II of the Securities Amendment Act 1988. It outlines the obligations of substantial security holders, the definition of “relevant interest”, the information that must be disclosed, the obligations of public issuers, and the remedial orders for breaches of the regime.

Part III: Issues

16. Part three discusses a number of issues that the Ministry of Economic Development is seeking comment on. These include:

- Whether the current definition of “relevant interest” is still appropriate or whether an approach focused on the control of voting rights is more appropriate;
- Whether the circumstances in which a relevant interest can be disregarded should be improved or changed;
- Whether the reference to convertible securities in the definition of “voting securities” should be removed or amended;
- Whether the 5% threshold for the substantial security holder regime is still appropriate and whether the threshold should be different for collective investment schemes;
- Whether the definition of “substantial security holder” should be amended so as to provide for situations involving differential voting rights, and, if so, what the replacement definition should be;
- Whether the substantial security holder disclosure regime should apply to collective investment schemes;
- What the time period for disclosure should be and whether the requirement for a substantial security holder to give notice should arise only when they have actual knowledge that they should disclose or when they ought to have known that they should disclose;

- What penalties and remedies should be available for a breach of the substantial security holder provisions and what role the Securities Commission should play in the regime; and
- Whether any other improvements could be made to the regime to make disclosure easier and to reduce compliance costs.

Part I - Policy Justification for Disclosure of Substantial Security Holders

17. Most international jurisdictions require persons or entities holding significant holdings of shares to report these holdings to the market. The rationale behind such legislation is to ensure that public issuers and the market are kept informed as to the ownership of significant holdings and the control of shares in a company. It is also intended to act as a deterrent to insider trading and other market manipulation by making transparent any significant transactions by these shareholders.

18. In New Zealand the law relating to disclosure by substantial security holders is found in Part II of the Securities Amendment Act 1988.

19. When the Amendment Act was debated in Parliament, the Minister of Justice, the Right Honourable Geoffrey Palmer, stated that one of the purposes of the regime was to ensure that participants in the market have equal access to price sensitive information. This included information about the identity of persons who were entitled to exercise, or control the exercise, of significant voting rights in a public company.² He noted that a disclosure regime would ensure that the public market remains what it is intended to be, which is a market to which members of the public have access as participants.

20. In *Brook Investments Ltd (in vol liq) v Paladin Ltd* Sinclair J stated that the purpose of the substantial security holder regime was to:

ensure that a public issuer, its members, the Stock Exchange and the investing public at large are kept informed as to the ownership of voting securities in a public issuer and as to the identity of those who are, or may be, in a position to control the company. In particular it is aimed at restricting secret dealing in shares for a takeover advantage.³

21. The rationale given in Australia for provisions that require substantial security holder disclosure is that holders, directors and the market are provided with sufficient information to enable them:

- to identify the controllers of substantial blocks of voting shares;
- to identify the associates of those substantial security holders;
- to know the details of any special benefits a person may have received for disposing of their interest; and
- to know the details of any agreements or special conditions or restrictions which may affect the disposal of shares or the way in which they are voted.⁴

² 490 NZPD 5282-83 (21 July 1988).

³ 21 October 1989, High Court Auckland, M 1581/89, page 18.

⁴ NCSC Policy Release 110 *Substantial shareholding notices* para 3.

Part II - Securities Amendment Act 1988

22. As stated above Part II of the Securities Amendment Act 1988 (“the Amendment Act”) is the Act that contains the regime for substantial security holder disclosure in New Zealand.

Substantial Security Holder Obligations

23. A “substantial security holder” is defined in section 2 as a “person who has a relevant interest in 5 percent or more of the voting securities of that public issuer or body”.

24. Under section 20(1) every person who is a substantial security holder in a public issuer must give notice to the public issuer and to the stock exchange on which the securities are listed when the five percent shareholding level is reached.

25. In addition, a substantial security holder must also give notice where there is a change in the number of voting securities of a public issuer in which a substantial security holder has a relevant interest, and that change is more than 1% of the total number of issued voting securities (section 22(1)).

Relevant Interest

26. The substantial security holder disclosure requirements are triggered by a person having a “relevant interest” in a public issuer that is above the set threshold of 5%. The Amendment Act states that a person will have a “relevant interest” in a voting security in a number of different situations. It also provides a number of situations where a relevant interest can be disregarded.

Content of Disclosure

27. The form, content and manner of disclosure that a substantial security holder in a public issuer must provide are prescribed in the Act and the Securities (Substantial Security Holders) Regulations 1997. Section 22(2)(e) states that notice must be given as soon as the substantial security holder knows, or ought to know, of the notice being required. The form requires the substantial security holder giving notice to state why the substantial security holder notice is required. A number of items of specific information must also be given, including the total number of voting securities issued by the public issuer and the total number in which the substantial security holder holds a relevant interest.

Obligations on the Public Issuer

28. Part II of the Amendment Act also places obligations on public issuers. This includes obligations to:

- maintain a file containing every substantial security holder notice and all information about the disclosure of relevant interests that it receives;⁵

⁵ Section 25(1) of the Amendment Act.

- at the request of a person by whom a notice is given, give to that person an acknowledgement of the notice;⁶
- state, in a note accompanying its statement of financial position laid before the public issuer in general meeting:
 - a. the names of all the substantial security holders in the public issuer;
 - b. the number of voting securities in the public issuer in which each substantial security holder has a relevant interest; and
 - c. the total number of issued voting securities.⁷

Remedial Orders

29. The Amendment Act gives the High Court power to make certain orders remedying contravention of the disclosure obligation.⁸ The Court has power to make an order when:

- there are reasonable grounds to suspect that a substantial security holder has not complied with ss 20, 21 or 22 in relation to a public issuer; or
- a person has not complied with a request for information pursuant to ss 28 or 29 from a public issuer; or
- a notice has been given under s.28, but not all required information has been disclosed.

30. There are a number of orders that the High Court can make.⁹ For example, the Court can make an order:

- directing a substantial security holder to comply with ss 20, 21 or 22 of the Amendment Act;
- directing a person to identify people who have relevant interests in the voting securities of a public issuer;
- directing the public issuer not to make payment of any sum due in respect of any voting securities;
- directing the public issuer not to register the transfer of all or any voting securities;

⁶ Section 23(4) of the Amendment Act.

⁷ Section 26(1) of the Amendment Act.

⁸ Section 30 of the Amendment Act.

⁹ Section 32 of the Amendment Act.

- restraining the disposing of any voting securities of the public issuer or any relevant interest in them;
- directing the forfeiture of any voting securities of the public issuer;
- declaring that the exercise of voting rights attached to voting securities of the public issuer is void and of no effect; and
- directing the public issuer, or any other person, to do or refrain from doing a specified act, for the purpose of securing compliance with any other order made under this section.

Part III – Issues for Consideration

31. Discussed below are a number of issues the Ministry of Economic Development is seeking public comment on. These include possible options for reform relating to:

- the definition of “relevant interest”;
- convertible securities;
- differential voting rights;
- the application of the disclosure regime to collective investment schemes;
- the 5% disclosure regime threshold;
- the giving of notices;
- enforcement; and
- penalties.

Definition of “Relevant Interest”

When Will a Person Have a Relevant Interest?

32. Both the Australian and New Zealand disclosure requirements are triggered by a person having a “relevant interest” in a public issuer that is above the set threshold. In Australia, the disclosure requirements also apply to listed registered managed investment schemes.

33. In New Zealand, a person has a “relevant interest” in a voting security if that person:

- is a beneficial owner of the voting security; or
- has the power to exercise, or control the exercise, of any right to vote attached to the voting security; or
- has the power to acquire or dispose of the voting security; or
- has the power to control the acquisition or disposition of the voting security by another person; or
- has the power to perform the three previous actions by virtue of any trust, agreement, arrangement or understanding relating to the voting security.¹⁰

¹⁰ Section 5(1) of the Amendment Act. Section 5(2) states that there are some situations where one person will have a “relevant interest” by virtue of another person having a “relevant interest”.

34. Under section 5(4), a person who has any of the powers referred to above will have a “relevant interest” regardless of whether the power is:

- express or implied;
- direct or indirect;
- legally enforceable or not;
- related to a particular voting security or not;
- subject to restraint or restriction;
- exercisable presently or in the future;
- exercisable only on the fulfillment of a condition;
- exercisable alone or jointly with other persons.

35. The definition of “relevant interest” in the Australian Corporations Act 2001 is similar in effect to the New Zealand definition. The basic rule in the Corporations Act is that a person will have a “relevant interest” if they hold the securities, have power to exercise, or control the exercise of, a right to vote attached to the securities, or have power to dispose of, or control the exercise of a power to dispose of, the securities.

36. The approach to the relevant interest test in the Amendment Act can be contrasted with the approach used in New Zealand’s Takeovers Code. Instead of focussing on a “relevant interest” the Code focuses on a test of control which is defined in relation to a voting right as “having, directly or indirectly, effective control of the voting right”. A “voting right” is defined in the Takeovers Code as “a currently exercisable right” to vote at a meeting of shareholders, provided that the right to vote is not one that can only be exercised in special circumstances. Under the Code, a voting right is not deemed to be controlled if it falls within one of the class exemptions formulated by the Takeovers Panel.

37. It could be argued that the substantial security holder disclosure regime should have a similar test to that used in the Code in the interests of consistency and so that the issue around how convertible securities should be treated would be removed (this issue is discussed in paragraphs 43 to 53). However, there may be good reasons to maintain a different test for the substantial security holder regime. In a takeover situation the issue of interest is the actual control of voting rights in the target company. It may be argued by contrast that a substantial security holder disclosure regime should also provide useful information to the market regarding holdings that do not presently have voting rights but may do so in the future, and important information regarding related parties transactions. For this reason the relevant interest test is more appropriate. Further, determining the actual control of voting rights in a situation can be a complex task that would create difficulties of compliance for substantial security holders. The test for relevant interest by contrast is simpler to apply.

Questions for Submission

1. Is the current definition of “relevant interest” appropriate? Is an approach focused on control of voting rights more appropriate?

When Will a Relevant Interest Be Disregarded?

38. The Amendment Act provides that a relevant interest shall be disregarded in a number of circumstances. These include:

- where the ordinary business of the person who has the relevant interest includes the lending of money or the provision of financial services, and that person has the relevant interest only as security given for the purpose of a transaction entered into in the ordinary course of the business of that person or that person has been designated by the Securities Commission as a person to whom this sub-section applies (section 6(1)(a));
- where a person has that relevant interest by reason only of acting for another person to acquire or dispose of that security in the ordinary course of their brokering business and that person is a member of a stock exchange or has been designated by the Securities Commission as a person to whom this sub-section applies (section 6(1)(b));
- where a person holds the relevant interest by reason only of being authorised to act as the representative of a body corporate at a particular meeting of members of a public issuer (section 6(1)(c));
- where it is held solely by reason of the person being appointed as proxy to vote at a particular meeting of members of a public issuer (section 6(1)(d));
- where the person is a trustee corporation or nominee company, and has the relevant interest by reason only of acting for another person in the ordinary course of business of that trustee corporation or nominee company, and the person has been designated by the Securities Commission (section 6(1)(e)); and
- where that relevant interest is held by reason only because the person is a bare trustee of a trust to which the voting security is subject (section 6 (1)(f)).

39. Under section 6(1) of the Amendment Act the Commission has the power to designate a person as a person whose relevant interest in a voting security should be disregarded in certain circumstances. In March 2002, the Securities Commission released a discussion document that sought comment on a number of issues regarding this function. These included questions such as whether there is a need for a power of designation in New Zealand's securities regulatory system, and whether there were alternatives, without the need for the Commission's involvement, to ensure that the relevant interests of persons are disregarded where appropriate in accordance with the present general policy of the law.

40. The Commission also asked for comment on whether they should designate all registered banks within the meaning of section 2 of the Reserve Bank of New Zealand Act 1989 on a class basis.

41. The Ministry does not intend to repeat the questions asked in that discussion document. However, we would like comment on the wider issue of whether improvements could be made to the provisions regarding when a relevant interest can be disregarded.

42. In Australia, section 609 of the Corporations Act deals with situations which do not give rise to a relevant interest. Section 609 is reprinted in Appendix A. It should be noted that there is no power of designation for ASIC in the Australian Corporations Act. There is simply a list of exemptions. Some subsections in section 609 are similar to provisions in section 6(1) of the Amendment Act, but other subsections have no corresponding provision in New Zealand. The Australian subsections which have no corresponding provisions in the Amendment Act deal with share buy-backs, market traded options and derivatives, conditional agreements, pre-emptive rights, and clearing and settlement facilities.

Questions for Submission

2. Can section 6 (concerning when a relevant interest can be disregarded) be improved?
3. Should section 6(1) be amended so as to include similar categories to those in section 609 of the Corporations Act that do not already have corresponding provisions in section 6(1) of the Amendment Act? Should the Securities Commission's power of designation be continued or should there simply be a list of exemptions?

Convertible Securities

43. Under section 2 of the Amendment Act, a voting security “means a security of the public issuer or body which confers a right to vote at meetings of members or shareholders (whether or not there is any restriction or limitation on the number of votes that may be cast by or on behalf of the holder of the security)”. It is specifically stated that the term “voting security” includes a security which, in accordance with the terms of the security, is convertible into a security of that kind.

44. An issue has been raised as to whether convertible securities which do not carry a right to vote (even if they can be converted in due course into securities which do carry the right to vote) should rank as voting securities for the purposes of the threshold for disclosure.

45. The Australian legislation does not include convertible securities within the definition of “voting share”. The Australian legislation states that if one person with a “relevant interest” gives another person an enforceable right in relation to the security that would, if enforced, give the second person a “relevant interest” in the security, then the second person is taken to already have a “relevant interest”.

46. This provision dealing with future rights is applicable to convertible securities, but only if the convertible provides a right to acquire a security that is *already* on issue.

Options for Reform

47. The issue is what, if any, information should a substantial security holder be required to disclose in relation to their interests in convertible securities? In other words, is disclosure of “relevant interests” in securities that carry a present right to vote sufficient, or is disclosure of “relevant interests” in convertible securities also desirable? Four possible options have been identified:

- No requirement to disclose any information about interests held in convertible securities;
- No requirement to disclose any information about interests held in convertible securities, but allow public issuers to require disclosure of relevant interests held in convertible securities;
- A requirement to separately disclose any relevant interest held in convertible securities in addition to any interest held in voting securities; and
- Retain the status quo.

Option one: No requirement to disclose any information about interests held in convertible securities

48. This option is simple and would bring the New Zealand disclosure regime into line with overseas jurisdictions such as Australia and the United Kingdom. The disadvantage of this option is that it removes the requirement for disclosure in substantial security holder notices of potential or contingent interests in voting securities that are not yet on issue.

Option two: No requirement to disclose any information about interests held in convertible securities, but allow public issuers to require disclosure of relevant interests held in convertible securities

49. Under this option, sections 28 and 29 of the Amendment Act (which allow public issuers to request disclosure of relevant interests and other information) would be amended to continue to allow public issuers to request disclosure of relevant interests and other information in convertible securities, despite the fact that these securities would not come within the definition of “voting security”.

50. This option retains the advantages of simplicity and compatibility with overseas jurisdictions. It also offsets the disadvantage of option one (ie - it removes the requirement of disclosure in substantial security holder notices of potential or contingent interests in voting securities that are not yet on issue) by allowing the public issuer to make themselves aware of relevant interests in convertible securities. The public issuer would then be required under the listing rules to provide this information to the NZSE, which could then inform the market generally.

Option three: Requirement to separately disclose any relevant interest held in convertible securities in addition to any interest held in voting securities

51. There are two advantages to this option. First, the information about convertible securities when it is likely to be particularly relevant to the market – ie – when the person is already a substantial security holder of existing voting rights. Secondly, the information given to the market would be largely the same as that currently required, so there should be no additional compliance costs imposed on substantial security holders.

52. The disadvantage of this option is that substantial security holders are only required to give notice of convertible securities held when giving notice of substantial holdings in voting securities. Therefore, the market may be misled about a person's holdings of convertible securities. For example, a substantial security holder could purchase a large amount of convertible securities immediately after giving a notice. Given that no new notice would be required, the market could well be mistaken as to the extent of a substantial security holder's relevant interest in convertible securities.

Option four: Retain the status quo

53. The Ministry of Economic Development and the Securities Commission believe that the current situation is not sustainable. This is because it has led to difficulties for public issuers who have convertible securities on issue and for other market participants.

Questions for Submission

4. Should the reference to convertible securities in the definition of "voting security" in section 2 of the Amendment Act be removed or amended?
5. If so, what should it be replaced with? Do you favour one of the options identified or something else?

Application of the Substantial Security Holder Disclosure Regime to Collective Investment Schemes

54. The Australian Corporations Act 2001 applies in respect of holdings in listed companies and "listed registered managed investment schemes". In New Zealand, there is no such explicit reference to investment schemes. The Securities Commission noted in its discussion paper released in 1994 that it had difficulty in interpreting Part II of the Amendment Act in relation to collective investment schemes.

55. The main reason for the confusion is seemingly conflicting provisions. Section 2 of the Amendment Act defines "public issuer" as meaning a person "who is a party to a listing agreement with a stock exchange". In the case of listed collective investment schemes, the party to the listing agreement is usually the manager of the scheme. The securities of the investment schemes are the securities of the manager. On the other hand, section 2 also states that "substantial security holder in relation to a public issuer *or other body*, means a person who has a relevant interest in 5 percent or more of the voting securities of that public issuer *or body*".

56. The question is whether changes should be made to the Amendment Act, particularly the definition of public issuer, to make it clear that Part II of the Amendment Act applies to investment schemes.

57. One argument given as to why the substantial security holder disclosure regime should not apply to investment schemes is that it is less likely for an investment scheme to seek control of companies in which they invest. Another argument is that experience in Australia (where the legislation states that a person must give notice within two business days of becoming aware of the fact that they are a substantial security holder) suggests that investment scheme operators in complying with this requirement believe that it adds cost to investing as their investment moves are signaled to other traders.

58. However, the opposing view is that investment schemes should not be given relief from the disclosure regime simply because they are unlikely to seek control of companies in which they invest. There are a number of reasons for this view. For example, the objectives of the disclosure regime extend beyond identifying controllers of a company. Investment schemes have the potential to change or influence control by selling their shares, just like any other security holder. Further, information about the identity of any substantial security holder is useful to the market. Ensuring that the market is well informed is one of the main rationales for having a substantial security holder disclosure regime, and this should apply regardless of whether the security holder concerned is an individual, a company or a collective investment scheme. Finally, managers of collective investment schemes can also potentially manipulate the market or insider trade, so it is important for information about their substantial security holdings to be available.

Questions for Submission

6. Should the substantial security holder disclosure regime apply to collective investment schemes?
7. What changes should be made to the Amendment Act to reflect your answer to the previous question?

The Substantial Security Holder Threshold

59. The threshold for New Zealand's substantial security holder regime is 5%, meaning that the regime is applicable to any person who has a relevant interest in 5% or more of the voting securities of a public issuer.

Overseas Jurisdictions

60. In Australia, a person has a "substantial holding" if the total votes attached to voting securities in the body or scheme in which they have a relevant interest is at least 5% of the total number of votes attached to voting securities in the body or scheme.

61. In the United Kingdom, the substantial holding threshold is only 3%. However, collective investment schemes can acquire up to 10% of the issued shares in a company before being deemed to be a substantial holder. The 10% figure is used as the threshold for all securities in Hong Kong and Ontario.¹¹

62. The argument in favour of having a higher threshold figure for collective investment schemes is similar to the argument for the substantial security holder regime not applying to collective investment schemes. That is, a different rule should apply to collective investment schemes because it is less likely for them to seek control of companies in which they invest. Therefore, although it is considered appropriate to require individuals and companies to disclose their relevant interests once they have a certain percentage of the voting securities of the public issuer (5% in New Zealand), collective investment schemes should not have to disclose their holdings until they have a higher percentage because only then does it become information that is important for the market to know.

63. Similarly, the argument against having a higher threshold for investment schemes is similar to the argument in favour of the substantial security holder regime applying to collective investment schemes. That is, different rules should not apply to collective investment schemes simply because they are unlikely to seek control of the companies in which they invest. They have the ability to change or influence control by selling their shares, just like any other security holder, and information about the identity of any substantial security holder is useful to the market.

Questions for Submission

8. Is the 5% threshold figure for the substantial security holder disclosure regime still appropriate?
9. Should the threshold figure for collective investment schemes be the same as for other substantial security holders?

Differential Voting Rights

64. Under section 2, a person is a “substantial security holder” if they have a “relevant interest in 5% or more of the *voting securities* of that public issuer or body”. This definition refers only to the total voting securities and does not provide for situations where there is more than one class of voting securities on issue and different voting rights between those classes.

65. It has been suggested that the Amendment Act be amended so that a person will be a substantial security holder, and therefore be required to give notice, if they have a relevant interest in 5% or more of any *class* of voting securities of a public issuer or body, as opposed to 5% of the *total* voting securities of that public issuer or body.

¹¹ Securities (Disclosure of Interest) Ordinances sections 4-6 and Ontario Securities Act s.101 respectively.

66. The objective would be to ensure that the requirement to disclose is imposed on security holders with more than 5% of the voting securities. The following example illustrates the point:

- A company issues 50 A class shares that have twice the voting rights as the 50 B class shares that are issued.
- A person with a relevant interest in 4 A class shares will have more voting rights than a person with a relevant interest in 5 class B shares.
- At present, the holder of the 4 class A shares would not be required to disclose their relevant interest in the shares, although the holder of the 5 class B shares would be required to disclose their relevant interest.

67. A number of overseas jurisdictions have worded their laws so that they only apply to classes. For example, section 13(d)(1) of the United States Securities Exchange Act 1934 requires notice to be given by people owning more than 5% of a class of security. Similar wording is found in Australia's Corporations Act 2001, the United Kingdom's Companies Act 1985 and in Hong Kong's Securities (Disclosure of Interests) Ordinance.

68. This consistency with comparable overseas jurisdictions could be desirable given that overseas investors in New Zealand would be more familiar with the requirements.

69. Other advantages of this option are that the calculation required is simple (each person only has to know how many securities they hold in each class and the total number of securities of that class that have been issued) and that it involves only minor changes to the existing regime. In most cases it will not involve a change at all, given that most public issuers only issue one class of voting securities. The disadvantage of this suggestion is that it would impose additional compliance costs on the public issuers that would be affected. In other words, public issuers who issue more than one class of shares with different rights attached to them.

70. Instead of amending the definition of "substantial security holder" so as to refer to "5% or more of any *class* of voting securities...", an alternative approach is to require disclosure when a person has a relevant interest in 5% or more of the total voting *rights*, as opposed to an emphasis on the voting securities. The advantage of an approach focusing on total voting rights is that it would be compatible with the Takeovers Code. However, the disadvantage is that it is a complex approach. This is because voting rights may change over time, and in those cases, procedures will be required for keeping the information up to date. Therefore, an approach focused on voting rights would increase compliance costs for the public issuers that would be affected (see also paragraph 37).

Questions for Submission

10. Should the definition of “substantial security holder” be amended so as to provide for situations involving differential voting rights?
11. If so, should the replacement definition be a relevant interest in any *class* of voting securities issued by the public issuer or body, or a relevant interest in the total voting *rights* in the public issuer?

Giving of Notices

71. Under section 20(4)(e) of the Amendment Act, a person must give notice “as soon as the person knows, or ought to know, that the person is a substantial security holder”. The Australian legislation is different. It states that a person must give notice “within two business days after they become aware of the information” to be disclosed, or by 9.30am on the next trading day of the relevant securities exchange after becoming aware of the information if a takeover bid is made for voting shares and the person becomes aware of the information during the bid period.

Constructive or Actual Knowledge?

72. The distinction between the New Zealand and Australian regimes is that in New Zealand the obligation to disclose arises even where a person only has constructive knowledge of the fact that they are a substantial security holder (i.e – when they ought to have known of that fact), whereas the Corporations Act in Australia requires actual knowledge of the information to be known before any obligation arises.

73. Given that there are a large number of remedial orders that can be given against a person for breaching the disclosure provisions under section 32 of the Amendment Act, it may be argued that an obligation to disclose even where a person only has constructive knowledge of the fact that they are a substantial security holder is too onerous in some situations. This argument could receive further weight if there are more orders added to section 32 as a result of changes to the disclosure regime.

74. The counter argument to this is that the “ought to be known” test should be used because most substantial security holders are companies and it is too difficult to prove that a company has knowledge of certain information. For this reason if constructive knowledge was not used very few breaches would be able to be proved and the entire regime undermined.

75. The question of how a company can “know” that it is a substantial security holder is determined by the rules of attribution laid out by the Privy Council in *Meridian Global Funds Management Asia Ltd v Securities Commission*.¹²

¹² [1995] 3 NZLR 7.

76. It held that a court needs to first look at the constitution of the company and rules implied by company law (which were referred to as primary rules of attribution). In addition, the courts need to look at general rules of attribution (such as principles of agency and estoppel) which enable companies to do business.

77. The Judicial Committee made the point that this does not mean that whenever an employee of a company has authority to do an act on the company's behalf (such as entering into a transaction to buy shares), knowledge of that act will for all purposes be attributed to the company. It is a question of fact in each case as to whether the knowledge that an act has been done should be attributed to the company.

78. Clause 38 of the SMIB proposes adding a new section 19Q requiring directors and officers of public issuers to disclose relevant interests and dealings in relevant interests of a security of that public issuer or a related body corporate within five days of the acquisition of that relevant interest or the dealing in that relevant interest or the provision otherwise becoming applicable (ie - a person with a relevant interest becoming a director or officer). Clause 38 of the SMIB also proposes adding a new section 19Z stating that failure to comply with this obligation is an offence. The provision, which is consistent with the current test in the substantial security holder regime on this point, states that

Every person who is aware *or ought reasonably to be aware* of information that the person is required to disclose under section 19Q, and who fails to disclose that information in accordance with a directors' and officers' disclosure obligation, commits an offence.

79. Under the new continuous disclosure provisions proposed in the SMIB, the Act is silent as to when a public issuer has information. This means that common law precedent in *Meridian* will apply to determine this issue on a case by case basis.

80. This approach has consistency with not just the substantial security holder disclosure regime but also Part I of the Amendment Act (which deals with insider trading), in which there is currently no test to determine when an insider has information. There are two issues relevant here. The first is whether it is appropriate for the substantial security holder disclosure regime to be silent on this issue and rely on *Meridian* or whether legislation should state when a company is aware of information. The second issue is whether the constructive knowledge test in *Meridian* should stand.

81. It is desirable that the approach to the question of whether knowledge means actual or constructive knowledge is consistent across the substantial security holder regime, the new continuous disclosure provisions and the new provisions relating to directors' and officers' obligations.

Timing of the Disclosure

82. There are currently two different timing tests under existing and proposed legislation relating to securities disclosure. Under sections 20(4)(e), 21(4)(e) and 22(2)(e) of the Amendment Act, notice must be given as soon as the person knows or ought to know that they are a substantial security holder, that they have ceased to be a substantial security holder, or that there has been a change in holding respectively.

83. The continuous disclosure regime that is also introduced into the Amendment Act by the SMIB requires public issuers to comply with the provisions of the listing rules of the NZSE, under which disclosure must be immediate. That is, a public issuer which is aware of material information that is not generally available to the market must give that information to the exchange immediately after becoming aware of the information.

84. Under the SMIB, a director or officer of a public issuer who has a relevant interest in a security of that public issuer must disclose that fact within 5 trading days of the provision becoming applicable (see paragraph 78). The provision becomes applicable by the listing of the public issuer, or by the person's appointment as a director or officer, or by a director or officer acquiring or disposing of a relevant interest in a security of the public issuer or a related body corporate.

85. The question is whether the Amendment Act should continue requiring notice to be giving immediately or whether it should provide that notice must be given within a specified period of time. If a certain period of time is to be specified, the next question is what that time period should be.

86. The justification that can be given for the time frame being longer for the disclosure of directors' and officers' interests (within 5 trading days) than for material information under the continuous disclosure obligations is that the information that must be disclosed under the continuous disclosure provisions is seen as more likely to have a greater impact on the market. It may be that the time frame for disclosure of substantial security holdings should be somewhere between immediately and within 5 trading days.

87. There is an argument for following the substantial security holder disclosure period provisions in Australia, where the Corporations Act sets out a 2 day time frame in which notice must be given.

88. Both the United States and Canada have different provisions for institutional investors. For example, in Ontario, the standard disclosure period for holdings of 10% or more is 2 business days, but institutional investors have up to 10 days after the end of the month in which the substantial holding was acquired to disclose the holding.

89. In the United States, the standard disclosure period for holdings of 5% - 10% is 10 calendar days after the holding is acquired. Institutional investors have 45 days after the end of the calendar year in which the holding is acquired to report holdings of between 5 and 10%. Institutional investors must report holdings of more than 10% within 10 days of the end of the month in which the holding is acquired. The rationale for allowing institutional investors more time to disclose substantial holdings is to allow the marketplace and the staff of the SEC itself more able to focus on acquisitions that have the potential to change or influence control.¹³

¹³ Securities Exchange Commission *Release No. 34-39538*.

Questions for Submission

12. Should the requirement for a person to give notice that they are a substantial security holder arise only when they have actual knowledge of that fact or when they ought to have had knowledge of that fact? Or should the existing reference to constructive knowledge be removed so that the regime is silent on this issue and subject to common law and therefore consistent with Part I of the Amendment Act and the new continuous disclosure provisions proposed by the SMIB? Should the legislation provide guidance as to when a company has knowledge?
13. Should the Act require notice to be given “immediately” or should a particular time period be specified? How long should that time period be and why?
14. Should there be a different designated time period for officials of collective investment schemes to give notice?

Penalties and Remedies

90. There are a range of penalties and remedies that are utilised for breaches of securities law. There are essentially three types of penalties - criminal, civil and remedial. In criminal proceedings the standard of proof required to convict is “beyond reasonable doubt”. In civil cases, the test is the “balance of probabilities”.

91. With regard to securities law breaches, the degree to which general deterrence will be promoted will be affected by whether:

- The burden of proving an offence can be practically met;
- The detection systems are adequate;
- The systematic arrangements and resources of the enforcement agency are adequate;
- The penalties are sufficiently high to deter the undesirable behaviour; and
- an offender could pay the efficient fine where detection is difficult.

92. In May 2002, the Ministry released a discussion document entitled “Penalties, Remedies and the Application of Securities Trading Law”. It considered the possible introduction of criminal and civil penalties for insider trading, continuous disclosure and potential market manipulation law, and what level of criminal and civil pecuniary penalties may be appropriate.¹⁴

¹⁴ Reform of Securities Trading Law volume 3, “Penalties, Remedies and the Application of Securities Trading Law”, part II, paragraphs 156 – 298.

Criminal Penalties

93. Whether criminal penalties should be imposed for breaches of the substantial security holder provisions will be influenced by the direction that is taken on other issues discussed elsewhere in this paper, such as the constructive knowledge versus actual knowledge question. If the constructive knowledge test is retained, it could be argued that criminal penalties are too severe. Another argument against penalties is that a breach of the substantial security holder disclosure regime is likely to be viewed as less serious than a breach of insider trading provisions or the continuous disclosure obligations. However, the counter argument could be that as criminal penalties result in more “stigma” than an adverse judgment in civil proceedings and provide a greater deterrent, so in order to ensure the regime is effective they should be imposed.

Civil Penalties

94. Another option would be to consider civil penalties. It may be argued that appropriate and effective civil penalties that promote deterrence and that are effectively enforced need to be in place. It should be noted that there are now criminal and civil penalties in Australia for breach of their substantial security holding provisions.

95. The argument for a civil penalties regime is that it provides a “middle ground” between private civil action and criminal prosecution. It provides for State enforcement in the civil courts with the standard of proof on the balance of probabilities.

96. The SMIB will introduce new provisions into the Amendment Act allowing for the imposition of civil penalties for breach of the new continuous disclosure obligations. It may be considered desirable for there to be scope for the High Court to impose financial penalties so as to have a degree of consistency with other areas of securities law.

97. If there is to be a civil penalties regime, the question arises as to what the maximum penalty should be. It may be desirable to have consistency with the maximum penalty in the SMIB. The relevant provision states that if the Court is satisfied that a public issuer has contravened a continuous disclosure obligation or a term or condition of a continuous disclosure exemption, it may order the public issuer to pay a fine not exceeding \$300,000.¹⁵

Administrative Financial Penalties

98. In the United Kingdom, the Financial Services and Markets Act 2000 empowers the Financial Services Authority (“FSA”) to impose a financial penalty in the following circumstances:

- on a firm, where the FSA considers that the firm has contravened a requirement imposed on it under that Act;

¹⁵ Section 19LA of the Securities Markets Act 1988, introduced by section 38 of the SMIB.

- on an approved person, where the FSA considers that s/he is guilty of misconduct, which is defined as failure to comply with a *Statement of Principle* issued by the FSA;
- on any person, where the FSA is satisfied that the person is or has engaged in “market abuse” or, by taking or refraining from taking any action, has required or encouraged another person to engage in “market abuse”; and
- on an issuer of listed securities or an applicant for listing, where there has been a contravention of the listing rules (or on a director of an issuer or applicant who at the material time was knowingly concerned in the contravention).

99. The advantage of the regulator having the ability to impose financial penalties is that they are a specialist body and matters would go through the system quicker than in the courts. However, some people may take the view that only judicial bodies should be able to impose monetary penalties and that it is inappropriate for a body such as the Securities Commission to have this power. There is also a potential conflict of interest issue, in the sense that the Securities Commission would then have law reform, monitoring, enforcement and judicial roles.

100. If the Securities Commission were to be entitled to impose financial penalties, the question arises as to what the maximum penalty should be. In the United Kingdom, the FSA has the power to impose a penalty “of such amount as it considers appropriate” in the situations referred to above in paragraph 98.

101. However, sections 69 and 210 of the Financial Services and Markets Act require the FSA to issue statements of policy about the imposition of financial penalties, and it is required to have regard to those statements of policy in exercising its power to impose financial penalties.

102. The statement of policy lists a number of factors that may be relevant in determining the amount of the financial penalty, including:

- the seriousness of the misconduct or contravention;
- the extent to which the contravention or misconduct was deliberate or reckless;
- whether the person on whom the penalty is to be imposed is an individual, and the size, financial resources and other circumstances of the firm or individual;
- the amount of profits accrued or loss avoided;
- conduct following the contravention;
- disciplinary record and compliance history;
- previous action taken by the FSA ; and
- action taken by other regulatory authorities.

103. Even it is accepted that the Securities Commission should be able to impose financial penalties, they will only be administrative penalties for minor breaches, and

therefore it may not be appropriate for them to be able to impose substantial pecuniary penalties.

104. There is also a question as to whether the Securities Commission should be able to make orders requiring disclosure similar to their powers in relation to continuous disclosure and directors disclosure under the SMIB. Section 38 of the SMIB proposes new provisions, including allowing the Securities Commission to make an order requiring a public issuer to disclose information if the Commission is satisfied that a public issuer has contravened a continuous disclosure obligation or a term or condition of a continuous disclosure exemption.¹⁶ It also allows the Securities Commission to order a person to disclose information if it is satisfied that the person has contravened a directors' and officers' disclosure obligation or a term or condition of an exemption from a directors' and officers' disclosure obligation.

Questions for Submission

15. Should non-compliance with substantial security holder obligations be a criminal offence?
16. Should civil penalties be imposed in cases of non-compliance with the obligations?
17. If so, what should the maximum penalty be that the High Court could impose?
18. Should the Securities Commission be given the power to impose administrative financial penalties? If so, what should the maximum penalty be?
19. Should the Securities Commission be given the power to make orders requiring disclosure of information?

Remedial Orders

105. The New Zealand and Australian courts have broadly similar powers to make orders where there has been a contravention of the substantial security holder disclosure regime. However, there are two main differences. First, the Australian courts have specific power to make additional orders, namely, making an order that securities be vested in ASIC, and making an order requiring a body corporate to repeal or modify its constitution.

106. The second difference between the two countries is the standard of proof required for a court to make an order. It seems that the ordinary civil burden of proof applies to proceedings under the Australian Corporations Act, but an order can be made in New Zealand if there are "reasonable grounds to suspect" non-compliance.¹⁷

¹⁶ Section 19G of the Securities Markets Act (formerly called the Securities Amendment Act).

¹⁷ Section 30 of the Amendment Act.

107. In regard to the question of what is meant by “reasonable grounds to suspect”, the Court of Appeal stated in *Meridian Global Funds Management Asia Ltd v Securities Commission*¹⁸ that:

Except in the event, unlikely in a disputed case, that there is direct proof, [a relevant] interest can be established only by the process of inference. It is to that process to which the words ‘reasonable grounds to suspect’ relate. Inferences may be drawn only from facts, and the statute does not depart from that fundamental. But once the facts are established, the statute requires the less stringent process of deduction on the basis of reasonable suspicion, which would not be enough in an ordinary civil case, to say nothing of a criminal case.

108. In the new provisions introduced by the SMIB dealing with continuous disclosure by public issuers and disclosure of relevant interests by the directors and officers of public issuers, the Securities Commission and the High Court may take certain actions “*if it is satisfied*” that some action has occurred. For example:

- the Securities Commission¹⁹ and the High Court²⁰ may make an order requiring compliance *if it is satisfied* that a public issuer has contravened the continuous disclosure obligations or a term or condition of an exemption from the continuous disclosure obligation;
- the High Court’s can also impose pecuniary penalties *if it is satisfied* that a public issuer has contravened the continuous disclosure obligations or a term or condition of an exemption from the continuous disclosure obligation;
- the Securities Commission can make an order requiring disclosure *if it is satisfied* that a person has contravened a directors’ and officers’ obligation or a term or condition of an exemption from a directors’ or officers’ disclosure obligation.

109. It may be considered desirable that the wording used in the substantial security holder disclosure obligations be consistent with the wording used in the new provisions introduced by the SMIB. A threshold higher than the “if it is satisfied” standard may be too high for these situations as they are intended to rectify the breach efficiently and this may be undermined by a higher threshold. On the other hand, some people may consider this standard too low, and argue that nothing less than the balance of probabilities test should apply. The response to this may be that even if the standard is “if it is satisfied”, people involved will still be entitled to present their case and will be entitled to the protection of the New Zealand Bill of Rights Act 1990 provisions. Furthermore, any Securities Commission hearings will be subject to judicial review.

¹⁸ [1994] 2 NZLR 291, 296. This aspect of the decision was not overturned by the Privy Council.

¹⁹ The new section 19G of the Securities Markets Act.

²⁰ The new section 19L of the Securities Markets Act.

Questions for Submission

20. Should section 32 of the Amendment Act be amended to allow the High Court to make an order requiring securities to be vested in the Securities Commission or an order requiring a body corporate to repeal or modify its constitution?
21. Should the standard of proof in section 30 of the Amendment Act be changed or should the “reasonable grounds to suspect” test be retained? If you think the standard of proof should be changed, what should it be changed to?

Form and Method of Disclosure

110. The Securities (Substantial Security Holders) Regulations 1997 set out the form of the substantial security holder notices and state the information that must be disclosed. Regulation 4 states that form 1 of the schedule must be used for specified notices (form 1 is included in Appendix B).

111. In regard to the form and method of disclosure, the question is whether any changes could be made to the Securities (Substantial Security Holders) Regulations 1997 to make disclosure easier and reduce compliance costs.

112. Another question is whether the possibility of mutual recognition of substantial security holder notices in New Zealand and Australia should be adopted. The information that must be disclosed in each country is similar, and it may reduce compliance costs if a company can produce just one notice to satisfy the requirements of both countries.

Questions for Submission

22. Do changes need to be made to the Securities (Substantial Security Holders) Regulations 1997 to make disclosure easier and reduce compliance costs? If so, what changes do you suggest?
23. Should the possibility of mutual recognition of substantial security holder notices in New Zealand and Australia be considered?

Other Aspects of the Substantial Security Holder Disclosure Regime

113. The intention of the Ministry of Economic Development has been for this discussion document to cover all the main areas of the substantial security holder disclosure regime. However, we would like to invite you to discuss other provisions that have not been covered where you think that improvements could be made.

Questions for Submission

24. Do you have comments on any other aspects of the substantial security holder disclosure regime?

Appendix A

Section 609 Corporations Act 2001 (Australia)

Situations not giving rise to relevant interests

Money lending and financial accommodation

(1) A person does not have a relevant interest in securities merely because of a mortgage, charge or other security taken for the purpose of a transaction entered into by the person if:

- (a) the mortgage, charge or security is taken or acquired in the ordinary course of the person's business of the provision of financial accommodation by any means and on ordinary commercial terms; and
- (b) the person whose property is subject to the mortgage, charge or security is not an associate of the person.

Note: Sections 11 to 17 define *associate* .

Nominees and other trustees

(2) A person who would otherwise have a relevant interest in securities as a bare trustee does not have a relevant interest in the securities if a beneficiary under the trust has a relevant interest in the securities because of a presently enforceable and unconditional right of the kind referred to in subsection 608(8).

Note: This subsection will often apply to a person who holds securities as a nominee.

Holding of securities by financial services licensee

(3) A financial services licensee does not have a relevant interest in securities merely because they hold securities on behalf of someone else in the ordinary course of their financial services business.

Shares covered by buy-backs

(4) A person does not have a relevant interest in a company's shares if the relevant interest would arise merely because the company has entered into an agreement to buy back the shares.

Proxies

(5) A person does not have a relevant interest in securities merely because the person has been appointed to vote as a proxy or representative at a meeting of members, or of a class of members, of the company, body or managed investment scheme if:

- (a) the appointment is for one meeting only; and
- (b) neither the person nor any associate gives valuable consideration for the appointment.

Market traded options and derivatives

(6) A person does not have a relevant interest in securities merely because of:

- (a) a market traded option over the securities; or
- (b) a right to acquire the securities given by a derivative.

This subsection stops applying to the relevant interest when the obligation to make or take delivery of the securities arises.

Note: Without this subsection, subsection 608(8) would create a relevant interest from the option or contract.

Conditional agreements

(7) A person does not have a relevant interest in securities merely because of an agreement if the agreement:

- (a) is conditional on:
 - (i) a resolution under item 7 in the table in section 611 being passed; or
 - (ii) ASIC exempting the acquisition under the agreement from the provisions of this Chapter under section 655A; and
- (b) does not confer any control over, or power to substantially influence, the exercise of a voting right attached to the securities; and
- (c) does not restrict disposal of the securities for more than 3 months from the date when the agreement is entered into.

The person acquires a relevant interest in the securities when the condition referred to in paragraph (a) is satisfied.

Pre-emptive rights

(8) A member of a company, body or managed investment scheme does not have a relevant interest in securities of the company, body or scheme merely because the company's, body's or scheme's constitution gives members pre-emptive rights on the transfer of the securities if all members have pre-emptive rights on the same terms.

Director of body corporate holding securities

(9) A person does not have a relevant interest in securities merely because:

- (a) the person is a director of a body corporate; and
- (b) the body corporate has a relevant interest in those securities.

Clearing and settlement facilities

(9A) The operator of a clearing and settlement facility (within the meaning of chapter 7) does not have a relevant interest in securities merely because of its provision of facilities for the settlement of transactions.

Prescribed exclusions

(10) A person does not have a relevant interest in securities in the circumstances specified in the regulations. The regulations may provide that interests in securities are not relevant interests subject to specified conditions.

Appendix B

Securities (Substantial Security Holders) Regulations 1997 Schedule

NOTES to Form 1

These notes do not form part the notice. Every notice must contain the information specified in the form and the information required by regulations 6 to 14.

1 Stock Exchange

A copy of this notice must be sent to the New Zealand Stock Exchange, or any other stock exchange registered under the Sharebrokers Act 1908, on which the securities of the public issuer are listed at the same time as it is sent to the public issuer.

{ Editorial Note: Note 1: Words “the New Zealand Stock Exchange, or any other” are to be omitted and word “any” is to be substituted on the “restructuring day”, by 2002 No 1 (P), s18(2) & s2(1). }

2 Overall totals

Give—

- (a) The total number of the public issuer's voting securities in which a relevant interest is held:
- (b) The total number of voting securities issued by the public issuer. The most recent statement given by the public issuer to security holders of the total number of voting securities issued by the public issuer should be used unless the person giving the notice knows that that number is not correct and knows the correct number:
- (c) The total percentage in which a relevant interest is held.

3 Beneficial/Non-beneficial relevant interests

A person has a beneficial relevant interest in a voting security if that person is a beneficial owner of the security. A person has a non-beneficial relevant interest in a voting security if the person has a relevant interest in the security other than by reason of being a beneficial owner of the security.

Where a relevant interest has changed in nature from being a non-beneficial to a beneficial relevant interest (or vice versa), complete both columns to show the effect of the change in nature of the relevant interest.

Class

If a relevant interest is held in the voting securities of more than one class, fill out a separate table for each class, and annex it to the notice.

4 Which relevant interests are to be disclosed

Give details of the following relevant interests:

- (a) In the case of a notice that a person has become a substantial security holder, every relevant interest:
- (b) In the case of a notice of a change in total number of voting securities in which relevant interest is held, the relevant interest(s) affected by the transaction or transactions from which the change results:
- (c) In the case of a notice that a person has ceased to be a substantial security holder, the relevant interest(s) affected by the transaction or transactions as a result of which the person ceased to be a substantial security holder:
- (d) In the case of a notice of a change in the nature of a relevant interest, the relevant interest(s) in respect of which there has been a change in nature.

5 Registered holders

Give the name of the registered holder(s) of the voting securities, or the name of the person(s) who are intended to be the registered holder(s) once any transfers involved in the transactions giving rise to the notice have been registered.

If the substantial security holder has relevant interests in more than one registered holding, give details of each of those registered holdings, and annex it to the notice.

6 Details of non-beneficial relevant interests

In respect of each non-beneficial relevant interest required to be disclosed, give the provision(s) of section 5 of the Securities Amendment Act 1988 under which the relevant interest arises.

7 Details of transactions

In respect of each transaction pursuant to which the relevant interest was acquired or disposed of, or from which the change results, give—

- (a) The date of the transaction pursuant to which the relevant interest was acquired or disposed of, or otherwise arose or ceased, or from which the change in number or nature results:
- (b) The number of voting securities affected by that transaction:
- (c) The consideration (if any), for that transaction, expressed in New Zealand dollars (including the value of benefits received or to be received (if any)):

- (d) A description of the nature of that transaction, including the names (if known) of the other party or parties to that transaction (unless it is a transaction on the stock exchange).

E.g. Listing on New Zealand Stock Exchange:

Joint venture with (name):

Sale on the New Zealand Stock Exchange:

Off-market purchase from (name)

Exercise of right of purchase under an option to acquire voting securities.

If a relevant interest was acquired or disposed of, or otherwise arose or ceased, from more than one transaction, or if the change in number or nature of the relevant interest results from more than one transaction, give the details for each transaction separately, and annex it to the notice.

However, give the details in aggregate for stock exchange transactions as follows:

- (a) The date of the transaction may be expressed as the date of the beginning and the date of the end of the period over which the stock exchange transactions occurred:
- (b) Information as to the number of voting securities and the consideration may be expressed as an aggregate number or amount for that period.

If the substantial security holder has 2 or more relevant interests in the same voting security, or in different voting securities, of the public issuer, the information prescribed by regulation 10 must be disclosed for each relevant interest, and annexed to form 1.

8 Documents required to accompany notice in case of non-beneficial relevant interests or change in nature of relevant interests

The notice must be accompanied by, or have annexed, relevant documentation if the notice discloses—

- (a) A relevant interest that arises, or a change in the total number of voting securities in which a relevant interest is held, other than by reason of the substantial security holder having, or ceasing to have, a beneficial relevant interest in any voting securities; or
- (b) A change in the nature of any relevant interest, including any amendments to relevant documentation in respect of a relevant interest.

Relevant documentation means—

- (a) Copies of every written contract, agreement, deed, or instrument; or
- (b) Copies of any written document recording the material terms of any oral agreement; or
- (c) If there are no such documents, a memorandum in writing specifying the material terms of any trust, agreement, arrangement, or understanding,— from which the relevant interest arises, or the change results, or, in the case of a notice that discloses a change in the nature of any relevant interest, from which the change in the nature of any relevant interest results.

It does not include a document that has accompanied, or been annexed to, another notice given to the same person under Part 2 of the Act, if the current notice indicates the date of the other notice.

Neither does it include a document in respect of a stock exchange transaction.

9 Miscellaneous

Give—

- (a) The number of pages that accompany the notice (if any):
- (b) The date of the last notice (if any) given to the public issuer in compliance with Part 2 of the Securities Amendment Act 1988 by the person(s) on whose behalf this notice is given:
- (c) The names of any other person(s) who are believed also to have given, or to be intending to give, a notice under the regulations in relation to the securities to which the notice relates.

Form 1

Regs. 4, 18, 19

Tick the appropriate box(es)

(Securities Amendment Act 1988)
Substantial Securities Holder Notice

Reg.4

<input type="checkbox"/>	Notice that a person has become a substantial securities Holder (<i>section 20 (3)</i>)	<input type="checkbox"/>	Notice that a person has ceased to be a substantial security holder (<i>section 21 (3)</i>)
<input type="checkbox"/>	Notice of a change in the number of voting securities in which a substantial security holder has a relevant interest (<i>section 21(1)</i>)	<input type="checkbox"/>	Notice of a change in the nature of relevant interest held by a substantial security holder (<i>section 22</i>)

1*

Name of substantial security holder

Address of substantial security holder

Contact name for queries

Telephone number

<input type="text"/>	<input type="text"/>	<input type="text" value=""/>
2 Total number of voting securities of the public issuer in which a relevant interest is held	Total number of voting securities issued by public issuer	Total percentage %

Class of voting securities

Number of votes attached to each voting security in that class

BENEFICIAL RELEVANT INTERESTS

NON-BENEFICIAL RELEVANT INTERESTS

3*

Number of voting securities of the class in which a beneficial relevant interest is held

 %

Percentage held at date of THIS notice

 %

Percentage held at date of LAST notice (if any)

Number of voting securities of the class in which a non-beneficial relevant interest is held

 %

Percentage held at date of THIS notice

 %

Percentage held at date of LAST notice (if any)

4*

DETAILS OF RELEVANT INTERESTS

Name(s) of registered holder(s)

DETAILS OF EACH RELEVANT INTERESTS

5*

Name(s) of registered holder(s)

6*

Date(s) of transaction(s)

Provision(s) of section 5

Date(s) of transaction(s)

7*

Number of voting securities

Consideration (expressed in NZ\$)

Number of voting securities

Consideration (expressed in NZ\$)

Description of nature of transaction(s), including the name(s) of any other party to the transaction(s) (if known)

8*

Relevant documentation	- forms part of this notice.....	<input type="checkbox"/>
	is not required to be filed.....	<input type="checkbox"/>
	has already been filed with the notice.....	<input type="checkbox"/>

9*

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
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Number of pages that accompany this notice (if any)	Date of last notice (if any)	Name(s) of any other person(s) who is (are) believed to have given, or to be intending to give, a substantial security holder notice in relation to the securities to which this notice relates
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I declare that to the best of my knowledge and belief the information contained in this notice is correct and that I am duly authorised to give this notice:

<input type="text"/>	<input type="text"/>	<input type="text"/>
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Signature (unless field by electronic means other than facsimile)

Full name

Date

Form 2

Reg. 18

(Securities Amendment Act 1988)

NOTICE REQUIRING DISCLOSURE OF RELEVANT INTERESTS

(To be given by a public issuer pursuant to section 28 of the Act for the purpose of requiring a person who is registered as the holder of voting securities to disclose relevant interests in those securities)

To: (Full name)

1. You are registered as the holder of voting securities in
(Name of public issuer).

2. Particulars of those voting securities are as follows:

Class of voting securities

Number of securities

3. You are required, pursuant to section 28 of the Securities Amendment Act 1988, to disclose—

(a) The name and address of every person who holds a relevant interest in those voting securities; and

(b) The nature of that interest.

4. To the extent that you are unable to supply any of that information in relation to a person holding a relevant interest, you are required, pursuant to section 28, to supply such other particulars as will, or are likely to, assist in identifying that person and the nature of that interest.

5. You are required to supply the information stated in clauses 3 and 4 above immediately in writing to—

..... (Name of public issuer)

..... (Address)

Dated at this day of 19.....

..... (Signature)

This notice is given on behalf of (Name of public issuer) by (Name of person giving the notice), (Description), who is duly authorised to give this notice.

Form 3

Reg. 19

(Securities Amendment Act 1988)

**NOTICE REQUIRING PERSON WHO IS BELIEVED TO HOLD A
RELEVANT INTEREST IN PUBLIC ISSUER TO DISCLOSE INFORMATION**

(To be given by a public issuer pursuant to section 29 of the Act for the purpose of requiring a person believed to have a relevant interest in voting securities to disclose information for the purpose of ascertaining who is, or may be, a substantial security holder)

To: (Full name)

1. (Name of public issuer) believes that you have, or may have, a relevant interest in its voting securities.
2. You are required, pursuant to section 29 of the Securities Amendment Act 1988, to supply information for the purpose of assisting (Name of public issuer) to ascertain who is, or may be, a substantial security holder.
3. Please supply the following information (To be specified by public issuer for the purpose stated in clause 2 above).
4. You are required to supply the information immediately in writing to—

..... (Name of public issuer)

..... (Address)

Dated at this day of 19.....

..... (Signature)

This notice is given on behalf of (Name of public issuer) by
..... (Name of person giving the notice), (Description),
who is duly authorised to give this notice.