



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 86

Tracing beneficial ownership

Part 6C.2 — Tracing beneficial ownership of shares

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Previous version: See *Superseded Policy Statement 86 [SPS 86]* in the ASIC Digest CD-ROM

From 5 July 2007, this document may be referred to as Regulatory Guide 86 (RG 86) or Policy Statement 86 (PS 86). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 86.1) or their policy statement number (e.g. PS 86.1).

What this guide is about

RG 86.1 This guide explains how we will exercise our powers under the beneficial ownership tracing provisions (Pt 6C.2) of the *Corporations Act 2001* (Corporations Act).

RG 86.2 The policy sets out:

- A** how we approach requests that we direct a person to provide details about the beneficial ownership of securities
see RG 86.3–RG 86.21
- B** when we will grant relief from a direction to disclose beneficial ownership information
see RG 86.22–RG 86.30
- C** when we will pass on information about beneficial ownership and when we will grant relief from the requirements for registers of beneficial ownership information
see RG 86.31–RG 86.43

D our approach to the enforcement of directions issued under Pt 6C.2

see RG 86.44–RG 86.66

Contents

What this guide is about	1
A When ASIC will give a beneficial ownership direction.....	3
Our policy	3
Underlying principles	5
Explanation.....	5
B Relief from responding to a direction	7
Our policy	7
Explanation.....	7
C Information about beneficial ownership	9
Our policy	9
Underlying principles	9
Explanation.....	10
D Enforcement of beneficial ownership directions	12
Our policy	12
Underlying principles	13
Explanations.....	14
Key terms.....	17
Related information	18

Important note: The content of this guide is based on the law as at June 2007. Examples in the guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements. This guide does not constitute legal advice. We encourage you to seek your own legal advice to find out how the Corporations Act applies to you.

A When ASIC will give a beneficial ownership direction

Our policy

Background

RG 86.3 ASIC, listed companies and the responsible entities of listed managed investment schemes can obtain details of the beneficial ownership of securities in those companies or schemes: s672A. A person must provide details of the beneficial ownership of securities they own, have a relevant interest in or have given instructions about if they are directed to do so under s672A. Third parties can request ASIC to give a direction requiring a person to disclose these details.

RG 86.4 A direction may be given to:

- (a) a person who is a member of the company or scheme—this is a ‘primary direction’; or
- (b) a person who is named in a previous disclosure under s672B as having a relevant interest in, or having given instructions about, securities in the company or scheme—this is a ‘secondary direction’.

Requests by members of a company or scheme

RG 86.5 We will normally give a direction under s672A at the request of a member if the request:

- (a) demonstrates that the information sought will contribute to an informed market in securities in the company or scheme; and
- (b) states that the member will take action to enforce the direction if it is not complied with.

RG 86.6 We will not give a direction at the request of a member if we consider that it would be unreasonable to do so in all the circumstances. In making this determination, we will consider the information provided in the member’s request.

RG 86.7 Every request by a member to issue a direction in relation to securities in a company or scheme should:

- (a) identify the applicant and confirm that the applicant is a member of the company or scheme;

- (b) specify the company or the responsible entity and scheme;
- (c) specify the person for whom a direction is requested and whether the person is a member of the company or scheme;
- (d) identify the securities for which information is sought;
- (e) state whether there are any current proceedings in relation to the information;
- (f) show why the market in securities of the company or scheme would be better informed if the information was disclosed;
- (g) state whether the applicant expects the person to whom the direction would be given to resist or obstruct disclosure; and
- (h) state whether the applicant proposes to take action to enforce compliance with the direction if necessary.

Requests by non-members

RG 86.8 We can direct a person to provide information under s672B without being requested to do so by a member: s672A(1). We may exercise this power on our own initiative or following a request by a person who is not a member.

RG 86.9 A submission by a person who is not a member should include the following information:

- (a) the identity of the applicant and the information referred to in subparagraphs (b) to (g) of RG 86.7;
- (b) the interest of the applicant in the beneficial ownership information sought;
- (c) whether the applicant has standing to enforce compliance with the direction under s1325A(3) and, if so, whether it proposes to take such action if necessary; and
- (d) why the applicant does not become a member of the company or scheme and make a request to us as a member under s672A.

RG 86.10 It may be more difficult for a non-member to persuade us to issue a direction than for a member. Where a non-member requests a direction, our decision whether to give the direction will depend on:

- (a) submissions on the matters referred to in RG 86.9; and
- (b) whether we are concerned that the market in securities will be uninformed without the information sought.

Underlying principles

RG 86.11 The purpose of the beneficial ownership tracing provisions is to promote a fully informed market and to provide a swift response to inquiries concerning the ultimate ownership of securities. The identity of the beneficial owners may give insights about the future of the entity or impact on its management. It also informs the market about whether the securities were acquired legally: see *Brunswick NL v Blossomtree Pty Ltd* (1992) 10 ACLC 658 at 667.

Explanation

Requests by members of a company or scheme

RG 86.12 If a member of a company or scheme requests us to give a direction, we must do so unless we consider that it would be unreasonable to do so in all the circumstances: s672A(2). For example, it will be unreasonable to require a person to disclose information if the request is unnecessary or vexatious.

RG 86.13 Given that the purpose of Pt 6C.2 is to promote a fully informed market, we will normally issue a direction if the request demonstrates that the information sought will contribute to this purpose.

RG 86.14 Members of a company or a scheme have standing to enforce a direction given by us: s1325A(3)(c). We will generally not give a direction unless the member is willing to enforce the direction or we would be prepared to do so.

Note: We will not necessarily enforce directions issued at the request of another person. We may leave enforcement up to that person: see RG 86.45.

RG 86.15 A distinct request must be made for the dispatch of each direction. A member making a request that we issue a direction under s672A must pay a fee for that request: see item 23 of schedule 1 of the Corporations (Fees) Regulations 2001. If a member wants us to dispatch more than one direction, a separate fee is required for each direction. We will accept multiple requests in the same letter.

RG 86.16 The quickest way for a member to make a request, and our preferred method of lodgement, is for the member to email a completed Form 6071A, together with any attachments, to applications@asic.gov.au. The member should then send paper copies, together with the fee to:

Manager – Applications & Advice
Australian Securities & Investments Commission
GPO Box 9827 in your capital city

Alternatively, the member can simply lodge paper copies together with the fee at the above address.

Note: Although use of the Form 6071A is optional, it will assist us if it is used.

Requests by non-members

RG 86.17 Whether we give a direction following a request by a person who is not a member will depend on:

- (a) the submissions made by that person; and
- (b) whether we are concerned that the market in the relevant securities will be uninformed without the information sought (e.g. if the applicant makes out a prima facie case that there has been a failure to lodge substantial holding information for the securities).

RG 86.18 The market's need for information, and our readiness to give a direction, will be greater if the company or scheme is involved in an active takeover situation.

RG 86.19 We expect that a person seeking information about beneficial ownership would generally become a member of the relevant company or scheme. If a person has bona fide reasons for not wishing to become a member of the company or scheme, that should be disclosed in their application.

RG 86.20 We will generally not issue a direction at the request of the relevant company or responsible entity because they can issue directions on their own behalf: s672A(1).

RG 86.21 Although there is no ASIC form applicable to a request by a non-member, a non-member who wishes to make a request that we issue a direction should otherwise follow the procedure outlined in RG 86.16.

B Relief from responding to a direction

Our policy

RG 86.22 A person who is given a direction may ask us for a full or partial exemption from compliance with the direction. A person who considers they may have difficulties in complying with a direction should approach us as early as possible, but no later than two business days after receiving the direction.

RG 86.23 We will only grant relief from compliance with a direction if we are satisfied that there are special reasons for particular information to be withheld, taking into account the purposes of Ch 6.

RG 86.24 The ordinary confidentiality requirements of nominees and their principals and the ordinary cost and inconvenience of providing information are not special reasons. To be special, the information or the cost or difficulty of providing it must be extraordinary, unusual or atypical. We will refuse requests that appear to be made simply to delay compliance.

Explanation

RG 86.25 We have discretionary powers of exemption and modification in relation to Pt 6C.2: s673.

RG 86.26 Where a person requests that we provide an exemption from the requirement to provide information under s672B, they do not have to provide a statement in response to the direction within the time period (two business days) in s672B(2)(a). This is provided that they make this request no later than two business days after we give the person a direction. Otherwise their request cannot be considered and does not stop time running under s672B(2)(a).

RG 86.27 If we refuse the person's request, the person must respond to the direction within two business days after we notify the person of our decision: s672B(2)(b).

RG 86.28 We must consider the purposes of Ch 6 set out in s602 when deciding whether to grant relief under s 673. These include the purposes of:

- (a) ensuring that the acquisition of control takes place in an informed market; and

- (b) providing the holders of securities with knowledge of the identity of any person who proposes to acquire a substantial interest.

RG 86.29 Because of the importance of these purposes, we think there must be special reasons present before we will grant relief from the obligation to provide information under s672B.

RG 86.30 Difficulty in complying with a direction within the time required is not a special reason, unless there are circumstances special to the applicant's holding in the company or scheme. Special reasons for an exemption for a secondary direction may involve circumstances special to the instructions in relation to the securities in question. Given the importance of the purpose behind Pt 6C.2 of promoting a fully informed market, we do not envisage that we will often grant an exemption from the requirement to provide information under s672B.

C Information about beneficial ownership

Our policy

Our disclosure policy

RG 86.31 We will give the relevant company or responsible entity all relevant information obtained in response to a direction given by us. However, we will not disclose the identity of a person who requests that we issue a direction.

RG 86.32 We will only pass on information obtained under a direction to:

- (a) the relevant company or responsible entity; or
- (b) where the direction was given at the request of a member, that member.

Register of beneficial ownership information

RG 86.33 A company or responsible entity must keep information provided to it under Pt 6C.2 in a register: s672DA. The register must present the information in a certain form unless ASIC approves otherwise: s672DA(6). We will provide this approval where the applicant demonstrates that the alternative form of presentation does not make the information less accessible.

RG 86.34 We may also extend the 21 day period that the company or responsible entity has to comply with a request for a copy of the register: s672DA(8). We will only extend this time period in exceptional circumstances.

Underlying principles

RG 86.35 The register of beneficial ownership information provides public access to information about the beneficial ownership of securities. Information on the register must be accessible. The company or responsible entity must ensure that separate entries can be distinguished and are logically organised (e.g. in order of receipt).

Explanation

Our disclosure policy

RG 86.36 Where we receive information in response to a direction under s672A:

- (a) we may pass on the information to the relevant company or responsible entity; and
- (b) if we gave the direction in response to a request by a member, we must pass on the information to that member unless we consider it would be unreasonable in all the circumstances to do so: s672C.

RG 86.37 We will only pass on information to a person referred to in s672C (i.e. the company or responsible entity or a member who requested we give a direction). However, other persons may obtain beneficial ownership information by inspecting or obtaining a copy of the register of information maintained by a company or responsible entity under s672DA.

RG 86.38 We will generally pass on information to the relevant company or responsible entity, since the company or responsible entity must then include the information in a public register: s672DA. Section 672C does not contemplate that we may disclose the identity of a member who requested us to provide a direction and we will not do so.

Register of beneficial ownership information

RG 86.39 When a company or responsible entity receives information in response to a direction or provided by us under s672C, the information must be recorded in a register within two business days of receipt: s672DA(9).

RG 86.40 The register may be kept by means of a mechanical, electronic or other device that meets the requirements of s1306. The register may therefore be kept on computer or microfiche. However, it must be available for inspection: s672DA(7). Providing a screen viewer or microfiche reader would meet the inspection requirements under s672DA(7). Copies must be provided in readable form (such as a computer printout or photographic copy of a microfiche): s672DA(8) and 1306(4).

RG 86.41 A company or responsible entity is not required to include any analysis of information provided to it under Pt 6C.2 in the register. Nor is the company or responsible entity required to reformat the information within a register entry. However, a company or responsible entity will not satisfy the requirements of s672DA unless a

person searching the register can distinguish and locate separate entries and those entries are logically organised. For example, the company or responsible entity may maintain an index or search function that identifies separate entries by their date and by the persons to whom they relate.

RG 86.42 We may approve a different form of register from that specified in s672DA(6). Any request for us to approve a different form of register should set out the reasons for that request. We cannot approve the inclusion of a particular item of information in a form different from that of other items on the register. When considering a request, we will take into account the purpose of s672DA of requiring companies and responsible entities to maintain registers of information that are publicly available.

RG 86.43 It is also important that the information in the register is provided to the public in a timely manner. It will only be in exceptional circumstances that we will allow a company or responsible entity more than 21 days to provide a person with a copy of the register under s672DA(8).

D Enforcement of beneficial ownership directions

Our policy

When we will enforce breaches

RG 86.44 If we have issued a direction on our own initiative, we will generally move swiftly to enforce compliance with the direction. As soon as the time for compliance has expired, we may commence enforcement proceedings without further notification to the recipient of the direction or any other person.

RG 86.45 If we have issued a direction following a request made by a member or another person, we may enforce the direction if it is appropriate. In deciding whether to enforce the direction, we will consider whether the market has insufficient information about control over securities in the company or scheme. We will also consider information that may have led to the direction being issued. However, we will not necessarily enforce a direction issued at the request of another person. We may leave enforcement up to that person.

RG 86.46 We may not immediately enforce a breach that appears to have been technical and inadvertent. However, unless we have decided to leave enforcement up to another person, if the breach is material and no attempt is made to correct it, we will normally seek orders under s1325A.

RG 86.47 If enforcement proceedings are taken by the party seeking the relevant information, any request for intervention by us will be dealt with in terms of our general policy on intervention, Regulatory Guide 4 *Intervention* (RG 4).

Beneficial ownership directions to be promptly enforced

RG 86.48 It is our policy that beneficial ownership directions should be promptly enforced. If we intend to conduct enforcement action, we will generally file an application with the court as soon as:

- (a) the statutory period for compliance has expired; or
- (b) a response in terms of s1325A(1)(c) has been received.

RG 86.49 We consider that, generally, the hearing of the principal application should proceed as soon as possible. We also consider that

court processes should not be used by a defaulting party to create further delays in providing the relevant information.

Orders sought by us

RG 86.50 Orders sought by us will vary with the circumstances of each case and according to whether the defaulting recipient of the direction is within the jurisdiction.

RG 86.51 Concurrently with the filing of an application with the court, an interlocutory application will be made. This application will normally be made ex parte and will seek orders to preserve the status quo.

RG 86.52 Once we have proven default, the onus is on the respondent to show why:

- (a) it should be excused from compliance; or
- (b) the relevant securities should not be sold or vested in us.

RG 86.53 If, after consideration of issues raised in the litigation process, we are of the view that vesting orders are not appropriate, we may elect not to press for vesting orders. If the defaulting party has not appeared on the hearing of the application, vesting orders will generally be sought.

RG 86.54 Where appropriate, other remedies provided for in the Corporations Act will be considered. We may also consider whether there have been any misstatements in any prospectus, Product Disclosure Statement, notice to the Australian Stock Exchange or bidder's statement that may have been issued relevant to the security holding.

RG 86.55 As an alternative to taking enforcement proceedings before the court, we or any other persons whose interests are affected may be able to apply to the Takeovers Panel for a declaration of unacceptable circumstances and appropriate orders (including remedial orders): Subdiv B of Div 2 of Pt 6.10.

Underlying principles

RG 86.56 Public policy that underlies our regulation of beneficial ownership directions includes:

- (a) the protection of the general body of securityholders;
- (b) compliance with our directions;

- (c) the promotion of an informed market in accordance with the Eggleston principles; and
- (d) the efficient allocation of our resources.

Explanations

When we will enforce breaches

RG 86.57 Directions may be issued by us following a request by a member or another person. However, many directions bear no relation to our regulation or enforcement priorities. For that reason, we will not necessarily enforce a direction issued at the request of another person.

RG 86.58 Directions must be responded to within two business days. For some recipients (e.g. nominee companies) this may involve providing a wide range of information in a short time. However, in many cases, the difficulties facing a nominee can be avoided if the nominee agrees with the inquirer on the nature and extent of the information to be provided in response to the direction. The purpose of s672B will often be satisfied if the nominee provides:

- (a) the identity and address of the person or persons on whose behalf the nominee holds the securities;
- (b) the name and address of any other person who has a relevant interest in the securities, including the power to give instructions (this will include any person who is given the power by the nominee's principal and who is notified to the nominee); and
- (c) any current instructions that the principal or another authorised person has given about voting and dividend or distribution rights attached to the securities and to the holding and disposal of the securities. The date of these instructions should also be given. It would be necessary to supply the full name and address of the person who gave each instruction and full particulars, such as dates, and, where appropriate, times.

RG 86.59 Strictly speaking, a nominee does not discharge its obligations under the Corporations Act by making limited disclosure of this kind. While we would not take enforcement action over incomplete compliance in circumstances such as these, an inquirer who agrees with a nominee to accept limited or preliminary information can subsequently seek full disclosure under Pt 6C.2.

Beneficial ownership directions to be promptly enforced

RG 86.60 The legislature has provided for a two day response time. It is an offence not to comply with the provisions of Pt 6C.2. There is a clear legislative intention of strict compliance with the spirit of the legislation and the provision of relevant information within the given time period: see *Crosley Ltd v North Broken Hill Holdings Ltd & Ors* (1986) 4 ACLC 432. Accordingly, if we intend to take enforcement action, we will generally do so promptly.

RG 86.61 The remedies for failing to comply with s672B indicate that the requirements of the section are to be taken seriously:

‘The object of the legislature was to create and maintain an informed market for public company shares and it regards the object as so important that it provides for drastic consequences...

The legislation deliberately chose a small and hair-pressure trigger for what is a very powerful and potentially destructive gun.’
(Fullagar J in *Re North Broken Hill Holdings Ltd* (1986) 4 ACLC 131 at 144 and 146.)

Orders sought by us

RG 86.62 Section 1325A empowers the court to deal with breaches of Pt 6C.2. The court may make appropriate orders (including remedial orders) if a person:

- (a) contravenes a provision of Pt 6C.2; or
- (b) states in a notice under s672B that they do not know particular information about the securities or about a person with a relevant interest in, or who has given instructions about, the securities.

RG 86.63 Where the defaulting recipient is an overseas person or corporation, orders sought will usually deal with the relevant securities, including the vesting of the securities in us: s1325A and paragraph (g) of the definition of ‘remedial order’ in s9. The orders may also include other remedial orders. We may seek orders under s1325A even if a law of another jurisdiction prohibits a person from complying with Pt 6C.2. It is important to note that the beneficial ownership provisions operate extraterritorially so as to impose obligations on foreign entities, even where performance of the obligations would result in a breach of local law: see *Australian Securities Commission v Bank Leumi Le-Israel (Switzerland) & Ors* (1996) 14 ACLC 1576 at 1592.

RG 86.64 Where the defaulting recipient is within the jurisdiction, in addition to the orders referred to above, orders directing compliance with a direction and orders directing that certain persons (e.g. directors) provide the information on behalf of a company may be appropriate. It may often be important to seek the information as of a certain date.

RG 86.65 Ex parte interim orders are appropriate for enforcement of Pt 6C.2 because timely compliance with the provisions is required and once we have made out the prerequisite matters referred to in s1325A(1), we have a prima facie case for relief. It is our policy that no dealings with the relevant securities should be permitted while the breach continues. At the same time as we make an interlocutory application, we will generally also file an application seeking orders that the securities be sold or vested in us.

RG 86.66 Where appropriate, other remedies provided for in the Corporations Act will be considered, for example:

- (a) s672F: a person who fails to comply with s672B may be liable for damages;
- (b) s1041H: where the behaviour amounts to misleading or deceptive conduct, the provisions of s1041H may be used;
- (c) s1041E, 1308, 1309 etc: if false information is provided in circumstances dealt with in those sections then proceedings may be commenced in respect of that false information;
- (d) s1310: a person who obstructs or hinders us in the exercise of our powers or functions is guilty of an offence; and
- (e) s1311: a failure to comply with a direction is an offence and criminal proceedings may be commenced.

Key terms

RG 86.67 In this guide, these terms have the following meaning:

ASIC Australian Securities and Investments Commission

company A listed company

Corporations Act *Corporations Act 2001*, including regulations made for the purposes of the Corporations Act

direction A primary direction or a secondary direction

member Has the meaning given in s9

primary direction A direction given under s672A(1)(a)

responsible entity The responsible entity of a listed managed investment scheme

scheme A listed managed investment scheme

secondary direction A direction given under s672A(1)(b)

Related information

RG 86.68

Headnotes

Tracing beneficial ownership, beneficial ownership directions, primary directions, secondary directions, requests for directions, responding to directions, disclosure of beneficial ownership information, register of beneficial ownership information, relief, enforcement of directions

Regulatory guides

RG 4 *Intervention*

Legislation

Corporations Act 2001, Chapter 6, Pt 6.10, Div 2, Subdiv B, Pt 6C.2, Pt 6C.3, s602, 672A, 672B, 672C, 672DA, 672F, 673, 1041E, 1041H, 1306, 1308, 1309, 1310, 1311, 1325A; *Corporations (Fees) Regulations 2001*, schedule 1, item 23

Cases

Australian Securities Commission v Bank Leumi Le-Israel (Switzerland) & Ors (1996) 14 ACLC 1576

Brunswick NL v Blossomtree Pty Ltd (1992) 10 ACLC 658

Crosley Ltd v North Broken Hill Holdings Ltd & Ors (1986) 4 ACLC 432

Re North Broken Hill Holdings Ltd (1986) 4 ACLC 131

Information releases

[IR 00/3] *CLERP update: New rules for listed managed investments* (7 February 2000)

[IR 05/50] *ASIC revises practice in relation to beneficial tracing notices* (5 September 2005)