

Privileges Committee

**Draft Constitution
(Disclosures by Members)
Further Amendment
Regulation 2007**

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Terms of Reference

That under section 14A of the *Constitution Act 1902*, the draft Constitution (Disclosures by Members) Further Amendment Regulation 2007 be referred to the Privileges Committee for inquiry and report by Thursday 29 November 2007.

LC Minutes (15/11/2007) 356

Committee Membership

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Summary of Recommendations

Recommendation

Page 5

That the draft Constitution (Disclosures by Members) Further Amendment Regulation 2007 be supported.

Chapter 1 Introduction

Establishment of the inquiry

- 1.1 On 15 November 2007, on the motion of the Hon Tony Kelly MLC, the Leader of the House, the Legislative Council resolved to refer the draft Constitution (Disclosures by Members) Further Amendment Regulation 2007 to the Privileges Committee for inquiry and report. The terms of reference for the inquiry are set out on page (iv) of this report. A similar inquiry was self-referred by the Legislative Assembly's Standing Committee on Parliamentary Privilege and Ethics.
- 1.2 The draft Regulation proposes amendments to the Constitution (Disclosures by Members) Regulation 1983 which was made under section 14A of the *Constitution Act 1902*. Section 14A(5) of that Act requires that, before making a regulation relating to disclosure by members, the Governor must provide any parliamentary committee 'established for the purpose of considering the proposed regulation' an opportunity to comment on the regulation, and take into account any such representations. While there is currently no committee established for that purpose, the referral of the draft Regulation to this Committee is intended to satisfy the requirement in section 14A(5) in relation to the Legislative Council.

Conduct of the inquiry

- 1.3 On 27 November 2007 the Committee met to consider the inquiry terms of reference. Following deliberation, the Committee resolved to adopt this report.

Structure of this report

- 1.4 Chapter 2 outlines the amendments proposed by the draft Regulation, the matters the Committee took into account when considering those amendments, and the Committee's conclusions.

Chapter 2 The draft Regulation

Schedule 1 of the Constitution (Disclosures by Members) Regulation 1983 contains a number of forms which members are required to use to fulfil their disclosure obligations under the Regulation. Form 1 is to be used for primary returns, Form 2 is to be used for ordinary returns, and Form 3 is to be used for supplementary ordinary returns. The matters to be disclosed in each of the Forms are substantially the same, the main differences relate to the period at which disclosure occurs.

The draft Constitution (Disclosures by Members) Further Amendment Regulation 2007 proposes four changes to the Forms. Three of the changes concern the parts of the Forms which illustrate the information to be disclosed under clause 12 of the Regulation ('Interests and positions in corporations'). Those changes are each in substantially the same terms, but are applied to Form 1, Form 2, and Form 3. The final change corrects a minor typographical error in Form 3. Each of the proposed changes is considered in turn below.

Form 1 (Primary returns) Part 3: 'Interests and positions in corporations'

- 2.1 Part 3 of Form 1 (Primary returns) contains: explanatory text outlining what is required to be disclosed by clause 12; a table in which members are to provide the required details; and an example illustrating how the table is to be completed.
- 2.2 The draft Regulation proposes to amend the illustrating example, and to add a second illustrating example.
- 2.3 The explanatory text, the table, and the current example with the proposed amendments are shown below (shading indicating new text on next page):

Part 3 Interests and positions in corporations

Under clause 12 of the Constitution (Disclosures by Members) Regulation 1983, you must disclose in the table below the following particulars for each corporation in which you had an interest or held any position (whether remunerated or not) on the date on which you took the pledge of loyalty:

- (a) the name and address of each corporation,
- (b) the nature of the interest (if any) or a description of the position held,
- (c) except in the case of a public company, a description of the principal objects of each such corporation.

If you received income in respect of any position held in a corporation, that information should be disclosed in Part 2.

Name and address of corporation	Nature of interest (if any) or description of position held	Description of principal objects of corporation

Examples only:

CD Corporation Limited, 1 Martin Place, Sydney NSW 2000	20 shares shareholder	To provide public affairs advice to its clients
MD Corporation Pty Limited, 33 Kingsgrove Road, Kingsgrove NSW 2208	majority shareholder	To provide financial advice to its clients

- 2.4 The main changes to the example concern the following aspects of the requirements of clause 12: the nature of the interest in the corporation which must be disclosed (middle column of the table); and the question of whether the principal objects of the corporation need to be disclosed (right hand column of the table).

Nature of the interest to be disclosed

- 2.5 Clause 12(1)(b) of the Constitution (Disclosures by Members) Regulation 1983 provides that a member must disclose ‘the nature of the interest, or the description of the position held, in each such corporation’. The meaning of ‘interest’, and associated definitions, are set out in Appendix 2 of this report. The Committee understands that there is no requirement in any of these provisions for members to disclose the number of shares they hold in a corporation, and that members fully comply with their obligations if they simply state ‘shareholder’ in the middle column of the table provided (in addition to any positions in corporations they may hold). In that context, the intention of the draft amendment to the example is simply to reflect more accurately the requirements of the current Regulation in relation to what must be disclosed. This interpretation is consistent with the practice of most members of the House. While some members disclose the number of shares held in corporations (particularly in primary returns), the majority of members who hold shares simply disclose that they are shareholders.¹
- 2.6 The Committee also understands that in the second example proposed by the draft Regulation, the reference to ‘majority shareholder’ is intended to illustrate the appropriate information to be disclosed in the case of a member who has a controlling interest in a company.

¹ See: Parliament of New South Wales, *2007 Register of Disclosures by members of the Legislative Council for the period 1 July 2006 to 30 June 2007: Primary Returns; Ordinary Returns*

Whether the principal objects of the corporation need to be disclosed

- 2.7 Clause 12(1)(c) of the Constitution (Disclosures by Members) Regulation 1983 requires a member to disclose ‘except in the case of a public company – a description of the principal objects of each such corporation’. The definition of ‘public company’ and other associated definitions are set out in Appendix 3 to this report.
- 2.8 The Committee understands that in the first illustrating example shown above the principal objects of the company have been deleted to reflect the fact that the company referred to is a public company and is therefore within the scope of the exception in clause 12(1)(c). By contrast, in the second illustrating example shown above, the principal objects of the company *are* shown, as that company is a proprietary company (‘Pty’), and therefore not a public company.²

Form 2 (Ordinary returns) Part 5: ‘Interests and positions in corporations’

- 2.9 Part 5 of Form 2 (Ordinary returns) is in the same terms as Part 3 of Form 1 discussed above, and the changes proposed by the draft Regulation are also the same.

Form 3 (Supplementary ordinary returns) Part 5: ‘Interests and positions in corporations’

- 2.10 Part 5 of Form 3 (Supplementary ordinary returns) is in the same terms as the parts of Forms 1 and 2 referred to above except that the textual explanation is not as detailed. The changes proposed by the draft Regulation are also the same.

Form 3 (Supplementary ordinary returns) Part 1 - Minor typographical error

- 2.11 The proposed change is in Part 1 of Form 3. The terms of the change are shown below:

List in the table below any interests in real property you held during the supplementary ordinary return period, which are additional to those ~~which~~ that you have already declared in your most recent return.

Conclusion

- 2.12 Having considered the amendments proposed by the draft Regulation, the Committee has concluded that the changes proposed by the draft Regulation clarify aspects of the Forms and, if adopted, would assist members to comply with their disclosure obligations. The Committee therefore recommends:

² ‘A company will be classed as a public company if it does not come within the definition of proprietary company in the (CTH) Corporations Act’: *Halsbury’s Laws of Australia* [120-1170]; ‘Public company: 1. A company which is not a proprietary company: Corporations Law s 9’, *Butterworths Australian Legal Dictionary*, 1997 p 952

Recommendation

That the draft Constitution (Disclosures by Members) Further Amendment Regulation 2007 be supported.

Appendix 1 Draft Constitution (Disclosures by Members) Further Amendment Regulation 2007

consultation draft



New South Wales

Constitution (Disclosures by Members) Further Amendment Regulation 2007

under the

Constitution Act 1902

[The following enacting formula will be included if the Regulation is made:]

Her Excellency the Governor, with the advice of the Executive Council and in compliance with the provisions of section 14A (5) of the *Constitution Act 1902*, has made the following Regulation under the *Constitution Act 1902*.

Premier

Explanatory note

The object of this Regulation is to amend the *Constitution (Disclosure by Members) Regulation 1983*:

- (a) to provide new examples in the Forms for returns set out in Schedule 1 to the Regulation in relation to disclosures relating to interests and positions in corporations, and
- (b) to correct a minor typographical error in a Form.

This Regulation is made under section 14A (Disclosure of pecuniary interests and other matters by Members) of the *Constitution Act 1902*.

consultation draft

Clause 1 Constitution (Disclosures by Members) Further Amendment Regulation
2007

**Constitution (Disclosures by Members) Further
Amendment Regulation 2007**

under the
Constitution Act 1902

1 Name of Regulation

This Regulation is the *Constitution (Disclosures by Members) Further
Amendment Regulation 2007*.

2 Amendment of Constitution (Disclosures by Members) Regulation 1983

The *Constitution (Disclosures by Members) Regulation 1983* is
amended as set out in Schedule 1.

consultation draft

Constitution (Disclosures by Members) Further Amendment Regulation
2007

Amendments

Schedule 1

Schedule 1 Amendments

(Clause 2)

[1] Schedule 1 Forms

Omit the matter headed "Example only:" from Part 3 of Form 1.

Insert instead:

Examples only:

CD Corporation Limited, 1 Martin Place, Sydney NSW 2000	shareholder	
---	-------------	--

MD Corporation Pty Limited, 33 Kingsgrove Road, Kingsgrove NSW 2208	majority shareholder	To provide financial advice to its clients
--	-------------------------	---

[2] Schedule 1, Form 2

Omit the matter headed "Example only:" from Part 5 of the Form.

Insert instead:

Examples only:

CD Corporation Limited, 1 Martin Place, Sydney NSW 2000	shareholder	
---	-------------	--

MD Corporation Pty Limited, 33 Kingsgrove Road, Kingsgrove NSW 2208	majority shareholder	To provide financial advice to its clients
--	-------------------------	---

[3] Schedule 1, Form 3

Omit "which" where secondly occurring in Part 1. Insert instead "that you".

[4] Schedule 1, Form 3

Omit the matter headed "Example only:" from Part 5 of the Form.

Insert instead:

consultation draft

Constitution (Disclosures by Members) Further Amendment Regulation
2007

Schedule 1 Amendments

Examples only:

CD Corporation Limited, 1 Martin Place, Sydney NSW 2000	shareholder	
---	-------------	--

MD Corporation Pty Limited, 33 Kingsgrove Road, Kingsgrove NSW 2208	majority shareholder	To provide financial advice to its clients
--	-------------------------	---

Appendix 2 Meaning of ‘interest’ in corporation

Constitution (Disclosures by Members) Regulation 1983:

Clause 7:

interest means:

(...)

- (b) in relation to any corporation—a relevant interest (within the meaning of the Corporations Act 2001 of the Commonwealth) in any securities issued or made available by the corporation

(...)

securities has the same meaning as it has in section 92 (1) of the Corporations Act 2001 of the Commonwealth.

Corporations Act 2001 of the Commonwealth:

Section 9:

relevant interest, in relation to securities, has a meaning given by sections 608 and 609.

Section 608: Relevant interests in securities

Basic rule—relevant interest is holding, or controlling voting or disposal of, securities

- (1) A person has a relevant interest in securities if they:
- (a) are the holder of the securities; or
 - (b) have power to exercise, or control the exercise of, a right to vote attached to the securities; or
 - (c) have power to dispose of, or control the exercise of a power to dispose of, the securities.

It does not matter how remote the relevant interest is or how it arises. If 2 or more people can jointly exercise one of these powers, each of them is taken to have that power.

Extension to control exercisable through a trust, agreement or practice

- (2) In this section, power or control includes:
- (a) power or control that is indirect; and
 - (b) power or control that is, or can be, exercised as a result of, by means of or by the revocation or breach of:

- (i) a trust; or
 - (ii) an agreement; or
 - (iii) a practice; or
 - (iv) any combination of them;
- whether or not they are enforceable; and
- (c) power or control that is, or can be made, subject to restraint or restriction.

It does not matter whether the power or control is express or implied, formal or informal, exercisable alone or jointly with someone else. It does not matter that the power or control cannot be related to a particular security.

Extension to relevant interests held through bodies corporate

- (3) A person has the relevant interests in any securities that any of the following has:
 - (a) a body corporate, or managed investment scheme, in which the person's voting power is above 20%;
 - (b) a body corporate, or managed investment scheme, that the person controls.

Paragraph (a) does not apply to a relevant interest that the body corporate or scheme itself has in the securities merely because of the operation of that paragraph in relation to another body corporate or managed investment scheme.

- (4) For the purposes of paragraph (3)(b), a person controls a body corporate if the person has the capacity to determine the outcome of decisions about the body corporate's financial and operating policies.
- (5) In determining whether a person has this capacity:
 - (a) the practical influence the person can exert (rather than the rights they can enforce) is the issue to be addressed; and
 - (b) any practice or pattern of behaviour affecting the body corporate's financial or operating policies is to be taken into account (even if it involves a breach of an agreement or a breach of trust).
- (6) The person does not control the body corporate merely because the person and an entity that is not an associate jointly have the capacity to determine the outcome of decisions about the body corporate's financial and operating policies.
- (7) A person is not taken to control a body corporate merely because of a capacity they have if they are under a legal obligation to exercise that capacity for the benefit of:
 - (a) if the person is an individual—someone else; or
 - (b) if the person is a body corporate—someone other than its members.

Extension to control in anticipation of performance of agreements etc.

- (8) If at a particular time all the following conditions are satisfied:
- (a) a person has a relevant interest in issued securities;
 - (b) the person (whether before or after acquiring the relevant interest):
 - (i) has entered or enters into an agreement with another person with respect to the securities; or
 - (ii) has given or gives another person an enforceable right, or has been or is given an enforceable right by another person, in relation to the securities (whether the right is enforceable presently or in the future and whether or not on the fulfilment of a condition); or
 - (iii) has granted or grants an option to, or has been or is granted an option by, another person with respect to the securities;
 - (c) the other person would have a relevant interest in the securities if the agreement were performed, the right enforced or the option exercised;

the other person is taken to already have a relevant interest in the securities.

Note: Subsections 609(6) and (7) deal with specific situations in which the agreement will not give rise to a relevant interest.

Body corporate may have relevant interest in its own securities

- (9) This section may result in a body corporate having a relevant interest in its own securities.

Section 609 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) an 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 3 Meaning of ‘public company’

Constitution (Disclosures by Members) Regulation 1983:

Clause 7:

public company means a listed company within the meaning of section 9 of the Corporations Act 2001 of the Commonwealth.

Corporations Act 2001 of the Commonwealth:

Section 9:

listed: a company, managed investment scheme or other body is listed if it is included in the official list of a prescribed financial market operated in this jurisdiction.

listed corporation means a body corporate that is included in an official list of a prescribed financial market.

Appendix 4 Minutes of proceedings

Note: Asterisks indicate text which has been omitted as not relevant to the current inquiry.

Minutes No. 4

Tuesday, 27 November 2007, Parliament House, 6.02 pm.

1. Members present

Ms Griffin (Chair)
Miss Gardiner (Deputy Chair)
Mr Donnelly
Mr Harwin
Ms Fazio
Revd Mr Nile
Mr West

In attendance: David Blunt, Stephen Frappell, Velia Mignacca, Jenelle Moore.

2. Confirmation of Minutes of previous meeting

Resolved, on the motion of Mr Donnelly: That Minutes no. 3 be confirmed.

3. Correspondence

The Committee noted the following items of correspondence received:

- Letter received 12 November 2007 from the Department of Premier and Cabinet to the Clerk forwarding the draft *Constitution (Disclosures by Members) Further Amendment Regulation 2007* for inquiry and report.

4. Inquiry into the draft Constitution (Disclosures by Members) Further Amendment Regulation 2007

The Committee considered the Chair's draft report.

The report was read.

The Committee deliberated.

Resolved, on the motion of Ms Fazio:

1. That the report be adopted.
2. That the report be signed by the Chair and presented to the House.

3. That the correspondence received by the Committee be tabled with the report and made public.
4. That the report of the Committee, on tabling and publication, be forwarded to the Department of Premier and Cabinet in response to the letter received 12 November 2007

7. Adjournment

The Committee adjourned at 6.15 pm sine die.

David Blunt
Clerk to the Committee