



**ASIC**

Australian Securities & Investments Commission

CONSULTATION PAPER 64

# **Approving a purpose for accessing the register of members of a mutual entity**

May 2005

## What this paper is about

- 1 This consultation paper sets out ASIC's proposed policy for approving a purpose for which access is sought to a mutual entity's register of members under reg 12.8.06(4) of the Corporations Regulations 2001 (the Regulations).
- 2 The purpose of publishing this paper is to articulate our proposals for industry and to ask for feedback on them.
- 3 This consultation paper is not in ASIC's usual format for consulting on policy proposals. It reflects the discrete and technical nature of these policy proposals.

## Your feedback is invited

- 4 We invite you to comment on our proposed policy generally, and on the questions we have included. Please provide us with any additional information (both qualitative and quantitative) to support any comments, issues or arguments you raise. Following the consultation period, we aim to publish our final policy by 30 September 2005.

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### Your comments

Submissions are due by **15 July 2005** and should be sent to:

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## Section 1: Access to the register of members of a mutual entity

**1.1** Under s173 of the *Corporations Act 2001* (the Act), companies and registered schemes are required to provide a copy of their register of members within seven days to a person requesting access to the register and paying the required fee.

**1.2** However, under Division 2 of Part 12.8 of the Regulations (in particular, reg 12.8.06), access to the register of members of bodies that may be generically described as ‘mutual entities’ is restricted. In this context, the term ‘mutual entities’ refers to bodies that are caught by reg 12.8.02, namely:

- (a) transferring financial institutions under Item 1 of Schedule 4 of the Act; or
- (b) entities that are entitled to call themselves a ‘building society’, ‘credit society’ or ‘credit union’.

**1.3** The explanation for reg 12.8.06 appears in the Explanatory Statement to the Corporations Amendment Regulations 1999 (No. 3). That document explains that reg 12.8.06 is designed to continue arrangements that applied under the Financial Institutions Codes, which governed the regulation of such mutual entities before their regulation was transferred to the Act. It further explains that access to the register of members of a mutual entity is restricted because the list of members of a mutual entity represents the mutual entity’s list of customers. The disclosure of the mutual entity’s customer base may cause substantial detriment, particularly if the person seeking access and the mutual entity are competitors.

**1.4** Regulation 12.8.06 modifies s169 by allowing mutual entities to have a separate register of ‘member shares’, which are shares that are issued by mutual entities to their customers.

**1.5** It also modifies s173 by allowing the mutual entity to:

- (a) require the party seeking access to the register to agree in writing, before inspecting the register, to divulge the information about members obtained from inspecting the register only to certain named persons and to use it only for certain specified purposes; and
- (b) refuse access if it is not satisfied that:
  - (i) access is being sought by a member who intends to call a meeting of members; or

- (ii) the purpose for which the party seeks access to the register has been approved by ASIC.

**1.6** This paper focuses on ASIC's powers to approve a purpose in relation to (b)(ii) in paragraph 1.5 above.

**1.7** ASIC may approve a purpose for accessing a register of members after a person lodges a written application with ASIC. In some circumstances, ASIC may approve a purpose on its own initiative.

**1.8** An application to ASIC for approval of a purpose might arise in the following circumstances:

- (a) a member of the mutual entity wishes to communicate with other members, but does not intend to call a meeting of members; or
- (b) a non-member of the mutual entity wishes to communicate with members. A common scenario is where the person seeking the register wishes to inform members of the mutual entity of a reconstruction proposal.

**1.9** Legitimate reasons why a person might wish to contact a member of a company may include matters such as:

- (a) a member or third party seeking to circulate material to members of the company raising issues with the performance of the company or its management;
- (b) a member seeking to convene a general meeting of the members; or
- (c) a member or third party making a bid for securities held by the members of the company.

These sorts of reasons for access all promote proper and usual commerce and good corporate governance, and they are, in general, applicable to all companies.

**1.10** In the context of a person sending information to members about a proposal for a reconstruction or merger of a mutual entity, ASIC does not consider it a requirement that a purpose only be approved if the communication is made through the directors or management of the mutual entity. Any proposal that the board of the mutual entity should become the 'gatekeeper' for communication with its members is not consistent with the kinds of policy objectives that the register provisions are generally designed to achieve. Persons seeking to communicate independently with members may be at odds, to some greater or lesser degree, with the incumbent directors.

**1.11** Even if ASIC has approved a particular purpose for inspection of the register, the mutual entity retains the right to refuse access if it is not satisfied that access is being sought for the ASIC-approved purpose. If

the mutual entity is satisfied on reasonable grounds that access is being sought for unapproved purposes, it may deny access. ASIC's approval of a particular purpose does not, in itself, provide any unqualified right of access.

## Section 2: ASIC's approval of a purpose

### What purposes will ASIC approve?

**2.1** Regulation 12.8.06 does not set out a finite list of approved purposes. Similarly, it is not possible for ASIC to set out an exhaustive range of approved purposes. While the regulation has a protective function in regard to transferring financial institutions, it is clearly not designed to be prohibitive in terms of who can get access to the register. For example, it does not state that only members should be able to get access to the register of a mutual entity. It requires ASIC to consider approving a particular purpose rather than focusing on who has requested the approval.

**2.2** Generally, ASIC proposes to approve the following purposes:

- (a) sending information to members of a mutual entity about a bona fide proposal for the reconstruction or merger of the mutual entity;
- (b) a member or third party seeking to circulate material to members of the mutual entity raising issues with the performance of the company or its management; and
- (c) a member seeking to convene a general meeting of the members.

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#### Your comments

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**Q1** What purposes, apart from those in 2.2 above, do you consider should normally be approved by ASIC?

**Q2** In relation to each of the purposes in 2.2, in what circumstances (if any) do you consider that ASIC should refuse approval? Why?

### What factors does ASIC take into account?

**2.3** In considering whether to approve a purpose, ASIC will take into account all relevant matters. These may include:

- (a) whether the applicant has endeavoured to obtain access to the register by approaching the relevant mutual entity. If the applicant has not made a request to the mutual entity for access to the register prior to submitting its application, ASIC would generally not approve that purpose;
- (b) whether the purpose is relevant to the holding of members' interests recorded in the register of members or the rights attaching to those

interests, in accordance with s177 and the register provisions generally;

- (c) the content of the applicant's proposed communication to members;
- (d) whether the applicant has any reasonable alternative means of obtaining the information sought from the register;
- (e) the mutual entity's comments and submissions in relation to the application;
- (f) the interests of the members of the mutual entity as a whole. For example, in an extreme case it may not be in the interests of members to approve a purpose if it is crucial for security reasons that the identity of members or their address remain undisclosed; or
- (g) whether there is a real likelihood that the approval of the relevant purpose could result in significant detriment to members of the mutual entity.

**2.4** In deciding whether to approve a purpose ASIC will also consider whether the purpose itself is lawful. For example, it would not approve a purpose of convening a general meeting of members to consider a resolution that requires directors to do certain things. This purpose should not be approved because it would unlawfully usurp the directors' management powers.

**2.5** However, if ASIC is satisfied that the purpose is lawful it will not refuse to approve it just because further acts or disclosure to members may need to occur in order to implement it in a lawful fashion. Of course, ASIC would consider taking action if any disclosure to members made under an approved purpose was misleading or otherwise breached the Act.

**2.6** Generally, ASIC will not undertake a detailed analysis of the commercial merits of any offer under an approved purpose. However, ASIC may refuse to approve a purpose if it appears that an offer is so deficient on face value that it could not properly be construed as a bona fide offer for the shares or interests.

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### **Your comments**

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- Q3** What other factors do you believe that ASIC should take into account in determining whether to approve an applicant's purpose for accessing the register of members?



## **Application process**

**2.7** Parties wishing to seek ASIC's approval of a purpose should make a written application to ASIC. An applicant who applies for a purpose to be approved should provide ASIC with the terms of the proposed purpose and copies of any draft communication to members to be sent if the application is successful.

**2.8** Before ASIC approves a purpose under reg 12.8.06 it will contact the mutual entity to permit it a reasonable opportunity to make submissions on the issue of whether or not ASIC should approve that purpose. Applicants should be aware that this need for consultation may cause some delay in decision making.

## **What form will ASIC's approval take?**

**2.9** After reaching a decision on the application, ASIC will write to both the applicant and the mutual entity to advise them of the decision. This letter will explain the reasons for ASIC's decision.

**2.10** As there is no express provision in reg 12.8.06(4) that allows ASIC to impose conditions on the approval of a purpose, ASIC considers that it should not impose conditions when approving a purpose.