OVERVIEW

The Australian Institute of Company Directors (AICD) commends the Advisory Committee for compiling the *Insider Trading Proposals Paper* in the light of submissions made on the Advisory Committee's 2001 *Discussion Paper* and of the enactment with effect from March 2002 of the *Financial Services Reform Act* 2001 (FSRA). In particular, AICD commends the more extended discussion in the Proposals Paper of the application of the insider trading laws to financial products other than securities and to markets other than ASX and of the disclosable information element.

However, the AICD notes that the Advisory Committee has not addressed the arguments adduced by AICD for restoration of the "person connection" test in determining who is an "insider" to explain how, in a supposedly free market society, it is fair to make it unlawful for people who, through their own skill and effort unaided by any "connection" to the relevant company, lawfully acquire information that is not generally available, to turn that information to their advantage. AICD considers this question to be fundamental to the scope and operation of fair and workable legislation.

AICD's detailed submissions on the Proposal Paper follow.

1 CHAPTER 1 - FINANCIAL MARKET TRANSACTIONS

1.1 Disclosable information element

The Proposals Paper (para 1.22) puts forward for consideration the proposal that:

The insider trading laws could be more directly linked to current disclosure standards by requiring that, in addition to information being materially price-sensitive and not generally available:

> "*The information must relate to matters that a regular user would reasonably expect to be disclosed to other users of the market on an equal basis, whether at the time in question or in the future…*"

AICD believes that the Proposals Paper (paras 1.28-1.39) makes a strong case for making that change to Australia's insider trading legislation. In particular, adoption of the

disclosable information element would significantly reduce the operation of the insider trading legislation in ways that are anomalous, illogical or unfair.

AICD also submits that if the disclosable information element is to be introduced:

- it should be an element of the offence and not merely a defence; and
- because of the inherent uncertainty of its operation, it would not of itself justify removal of the *readily observable matter* test of when *information is generally available*.

As the Advisory Committee pointed out in its introduction to the 2001 Discussion Paper, "*in almost every respect the Australian insider trading laws are stronger in their terms than comparable overseas laws*". That is true to the extent that the use in the legislation of the labels *insider, inside information* and *insider trading* cannot unfairly be characterized as misleading and deceptive.[1]

1.2 Application of insider trading laws to markets other than ASX

Like the Advisory Committee, AICD strongly supported the view expressed in the *Financial System Inquiry Final Report* that laws should not advantage one market over another, or discriminate between markets, except where there is an overriding public interest. The AICD also agrees with the point made in para 1.8 of the Proposals Paper that, in harmonizing the regulation of different financial markets with similar economic functions, account must also be taken of the essential differences between those markets.

In that light, AICD's views on the matters raised in the Proposals Paper in relation to markets other than ASX are:

(a) *SFE*

The Proposals Paper raised for consideration whether the present insider trading laws for SFE-traded should:

- remain unchanged;
- be limited to those products regulated under the pre-2002 legislation;

[1] The AICD suggests replacing *Insider Trading* as the title to CA Pt 7.10 Div. 3 with *Financial Products Trading Information Communication.*

- be limited by including the disclosable information element; or
- be limited in some other way.

The Proposals Paper discusses only the second and third policy options. The considerations put forward by the Advisory Committee in that discussion lead the AICD to support both the second and third policy options.

(b) *OTC Financial Markets*

The Advisory Committee raised for consideration whether the current insider trading laws for OTC - traded financial products should:

- remain unchanged;
- be repealed;
- be limited to "*linked*" products;
- be limited to disclosable information; or
- be changed in some other manner.

The Advisory Committee discussed the merits of only the second, third and fourth of those options. The considerations put forward by the Advisory Committee in that discussion lead the AICD to support the second option, and exempting all OTC transactions from the insider trading laws.

(c) *Exempt Markets*

As the Advisory Committee points out, each exempt market has been established by a separate market declaration and has its own rules, including disclosure requirements. The AICD therefore agrees that the application of the insider trading laws to particular exempt markets would depend on the general policy approach to regulating markets and the characteristics of each exempt market.

(d) *Emerging Markets*

The AICD agrees with paras 1.85 and 1.86 of the Proposals Paper.

2 CHAPTER 2 - *POSSIBLE CARVE-OUTS*

2.1 Entity making a general issue

AICD submits that the rationale for excluding issuers from the insider trading regime as set out in para 2.7 of the Proposals Paper is more persuasive than that for including issuers in the insider trading regime as set in para 2.6.

AICD would also add the consideration that the policy underlying the introduction of CA Part 6D.3 by the *Corporate Law Economic Reform Program Act* 1999 was to confine the potential liability of an issuer under a Chapter 6D disclosure document to the range of criminal and civil liabilities in Part 6D.3, and to exclude other potential liability, for example, under TPA s52 or CA s1041E-1041H.

AICD notes that the Advisory Committee (Proposals Paper para 2.9) considers that offerees who subscribe for new issues when aware of inside information not known to the issuer should remain subject to the insider trading regime.

The issue is probably academic, in that it is difficult to imagine circumstances in which it would come to light that an offeree was in possession of price-sensitive unpublished information when subscribing under a prospectus offer.

The issue, however, raises a paradox. An offeree in possession of price-sensitive unpublished information who subscribes contravenes the insider trading laws, even if the subscription would have taken place had the offeree not been in possession of that information. On the other hand, if possession of that information leads the offeree **not** to subscribe, no offence is committed. Yet, in moral terms, the latter seems as reprehensible (or otherwise) as the former.

The issue is relevant to the discussion in the Proposals Paper (paras 4.23-4.28) on whether a 'use' requirement should be added as an element of the insider trading offence. It is also applicable to the issues raised by the Advisory Committee on placements and buy-backs.

2.2 Entity making an individual placement

Here again, AICD submits that the arguments for excluding issuers from the insider trading regime as set out in para 2.14-2.16 of the Proposals Paper outweigh those for including issuers, as set out in para 2.17 of the Proposals Paper.

In addition, the due diligence defences afforded by CA Part 6D.3 are applicable only to potential liability in respect of a Ch 6D disclosure document lodged with ASIC. An issuer making an exempt placement faces potential civil liability for misleading or deceptive conduct under CA s1041H, in respect of which there is no due diligence defence, as well as potential criminal liability under CA ss1041E-1041G.

2.3 Buy Backs

In considering the application of the insider trading laws to buy-backs, AICD notes that, although the table of *Other provisions relevant to buy-backs* in CA s257J includes the continuous disclosure provisions in Chapter 6CA, it does not include a reference to the insider trading provisions. There is fairly strong inference to be drawn from the omission that the Parliament did not intend buy-backs to be subject to the insider trading provisions.

Be that as it may, AICD is more persuaded by the argument for excluding buy-back entities from the insider trading regime set out in para 2.24 than by those for including them as set out in para 2.25.

AICD makes the additional points:

- having regard to the imputed possession by a body corporate of information possessed by any of its officers under CA s1042G, it would be practically impossible for a buy-back entity to know on a day-by-day basis - as a buy-back would require - whether or not it is an insider; and

- the inclusion of a buy-back entity in the insider trading regime would lead to unequal treatment as between those of its shareholders who are able to accept the buy-back offer before the entity became an insider, and those who are deprived of the opportunity to accept the offer after the entity becomes aware that it is an insider.

The latter two considerations are applicable also to entities making general issues and exempt placements.

2.4 Private transactions in exchange-tradeable financial products

AICD makes the following two points on this matter:

- non-disclosure of unpublished price-sensitive information by a party to a private transaction would probably amount to misleading or deceptive conduct within the meaning of s1041H, leading potentially, to strict civil liability; and

- in principle, there is a qualitative difference between a private transaction involving, on the other hand a person with "privileged" access to information-directors and other persons connected, who are *real* insiders - and, on the other hand, others who are *notional* insiders by virtue only the possession of information acquired without "privileged" access.

To exclude from the insider trading regime only *notional* insiders would, to that extent, bring Australia's laws more into line with those of overseas jurisdictions which, in the view of AICD, would be a step in the right direction for Australia.

If, however, the policy decision were made to include all or any private transactions in the insider trading regime, AICD would support the addition of the disclosable information element.

2.5 Transactions under non-discretionary trading plans

The Advisory Committee rightly draws attention to "the lack of flexibility under current Australian law", which prevents directors and other persons involved in management to sell their company's shares under a trading plan lawfully entered into in good faith.

In its submission on the Discussion Paper, AICD advocated the introduction of a rule similar to SEC Rule 10b5-1 along the lines set out in paras 2.41-2.43 of the Proposals Paper, and AICD remains of that view. Additionally, there would not appear to be any policy reasons against introduction of such a rule. None are indicated in the Proposals Paper.

2.6 Transactions in unlisted entities

AICD supports the policy option of excluding from the insider trading laws all transactions in the securities or other financial products of all unlisted entities.

First, to do so would overcome the anomaly, identified in para 2.47 of the Proposals Paper, that a sale of the shares in an unlisted entity attracts the insider trading laws, but a sale of its assets does not, except to the extent that the assets include Div. 3 financial products.

Secondly, parties to a transaction in unlisted financial products are, as is pointed out in more than one place in the Proposals Paper, free to choose a mutually-agreed level of disclosure.

Thirdly, the parties to a transaction involving unlisted financial products remain subject to the prohibition against misleading or deceptive conduct in CA s1041H which, as noted earlier, imposes strict civil liability.

Fourthly, limiting the operation of the Australian insider trading laws to listed financial products would align them more closely to corresponding laws in comparable jurisdictions.

3 CHAPTER 3 - MATTERS THAT SHOULD BE CHANGED

In approaching the twelve matters discussed in this Chapter, the AICD makes the general submission that the Advisory Committee follow the counsel of Lord Falkland[2] that: *when it is not necessary to change, it is necessary not to change.*

[2] Lucius Cary, Viscount Falkland (1610-1643). Secretary of State under Charles I (1642).

3.1 Strengthen the reporting requirements for directors

AICD is prepared to support the Advisory Committee's recommended changes to CA s205G set out in para 3.6, subject to the reservation that the expansion of the disclosure requirement to "trading through related parties", and the contraction of the disclosure period from 14 days to two business days, would make the requirement unduly and unnecessarily burdensome in relation to any benefit.[3]

Bearing in mind that a director in possession of inside information may not deal at all in the relevant securities, notification of a dealing by a law-abiding director *ex hypothesi* does not convey any price sensitive signal. To require disclosure within two business days would be to bestow an unwarranted sense of urgency that could mislead investors who are unversed in the insider trading laws into thinking that the dealing conveys a price-sensitive signal. AICD is, however, prepared to accept that 14 days may be seen to be an unduly long period, and would support the Advisory Committee's original suggestion in the 2001 Discussion Paper of five business days.

AICD does not favour extension of the disclosure requirement to the five most highly paid executives on the ground of its arbitrariness[4] or to "executives who report directly to the CEO", as that is not a concept to be comfortably incorporated in legislation.

3.2 Amend the test of generally available information

As stated earlier, AICD does not support elimination of the "readily observable matter" test as a trade-off for introducing a disclosable information concept into the definition of inside information. AICD notes the Advisory Committee's view that such a concept would cover the "excess stocks in the yard" example given in the EM to justify the ROM test; but to the AICD that is by no means *necessarily* the case: it would depend on the volume of excess stock and the reasons for its remaining in stock.

On the two suggested approaches to clarifying the ROM test, the AICD prefers the second on each of the three elements, that is:

[3] For the reasons set out in footnote 333 to the 2001 Discussion Paper.
[4] As pointed out in the 2001 Discussion Paper footnote 331, the idea is derived from CA s300A(1)(c). That provision was, however, not included in the consultation process for the Bill for the *Company Law Review Act* 1998, but was included at the behest of the Senate majority and conceded by the Government as part of the 'price' for enacting the Bill.

- *observable to whom* - disclosed in a public area or can be observed without infringing rights of privacy, property or confidentiality;
- *how observable:* a matter is readily observable even if other users of the market cannot obtain it because of limitations on their resources, expertise or competence, or because it is only available on payment of a fee; and
- *where observable:* a matter may be readily observable even if it is only available overseas.

3.3 Introduce rebuttable presumptions

As the Advisory Committee notes, to introduce rebuttable presumptions into legislation that carries criminal and civil penalties is a serious matter. That it is nevertheless favoured by the Advisory Committee is yet another example of how careless many law "reform" proposals are of the fundamental principle of the common law: *the presumption of innocence.*

Rebuttable presumptions involve bad policy and bad law. AICD sees them as intrinsically objectionable. We are greatly concerned that the justification cited, based upon *likely* access to inside information is to "… overcome the considerable evidential difficulties of independently proving subjective knowledge…". Directors and officers are entitled to the standard protections of the law and should not be prejudiced or discriminated against by virtue of office or employment.

AICD is concerned about the suggestions in paragraph 3.31 and 3.32, the first being that directors and other senior officers must fully inform themselves before transacting in the company's shares. The suggestion seems to be that there is an obligation to discover price-sensitive information, which would of itself be a disqualifying event. To suggestion that prior confirmation be obtained from the CEO would impose an extraordinary burden upon the CEO with attendant potential exposure. A CEO would be justified in refusing to provide such confirmation and, properly advised, ought to refuse. Additionally, it is information known to the particular officer that is relevant, not information known to the company.

AICD would also express concern that little regard seems to be given to the different management structures within companies and the different ways in which information, price-sensitive or potentially so, ebbs and flows. In a senior management team comprising, for example, CEO, CFO, chief information officer, general counsel/company

secretary, GM human resources and GM public affairs, it may be that only three of the six are involved in the planning of, and are aware of, a rights issue. Most listed companies have strict rules imposed upon directors and senior officers, which prohibit share trading except in limited periods eg within 30 days of the announcement of half-yearly and yearly results (and even then not, if in possession of price-sensitive information).

3.4 Repeal the on-selling exemption for underwriters

As AICD noted in its submission on the Discussion Paper, the on-selling exemption does not appear to have caused any disquiet since its introduction in 1991. On that basis, AICD would not recommend that the exemption be repealed.

AICD is concerned that the Advisory Committee does not accept the likely effect of repealing the exemption on the cost and availability of underwriting. To AICD it is self-evident.

3.5 Repeal the statutory exemption for external administrators

AICD repeats its submission on the corresponding part of the Discussion Paper:

> *Contrary to the position taken by the DP, AICD believes not only that the present exemption for liquidators, personal representatives and trustees in bankruptcy should be retained, but also that it should be extended to other external administrators. An external administrator's task is quite difficult enough without having to worry about insider trading legislation and, as the DP notes, an external administrator does not make any personal gain from transactions entered into in that capacity.*

The exemption also does not appear to have given rise to any problems, and that alone justifies leaving the exemption alone. The Proposals Paper does not disclose what, if any, submissions the Advisory Committee received from the external administration community. Were they asked about the matter?

3.6 Clarify the relevant time for on-exchange transactions

AICD would join with the Advisory Committee in supporting the third option - that the relevant time is when the on-market offer is accepted by another exchange trader - as it is not until then that anyone has acquired or disposed of the relevant securities, which is a pre-requisite for the operation of CA s1043A(1).

3.7 Permit exercise of physical delivery option rights

AICD would again join with the Advisory Committee in supporting the principle of informed persons being able to exercise fixed price physical delivery option rights.

At the same, it has to be acknowledged that the reason why most people would go along with exempting the exercise of such an option from the insider trading laws is that it does not involve the *use* of inside information. That is something to which the Advisory Committee might usefully have adverted in its discussion in Ch. 4 of the Proposals Paper under the heading ***No use requirement***.

AICD would not, however, support a requirement for advance public notification by directors and senior officers before exercising such an option. As the Advisory Committee notes:

- the mandatory disclosure could be misleading; and
- it would need to be made clear how far down the corporate chain the test of "senior officer" would apply.

AICD considers that the same problem arises with disclosure by directors and senior officers of dealings generally: see para 3.1 above.

3.8 Extend the Chinese Walls defence to procuring

AICD notes that the Advisory Committee has been persuaded by unanimity of submissions that this change is necessary, and AICD agrees with this change.

3.9 Permit bid consortium members to trade for the consortium

Given the *régime* imposed by CA Ch.6, AICD agrees with the Advisory Committee's view that the "own intentions" exemption should continue to apply only to a person who trades on behalf of a bid consortium. However, AICD does not support that *régime.*

3.10 Protect uninformed procured persons from civil liability

The Advisory Committee's view reflects the view expressed in AICD's submission on the Discussion Paper.

3.11 Extend the equal information defence to civil proceedings

AICD agrees with the Advisory Committee's view, again reflecting unanimity of submissions on the Discussion Paper*,* that the insider trading legislation should provide an equal information defence in civil proceedings similar to the defence that applies in criminal proceedings.

3.12 Permit courts to extend the range of civil claimants

AICD doubts whether the likely (considerably) greater complexity that would arise from trying to define "contemporaneous traders" would be justified by any measurable improvement in the operation of the insider trading laws. There is nothing in either the Discussion Paper or the Proposals Paper to suggest any need, still less a pressing need, for legislative change down that path.

4 CHAPTER 4 - MATTERS THAT SHOULD NOT CHANGE

4.1 Regulate entities as well as natural persons

The requirement for Chinese Wall arrangements to enable a body corporate to deal without infringing the insider trading laws has been a feature of those laws since their introduction in 1975, and AICD agrees with the Advisory Committee in seeing no need for change.

4.2 Maintain only "information connection" approach

AICD notes that the Advisory Committee does not address the matters raised on this issue in its submission on the Discussion Paper. AICD is reminded of the law student in Professor Henry Manne's class who, during a classroom discussion demonstrating the difficulty of finding a satisfactory ethical or economic basis for prohibiting insider trading generally, stamped her foot and angrily declared "I don't care; it's just not right!"[5]

There is only one possible justification for imposing only an "information connection" test: that all participants in the relevant market must have equal access to "inside" information or, in other words, that knowledge and information are "free" goods that should be available freely to everyone.

One has only to spell out the argument to see its error: in real life, informational advantages provide the motivation for important aspects of almost every transaction in a market economy. Moreover, access to a particular piece of information is a function of the cost of obtaining it. In other words, more alert or skilled people, or people who have invested resources to develop their human capital in such a way as to assimilate information better, are always going to have superior access to information. Moreover, there are inevitably variations in the manner in which market participants assess information. The resulting inequality of information is a consequence of the division of labour and cannot justifiably be called unfair.[6] Indeed, Hayek in his celebrated paper *The Use of Knowledge in Society*[7], to which AICD drew the Advisory Committee's attention in its submission on the Discussion Paper, makes the point that the division of labour is the product of the division of knowledge.

That point is recognized explicitly in para. 1.20 of the Discussion Paper:

"Market participants with superior skill, time or commitment will therefore inevitably have a trading advantage."

They will often have that trading advantage by reason of acquiring in a perfectly lawful

[5] Hence, those who believe that insider trading should be prohibited on ideological, as opposed to reasoned ethical or economic, grounds have come to be known in the literature as *foot stampers.* Note that this is in the context of US law, which requires an "insider" to have a fiduciary duty to the relevant company. The counter-party on the source of the relevant information: Discussion Paper Appendix 6.
[6] See Jonathan R Macey *Ethics, Economics, and Insider Trading* Harvard Journal of Law and Public Policy, Vol 11 p785 at p799.
[7] Reprinted in F.A Hayek *Individualism and Economic Order* (RKP. London 1976)

way information that is not "generally available". Yet, it is precisely in that situation that such a market participant is prohibited by Australia's Insider Trading laws from trading! It is difficult to see much *market efficiency* in that.

How does the Advisory Committee justify the prohibition working that way in the name of *market fairness*? The answer lies in the linguistic legerdemain in the following paragraph in the Discussion Paper:

> *1.21 Market fairness does not require the elimination of these risks or advantages. Likewise, market participants should not be discouraged from conducting research and analysis, which promote the efficiency of these markets. Indeed, skill, acumen and diligence should be encouraged. However, insider trading deals with situations where market participants who hold* ***confidential*** *price-sensitive information can take the premium from trading without the same risks that are run by other market participants, who cannot gain access to that information by ordinary research, skill or analysis. (Emphasis added).*

The legerdemain is, of course, in the use of *confidential,* which suggests to the unwary reader that information that is not "*generally available*" is necessarily information imparted or received on a confidential basis. That is certainly not the case under Australia's present insider trading laws.

Restoration of the "person connection" test would therefore not only bring Australia's laws more into line with those of almost all other comparable jurisdictions, but would also bring them into line with a reasonable notion of market fairness. One should also not overlook that what is essentially prohibited by Australia's insider trading laws - the exploitation of one's own discoveries - is precisely what is protected by our intellectual property laws.

In any event, the expression *market fairness* is in itself logically and linguistically inappropriate, applying as it does an adjective which characterizes human behaviour to the abstract entity of the market.[8]

[8] Like the complaint of a toreador that it was unfair of the bull to gore him.

4.3 Continue to exclude non-trading

In neither the Discussion Paper nor the Proposals Paper does the Advisory Committee address the central paradox that, if trading with the advantage of information not generally available is sufficiently heinous to merit severe criminal sanctions as well as civil liability, why is it that anyone may lawfully refrain from trading with the advantage of information that is not generally available. In moral terms, they are equivalently good or evil, depending on one's point of view. The paradox is by no means fully resolved by the argument that enforcement of such a prohibition would be practically impossible, but it is in AICD's view a sufficient argument to justify the Advisory Committee's recommendation against such a prohibition.

4.4 No requirement to inform recipients that they are receiving inside information

AICD supports the view of the Advisory Committee against imposing any obligation on a person lawfully disclosing inside information to inform the recipient that the information is inside information.

4.5 Should Australian legislation require that information must be specific or precise?

AICD notes from the appendices to the Discussion Paper that the EU Directorate requires information to be of *a precise nature*, and that the UK and South African legislation requires information to be *specific or precise.* The position in Germany and the US seems more or less the same as in Australia. To AICD, it is doubtful whether those requirements clarify usefully the notion of *information*, and so AICD would not advocate the adoption of such a requirement.

4.6 Should criminal liability for insider trading require that the accused has used or relied on the relevant information?

To AICD, if insider trading is to be made a crime, the essence of the crime must surely be the use or misuse of the relevant information. To object to a "use" requirement on the ground that "it would create a significant additional hurdle to effective enforcement of the insider trading laws" is very much the same as advocating the abolition of the need to prove *mens rea* on the ground of that it would enable more effective enforcement of the criminal law.

A law, like Australia's, which makes no distinction between:

- the liability of a director who makes use of inside information by buying or selling relevant securities; and
- the liability of a director in possession of inside information who sells under duress (eg at gunpoint or under pressure of commitments),

cannot be said to be exactly principled. That is no doubt why most of the comparable jurisdictions whose insider trading are outlined in the Discussion Paper - EU, UK, Germany, South Africa, Canada (Federal) require "*use*" as an element of the offence or, in the case of UK and South Africa, allow proof of non-use as a defence.

SEC Rule 10b5-1 makes an insider liable if that person trades "on the basis" of material non-public information, which surely implies an element of 'use', and in any event provides for a number of defences when the inside information is not a factor in the decision to trade.

Similar issues arise in relation to whether there should be an exemption for trading contrary to inside information.

4.7 Retain the communication and subscription exemptions for underwriters

AICD agrees that the communication and subscription exemptions are necessary for the effective functioning of the underwriting industry.

AICD has in its submission in Chapter 3 of the Proposals Paper expressed the view that the on-selling exemption should also be retained: see para 3.4 above.

4.8 Intermediaries to remain liable for aiding and abetting

AICD agrees that the current law, under which an intermediary who has knowingly received inside information from a client, or has been informed by the client that the client holds inside information, could be liable for aiding and abetting by trading in affected financial products for that client. Yet, the market effect of trading for that client would be no different from trading for that client without that knowledge. To make the intermediary liable in that context is likely to do no more than increase the level of deafness within the intermediary community.

4.9 No exemption for informed intermediaries acting for uninformed clients

AICD notes that submissions generally favoured permitting an informed intermediary to act for any uninformed clients on an execution-only basis, and suspects that the generally - held view among intermediaries is that it is perfectly lawful to do so. That may well be why no one appears to have brought clear evidence that the lack of an exemption has caused major problems.

AICD would support permitting an informed intermediary to act for uninformed clients on an execution only basis, as it is difficult to see any harm in doing so on any rationale for prohibiting insider trading.

4.10 No derivative liability for controllers

AICD agrees with the Advisory Committee's view that controllers or supervisors should not be subject to derivative civil liability for the activities of persons under their control or supervision.

4.11 No exemption for directors of takeover targets or their white knights

One of the more important tasks of directors of a target company facing a hostile CA Chapter 6 takeover bid will often be to attract as many higher counter-bids as possible, to the advantage of the target shareholders. There may be occasions when it is expedient for that purpose to communicate inside information to a potential counter-bidder. It is difficult to see a compelling reason for not allowing target company directors to do so, provided that the potential counter-bidder gives the target company an enforceable undertaking to keep the information confidential and not to acquire target company shares

from uninformed counterparties before the information becomes generally available. If not before, that will occur with the issue of the bidder's and target's statements.

4.12 No obligation on Exchanges to publish their insider trading referrals

AICD agrees with the Advisory Committee that such an obligation would be inappropriate.

4.13 No differing criminal and civil insider trading regimes

Although AICD supports restoration of the "person connected" test as the delineation of an "insider", AICD shares the Advisory Committee's view against a proposal to confine criminal liability to fiduciaries and other person connection with the relevant entity. However, the fact that the proposal has been put to the Advisory Committee is in indication that such unfairness as is to be seen in insider trading is seen in the use of inside information by *real* insiders.

4.14 No recommended reform of ASIC's enforcement powers

In principle, AICD opposes giving the regulator the power to impose administrative penalties for insider trading because, whether any insider trading has occurred at all will, having regard to the nature and elements of the offence and the potential availability of a range of defences, seldom, if ever, be sufficiently clear-cut to justify such a power. Insider trading is not quite on the same level, or of the same character, as a parking infringement.

4.15 No change to compensation assessment rules

AICD agrees with the Advisory Committee that the existing rules for assessing what constitutes profit made or loss avoided should remain.

4.16 Retain civil remedies for companies whose securities are traded

In its discussion of this question in the Discussion Paper, the Advisory Committee seems to have assumed that insider trading in an entity's securities is always and necessarily damaging to the company. On the contrary, insider trading may alert the board of the entity to something affecting the company of which it is not otherwise aware, to the company's advantage. In that light, insider trading can be seen as a means by which information which cannot expediently be made known explicitly to the market by announcement can be made known implicitly to the market, and to the relevant company itself, through the price mechanism.

4.17 No speculative trading provision

As foreshadowed in its submission on the Discussion Paper, AICD agrees that there should not be any new statutory prohibition on "speculative trading" by directors and other corporate decision - makers.

4.18 No short swing profit provision

AICD supports the Advisory Committee's recommendation against a specific statutory prohibition on short swing profits.

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