

ASIC CLASS ORDER [CO 07/183]

EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

Paragraph 1075A(1)(b) — Declaration

The Australian Securities and Investments Commission (*ASIC*) makes ASIC Class Order [CO 07/183] under paragraph 1075A(1)(b) of the *Corporations Act 2001* (the *Act*). Except as otherwise stated, legislative references made in this statement relate to the Act.

1. Background

Under subsection 1071H(1), within 2 months after a company issues a security, the company must complete all the appropriate certificates or other title documents in connection with the issue of the security and, subject to contrary instructions from the holder, send or deliver the completed certificates or other title documents to the holder or to another person who has been nominated in writing by the holder.

The effect of subsection 1071H(2) is that the requirements of subsection 1071H(1) need not be met where the operating rules of a prescribed CS facility include a provision to the effect that:

- (a) no document is required by subsection 1071H(1) to be completed and delivered by a company in relation to the issue of a security in specified circumstances; or
- (b) the only document required by subsection 1071H(1) to be completed and delivered by a company in relation to the issue of a security in specified circumstances is the document required by the provision.

Subsection 1071H(3) requires that, where a transfer of securities occurs, the company must deliver the appropriate title documents to the transferee within 1 month of the date the transfer is lodged with the company. This requirement is, however, displaced where the transfer is “covered by the operating rules of a prescribed CS facility”, in which case the only documents required are those that the relevant operating rules prescribe: s 1071H(4).

Under regulation 7.1.03 of the *Corporations Regulations 2001* the only “prescribed CS facility” at this time is the ASX Settlement and Transfer Corporation Pty Ltd (*ASTC*). Relevantly, *ASTC*’s main purpose, according to its operating rules, is to:

- (a) enable participants of the financial market operated by ASX Limited (the *ASX*) to pay money or otherwise meet settlement obligations, arising out of financial products and derivatives; and

- (b) enable issuers and participants to record holdings of financial products and to take permitted action in accordance with instructions, agreements or arrangements in relation to financial products.

The settlement services provided under the clearing and settlement facility operated by ASTC are done so through the Clearing House Electronic Subregister System (*CHES*), a computer system that manages the process of settling transactions conducted on the ASX. The CHES processes do not involve the issue of certificates, either when securities are issued or when they are transferred. Rather statements showing relevant transactions are issued.

Currently the securities of a number of Australian companies are traded on a financial market operated by New Zealand Exchange Limited (the *NZX*). A similar system to CHES operates to effect clearing and settlement in relation to NZX transactions. The system is referred to as the Fully Automated Screen Trading and Electronic Registration Trading or “FASTER” system, and is an approved electronic transfer system under the *Securities Transfer Act 1991* (New Zealand) in accord with the *Securities Transfer (Approval of FASTER System) Order 2001*.

Like CHES, the FASTER system operates on the basis that the relevant securities are held and transferred in an “uncertificated form”. However, the NZX does not have the benefit of being a prescribed CS facility. Division 2 of Part 7.11 has extraterritorial operation: s 5(4). This means that the issue and transfer of Australian companies’ securities under the FASTER system must be in accordance with subsections 1071H(1) and (3) outlined above.

To the extent that those provisions have not been complied with to date in relation to the issues and transfers in question, inadvertent contraventions of the law of a technical nature may have taken place. None of those contraventions affect the validity of the issues or transfers: s 1101H. Moreover, the contraventions do not amount to an offence: ss 1311(1) and (1A).

2. Purpose of the class order

The purpose of Class Order [CO 07/183] (the *Class Order*) is to ensure that issues and transfers of the securities of Australian companies that are effected through the FASTER system in New Zealand will be treated in the same manner as issues and transfers of securities that are effected through the ASTC in Australia. In the absence of the Class Order, issues and transfers of these securities potentially involve technical contraventions of subsection 1071H(1) or 1071H(3).

ASIC may only exercise its discretionary power under subsection 1075A(1) where it is satisfied (according to subsection 1075A(2)) that:

- (a) if the exemption were granted or the declaration were made, the interests of the holders of those financial products, or of financial products in that class, would continue to have adequate protection; and

- (b) the granting of the exemption or the making of the declaration would make the transfer of those financial products, or of financial products in that class, more efficient.

ASIC is satisfied that on making the Class Order, relevant investors would continue to have adequate protection. In this regard, ASIC notes:

- that the NZX is responsible for the FASTER System and is responsible for conducting an accreditation examination of participants' messaging systems and operational procedures before it allows a participant to connect to the FASTER System;
- that the NZX is also responsible for taking steps to ensure adequate:
 - security against unauthorised access and misuse of data;
 - capacity planning to deal with sudden increases in demand;
 - business continuity planning and contingency systems to ensure continuous service in the event of system failures;
 - investigation of any complaint of misuse of the system;
 - provision is made for ongoing audit and review of the operation of the system; and
 - audit trails of all transactions processed through the FASTER System; and
- that the NZX and listed companies are responsible for providing suitable insurance cover in the event of failure of the selling NZX company to meet its obligations as a result of an invalid transfer.

ASIC is also satisfied that making the Class Order would make the transfer of the securities in question more efficient. No useful purpose is served by the continued application of a requirement to provide title documents for securities covered by an electronic system of registration and transfer.

3. Operation of the class order

The Class Order has the effect of making section 1071H apply as if it included a provision exempting issues and transfers covered by the FASTER system in the same way that subsections 1071H(2) and (4) exempt issues and transfers covered by CHESSE. This means that a company need not comply with subsection 1071H(1) or 1071H(3) where the issue or transfer of the company's securities is effected through the FASTER system and the applicable requirements regarding documents that must be provided have been satisfied.

4. Consultation

No consultation was undertaken as the Class Order is minor or machinery in nature.