

Chapter 2

Access to information in share registers

2.1 This chapter examines the bill's provisions on access to companies' share registers. It notes how the information in share registers has been used (and abused) and highlights broad support for the introduction of a provision to prevent improper use of register information through a list of improper purposes in the Corporations Regulations.

Accessing information in company registers

2.2 Companies are required to keep registers of their members containing members' names, postal addresses and shareholding details. These registers provide necessary information to assist current and future members to exercise their membership rights, and members and interested third parties to engage in commerce.¹

2.3 Currently, anyone may request a copy of a company's shareholder register without providing any indication of the purpose for which they intend to use the information.² There are various well-accepted reasons for a person to access the register.³ These include:

- members checking that their personal details are accurately recorded on the register;
- members communicating with other members about their potential rights to bring or join an action against the company for relief against oppression or to bring a statutory derivative action;
- members or interested third parties wishing to write to existing members with an offer to purchase shares at a fair price;
- members or interested third parties wishing to canvass a small number of members to identify sellers, as a step preliminary to a takeover bid;
- members wishing to contact other members in order to influence company management about the operation of the company or to obtain support for a members' resolution; and

1 Treasury, *Proposals paper: Access to company registers and related issues*, February 2010, p. 2, http://www.treasury.gov.au/documents/1716/PDF/Access_to_registers_proposals.pdf (accessed 10 November 2010).

2 Mr Geoff Miller, *Treasury Proof Committee Hansard*, 3 November 2010, p. 1.

3 See Mr Tim Sheehy, *Chartered Secretaries Australia, Proof Committee Hansard*, 3 November 2010, p. 12.

- candidates for directorship contacting members about their election.⁴

2.4 However, Treasury told the committee that 'increasingly, members' contact details are being used for a number of purposes that are not considered proper, but currently there are insufficient mechanisms in the legislation to prevent this'.⁵ The bill introduces a proper purpose test for the use of a company's share register. It requires persons seeking a copy of a register of members to apply to the company, providing their name, address, corporation, the purpose for which they will use the information in the register and whether this information will be disclosed to a third party.⁶ The company can refuse to provide a copy of the register where the purpose is an improper purpose.⁷

2.5 The bill's proper purpose test exclude undesirable uses of company register information (rather than specifying proper purposes). The Corporations Regulations (rather than the Act) will list these improper uses as:

- specific groups in the community (such as charities) soliciting donations from shareholders;
- brokers soliciting clients;
- obtaining information about the personal wealth of shareholders; and
- making off-market offers to purchase securities (other than for a takeover of an unlisted company).

2.6 The government's intent is to eliminate the improper use of registers, particularly 'predatory', unsolicited, off-market share offers. Where the purpose of an application is for an improper use, the request to provide a copy will be refused.⁸ There is scope for judicial review of this decision under section 1324 of the *Corporations Act*.

Misuse of information in share registers

2.7 The committee received evidence from various submitters to this inquiry that the information in share registers has been accessed by some for an inappropriate use. Dr Greg Golding, a partner at Mallesons Stephen Jaques representing the Law Council of Australia, told the committee that there are a small number of players who make offers to primarily unsophisticated retail shareholders to acquire shares 'on uneconomic terms'. He explained that many companies listed on the stock exchange

4 Treasury, *Proposals paper: Access to company registers and related issues*, February 2010, p. 2, http://www.treasury.gov.au/documents/1716/PDF/Access_to_registers_proposals.pdf (accessed 10 November 2010).

5 Mr Geoff Miller, Treasury, *Proof Committee Hansard*, 3 November 2010, p. 1.

6 Schedule 1, items 6 and 8.

7 Explanatory Memorandum, p. 6.

8 Explanatory Memorandum, p. 7.

over the last two decades have large shareholding bases of unsophisticated retail shareholders, especially where the shares are held as a consequence of demutualisation. Some of these shareholders have been the target of offers that, in the Law Council's view, are unacceptable. Dr Golding elaborated:

This year...there have been a number of offerings in those types of companies that we believe illustrate unacceptable behaviour in terms of the approach of the industry players. The way they mutate is illustrative of the fact that investor protection in this area has not been assisted by disclosure regimes. The legislation on the books at the moment is based on disclosure and an assumption that, given proper disclosure, a retail investor confronted with one of these offers will make a logical and rational choice not to accept the offer, particularly in circumstances where the market price of the relevant securities is available to the retail investor on far better terms. This is not patronising, but what we experience day to day is behaviours on the part of investors that are not rational in dealing with these offers. It is our belief that it is the behaviours that need to be protected, rather than through disclosure regimes. Therefore we have been a prominent supporter of further reforms to try to protect investors in this situation.⁹

2.8 Company Secretaries Australia (CSA) has surveyed its members (company secretaries) to seek information on who is accessing the company registers of the top 100 ASX companies. Ms Judith Fox, Director of Policy at CSA, told the committee that:

Ninety-five per cent of the requests are coming from non-shareholders, and they are certainly not coming from people who are seeking to initiate some sort of action to do with the governance and management of the company...For example, one major bank received 11 requests. Only one of those requests was from a shareholder, which is entirely proper. One was from an offerer to purchase shares at below market value, four were from charities, three were from investment companies and two were from estate finders. A major retailer received six requests. Two came from charities, one from a genealogical research company specialising in discovering unclaimed or forgotten assets, one from an offerer making below-market offers to purchase shares and two from investment companies. A major resources company received 10 requests, none of which were from shareholders. They included offerers to purchase shares at below market value, charities and requests from investment companies. A major supplier to the gaming industry received three requests, one from a merchant bank asking for the details of the holdings of one individual shareholder who had recently been in the media, one from a firearms dealer, which is genuinely alarming, and one from an unknown party, but research indicated that it was

9 Dr Greg Golding, Law Council of Australia, *Proof Committee Hansard*, 3 November 2010, p. 16.

probably a genealogical research company specialising in discovering unclaimed or forgotten assets.¹⁰

The need for a provision to prevent misuse of company register information

2.9 Submitters and witnesses to this inquiry were in broad agreement on the need for tighter regulation to prevent misuse of share register information (see paragraph 2.5).

2.10 CSA 'unequivocally supports' the bill's provision for persons seeking a copy of the register of members to apply to a company stating how they will use the information. Its position rests on both principled and practical considerations. CSA emphasised the 'basic privacy principle' that every shareholder has the right to know that their information will only be disclosed for the purposes for which it is provided—the management of the shareholding.¹¹ In practical terms, Mr Tim Sheehy, Executive Director of CSA, told the committee that company secretaries repeatedly have had to deal with 'sometimes angry and often distressed shareholders' who have been sold their shares at below market value. It is for this reason, he explained, that CSA has pushed for reform on the issue of access to share registers.¹² Ms Fox added:

In particular, given our Members' knowledge over the past decade of sources of requests for the registers from third parties (other than shareholders or for the purpose of a takeover), CSA confirms that the four improper uses of information from the register identified to date and specified in the Corporations Regulations align with the majority of requests with which our Members have had to contend over these past years.¹³

2.11 Telstra also supports the bill's provision on share register access. It noted in its submission to this inquiry that:

...the introduction of a provision into the Act which expressly grants a company the ability to prevent members or third parties from accessing its share register unless the members or third parties satisfy the company that they wish to access or take copies of the register for a 'proper purpose'. Telstra is also supportive of the introduction of offence provisions to prevent the misuse of share register information.¹⁴

10 Ms Judith Fox, Chartered Secretaries Australia, *Proof Committee Hansard*, 3 November 2010, p. 11.

11 Ms Judith Fox, Chartered Secretaries Australia, *Proof Committee Hansard*, 3 November 2010, p. 12.

12 Mr Tim Sheehy, Chartered Secretaries Australia, *Proof Committee Hansard*, 3 November 2010, p. 11.

13 Chartered Secretaries Australia, *Submission 1*, p. 1.

14 Telstra, *Submission 5*, p. 1.

Improper purposes in the Corporations Regulations

2.12 Submitters and witnesses also supported the government's approach of stating improper uses in the Corporations Regulations, as opposed to defining a proper purpose.

2.13 CSA supported the inclusion of the four improper purposes in the Corporations Regulations. It noted that these can be added to if the people who currently make below-market offers to purchase shares devise other methods and means to access shareholders' personal shareholding details.¹⁵

2.14 The Law Council also supports the list of improper purposes, although it argued that the scope of these proscribed purposes should be expanded to include 'dividend chaser' activities.¹⁶

An undertaking not to misuse?

2.15 Treasury's February 2010 Proposals Paper suggested a requirement that a person applying for information in a share register must satisfy the company that they are doing so for a 'proper purpose'.¹⁷ One of the key issues arising from the consultative process was whether to define these 'proper purposes' directly¹⁸ or whether they are best defined through specifying improper purposes.

2.16 The Law Council of Australia criticised the path mooted in the Proposals Paper. While it supports the list of improper purposes, the Council is concerned with the bill's requirement that persons seeking access to the register must state the purpose for which they require access. It argued that a statement of proper purposes may enable a company to delay providing the register in cases where a lawful purpose is unwelcome to the company.¹⁹ Mr Golding explained that:

...to test whether the company had taken the right action, you would need to go to court, and companies have all the power in that situation and it would take a period of time for courts to determine what the legislation intended by that. So we were concerned that companies may use this as a defensive tactic or for ulterior purposes quite unrelated to the particular offers that we are concerned about. We think a much better solution is to take that power from the company and have a negative specification of an improper purpose through the regulation so that the determination is effectively not being

15 Ms Judith Fox, Chartered Secretaries of Australia, *Proof Committee Hansard*, 3 November 2010, p. 12.

16 Law Council of Australia, *Submission 6*, p. 2.

17 Treasury, *Proposals paper: Access to company registers and related issues*, February 2010, p. 2, http://www.treasury.gov.au/documents/1716/PDF/Access_to_registers_proposals.pdf

18 This was the approach initially supported by the Insurance Australia Group. See *Submission 4*.

19 Law Council of Australia, *Submission 6*, p. 2.

made subjectively by the company but objectively by reference to a list of prescribed wrongful purposes.²⁰

2.17 The same concern was raised by the New South Wales Council for Civil Liberties. It stated in its submission:

We have read the submission of the Law Council of Australia on this matter, and agree with them in particular about the capacity the proposed legislation creates for delay. Amongst other things, allowing a corporation to decide what is an improper purpose would allow its management potentially to defend their own interests (e.g. during a hostile takeover when time is of the essence). This creates intolerable conflicts of interests.²¹

2.18 Instead of a statement of purposes with the company as the gatekeeper, the Law Council favours a process whereby the applicant is required to provide to the company an undertaking not to use the information contained in the register for an improper purpose.²²

2.19 CSA, on the other hand, argued that the process established by the bill is 'very practical' as it allows for complete transparency about why the register is being requested so the company is clearly aware of these reasons. As mentioned above, CSA sees the list of improper purposes as important to this process. It claimed that if a request seems improper and the applicant disagrees, 'then it is an entirely fair and relatively speedy process to go to the courts and to challenge that decision'.²³

'Use' and 'purpose' of share register information

2.20 The main area of difference among witnesses on the bill's share register provision relates to whether a person seeking information in a register should only be required to verify the use rather than the purpose of this information.

2.21 The Law Council has argued that it is the behaviour in question (the use) that needs addressing, not the means by which the behaviour is implemented (the purpose). As Mr Golding observed:

...we continue to believe it is not the purpose of the request for a register that is the evil here; it is the use to which it is put and, in particular, it is the behaviours of a small number of players in creatively mutating their offers that are the evil. So, at one level, an improper purpose negative power is still not addressing the root evil. We have a residual concern that unless you

20 Mr Greg Golding, Law Council of Australia, *Proof Committee Hansard*, 3 November 2010, p. 16.

21 New South Wales Council for Civil Liberties, *Submission 8*, p. 1. See also Dr Martin Bibby, *Proof Committee Hansard*, 3 November 2010, p. 21.

22 Mr Greg Golding, Law Council of Australia, *Proof Committee Hansard*, 3 November 2010, p. 18.

23 Ms Fox, Chartered Secretaries Australia, *Proof Committee Hansard*, 3 November 2010, p. 12.

deal with the root evil it will continue to be circumvented in some way. That being said, as I say, we think the legislation should be enacted broadly in its current form.²⁴

2.22 In contrast, CSA argued that the law needs to cover both the use of the information and the purpose. Ms Fox told the committee:

It really does need to cover the purpose because that comes back to that basic privacy principle that the shareholder needs comfort and confidence that the information is being used for the purpose for which it was provided. That it is being used appropriately is actually a separate issue. To just say, 'Let's just have an undertaking that it's going to be used appropriately and forget the purpose,' I think really defeats the very policy objective that was talked about that we referred to by providing the historical data around when the legislation was introduced.²⁵

Committee view

2.23 The committee supports the bill's provision to screen access to information in share registers. It is satisfied that the list of improper purposes will serve as the most efficient and effective way to determine whether an applicant proposes to access information for a proper purpose. It is important that this list is non-exhaustive and that the regulations can be expanded to ensure that share register information continues to be used only for proper purposes.

24 Mr Greg Golding, *Proof Committee Hansard*, 3 November 2010, p. 16.

25 Ms Judith Fox, *Proof Committee Hansard*, 3 November 2010, p. 14.