CHARTERED SECRETARIES
AUSTRALIA

Leaders in governance

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The Secretary
Senate Economics Legislation Committee
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Senate Economics Legislation Committee Inquiry into Corporations Amendment (No 1) Bill 2010

Chartered Secretaries Australia (CSA) is the independent leader in governance, risk and compliance. As the peak professional body delivering accredited education and the most practical and authoritative training and information in the field, we are focused on improving organisational performance and transparency. CSA represents the company secretaries of most of Australia's largest public and private companies, all of whom are involved in maintaining registers of members and considering requests to access and use those registers. Indeed, it is a requirement under the provisions of the Corporations Act that the company secretary maintain the register of members.

Support for the Bill and the introduction of a proper purpose test to access the register of members

CSA welcomes the opportunity to comment to the Senate Economics Legislation Committee on the Corporations Amendment (No 1) Bill 2010 (the Bill).

CSA unequivocally supports the Corporations Amendment (No 1) Bill 2010, that introduces legislation requiring persons seeking a copy of the register of members to apply to a company, stating their name, address, corporation, the purpose for which they will use the information contained in the register and whether the information will be disclosed to a third party. Excluding undesirable uses of the register remedies the shortcomings in the current law that allow shareholder details to be made available to anyone who requests a copy of the register regardless of the intended use of the information.

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. CSA therefore fully supports the Corporations Regulations specifying improper purposes as:

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

By limiting access to the register to appropriate purposes through legislative reform, the Bill ensures that shareholders' personal contact details will not be able to be accessed by all and sundry for commercial and improper gain.

CSA also supports the government's move to specify a non-exhaustive list of improper purposes in the Corporations Regulations. Should other improper purposes become evident in the future, or if offerors to purchase shares at below market value develop means of making such offers that seemingly accord with the legislation, the Regulations will be able to be amended more swiftly than if the improper purposes were specified in the Corporations Act.

Our reasons for supporting the Bill to ensure acceptable shareholder privacy rights are:

- Companies and registries should only use or disclose personal information on the share register for the purposes for which the information was provided, that is, administering the shareholders' shareholdings in the company.
- Consistent with the Privacy Act, the principle should be that shareholder personal information is to be kept private unless a proper exception applies. Under the current provisions of the Corporations Act anyone may access shareholder personal information and may use that information for any purpose other than a purpose specifically proscribed by s 177.
- The Corporations Act is out-of-date in relation to privacy rights in operation for Australians, and not aligned with the obligations to protect privacy relating to other forms of financial information. Australians have a right to privacy in relation to their wealth holdings in bank accounts, yet retail shareholders have no entitlement to privacy regarding their wealth holdings in shares. There are also strict privacy requirements protecting investors in relation to superannuation contributions, which contrast starkly with shareholders' lack of privacy.
- Shareholders — generally, large institutional shareholders — whose shareholdings are held indirectly via a custodian company are protected from the general public accessing their particulars. Currently, those Australians with direct shareholdings, that is, mostly retail shareholders, are disadvantaged by the absence of privacy. Direct shareholders, with less complex structures in the management of their shareholdings, should have similar levels of privacy and protection to those whose shareholdings are held indirectly.
- The substantial shareholding provisions in the Corporations Act provide a mechanism to require any shareholder with more than five per cent of shares to publicly disclose their interest in a listed company. This information is commonly used for understanding the levels of control of any particular company and CSA supports its retention on public policy grounds. Improved privacy rights for retail shareholders would not affect this mechanism.
- Members and others already have protection embedded in the legislation to ensure they can ask the company for a copy of the register if they have called a meeting; give a company notice of a resolution they propose to move at a general meeting and distribute statements to all members on any matter that may be considered at a general meeting. Increased privacy for shareholders would not affect existing rights to access and use the register for a proper purpose.
- If offers are made to shareholders as part of a takeover offer, they are subject to regulation as set out in Part 6 of the Act, which is designed to protect shareholders. At present, any other offers are not subject to regulation.

Are there unintended consequences attached to the Corporations Amendment (No 1) Bill 2010?

CSA is of the view that no unintended consequences will result from the introduction of a proper purpose test. CSA is aware that concerns could be raised that shareholder activism concerned with proper governance and management could be stifled by providing a company with the right to refuse members or third parties access to the register unless they satisfy the company that their request to access the share register is for a proper purpose. However, CSA is of the view that granting a company the right to refuse access to the register if it is not satisfied that the applicant's request is for a proper purpose will not inhibit shareholder rights in any way.

Existing rights of shareholders permit them to:

- ask a company for a copy of the register (s 249E(3)) if they have called a meeting
- give a company notice of a resolution they propose to move at a general meeting (s 249N(1)). The company must ensure that all members receive notice of the resolution at the same time (s 249O(2)) and at the company's expense if the notice is received in time to send out with the notice of meeting (s 249N(3))
- distribute statements to all members on any matter that may be considered at a general meeting (s 249P(1)). The company must distribute it to all members (s 249P(6)) and at the company's expense if the statement is received in time to send out with the notice of meeting (s 249P(7)).

Such protections ensure that members can access the register for a proper purpose. CSA also notes that shareholders may review the top 20 shareholders of a listed company and contact their fellow investors should they wish to discuss issues of concern relating to the standard of governance and management of a company.

CSA is also aware that there could be concerns raised as to the impact on the applicant by placing the onus on the requester to seek judicial review should the company refuse their request for access to the register, yet the applicant believes that their request is for a proper purpose. Given the existing shareholder rights set out above, should a company abuse the proper purpose test and refuse a legitimate request from a shareholder, CSA notes that the courts will impose an appropriate sanction on the company, for example, an award of costs, for refusing a proper purpose request.

On this basis, **CSA strongly recommends** that the Bill should be enacted.

Background to CSA support for the Bill

CSA has been advocating for many years that reform is required in relation to access to and use of the register of members of companies and its treatment in the Corporations Act 2001 (Cth). At present, the law does not provide acceptable privacy rights for shareholders in relation to public access to and use of their details on the register. The current law continues to permit third parties almost unhindered access to the registers of members. We therefore see the Corporations Amendment (No 1) Bill 2010 as a long overdue reform to act to remedy the shortcomings in the current law to protect the interests of shareholders.

CSA's initial concerns about access to the register were sparked by requests for copies of company registers in order to make offers to shareholders to purchase shares below market price. Such offers take advantage of unsophisticated and elderly shareholders. CSA Members were gravely concerned as offerors such as David Tweed exploited the provisions in the Corporations Act to breach shareholder privacy. The public disclosure of shareholders' addresses and their financial affairs rendered them vulnerable to this form of predatory activity. There is no evidence of decline in this practice, rather, the number of such offers and offerors active in the market is increasing over time.

However, it is important to note that the problem of access to the register is not confined to access for the purpose of sending unsolicited offers to shareholders to purchase their shares at below-market value. There is the broader issue of shareholder privacy that the Bill addresses, as it is concerned with ensuring that personal information held by companies on their share registers is only used and disclosed for the purposes for which it was provided by the shareholder. In particular, it ensures that third parties can only have access to that information for a proper purpose and only use the information for the purpose for which it was provided. CSA Members' experience is that third parties are seeking access to share registers for the purpose of establishing mailing lists and marketing and charitable fundraising databases.

Before 2008, the fees charged by companies for copies of share registers presented a significant, practical barrier to inappropriate requests for access to shareholder information. Share registries would charge companies, and companies would pass on to access seekers, a fee that was often in excess of $15,000 to provide a copy of the register of a large listed company.

In 2008, the Federal Court decided that a reasonable fee for a copy of AXA's share register was $250.00.[1] The decision was confirmed on appeal to the Full Federal Court.[2]

There has been a dramatic increase in the number of requests for copies of registers from third parties since this decision. A survey of CSA Members in the top 100 ASX listed companies in 2009 revealed that the vast majority of requests for the register over the past few years came from third parties, including not only offerors seeking to purchase shares at below-market value, but also brokers, charities, investment companies and genealogical research companies. The latter parties seek the register with the clear intention of expanding their marketing or fundraising database, despite the prohibition in the Corporations Act on the register being used for the purposes of sending marketing material.

The policy objective of the current provisions in the Corporations Act

Section 173 enshrines the generally accepted principle that it is conducive to the good governance of a company that non-members should be able to communicate with members of a company regarding the affairs of the company.[3]

Sections 177(1) and 177(1A) of the Corporations Act in its current form were enacted to prevent the misuse of information on registers in response to concerns that information from registers would be used to invade the privacy of shareholders, such as compiling mailing lists for direct marketing purposes.[4] That is, these sections were aimed at protecting the privacy of members, whilst recognising that legitimate uses of such information should not be prevented (for example, contacting shareholders in relation to takeovers).

Clearly, given the number of requests for the register that are now coming from brokers and charities who are seeking to extend their marketing capacity and invade the privacy of shareholders, the current provisions are not achieving the policy objective.

CSA Members note that parliament intended that there be some discretion to approve the use and/or disclosure of the information on the register, so that any decision would be subject to accountability to members. The Explanatory Memorandum accompanying the First Corporate Law Simplification Bill 1995 (Cth) contemplated that "[s]hareholders may be expected to hold

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[1] *Direct Share Purchasing Corporation Pty Ltd v AXA Asia Pacific Holdings Ltd* [2008] FCA 935. Direct Share Purchasing Corporation Pty Ltd (DSPC) is a company associated with Mr David Tweed.
[2] *AXA Asia Pacific Holdings Limited v Direct Share Purchasing Corporation Pty Ltd* [2009] FCAFC 15
[3] *Mackay Permanent Building Society Ltd v ASIC* [2005] AATA 1176
[4] Second Reading Speech to the First Corporate Law Simplification Bill 1994

the company's management accountable for any approval given" by the company for the use and/or disclosure of such information from the Register."

However, the current wording of the provisions in the Corporations Act provides no such discretion. Companies:

- are obliged to fulfil any request for the register of members unless that request specifically states it will be used for direct marketing purposes
- cannot withhold access to the register from a person who refuses to disclose the purpose for which they are seeking access
- cannot withhold access even if the person seeking access refuses to divulge their name (for example, a solicitor may request the register on behalf of a client and the company has no right to know the identity of the client)
- cannot withhold access if the company does not know the purpose for which a person is seeking access (the company can ask for the purpose but it does not have to be disclosed)
- cannot withhold access even if the company believes that the purpose for which a person is seeking access is improper.

CSA Members are of the view that the Corporations Amendment (No 1) Bill 2010 specifically achieves the original policy objective by introducing the proper purpose test for accessing the register of members.

Use of the register obtained prior to legislative reform

CSA is concerned that persons currently in possession of registers may take the opportunity to continue to send below-market offers to purchase securities or otherwise use the register for an improper purpose after any law reform is effected. As the company and registry would not be in receipt of a request for the register, they would be unaware (unless advised by a shareholder) that the register, obtained prior to any legislative change, was continuing to be used for an improper purpose.

CSA therefore supports the legislation clarifying that any use of a register currently in the possession of an applicant (having been received prior to the legislation taking effect) will be subject to the legislation and that the offences set out in the legislation will apply.

Alignment with privacy legislation

Furthermore, CSA Members are of the view that the Bill affords the benefit of the privacy protection afforded to other personal information under the *Privacy Act 1988* and the National Privacy Principles. Under the legislation and the National Privacy Principles, personal information can only be used for the purpose for which it was provided.

Other aspects of the Corporations Amendment (No 1) Bill 2010

CSA is also supportive of the other proposed amendments to the Corporations Act:

- prescribing a tiered fee structure to obtain a copy of the register
- including a regulation-making power that would enable a number of formats and device mediums to be prescribed in the Corporations Regulations, and
- prescribing that, where a register of members is maintained electronically, a person seeking to inspect the register does so on a computer
- increasing the criminal penalties for insider trading and market manipulation
- prescribing that an offer made under s 1019G(2) must remain open for at least one month.

CSA is of the view that the fees for each tier are appropriate. CSA Members note that, with the introduction of a proper purpose test, the number of requests for the register is likely to decrease substantially, given that the great majority of current requests come from third parties such as brokers and charities who are seeking to extend their marketing and fundraising

capacity and predatory offerors. The fees proposed for each tier are appropriate when viewed as fees for accessing the register for a proper purpose.

Conclusion

CSA fully supports the Bill and the amendments to the Corporations Regulations setting out improper uses of the register. Our members look forward to the proclamation of the legislation, which will allow them to manage company share registers so as to protect shareholders from efforts to invade their privacy.

In preparing this submission, CSA has drawn in particular on the expertise of its national Legislation Review Committee.

Yours sincerely

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