

Proposals paper

Access to company registers and related issues

February 2010

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Consultation process

Request for feedback and comments

The Government is seeking your feedback and comments on the proposals outlined in this paper, particularly any information about compliance costs, unintended consequences, and any other impacts, costs, and benefits.

The information will help to settle the Government's approach on the way forward in this area.

While submissions may be lodged electronically or by post, electronic lodgement is preferred. For accessibility reasons, please email responses in a Word or RTF format. An additional PDF version may also be submitted.

All information (including name and address details) contained in submissions will be made available to the public on the Treasury website, unless you indicate that you would like all or part of your submission to remain confidential. Automatically generated confidentiality statements in emails will not suffice for this purpose. Respondents who would like part of their submission to remain in confidence should provide this information marked as such in a separate attachment. A request made under the *Freedom of Information Act 1982* (Commonwealth) for a submission marked 'confidential' to be made available will be determined in accordance with that Act.

Closing date for submissions: Wednesday, 24 February 2010

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FOREWORD



I am pleased to release these proposals for reform to the laws on access to company registers and some related issues.

The continuing practice by some entities of making undervalued, often predatory, unsolicited off-market share offers is of concern to the Government. The Government is also sensitive to some of the privacy concerns that have been raised in submissions made to the *Access to Share Registers and the Regulation of Unsolicited Off-market Offers* options paper, released in May 2009. The cost to businesses of complying with requests to access share registers is another concern.

These proposals for law reform seek to balance concerns about misuse of information contained in the register against the legitimate reasons for access. With this balance in mind, a proper purpose test is proposed where a person seeks a copy of a register.

This paper also proposes a tiered fee structure where a company is required to provide a copy of its register. The proposal has been developed in light of concerns raised with each of the options in the May 2009 paper. The final proposals deal with minor changes to allow for technological advances and practices since the legislation was initially drafted.

In developing these proposals for reforms to the regulatory framework the Government has focused on achieving a balance between addressing investor protection and privacy concerns on the one hand and maintaining open and transparent access for legitimate uses of company share registers. These proposals also seek to avoid excessive and unnecessary regulatory burdens on business.

I look forward to receiving your views on these issues.

A handwritten signature in black ink that reads "Chris Bowen".

The Hon Chris Bowen MP
Minister for Human Services
Minister for Financial Services, Superannuation and Corporate Law

SUMMARY OF PROPOSALS

Proposal 1: A proper purpose test to access registers

A proper purpose test would need to be satisfied before a person is entitled to access a company's share register.

The test would require a person to state, in writing, the purpose for which they are seeking to access the company's register. If the company considers that purpose to be improper, the applicant will have the right to have the decision reviewed by a court.

Proposal 2: A tiered fee structure

A three-tiered fee structure based on the number of members of a company would apply to determine the cost of obtaining a copy of the register.

A base fee of \$250 would be payable for a copy of a company register with under 5,000 members. For a company with between 5,000 and 20,000 members, an additional \$0.05 would be paid per member. For companies with over 20,000 members a fee of \$1,000 plus \$0.01 for each additional member would be payable.

Proposal 3: Format for copies of the register

Where a register is kept electronically, a company would be required to provide a copy in the format requested by the applicant.

Proposal 4: Inspection of a register maintained on computer

Where a register is kept electronically, a person seeking to inspect the register would be required to inspect it on a computer unless the company agrees to provide a paper copy.

INTRODUCTION

In May 2009, the Government released the options paper, *Access to Share Registers and the Regulation of Unsolicited Off-Market Offers* (options paper). The options paper sought views on the appropriateness of the current framework for regulating the continuing practice of making undervalued, and often predatory, unsolicited off-market offers to purchase shares, and canvassed a number of options for reform.

The submissions received in response to the options paper have informed the Government's consideration of this important issue and contributed to the development of a number of proposals for law reform. These reforms are intended to continue to facilitate legitimate and beneficial access to the registers of companies and registered schemes whilst ensuring that improper uses of registers are eliminated.

This paper outlines four proposals which would amend the *Corporations Act 2001* (Corporations Act). If enacted, these proposals would:

- require a proper purpose for accessing a register to be demonstrated before a company is required to provide access;
- set down a three-tiered fee structure for obtaining access to a register, with the fee chargeable to be based on the number of members a company has;
- require a company to provide an electronic copy of its register in a format compatible with the requestor's software; and
- require a requestor who seeks access to a company's register which is kept electronically to view that register on computer.

The Government is particularly seeking comments on any unintended consequences these proposals may have should they become law.

The options paper also canvassed other reform options aimed at enhancing investor protection and reducing the risks posed by people that make predatory unsolicited offers to purchase shares. The Government expects to make further announcements relating to these issues in the near future.

PROPOSAL 1: A PROPER PURPOSE TEST TO ACCESS REGISTERS

BACKGROUND TO PROPOSAL

Historically, companies and registered schemes¹ have been required to keep registers of their members. These registers are considered public documents. They provide necessary information to assist current and future members exercise their membership rights, and members and interested third parties to engage in commerce.

The legitimate and beneficial reasons for accessing a member register are now much wider than the original objective, which was to enable creditors to discover the identity of members and the extent to which they were liable to contribute to the company's capital.² Access to the register of members facilitates good corporate governance through member engagement and participation.

Some reasons that a person may seek to access a register include those set out below.

- 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.
- Members or interested third parties wishing to canvass a small number of members to identify sellers, as a step preliminary to a takeover bid.³
- 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.
- Candidates for directorship contacting members about their election.

While a company must allow anyone to inspect or copy the register, privacy concerns are addressed by the *Corporations Act 2001* (Corporations Act) which restricts the use of information obtained from a register.⁴ A person can only use or disclose the information if it is relevant to the holding of the interests recorded in the register or the exercise of the rights attaching to them, or the company consents.⁵ For example, the use of information on the

1 For ease of reference, in this paper a reference to company should be read as including a reference to a registered scheme, where appropriate.

2 See for example *Oakes v Turquand* (1867) LR 2 HL 325, 366.

3 In the context of a takeover, see also subsection 641(1) of the Corporations Act in relation to information a target company is required to provide to a bidder once a bidder's statement has been given.

4 *Corporations Act 2001*, section 173. The Court can compel compliance with this right under section 1303 of the *Corporations Act 2001*.

5 *Corporations Act 2001*, section 177.

register for the direct marketing of goods or services would be prohibited.⁶ The restrictions on use of the information contained on the register, and the sanctions applying to misuse, protect members from undue intrusion.

Not only are the legitimate reasons for accessing member registers now much wider than the original intent, but developments in other areas of the law, such as privacy, raise the question of whether the law governing access to registers requires amendments to balance new competing policy considerations.

The options paper canvassed a particular model for a proper purpose test which was largely based on the test adopted by the United Kingdom (UK) in its Companies Act 2006. Under that model the Corporations Act would be amended to provide a company with the ability to prevent a member or third party from accessing its register unless the member or third party satisfies the company that they wish to access or take copies of the register for a 'proper purpose'. Under the UK proper purpose test the company would be required to apply to the courts or an external dispute resolution body to determine whether the request satisfies the test.

Submissions to the options paper reflected widespread support for the introduction of a proper purpose test. However, there were varying views as to best way in which to implement the test.

Proposed reform

The proper purpose test that is being proposed was not specifically raised in the options paper. The proposed test specifically targets improper uses of a register and will preclude the use of a register for the purpose of making unsolicited share offers for less than market value. The test does not seek to permit specific behaviours and as such would not set out proper purposes. Instead, the test will operate to exclude undesirable uses of the information on a register and, as such, would specify certain improper purposes. Accordingly, this method will be more effective in preventing the types of behaviour associated with use of a register that are causing concern, rather than attempting to define all purposes that could be considered proper.

Improper purposes would be specified in the Corporations Regulations 2001 (Corporations Regulations) to allow flexibility to, both, add other purposes, and amend or remove purposes where necessary.

Specifically, the test will set out what is required to be included in an application for access to a register, including the purpose for which access is sought. It will provide the company with the power to determine whether a purpose is proper but give the applicant the right to seek judicial review should they not agree with the decision of the company. As previously mentioned, a non-exhaustive list of improper purposes would be specified. Additionally, the Australian Securities and Investments Commission (ASIC) will produce guidance material on what purpose could be considered proper. New offences will be established that, in general, relate to issues such as improper use of register information, and false and misleading applications.

Further information about the specific aspects of the proposed test is set out below.

⁶ See note to subsection 177(1) of the *Corporations Act 2001*.

Applications for access

The Corporations Act would be amended to insert a provision allowing a company to refuse members or third parties access to its register unless they satisfy the company that they wish to access or take copies of the register for a 'proper purpose'.

A person seeking a copy of the register would be required to make a request to the company that includes:

- their name and address (for an individual) or the name and address of the person responsible for making the request (for an organisation);
- the purpose for which the information will be used; and
- whether the information will be disclosed to a third party.

Proper and improper purposes

The term 'proper purpose' would not be defined in the Corporations Act. Instead, guidance would be published by ASIC on what constitutes a proper purpose.

A non-exhaustive list of improper purposes would be specified in the Corporations Regulations. Four purposes that have already been identified as improper uses of the register are:

- the solicitation of donations from shareholders by specific groups in the community, such as charities;
- the solicitation of clients by brokers;
- the gathering of information regarding the personal wealth of shareholders; and
- the making of an off-market offer to purchase securities in a listed company, other than for a takeover.

Applicant's right of review

Should the company decide that the applicant's intended purpose is improper, the applicant would have 20 days to apply to a court for review of a company's decision if they believe that their intended purpose is proper.

Role of the court

Where an application is made, the court would review the request for a copy of the register with reference to the improper purposes specified in the Corporations Regulations and guidance material produced by ASIC.

Where a court is satisfied that the copy of the register is not sought for a proper purpose, an order would be made for the company not to comply with the request (or similar requests). The court may also order costs in favour of the company or the applicant. Where the court is satisfied that a copy of the register is sought for a proper purpose it would make an order for the company to comply with the request (and similar requests).

Related offences

Under the proposed test it would be an offence:

- for a person, in applying for access to a register, to knowingly or recklessly make a statement that is misleading, false, or deceptive; and
- for a person to do anything that may result in the information contained in the register being disclosed to another person if they suspect that person may use the information for an improper purpose.

Impacts of the proposal

There would be various impacts of implementing this proposed test on corporations, shareholders, and persons seeking to access the register.

For corporations, a proper purpose test would be likely to decrease costs in dealing with requests for access by providing clear guidance about instances in which requests to access a register could be denied. It is also anticipated that application of the test will result in fewer requests being made to companies by discouraging people from seeking access for improper purposes.

Shareholders, particularly the more vulnerable and less educated investors targeted by unsolicited offers to purchase shares, would benefit from no longer receiving these offers. ASIC's consumer research indicates most shareholders who accept these offers do not understand that they are selling their shares or that the price offered is significantly below market value, despite the required warnings. However, any shareholders that use the unsolicited offers as a way to easily sell their shares may be disadvantaged. In general, though, shareholders should benefit from the increased protection of the personal information offered by this proposal, particularly given the present ability of organisations seeking donations and brokers seeking clients to by-pass the current prohibition on using a copy of a member register for direct marketing to shareholders.

For people seeking access to a register, there will be a requirement to include more information in their written requests for access than is currently required. However, the requirement to state a reason for seeking access should impose only a minimal increase in compliance burden. This proposal would not impact those seeking to access the register in order to exercise their rights as a shareholder.

Focus questions

- 1 Will the proposal to require a proper purpose test to be satisfied before a company is required to grant access to its register result in any unintended consequences?
- 2 Is the period of 20 days within which to make an application for judicial review appropriate?
- 3 Are there any other improper purposes that should be specified by regulation?
- 4 Is there any other conduct related to this proposal that should constitute an offence?

PROPOSAL 2: A TIERED FEE STRUCTURE

BACKGROUND TO PROPOSAL

While members of the company are allowed to inspect a register without charge, non-members must pay a fee up to the prescribed amount to inspect a register. In addition, companies must give a member or non-member a copy of a register (or a part of a register) within seven days of that person requesting a copy and paying the fee up to the prescribed amount.⁷

For non-members, the company may charge up to \$5.00 for each inspection if the register is not kept on a computer, and up to 'a reasonable amount that does not exceed the marginal cost to the company of providing an inspection' if the register is kept on a computer.⁸

Where a person requests a copy of the register, the company may charge up to 50 cents per page if the register is not kept on a computer and up to 'a reasonable amount that does not exceed the marginal cost to the company of providing an inspection' if the register is kept on a computer.⁹ The absence of an explicit fee for accessing a register kept on computer attempts to balance the two competing policy considerations of facilitating 'rapid and easy access' by the public to a company's register in the interests of promoting good corporate governance and commerce, and managing compliance costs for companies.¹⁰

Employing the concept of 'marginal cost' attempts to allow companies to set fees with respect to their particular operational costs of providing access. The aim of the 'reasonableness' component is to ensure companies do not set so high a price for access that results in access not occurring. It also recognises that access to the information is largely dependent on the company considering that the information is more relatively discoverable by the company than the company's members or interested parties.

The rules must also cater for the costs of non-member access to registers for the reasons stated above. While a company is generally precluded from recovering costs associated with setting up and maintaining its registers, the Corporations Act provides that the company may recover fees in certain circumstances associated with requests to inspect or provide copies of its registers.

Costs of accessing a register

The decision of the Federal Court of *Direct Share Purchasing Corporation Pty Ltd v AXA Asia Pacific Holdings Limited* (AXA decision), determined that the cost of accessing a register equates to \$250 per copy. Since the AXA decision, which was confirmed on appeal to the full bench of the Federal Court, numerous representations have been made to the Government concerning the effect of the decision in attracting requests for companies to provide copies of member registers for \$250. Companies argue that this amount does not necessarily reflect the cost of producing a copy of the register.

⁷ *Corporations Act 2001*, subsections 173(2) and 173(3).

⁸ Item 1 of Schedule 4 to the Corporations Regulations 2001.

⁹ Item 3 of Schedule 4 to the Corporations Regulations 2001.

¹⁰ The then Attorney-General, the Hon Michael Lavarch MP, Second Reading Speech: First Corporate Law Simplification Bill 1994 (Cth), House of Representatives, Parliamentary Debates, vol HR 199, 1995, p 709.

The options paper canvassed six options to address the complex operation of the current provisions. All respondents were in favour of changing the current regime but problems were identified with all options. These problems are summarised below.

- If the status quo was maintained, the introduction of a proper purpose test would resolve the issue of inappropriate access, but companies would still be left with the decision that \$250 is considered the reasonable cost.
- Removal of the 'marginal cost' element of the current test would leave the concept of reasonableness, which generally requires an objective evaluation of the particular circumstance of each case.
- Removal of marginal cost may avoid the complexities identified in the AXA case but the use of reasonableness alone would not provide sufficient guidance for companies to determine what costs should be included when seeking to recover fees.
- Allowing companies to pass on the full cost of access in the absence of a reasonable qualifier would permit companies to frustrate access by setting a high price for access.
- The introduction of a market fee, whereby members and interested parties would negotiate a price with a company, may result in the removal of regulator requirements on companies, particularly where they are greater than the transaction costs associated with negotiation. On the downside, companies may be able to manipulate prices so as to preclude optimal access to the register.
- Requiring companies to disclose to their members their policies for negotiating costs for access to company registers is likely to impose additional compliance costs on companies and lead to unsatisfactory outcomes for small investors, who do not have the same bargaining power as large investors.
- Setting a fee that aligns with the current takeover fees would be simple to comply with and could be readily reviewed to ensure that it reflects current market prices associated with providing access. This would not, however, represent a reasonable option for the majority of investors. For example, the cost of a copy of the Commonwealth Bank's register, with a current membership of 770,000, using the takeover prescribed fee, would be \$77,000.

Although submissions generally favoured an option that would create a degree of certainty in the fee payable, such as corporations passing on the full cost of producing a copy or aligning the fee with the takeovers fee, such options could act as an impediment to legitimate use of the register. For this reason, an alternative option is proposed.

Proposed reform

A three-tiered fee structure would be prescribed in the Corporations Regulations which would more adequately reflect the cost of producing a copy to a corporation and therefore reduce the net cost to companies of complying with requests. The proposed structure would also provide certainty as to the amount that is payable for a copy. This would reduce the complexity and costs for the company in determining an appropriate fee. It would also eliminate the risk of substantial disputes arising between parties as to the fee that should be payable.

The first tier would apply to a company with up to 5,000 members and impose a flat fee of \$250. The \$250 fee determined in the AXA case is based on the Court's assessment of a

reasonable fee, which took into account expert evidence from an economist, an IT professional, and a state manager with Computershare.

The second tier would apply to a company with between 5,000 and 20,000 members and impose a fee of \$250 plus \$0.05 for each member in excess of 5,000. For a company with 20,000 members, a copy of the register would cost \$1,000.

The third tier would apply to a company with more than 20,000 members and impose a fee of \$1000 plus \$0.01 for each member in excess of 20,000. A copy of the register of a company with 500,000 members would cost \$5,800.

A cost of \$0.05 per additional member recognises that there are marginal costs associated with providing additional names. The reduction of this marginal cost to \$0.01 reflects that there are economies of scale in producing a copy of a register with a large number of members.

In adopting a tiered approach, the fee payable recognises that the cost of producing the register should not be an impediment to obtaining a copy and reflects that adopting a set price per name should not operate to prevent access to copies of the register.

Focus questions

- 5 Will the proposal to impose a three-tiered fee structure for obtaining a copy of a register result in any unintended consequences?
- 6 Are the proposed fees for each tier appropriate?

PROPOSAL 3: FORMAT FOR COPIES OF THE REGISTER

BACKGROUND TO PROPOSAL

Currently, where a person requests an electronic copy of a register, companies must provide the data in an electronic format that is readable, but there is no requirement to provide the data 'formatted for the person's preferred operating system'.¹¹ As a result, companies do not have to provide the data in the format requested by the person seeking a copy of the register.

There would be benefits, and cost reductions, for the person requesting the electronic copy of the register if they received the data in their preferred format. An example would be a copy provided in a format that allows the data to be easily read, used, and manipulated for the purposes for which the data was requested (and for which the legislation allows).

As discussed previously, the purpose of the rules for maintaining and allowing access to company registers is to facilitate fast and easy access by the public to the information for a reasonable cost. That companies are able to provide the information in a format that is not the preferred format does not appear to align with the intention behind the provisions.

It is arguable that this condition was originally intended to reduce costs to companies that have different operating systems from the person requesting the copy. However, given the advances in technology, as well as the convergences of operating systems since these provisions were enacted, these compliance costs may no longer be significant enough to warrant retaining the condition.¹²

In addition, the legislation explicitly refers to 'floppy disks' as a medium on which the electronic information can be provided. This reference is now largely outdated, as this medium has been replaced with newer and better technologies for portable electronic data storage devices, such as CD ROMs, DVD ROMs, and USB flash memory drives (or thumb drives).

The options paper proposed that the law be amended to require an electronic copy be provided in the format requested, unless both parties agree to an alternate format. The submissions generally appreciated that the format of an electronic copy of the register should not be used to frustrate access, however, the majority favoured including either a specific format in the Corporations Regulations, or a reference to an industry standard. All submissions supported the removal of references to outdated technology and favoured the use of a more technology-neutral term, such as portable electronic storage device, which would encompass CD-ROM, DVD-ROM and USB memory drives.

Proposed reform

The Corporations Act would be amended to include a regulation-making power that would enable a number of formats and device mediums to be prescribed in the Corporations

¹¹ See subsection 173(3) of the Corporations Act.

¹² This condition was also criticised by Justice Finkelstein in the AXA case as possibly allowing companies to frustrate the access regime. See discussion at [10].

Regulations. The prescribed formats would encompass those currently supported in the business community and be determined in consultation with stakeholders.

Focus questions

- 7 Will the proposal to enable a variety of portable storage devices to be used to obtain an electronic copy of a register result in any unintended consequences?

PROPOSAL 4: INSPECTION OF A REGISTER MAINTAINED ON A COMPUTER

BACKGROUND TO PROPOSAL

If a company keeps a register on a computer, a person wishing to inspect the register is able to demand that the company provide the register for inspection in hard copy, unless both the person and the company agree that the person inspect the register on the computer.¹³

This can force a company to incur the expense of preparing a hard copy of a register, even when the person only intends to inspect the register and does not intend to retain the hard copy. Moreover, companies may not be able to recoup the costs associated with preparing the hard copy, as opposed to when the person requests a copy of the register.

The current provisions fail to reflect the increasingly computerised nature of record keeping and increasing levels of computer literacy. These provisions also expose companies to the costs associated with maintaining the register both on computer and in hard copy.

Submissions to the options paper generally supported the register being available for inspection on a computer where it was maintained electronically, provided that adequate security procedures were implemented to protect the details of members. This is primarily an issue where a register contains additional information to that required under the Corporations Act. None of the submissions indicated that there would be difficulties in addressing these security concerns.

Proposed reform

The Corporations Act would be amended to allow a register that is maintained electronically to be viewed on computer. This will ensure that companies are not subject to undue costs of providing access in hard copy each time it is requested when they have elected to provide access electronically. The proposed change would reflect the modernisation of record keeping and facilitate costs savings associated with improvements to technology. In addition the possibility of copies of the register being obtained without payment of the prescribed fees will be avoided.

Focus questions

- 8 Will the proposal to require an electronically stored register to be viewed on computer result in any unintended consequences?

¹³ See *Corporations Act 2001*, subsections 173(1) and 173(1A).