CHARTERED SECRETARIES
AUSTRALIA

Leaders in governance

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CSA comments on access to and use of the register of members of a company

Background

CSA represents the company secretaries and other governance professionals of most of Australia's largest public and private companies, most of whom are involved in maintaining registers of members and considering requests to access and use those registers. CSA's members have had to deal with requests from a number of bodies to access the register and have had to respond to shareholders who have objected to the use of that information.

CSA believes that there are two separate issues that require consideration in relation to access to and use of the register:

- the unclear relationship between ss 173 and 177 of the Act
- the use of information from the register to make offers to purchase shares that seek to take advantage of unsophisticated investors in a largely unregulated environment.

Unclear relationship between ss 173 and 177 of the Act

Under s 173(3), companies and registered schemes are obliged to provide a copy of all or part of their register of members within seven days to a person requesting access to the register and paying the required fee.

Section 177(1) places a restriction on information from the register being used to contact or send material to the members, and provides the example of putting a person's name and address on a mailing list for advertising material as falling within this restriction.

CSA members believe that there is considerable confusion as to the position of companies:

- either giving access to registers, or
- attempting to comply with s 177(1) and hence denying access to registers.

On the issue of giving access to registers, minimal guidance is provided in s 177(1A)(a) regarding the circumstances in which information from the register can be used. It would be very helpful if this guidance could be expanded and CSA will actively advocate for such expanded guidance.

On the issue of attempting to comply with s 177(1) and hence denying access to registers, CSA is concerned that when companies or company secretaries deny access to the register, because it is believed that the information will be used for improper purposes under the Act, currently s 177(1) provides no protection to the company or the company secretary.

At present, if a company believes it is bound to refuse access to the register, it is left to a court of law to decide if the purpose for which the access is requested falls within the restrictions of s 177(1).

CHARTERED SECRETARIES AUSTRALIA LIMITED ABN 49 008 615 950

LEVEL 10, 5 HUNTER STREET, SYDNEY NSW 2000, GPO BOX 1594, SYDNEY NSW 2001 **TEL** +61 2 9223 5744 **FAX** +61 2 9232 7174 **EMAIL** info@CSAust.com

www.CSAust.com

In summary, there is a provision in the Act relating to granting or denying access to the register but it provides very little guidance as to how to apply it. CSA strongly believes that if a company or company secretary has acted at all times in good faith in denying access to a company register, then no liability should attach should a court later decide that access should be granted.

For example, CSA members have frequently been approached by investment and advisory groups seeking to introduce shareholders to their services by offering them access to the group's latest research report on the company in question. Such parties note that s 177(1A) overrides s 177(1) if the use of the information is relevant to the holdings of the interests recorded in the register and claim that the distribution of research reports to company members falls within this provision.

CSA is concerned that the distribution of such information may well be marketing. CSA members certainly know from their dealings with many disgruntled company shareholders, angry that their names and addresses have been provided to third parties, that such shareholders view these approaches as nothing more than the investment and advisory groups seeking to promote themselves to shareholders.

Advocacy

CSA advocates that the Act should offer greater certainty as to when companies can and cannot accept or decline a request to access the register of members. CSA also advocates that, if a company or company secretary has acted at all times in good faith in denying access to a company register, no liability should attach should a court later decide that access should be granted.

The use of the register to make offers to shareholders

CSA notes that it is becoming common for information from the register to be used to make unsolicited offers to shareholders to purchase their shares. However, considerable concern has been expressed publicly about these offers where they are not part of a takeover bid. CSA strongly endorses these concerns.

The offerors in these instances argue that their request for information from the register is relevant to the shareholding and therefore within the s 177(1A) exemption. CSA notes that if such offers had been made as part of a takeover offer, they would be subject to regulation as set out in Part 6 of the Act, which is designed to protect shareholders. Yet because such offers are not takeover offers, they are largely unregulated, despite the fact that they are typically significantly below market value and frequently target unsophisticated investors. In many instances, the investors who are targeted may have received shares via a demutualisation or by inheritance and may have little idea of their true or potential value. CSA believes this anomalous regulation in relation to investor protection is a matter that requires urgent attention.

CSA believes that a number of issues arise as a result of these offers being largely unregulated. Some examples include:

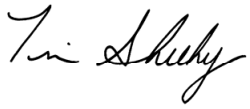
- While the offerors in these instances may provide both the market price per share and the price being offered, as well as the payment terms, this latter information is not explained in detail, thus making it difficult for shareholders to clearly comprehend the exact nature of the offer. For example, where offers set terms involving payment by instalments spread over a number of years, there is no guarantee as to how those payments are going to be made as the years progress. For example, there is no mention of a trust fund which would secure payment even if the offering company ceases to exist. CSA notes that, under the trade practices legislation, companies need to ensure that important contractual information is not hidden in fine print or not provided at all, in order to protect consumers, and queries why the government believes it is acceptable that offers for shares can utilise this potentially misleading form of offer.

- The tax implications of offers involving instalment payments remain unclear or undisclosed to shareholders, that is, that the full capital gains tax (CGT) liabilities for individuals may fall in the first year, even though they are only receiving a fraction of the offer price at that time, and are surrendering their rights to any future dividends. Essentially, the offers being made are self-funding (for the offeror) out of dividend cash flow but this is not being made clear to the selling shareholders. In many instances, it is highly unlikely that the first instalment payment received by the selling shareholder will be sufficient to meet any CGT liability. In this scenario, Centrelink and social service benefits may also be jeopardised.

Advocacy

CSA advocates that consideration should be given to greater regulatory control through ASIC of unsolicited offers to shareholders to purchase shares where the offer is not part of a takeover bid.

In addition, in order to ensure that consumers are protected from misleading and deceptive offers, CSA advocates that, in the case of offers to shareholders to purchase shares where the offer is not part of a takeover bid, offerors should make and disclose appropriate arrangements for the security of payment, if the offeror is paying on terms. We believe it may also be necessary to consider the need for additional disclosure in relation to potential tax and other consequences arising from accepting the offer, as we are of the view that this would be a highly emotive matter for some individuals.



Tim Sheehy
CHIEF EXECUTIVE