



**CHARTERED SECRETARIES
AUSTRALIA**

Leaders in governance

18 March 2011

Belinda Gibson
Deputy Chair
Australian Securities and Investments Commissions
GPO Box 9827
Sydney NSW 2001

Dear Belinda

***Access to the register of members and the regulation of
unsolicited off-market offers to purchase securities***

Chartered Secretaries Australia (CSA) has advocated for many years that reform was required in relation to access to and use of the register of members of companies and its treatment in the *Corporations Act 2001* (Cth) and was extremely pleased to see, and very supportive of, the government acting last year to introduce a proper purpose test in relation to the use of the register.

However, CSA Members wish to bring to your attention that we have been made aware that, despite the new legislation, the well-known offeror to purchase shares at below-market value, David Tweed, has been threatening companies with legal action for not allowing him to inspect and copy the register of members, claiming that he has found a loop-hole in the revised legislation.

His claim is that under s 1300(3) of the Corporations Act, a person permitted to inspect a book (the definition of which includes a company's register of members) may make copies and any person who refuses is guilty of an offence. Apparently, he is asserting that making copies under this section excludes the proper purpose test introduced by the new legislation. Both companies and now senior management of those companies personally are being threatened with legal action where they have not allowed Mr Tweed to inspect and take copies of the register of members under that section.

CSA Members point out that since the change in the legislation, the law is now very clear that the proper purpose test applies irrespective of how the information comes into a person's possession. Pursuant to s 177(1AA) of the Corporations Act, a person must not:

- (a) use information obtained from a register kept under this Chapter (a company's register of members is required to be kept under s 169 of that Chapter) for any purpose prescribed by regulations made for the purposes of paragraph 173(3A)(b) (the proper purpose test), or
- (b) disclose information of that kind knowing that the information is likely to be used for any such purpose.

As such, the method of getting a copy of the register of members, either through s 1300 or s 173 of the Corporations Act is irrelevant; a person must comply with the proper purpose test when using the information contained within the register.

Moreover, companies and their personnel are under an express legal duty not to disclose the information on the register knowing that the information is likely to be used for an improper purpose and so are well within their rights to refuse access to the register of members or copies to be taken until such time as surety is given that the information on the register will not be used for an improper purpose.

CSA is very concerned that companies, and now their personnel, are being threatened with costly and vexatious legal claims as part of an attempt to bring significant pressure on those companies to potentially breach their legal obligations and provide information which is likely to be used for an improper, and therefore illegal, purpose. This of course is a real threat to those smaller companies and their personnel that simply do not have the resources to fight such vexatious claims, resulting in a very real risk to shareholders' privacy, which the revised legislation seeks to secure.

Such vexatious action should not be allowed to continue. CSA notes your comments in the recent ASIC Media Release, 11-24AD *ASIC acts on low-ball NIB offer*.

ASIC has previously made it clear that we want to stamp out the practice of making illegal unsolicited share offers. The recent changes to the law enable ASIC to crack-down on sharemarket predators. We'll use our powers to protect retail investors when the law has been broken.

We commend ASIC for this stance and call upon it to clarify that the law applies in the manner that CSA Members believe it does, that is, s 177(1AA) applies to the use of the information contained on the register no matter how it is obtained.

Should ASIC agree with CSA Members that s 177(1AA) applies in this fashion, CSA is of the view that it would be very useful for ASIC to disseminate this information via a media release and prominently on its website, to assist smaller companies to gain clarity as to how the law operates. Public notification from ASIC that the information contained on a register cannot be used for an improper purpose regardless of how it is obtained would support companies to formulate a response should they find themselves approached by Mr Tweed or other similar offerors. We would also ask ASIC to consider whether there are any additional measures or powers at their disposal to prevent individuals from trying to subvert the law in this manner.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Tim Sheehy', written in a cursive style.

Tim Sheehy
CHIEF EXECUTIVE