CHARTERED SECRETARIES
AUSTRALIA

Leaders in governance

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Share Register and USO Options Paper
Corporations and Financial Services Division
The Treasury
Langton Crescent
CANBERRA ACT 2600

By email: unsolicitedoffercomments@treasury.gov.au

Dear Minister Bowen

Access to share registers and the regulation of unsolicited off-market offers

Chartered Secretaries Australia (CSA) welcomes the opportunity to comment on the options paper: *Access to share registers and the regulation of unsolicited off-market offers* (the paper).

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.

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. Our members are conscious that, despite all their efforts over the years to bring this issue to this government's and its predecessor's attention, the law continues to permit third parties almost unhindered access to the registers of members. We therefore see this as an unparalleled opportunity for the government to act to remedy the shortcomings in the current law to protect the interests of shareholders.

Clarification of issue requiring reform

CSA notes that the paper views the problem of access to the register as being confined to access for the purpose of sending unsolicited offers to shareholders to purchase their shares at below-market value.

However, CSA believes that it is important to address the broader issue of shareholder privacy and not simply one aspect of the problem: unsolicited offers to purchase shares below market value.

There are two issues that require attention:

1. How to ensure 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, how to ensure 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's experience is that third parties are seeking access to share registers for the purpose of establishing mailing lists and marketing and charitable fundraising databases.
2. How to ensure that there are effective consumer protection provisions to protect vulnerable investors from predatory and below market unsolicited offers for their shares. A proper purpose test is unlikely in itself to protect shareholders from these offers as it is likely that access to the register for the purpose of making an offer to buy shares will continue to be a proper purpose.

CSA strongly urges the government to retain the distinction between these two separate issues when considering reform.

Background to CSA call for legislative reform

CSA's initial concerns about access to the register were sparked by requests for copies of company registers in order to make unsolicited offers to shareholders to purchase shares below market price. Such offers take advantage of unsophisticated and vulnerable shareholders. 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.

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, including from brokers and charities, who 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.

CSA does not consider that the level of fees is an appropriate mechanism to regulate access to the register. Those who stand to gain commercially from access to the register will be willing to pay high fees regardless of the propriety of their purpose; those with legitimate reasons for accessing the register — for example, members seeking to raise concerns with other members — may be inappropriately deterred. The solution must be a principles-based mechanism to regulate access to shareholder information.

Alignment with National Privacy Principles

The paper states that 'the restrictions [on use of the information contained on the register] are consistent with the National Privacy Principles set out in Schedule 3 of the *Privacy Act 1988* (Privacy Act)' (page 2).

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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

CSA does not agree with this statement.

CSA believes that, currently, shareholder information does not have 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, but this does not apply to shareholders' personal information on a share register, which may — and in fact must under the current legislation — be disclosed to third parties without the consent of the shareholder.

Our reasons for calling for reform 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. This obligation should be subject to the same or similar exceptions to Principle 2 of the National Privacy Principles set out in Schedule 3 to the Privacy Act. At present, shareholder consent is *not* required to access or use their details on a share register.
- Consistent with the Privacy Act, the principle should be that shareholder personal information is to be kept private unless a specific 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 cannot prevent public disclosure of 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, despite the government encouraging Australians to directly invest. 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 subject neither to regulation, nor to shareholder consent to disclosure of their details for the purpose of receiving such offers.

As an overarching principle, **CSA recommends** that companies should only be permitted to use or required to disclose shareholder information for the purposes for which it was provided or with the consent of the shareholder or as required by law.

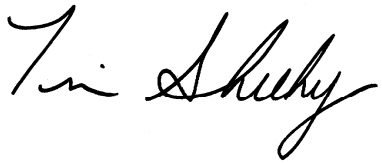
CSA recommends that third parties should only be permitted to have access to or copies of shareholder information:

- with the consent of the shareholder (for example, individual shareholders should be able to authorise their brokers, financial advisers, accountants, lawyers etc to access their personal information)
- with the consent of the company acting consistently with the National Privacy Principles (for example companies need to disclose shareholder information to printers, mailing houses, banks etc in connection with the distribution of shareholder communications and the payment of dividends)
- where the person seeking access has lodged a bidder statement in connection with a takeover offer for the company
- where there is an existing express right of access under the Corporations Act (for example s 249E(3) gives a right of access to the register to members seeking to convene a meeting of the members of the company)
- as otherwise required by law (for example, revenue and law enforcement authorities may have rights of access to shareholder information), or
- for a purpose determined by an external dispute resolution body, such as the Takeovers Panel, or the courts to be a proper purpose, having regard to the legitimate privacy and other interests of shareholders and where the purpose is relevant to the holding of their shares.

Our views on the specific options put forward for consultation in the paper are set out on the following pages.

In preparing this submission, CSA has drawn on the expertise of the members of our two national policy committees.

Yours sincerely



Tim Sheehy
CHIEF EXECUTIVE

PART 1: ACCESS TO COMPANY AND SCHEME REGISTERS

1 Proper purpose test for access to registers

The paper states on page 2 that: ‘The restrictions on use of the information contained on the register, and the sanctions applying to misuse, protect members from undue intrusion.’

CSA disputes the veracity of this statement.

The current law does not protect the privacy of shareholders in a way that shareholders are entitled to expect or as many parties mistakenly believe that it already does.

Background

The law as it stands neither achieves the policy objective, which was to provide protection and privacy to shareholders, nor enables companies to refuse a request for access to the register for improper purposes.

A request can be refused if a third party specifically states that they want to use the register for a purpose prohibited by s 177 — but if an access seeker has ascertained that they can get an extremely cheap mailing list by not disclosing the purpose for which they want the register, the likelihood of them disclosing their actual purpose may be extremely low. Under the current provisions, any request that does *not* make an outright statement that the purpose for which the register is sought is prohibited under s 177 must be met, even when the company suspects that the purpose for which the register is sought may be improper.

A company that becomes aware of a potential breach of the Act can of course report the matter to ASIC. However, CSA is unaware of any action having been taken against any person to whom the register has been supplied when the company has raised concerns with ASIC that the request is for an improper purpose. As importantly, the shareholders’ privacy has already been breached, and they are already on an access seeker’s database — asking a regulator to investigate at this point is well and truly shutting the stable door after the horse has bolted.

CSA also contends that it is very difficult for a regulator to enforce the current provisions. In many cases it may be very difficult to prove that a piece of direct marketing from a third party sent to those on its database was mailed to an address that was obtained from a particular company’s share register.

Moreover, a number of charities are now approaching companies seeking access to and use of the register of shareholders, stating that they wish to engage in fundraising.

Currently the law provides little comfort to shareholders and supports abuse of shareholder privacy by any third party. CSA members believe that the government must act to change this.

Who is requesting the register?

Our members note that, in their experience, 95 per cent of requests for access to company registers are from non-shareholders.

For example, a survey of our members in the top 100 ASX listed companies reveals that the vast majority of requests for the register came from third parties, including offerors seeking to purchase shares at below market value, brokers, charities, investment companies and genealogical research companies. CSA is happy to provide details on a confidential basis.

How easy is it for a third party to access the register?

There is no restriction in the current law on who may obtain a copy of the register. The only restriction is on the use that may be made of the information on the register. Section 177(1) prohibits using the information to contact or send material to a person. However, s 177(1A) creates an exception where the use or disclosure of the information is relevant to the shareholding or approved by the company.

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 they consider the use of the information to be 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 believes that the distribution of such information is pure and simple 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.

As of last year when the AXA decision was handed down, charities are now also seeking access to the register of members, and our members also believe that such requests are efforts to expand the database of the charity either for the purposes of marketing or, as specifically stated at times, for the purposes of fundraising.

For example, one charity originally wrote to a number of large, public listed companies noting it wished to obtain a greater understanding of the wealth of the individuals on the register. This request for the register acknowledged the requirements of s 177(1) and stated that the charity would not use information obtained from the register to contact or send information to shareholders listed on it.

Our members are concerned in these sorts of cases that the register would be one of multiple sources of information used by these charities to contact those listed on the register and therefore the request may fall within the prohibition.

ASIC agreed with our concerns when we raised them late last year and contacted this particular charity to express its reservations about the intended use of the register. The charity simply waited four months, then sent a new letter to the same companies it had previously approached, making sure its request was differently worded.

The new letter from the charity states it wishes to contact shareholders to donate their shares or dividends to the charity, that is, it intends to use the register for fundraising. It contends that such a use is an approved use of the register. Those companies contacted by this particular charity that we know of are ANZ, Westpac, BHP Billiton, Westfield Group, Woodside, AMP, Commonwealth Bank, Wesfarmers, Amcor, Fosters and Telstra.

The current law does not support the policy objective

Sections 177(1) and 177(1A) were originally enacted to prevent misuse of the information on registers in response to concerns that information from registers would be used to invade the privacy of shareholders by compiling mailing lists for direct marketing purposes. That is, these sections were aimed at protecting the privacy of members, while 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 third parties such as brokers and charities who are seeking to extend their marketing and fundraising capacity and invade the privacy of shareholders, the current provisions are not achieving the policy objective.

It was also originally 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. We note that the Explanatory Memorandum accompanying the First Corporate Law Simplification Bill 1995 (Cth) contemplated that '[s]hareholders may be expected to hold 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 a prohibited purpose
- 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 (eg, 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 by the party making the request)
- cannot withhold access even if the company believes that the purpose for which a person is seeking access is improper.

Additional risk attached to current regulatory framework

CSA notes that, at present, with a register of members costing $250 and available to any third party that requests it, there is a very real risk of general data collection that could provide for serious invasions of the privacy of Australian shareholders.

At present, it is extremely easy for any third party to gain access to the registers of the majority of Australian listed companies at very small cost. Advances in technology in turn provide for the data to be sorted and collated according to any requirement. The data from each register can then easily be merged, providing one individual or organisation with a comprehensive database of the wealth holdings of Australian shareholders, including personal information such as addresses. Indeed, this is already what is being publicly proposed by one particular charity, that has stated that its interest in gaining copies of the registers of various companies is so that it can understand the wealth holdings of private shareholders in Australia's largest listed companies. The information in this merged database can in turn be sold to any other third party.

CSA believes that facilitating such amassed data collection by unregulated third parties is not in the interests of any Australian shareholder or, indeed, in the interests of the Australian economy as a whole.

The proper purpose test in UK legislation

The UK legislation contains provisions that specify that requests to access the register must be for a 'proper purpose'. Individuals requesting access must disclose their name and address, and if the request is made on behalf of an organisation the name and address of the person making the request on its behalf must be given. They must also disclose the purpose for which the information will be used. If they are making the request on behalf of someone else, they have to give the same details for that person.

The company must comply within five working days. A company cannot simply decline a request. If it considers that the request is not for a proper purpose it may apply to the court not to release the register. It also has to notify the person making the request that it has applied to the court. If the court considers that the request is not for a proper purpose it will direct the company not to comply and may order costs against the person making the request. If the court does not direct the company not to comply with the request then the company must do so when the court gives it decision or when proceedings are discontinued.

The Act does not specify what constitutes a proper purpose, but the Institute of Chartered Secretaries and Administrators' (ICSA) Guidance Note on this matter notes that a proper purpose would include members contacting other members in order to exercise their rights under the Companies Act. The ICSA Guidance Note is attached to this letter.

It is important to note that it is the company that must initiate the court action if it wishes to refuse access to the register. The party requesting access does not have to initiate court action to gain access.

CSA sought advice from ICSA on the operation of the proper purpose test in the UK since its introduction. Advice from ICSA indicates that the proper purpose test has been a success for shareholders and companies. It appears to be working smoothly, and there has been a decline in the number of requests from third parties. As the companies must initiate the court action to stop access to the register, companies would be held accountable for squandering company resources or denying shareholder rights in bringing court actions in cases where they know that the request for access is legitimate.

How should a proper purpose test work in Australia?

CSA recommends that the legislation should:

- specify that requests to access the register must be for a 'proper purpose'
- give clear guidance as to which purposes are 'proper' with scope for further clarification in the Regulations[3]
- require access seekers to give their name and address and, if the request is made on behalf of an organisation, the name and address of the person making the request on its behalf
- require access seekers to state the purpose for which the information will be used and, if they are making the request on behalf of someone else, the same details for that person

[3] For example, the guidance could note that shareholders accessing the register for the purpose of contacting other shareholders, or the launch of a takeover are proper purposes, while fundraising for charitable institutions, direct marketing, the provision of mailing lists to brokers and the creation of a database to further third-party interests are improper purposes.

- require access seekers to use the information only for the disclosed purpose and to return or destroy the information once that purpose is complete
- specify that the company must comply or refer the request to an external dispute resolution body within ten working days[4]
- specify that if it considers that the request is not for a proper purpose it may apply to an external dispute resolution body, such as the Takeovers Panel, not to release the register. The company would be required to notify the access seeker that it has applied to the external dispute resolution body. If the external body adjudicating whether the request is for a proper purpose considers that the request is not for a proper purpose it will direct the company not to comply, and if it does not direct the company not to comply with the request then the company must do so when the external dispute resolution body gives its decision. There should also be a mechanism to allow costs to be awarded against the unsuccessful party.

CSA considers that it would be preferable to have a body such as the Takeovers Panel adjudicate as to whether a request to access the register is for a proper purpose, rather than following the UK experience of referring such matters to a court. Our recommendation on this issue is based on:

- the current experience of the Takeovers Panel in making determinations on the proper purpose of takeovers
- the commercial acumen represented on the Panel
- the current experience of the Takeovers Panel in protecting shareholder interests
- the reduction in costs for parties in referring matters to the Panel rather than to the court
- the expedition of requests in referring matters to the Panel rather than to the court.

CSA is conscious that the Australian Shareholders' Association is concerned that any amendment to the law governing access to the register will impinge on shareholder rights. However, CSA's call for reform will not jeopardise existing shareholder rights. CSA notes that members already have protection embedded in the legislation to ensure that they can:

- ask the 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 emphasises that it has always contended and will continue to strongly contend that shareholder access to the register for the purpose of contacting other shareholders in relation to the governance and management of the company is a proper purpose.

CSA reiterates that increased privacy for shareholders would not affect existing rights to access and use the register for a proper purpose.

[4] The paper proposes that 'the Corporations Act would be amended to provide a company with the ability to prevent members or third parties from accessing its registers unless the members or third parties satisfy the company that they wish to access or take copies of the registers for a "proper purpose"' (page 3). CSA notes that the UK legislation does not give the company the right to make a final determination that a purpose for accessing the register is improper, and CSA *does not* recommend that in Australia the company should be given such a right.

2 Fees for copies of member registers

CSA does not consider that the level of fees is an appropriate mechanism to regulate access to the register. Those who stand to gain commercially from access to the register will be willing to pay high fees regardless of the propriety of their purpose; those with legitimate reasons for accessing the register — for example, members seeking to raise concerns with other members — may be inappropriately deterred. The solution must be a principles-based mechanism to regulate access to shareholder information.

CSA considers that, in principle, access seekers should be required to meet the costs incurred by companies (or in many cases their outsourced share registry provider) of providing access to or copies of the register. However, companies and registries should not be permitted to charge fees above their actual costs as a deterrent to those legitimately requiring access to the register.

Consistent with these principles, CSA considers that is in the interests of companies and access seekers that there be a readily determinable fee for access to registers that does not require in every case a difficult and possibly contentious estimate of reasonable or marginal costs. On this basis, CSA does not support the various options put forward in the paper (eg, marginal cost, reasonable cost, market cost etc) for clarifying the fee for accessing a register.

CSA recommends that a practical and workable manner in which to deal with fees for copies of the register is to:

- align the prescribed fee with, for example, the takeover prescribed fee of 10 cents per shareholder name and address, but set a cap so that those seeking copies of the registers of large, listed companies with an extensive shareholder base are not disadvantaged
- permit companies to reduce or waive the prescribed fee in the case of shareholder requests for copies of the register that are for a proper purpose
- provide the external panel with the right to vary the access fee in particular cases.

CSA believes that more work will need to be done on ascertaining what a readily determinable fee should be, but strongly believes that certainty as to the fee is required.

3 Format and medium for electronic copies of registers

CSA recommends removing the express reference to ‘floppy disks’ from the legislation and replacing it with a more general reference to ‘portable electronic data storage device’.

CSA recognises that companies should not be permitted to thwart access seekers by providing copies of the register in obscure or unusable formats. Conversely, companies should not be put to undue expense or inconvenience in providing a copy of the register in any format that the access seeker requests.

CSA recommends that the legislation should provide that copies of the register are to be provided:

- in the format and medium agreed by the company and the access seeker
- in a format and medium specified in the Regulations, or
- in a format and medium directed by the external panel.

CSA considers that it is desirable in the interests of certainty that the Regulations specify commonly used formats and media which should be acceptable to both the company and the access seeker. CSA considers that it is desirable that this is done in the Regulations which can be more readily updated to reflect developments in technologies, formats and standards.

4 Inspection of the register on a computer

CSA agrees that the current provisions do not reflect the increasingly digitised nature of record keeping and increased levels of computer literacy.

CSA recommends that where a register is maintained on a computer it should be inspected on a computer, unless both the access seeker and the company agree to an inspection of a hard copy.

PART 2: OPTIONS TO PROTECT RETAIL INVESTORS

All comments in this section relate to unsolicited offers to purchase shares at below-market value.

CSA notes that the paper states that: 'there is evidence to suggest that few people actually accept these offers' (page xi).

CSA has anecdotal evidence to suggest that quite a number of shareholders have accepted these offers, and continue to do so, and would be keen to review the evidence referred to by the government on this matter. CSA believes that the government should release its evidence, given its importance to any decision on this issue.

The number of our members who have had to deal with distraught shareholders or their relatives, as well as our multiple discussions with the registrars on this issue and their concern at the number of transactions recorded following a mail-out to members from offerors once they have a copy of the register, lead us to a very different conclusion from the paper.

CSA accepts, given that the issue of unsolicited offers to purchase shares at below-market value is one that has been bedevilling shareholders for many years, that there has been education on such offers provided by way of media coverage and that more shareholders are likely to be wary of such offers at the present time. CSA also accepts, given that the shareholders of demutualised companies were targeted again and again over some years, that many of the most vulnerable shareholders have been stripped of their shares by predatory offers over the years, providing less fertile ground for current activity. However, these two factors do not lead us to a conclusion that few people accept such offers, but to a conclusion that fewer people are available to be preyed upon in this manner.

Unsolicited offers to purchase shares at below-market value 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 notes that it was public policy to encourage members of mutual organisations to convert to shareholders.

CSA also notes that our members found that a significant number of those shareholders who have accepted predatory offers over the years were aged 70 or more. Frequently, it was relatives who contacted the company secretary to express their disbelief that the older family member could have had their privacy intruded on and their vulnerability exploited. While that particular generation of shareholders may have already had their wealth stripped, given the continuing public policy to encourage Australians to become shareholders directly as well as indirectly, and the lack of financial literacy identified by the government as a key concern that needs addressing, CSA believes that there will be a new generation of older shareholders who will become vulnerable to unsolicited offers to purchase shares at below-market value. Ill health or lack of capacity brought on by age can render shareholders vulnerable to unsolicited offers, which in turn creates instability in their retirement incomes.

CSA therefore believes that corrective action is required.

1 Cooling-off period

CSA is concerned that a one-month cooling-off period could give rise to unanticipated difficulties, given that the share price is likely to shift during the month that the offer is subject to consideration. A three-month cooling-off period could see even more dramatic shifts in the share price, further complicating the situation.

CSA is aware that a cooling-off period is intended to provide the most vulnerable shareholders with an opportunity to withdraw from the contract, which in turn provides the opportunity for relatives of those shareholders least able to assess the risks of the offer to intervene on behalf of a family member. However, the dynamics of the market are such that an extended cooling-off period cannot function in relation to shares in the same manner as other financial products, such as insurance and superannuation, where the offer under consideration is not subject to forces outside the control of either the offeror or offeree.

CSA therefore recommends a cooling-off period of, say, seven days. This may provide an opportunity for friends or relatives of the most vulnerable shareholders to advise them of the consequences of accepting the offer as well as allowing the shareholders themselves to withdraw their acceptance of a below-market offer.

2 Consumer advisory warning statement

CSA recommends that a prescribed government warning be included on any offer document warning shareholders of the risk of accepting such an offer.

CSA recommends that both a short and long warning statement be included, that is, a two-stage approach. CSA believes this will be the most effective means of warning shareholders of the risks attached to accepting such offers.

3 Inclusion of ASIC leaflet

CSA opposes the inclusion of an ASIC leaflet with unsolicited offers at below-market value, because it could be misinterpreted as official support for such offers.

CSA members note that vulnerable shareholders frequently believe that only the company has access to their personal information, and that any correspondence is therefore approved by the company. Given that such shareholders are not likely to read in detail any offer to purchase shares sent to them, the inclusion of a leaflet from the regulator, ASIC, could well be interpreted as official approval of the unsolicited offer. While the content of the ASIC leaflet would contain a warning, CSA members believe that vulnerable shareholders will not engage with the content, but simply note that that a leaflet from the regulator is included with the unsolicited offer and conclude that the leaflet supports the offer.

4 Companies to procure brokers to purchase shares

CSA recommends that companies should be encouraged to facilitate mechanisms to allow shareholders to sell their shares. For example, the share registry providers for many companies have in place mechanisms to allow shareholders who do not have a broker to sell their shares on market. The registry providers usually charge a small fee comparable to brokerage charges for this service. However, CSA considers that such actions should *not* be mandated. That is, CSA does not believe that companies should be obliged to procure brokers or others to arrange for the purchase of shares for market value.

Companies do not and cannot know which shareholders have been targeted by offers to purchase their shares at below-market value. Even where they can ascertain from the register who has been targeted, it is after the event.

There is also the issue of cost to those shareholders who are not vulnerable to exploitation by predatory offerors. Sophisticated shareholders already indicate to our members their dissatisfaction when money is expended on warning shareholders of predatory offers, as has

been undertaken in the past by many large, listed companies following a request for the register. The cost of mailing shareholders is substantial in such companies and is a cost to shareholders.

For example, based on information supplied by our members, it costs around $1 per shareholder to write to a large company's shareholders. Some companies have in excess of one million shareholders on their register.

CSA does not believe it is always good governance for companies to write to shareholders offering to buy shares, at cost to shareholders, to lessen the impact of the predatory commercial interests of offerors when other options are available for consideration.

CSA does recommend, however, that where a third party intends making an offer at below-market value to some but not all of the company's shareholders, the offeror must provide the company with the names and addresses of each holder to whom an offer will be made as well as full details of the offer that will be made. The offeror must provide this information to the company at least 10 business days before the offers are made and must not make the offers any later than 20 business days after providing this information to the company. This would encourage companies to facilitate alternative sales mechanisms for those shareholders who have been targeted, without having to write to all shareholders.

Finally, in order to encourage companies to facilitate alternative sales mechanisms, CSA believes that any regulatory obstacles relating to share sales to allow companies or the ASX to facilitate the sales of small parcels of shares at any time would need to be removed. CSA notes that at present there are periods when companies are unable to buy their own shares. Issues arise when companies are involved in the buying or selling of shares due to directors and management holding inside information that prohibit any action of this kind.

5 'Do not contact' register

CSA supports a legislative scheme under which shareholder personal information would generally only be disclosed for a proper purpose or with the shareholder's consent. CSA considers that it would be very much a second-best alternative if shareholder information could be generally disclosed to third parties unless the shareholder specifically requests that it not be.

CSA notes that share registry information is not like an individual's telephone number. An individual may well see value in having their telephone number published in the White Pages, but nevertheless not wish to be contacted by telemarketers and others making use of White Pages information. In contrast, there is little or no utility for a shareholder in having their personal information on a share register available to the general public.

CSA also notes that there would be a level of costs to companies in establishing and maintaining a register of those shareholders who did not want to be contacted by or have details made available to third parties.

6 Prescribe a format for the offer document

CSA strongly recommends a prescribed format for the offer document, setting out the offer price, market price, the amount of the difference, a warning statement (in two stages) and alternative details on how to sell through a broker at market price.

CSA has long had concerns that the layouts and formats currently employed by offerors obfuscate the offer and create confusion. For example, 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.

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.

CSA recommends that, in the case of offers to shareholders to purchase shares at below-market value 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.

If the government decides to proceed with a prescribed format for the offer document, CSA members would be more than happy to be involved in the design of the form.

7 Alternative sale method

CSA believes that reputable brokers would be most unwilling to be associated with offers to purchase shares at below-market value. As with the suggestion of including a leaflet from ASIC, CSA also believes that the inclusion of a list of brokers could be misinterpreted by those in receipt of such offers that they are 'approved' in some fashion. CSA does not therefore believe that the offer document should include the details of brokers willing to facilitate sales at market prices for a fixed fee.

However, as noted earlier, **CSA recommends** that facilitating mechanisms to allow shareholders to sell their shares at market prices (such as through the share registry provider) are to be encouraged and **recommends** that a prescribed format for the offer document should include a link to the page on the ASX website where information on brokers can be found (see http://www.asx.com.au/resources/brokers/index.htm).

CSA also believes that any regulatory obstacles relating to share sales to allow companies or the ASX to facilitate the sales of small parcels of shares should be removed.

8 Offers to remain open for one month

CSA opposes amending the legislation to clarify that offers remain open for one month.

CSA does not see the benefit in such an amendment. As the offers are below-market value, providing such clarification assists the offeror without providing any commensurate benefit to the shareholders. Indeed, it provides more opportunity for the offeror to exploit shareholders.

9 Unconscionable conduct provision

CSA recommends that the provisions regarding unconscionable conduct in the ASIC Act should apply to unsolicited offers to purchase shares.

10 Meaning of 'financial services'

CSA supports the removal of subregulations 2C(2) and 2C(3) of the ASIC Regulations, thereby removing the ability for a person to be exempted from the unconscionable conduct provisions merely by making certain disclosures.

Conclusion

CSA believes it is important to address the broader issue of shareholder privacy and not simply one aspect of the problem: unsolicited offers to purchase shares at below-market value.

CSA recommends that third parties should only be permitted to have access to or copies of shareholder information:

- with the consent of the shareholder (for example, individual shareholders should be able to authorise their brokers, financial advisers, accountants, lawyers etc to access their personal information)
- with the consent of the company acting consistently with the National Privacy Principles (for example companies need to disclose shareholder information to printers, mailing houses, banks etc in connection with the distribution of shareholder communications and the payment of dividends)
- where the person seeking access has lodged a bidder statement in connection with a takeover offer for the company
- where there is an existing express right of access under the Corporations Act (for example s 249E(3) gives a right of access to the register to members seeking to convene a meeting of the members of the company)
- as otherwise required by law (for example, revenue and law enforcement authorities may have rights of access to shareholder information), or
- for a purpose determined by an external panel or the courts to be a proper purpose, having regard to the legitimate privacy and other interests of shareholders and where the purpose is relevant to the holding of their shares.