



CHARTERED SECRETARIES  
AUSTRALIA

*Leaders in governance*

24 February 2010

Access to Company Registers and Related Issues  
Corporations and Financial Services Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

Email: [accesstoregisters@treasury.gov.au](mailto:accesstoregisters@treasury.gov.au)

Dear Treasury

***Proposals paper: Access to company registers  
and related issues***

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.

***Support for the proposals***

Chartered Secretaries Australia (CSA) welcomes the opportunity to comment on the proposals paper: *Access to company registers and related issues* (the paper).

We commend the government for the proposals set out in the paper, particularly the introduction of a proper purpose test, which remedy the shortcomings in the current law to ensure protection of the interests of shareholders. The government is to be congratulated for its approach to ensuring that acceptable rights to public access to and use of shareholders' details on the register will be put in place.

CSA is of the view that the proposals for law reform set out in the paper balance concerns about misuse of information contained in the register with ensuring legitimate reasons for access can be met.

***CSA recommendations***

***1 A proper purpose test to access registers***

CSA strongly supports the introduction of a proper purpose test.

***Are there unintended consequences attached to this proposal?***

CSA is of the view that unintended consequences will not result from the introduction of a proper purpose test. CSA is aware that concerns could be raised that shareholder activism

concerned with proper governance and management could be stifled by providing a company with the right to refuse members or third parties access to the register unless they satisfy the company that their request to access the share register is for a proper purpose. However, CSA is of the view that granting a company the right to refuse access to the register if it is not satisfied that the applicant's request is for a proper purpose will not inhibit shareholder rights in any way.

Existing rights of shareholders permit them to:

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

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

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

On this basis, **CSA recommends** that the proposal as worded in the paper should proceed, that is, that:

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.

**CSA also recommends** that

- where the information is to be disclosed directly or indirectly to one or more third parties, the access seeker should provide the name and address of each third party and the purpose for which they will use the information
- the access seeker should also be obliged to inform each third party who has access to the information that it may only be used for the stated purpose
- a time limit be set on the use of the register.

***Is the period of 20 days in which to make an application for judicial review appropriate?***

CSA notes that providing for 20 business days, rather than 20 days, provides any applicant seeking judicial review a more appropriate opportunity to formulate their application.

**CSA recommends** that the appropriate period in which to make an application for judicial review is 20 business days.

***Are there any other improper purposes that should be specified by regulation?***

CSA notes that there is an inconsistency in the paper concerning one of the specified improper purposes. On p 3 the paper states that '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'. On p 4, the paper states that one of the purposes already identified as an improper use of the register is 'the making of an off-market offer to purchase securities in a listed company, other than for a takeover'.

CSA is of the view that the second statement of the proposal, that it would be an improper use of the register to make an off-market offer to purchase securities in a listed company other than for a takeover, is the most appropriate approach to a definition. CSA believes that focusing on the market value of shares as the defining feature of an improper purpose will create an opportunity for further predatory offers, which the introduction of the proper purpose test is designed to extinguish.

For example, CSA points to instances in the past when offerors, more commonly known for their below-market value offers, contact shareholders with an offer at market value, but on deferred payment terms. These offers set terms involving payment by instalments spread over a number of years, with 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 any takeover offer must provide a statement guaranteeing the availability of funds.

Furthermore, 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 is of the view that if the definition of an improper purpose focuses on offers of below-market value, offers made on deferred payment terms will constitute a proper purpose, providing a loophole for predatory offers to continue. This would defeat the policy objective of introducing a proper purpose test designed to stop such offers.

CSA also notes that, while there have been concerns expressed that making off-market offers to purchase securities in a listed company should not be deemed an improper purpose, our members are unaware of any off-market offers made to shareholders over the past decade other than predatory ones or those made as part of a takeover offer. CSA believes that the theoretical application of the law should not guide the proposed law reform, when there is compelling evidence that the current capacity to seek access to the register to make off-market offers to purchase securities (other than takeover offers) has been the subject of ongoing abuse and not otherwise utilised.

**CSA therefore recommends** that the definition of one of the four improper purposes already identified should be ‘the making of an off-market offer to purchase securities in a listed company, other than for a takeover’.

***Is there any other conduct related to this proposal that should constitute an offence?***

CSA supports the offences set out in the paper.

CSA is of the view that the wording that it would be an offence ‘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’ may need to be strengthened. The current wording is such that the access seeker must form an intent.

CSA notes that a person requesting the register for a proper purpose may need to disclose the information to a third party, for example, a mailing house. This disclosure would still be for a proper purpose. However, it would be an improper purpose for the information to be sold to another party, who may or may not use it for a proper purpose.

Related to this is a concern that the proposed offence ‘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’ may have unintentional consequences. For example, the stated purpose provided by an applicant could be proper, but a company could have prior knowledge of the applicant that leads to a strong suspicion that the actual purpose for which the register will be used may be improper.

**CSA recommends** that the obligation on any requester of the register should be to use the information only for that proper purpose and that it would be an offence to use it for an improper purpose.

***Further recommendation***

CSA is of the view that it is unclear what protections will be afforded companies that rely in good faith on the ASIC guidelines in determining whether a request for access is for a ‘proper purpose’. A company may rely in good faith on the ASIC guidelines and assess a request for access as improper. A court could, upon application, in turn find that the request was for a proper purpose.

**CSA recommends** that the legislation contain a ‘safe harbour’ provision to protect companies that rely in good faith on the ASIC guidelines in assessing an application for access as for an improper purpose, but which is subsequently found by a court to be for a proper purpose.

**2      *A tiered fee structure***

CSA supports the introduction of certainty as to fees, and is of the view that the proposed tiered structure balances the cost to companies in providing a copy of the register and reasonable costs for those legitimately seeking access to the register. CSA also supports prescribing the tiered fee structure in the Corporations Regulations.

**CSA recommends** that the Regulation also 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.

***Are there unintended consequences attached to a tiered fee structure?***

CSA does not believe that there are any unintended consequences attached to the proposal to introduce a tiered fee structure.

***Are the fees for each tier appropriate?***

CSA is of the view that the fees for each tier are appropriate.

CSA notes that, with the introduction of a proper purpose test, the number of requests for the register is likely to decrease substantially, given that the great majority of current offers come from third parties such as brokers and charities who are seeking to extend their marketing and fundraising capacity and predatory offerors. The fees proposed for each tier are appropriate when viewed as fees for accessing the register for a proper purpose.

**3      *Format for copies of the register***

CSA supports the proposal to amend the law to include a regulation-making power that would enable a number of formats and device media to be prescribed in the Corporations Regulations. CSA is also very supportive of the government's intention to determine the prescribed formats in consultation with stakeholders.

***Will there be any unintended consequences attached to the proposal?***

CSA is of the view that there are no unintended consequences attached to the proposal. CSA notes that the proposed consultation with stakeholders should include companies, registries and shareholders, to ensure that commonly used formats and media acceptable to both the company and the access seeker are agreed upon.

**4      *Inspection of a register maintained on a computer***

CSA supports the proposal that the Corporations Act be amended to allow a register that is maintained electronically to be viewed on a computer.

***Are there unintended consequences attached to the proposal?***

CSA is of the view that there are no unintended consequences attached to the proposal.

***Other recommendations******Use of the register obtained prior to legislative reform***

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

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

***Review of legislation***

CSA is of the view that it would ensure the policy objectives are being achieved by including a three-year review of the legislation. This would ensure an assessment of the effectiveness of the proposed regime. Given the capacity of predatory behaviour to adapt to previous attempts to curtail such activity, a review is a means of clarifying if any loopholes have emerged.

**CSA recommends** that the legislation be reviewed in three years to ensure that the policy objective is being achieved.

**Conclusion**

In preparing this submission, CSA has drawn on the expertise of the members of our national policy committee, the Legislation Review Committee.

CSA would welcome further contact during the consultation process and the opportunity to be involved in further deliberations.

Yours sincerely

A handwritten signature in black ink that reads "Tim Sheehy". The signature is written in a cursive, flowing style.

Tim Sheehy  
CHIEF EXECUTIVE