



**CHARTERED SECRETARIES
AUSTRALIA**

Leaders in governance

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Mr John Price
Director, Applications and Advice
Regulation Directorate
Australian Securities & Investment Commission
GPO Box 9827
Melbourne VIC 3001

Dear Mr Price

**ASIC Consultation Paper: Approving a purpose for accessing the
register of members of a mutual entity**

Chartered Secretaries Australia (CSA) welcomes the opportunity to comment on the ASIC consultation paper: Approving a purpose for accessing the register of members of a mutual entity.

CSA is Australia's peak membership body for governance and in Australia has over 8,500 members and affiliates representing the majority of listed public companies, unlisted companies and mutual entities. Members of CSA have a thorough working knowledge of the issues relating to accessing the register of members, as they have the responsibility for managing such access in the majority of cases.

We refer to the Consultation Paper seeking comment on the Commission's proposed policy for approving a purpose for which access is sought to a mutual entity's register of members under reg 12.8.06(4) of the Regulations.

In responding, we refer not only to mutual entities but also take a wider view of the proposals as they might apply to other corporations, listed and unlisted. CSA has made many submissions to ASIC and its predecessors in respect of the access to and use of the members' registers of listed companies. CSA's members, as company secretaries of listed and unlisted companies, have had to deal with such requests from a number of bodies and have had to respond to members who have objected to the use of that information.

While we recognise the difference between the register of a mutual entity and that of a company/registered scheme, whereby the mutual entity's register represents its customer base, we believe that the issues of privacy and confidentiality apply equally to members of a company. Under s 173, 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. Companies cannot refuse the request nor can they enquire as to the proposed use of the information.

In response to the Consultation Paper's questions, CSA comments:

What purposes will ASIC approve

- (a) CSA supports the proposed purpose set out in 2.2 (a) provided the person seeking access can demonstrate that its proposal for the reconstruction or merger of the entity is bona fide and for the benefit of the members.
- (b) CSA supports the proposed purpose set out in 2.2 (b) provided the information is reasonable and does not defame the entity, its board or management.
- (c) CSA supports the proposed purpose set out in 2.2 (c) provided that the meeting is for a matter that is relevant to members and is one that they can properly resolve. In this respect we believe matters relating to issues such as environmental, industrial and social issues requiring directors to do certain things should not be approved, as they may be addressed appropriately at the annual general meeting of the entity, provided there is sufficient support from the members. We agree that ASIC should retain the right to refuse an application if in its view that matter is unlawful or not proper for members to consider.
- (d) CSA recommends that ASIC could be granted the discretion not to release the register, having regard to the privacy of members and the use of the register, but would not be obligated to disclose its reasons

What factors does ASIC take into account ?

- (a) CSA supports the proposed factor set out in 2.3 (a). CSA believes that the applicant must have made a request of the company and been refused before seeking approval from ASIC.
- (b) CSA supports the proposed purpose set out in 2.3 (b). CSA believes that the purpose of the request for the register should be set out in the request and that it should be relevant to the holding and interest of the members.
- (c) CSA supports the proposed purpose set out in 2.3(c). CSA believes that persons seeking access to the register should provide not only the purpose for their request, but also the content of the proposed communication to members. This may provide the entity sufficient information to permit access.
- (d) CSA supports the proposed purpose set out in 2.3(d).
- (e) CSA supports the proposed purpose set out in 2.3 (e).

Application process

CSA supports the proposed steps set out in 2.7 and 2.8

What form will ASIC's approval take?

CSA supports the proposed purpose set out in 2.9. While we recognise that there is no express provision in reg 12.8.06(4) to allow ASIC to impose conditions on the approval of a purpose, we believe that there may be circumstances that may require conditions to be applied to ensure that the access to and use of the register is properly applied after the application has been approved.

CSA reiterates its view that each of these proposals should be applied for companies and registered schemes, listed and unlisted. There have been many requests for use of the register made to listed and unlisted companies, which have subsequently been demonstrated to be for purposes which are clearly not for the benefits of the members individually or as a group. We acknowledge the efforts made by ASIC to pursue bodies and individuals in its role as a protector of the interests of consumers and investors. We believe that the proposals designed to protect the interests of members of mutual entities should apply equally to members of listed and unlisted companies and registered schemes.

We submit also that the terms of access to the register should be clarified.

At present s 173 of the *Corporations Act* requires companies provide a copy of the register or part of the register to persons applying for the register. The legislation is unclear as to what 'part' of the register means. Requests for a part of the register have included requests for a selection of a part according to members in a specific geographical area, to holdings of a certain size or at a particular date. We believe that such information can be a clear breach of privacy for the individual member as it may expose their personal financial status and location to an unreasonable extent.

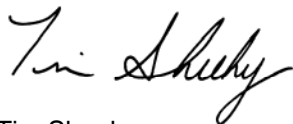
Section 177 of the Act prohibits the use or disclosure of information obtained from the register unless that use or disclosure is 'relevant to the holding of the interests recorded in the register or the exercise of the rights attaching to them'. We believe that in assessing any application under the regulations, ASIC should include the relevancy of the use of the information to the holding in its criteria for approval or refusal. In this respect we note the recent decision of IMF (Australia) Ltd v Sons of Gwalia Ltd which considered the construction to be given the word 'relevant', deciding that it should be applied narrowly to protect the privacy of shareholders. We recommend to the Commission a recent article in CSA's journal *Keeping good companies*, 'Contacting shareholders using share register information', which discusses the implications of that case and the options available to companies receiving request for access to their share register.

Application beyond mutual entities

CSA reiterates its support for the proposals set out in the Consultation Paper and strongly advocates their application beyond mutual entities to corporations, both listed and unlisted. CSA also seeks ASIC's support for legislative reform in relation to access to the register of members of companies.

In preparing this submission, CSA has drawn on the expertise of the members of our national Legislation Review Committee, all of whom are engaged with managing the registers of members.

Yours sincerely



Tim Sheehy
CHIEF EXECUTIVE



Contacting shareholders using share register information

By **Michelle Milligan**, Senior Associate, Minter Ellison Lawyers

- *What are the restrictions on using information obtained from a company's share register to contact shareholders?*
- *May a third party use register information to market its services to a company's current or former shareholders?*
- *Should a company give access to its share register where it is apparent that the register information is likely to be used for a prohibited purpose?*

A recent case highlights the need for a careful case-by-case assessment of the lawfulness of any proposed use or disclosure of information obtained from a company's register of members to contact or send material to the company's current or former shareholders.

In particular, the case shows that there are significant limitations on the extent to which commercial organisations (including brokers, investment advisers and other service providers) can use contact details obtained from a company's register of members to market their services to the company's shareholders, even where the services are clearly related to their status as shareholders.

Some companies (particularly listed companies with large shareholder bases) regularly receive requests for access to their share registers from organisations who wish to market their services to the company's shareholders. For companies who receive such requests, the issue that arises is whether the company should provide such access where it is apparent that the register information is likely to be used for a prohibited purpose. A

company's legal obligations in these circumstances are not clear. As a practical matter (and depending on the particular circumstances), the appropriate course may be for the company to refuse to provide access to its register of members in these circumstances. However, a company needs to be aware that this approach carries the risk of legal challenge due to the uncertainty of its legal obligations in these circumstances.

What are the applicable statutory provisions?

Under s 173 of the *Corporations Act 2001* (Cth), a company is required to:

- allow anyone to inspect the company's register of members (subject to, in the case of non-members, payment of any fee charged by the company that does not exceed a prescribed amount)
- give anyone a copy of all or part of the register following payment of any fee charged by the company that does not exceed a prescribed amount.

However, s 177 imposes restrictions on the use and disclosure of information obtained from a company's register of members. In particular, there is a prohibition on:

- the use of information about current or former members (such as their names and addresses) obtained from a company's register of members to contact or send material to those current or former members (see s 177(1)(a)), or
- the disclosure of information obtained from a company's register where the disclosing person knows that the information is likely to be used to contact or send material to a current or former member (see s 177(1)(b)), unless an exemption applies.

What are the exemptions to these prohibitions?

There are two exemptions to these prohibitions:

1. The first exemption applies where the use or disclosure of the information is 'relevant to the holding of the interests recorded in the register or the exercise of the rights attaching to them' (see s 177(1A)(a)).
2. The second exemption applies where the use or disclosure of the information is approved by the company (see s 177(1A)(b)).

When is the use or disclosure of information 'relevant' to the holding of shares or to the exercise of the rights attached to shares?

Decision in the *IMF case*

In the Federal Court case of *IMF (Australia) Ltd v Sons of Gwalia Ltd* (admin apptd) (ACN 008 994 287)¹ (*IMF case*), French J considered the scope of the first exemption. In particular, His Honour considered whether a wide or narrow construction should be given to the requirement of the exemption that the proposed use or disclosure must be 'relevant' to the holding of the relevant interests (for example, shares) or the exercise of the rights attached to those interests.

French J formed the view that the word 'relevant' should be construed narrowly in the context of s 177, having regard to the apparent purpose of the prohibition. In His Honour's opinion, the prohibition is designed to protect the privacy of shareholders by limiting the permitted uses of information obtained about them from a company's register of members.

Under the narrow construction adopted by French J, for the first exemption to apply, there needs to be a reasonably close connection between the proposed use (or disclosure) of register information and the actual holding of shares or the exercise or enjoyment of the rights attaching to those shares.

French J noted that the exemption could be given a wider construction which would encompass any use of information which is connected in any way to a person's status as a past or present shareholder of a company. However, French J considered that it would be contrary to the purpose of the prohibition to construe the exemption as permitting a third party to make unsolicited approaches to shareholders, using register information, simply on the basis that the third party was marketing services connected with the recipients' status as current or former shareholders. Accordingly, French J declined to adopt this wider construction.

The effect of French J's construction of the first exemption is illustrated by the facts of the *IMF case*.

Facts of the *IMF case*

IMF (Australia) Limited (IMF) is an ASX-listed

company that engages in the commercial funding of litigation. IMF had been approached by a group of about 20 shareholders of Sons of Gwalia Limited (SOG) with a view to having it investigate and consider funding a potential claim by current and former shareholders against SOG arising from losses allegedly suffered by them as a result of their acquisition of shares at a time when SOG had not disclosed certain price-sensitive information to the market. SOG is a Western Australian mining company that entered voluntary administration in late August 2004.

IMF obtained information from SOG's register of members that it wished to use to approach other past and present shareholders of SOG who it thought might have a claim against SOG for the loss in value of SOG shares purchased by them during the period of SOG's non-disclosure of price-sensitive information. IMF proposed (among other things):

- to advise affected shareholders of the fact that a shareholder group had approached IMF with a view to engaging its services
- to give them information about their potential claims against SOG
- to invite them to engage IMF to investigate a collective action against SOG and to fund the litigation.

IMF sought the approval of SOG's administrators under s 177(1A)(b) to use the information obtained from SOG's register of members for these purposes. The administrators declined to give this approval on the basis that it would not be appropriate to do so. Accordingly, IMF could not rely on the second exemption outlined above to make its proposed approach to SOG shareholders.

In these circumstances, IMF sought a court declaration that its proposed use of the register information would not contravene s 177(1) on the basis that it fell within the first exemption outlined above (that is, s 177(1A)(a)).

French J dismissed IMF's application for a declaration, having concluded that the exemption did not apply to the course of conduct proposed by IMF. In reaching this conclusion, French J:

- recognised that IMF's proposed approaches to past and present SOG shareholders would be connected with their status as shareholders as they related to their past acquisitions of shares in SOG
- considered that the connection between IMF's proposed use of the register information and the past acquisition of SOG shares was not sufficient to make that use 'relevant' to the actual holding of SOG shares or to the exercise or enjoyment of rights attaching to those shares, applying the narrow construction of

this requirement outlined above and

- considered that the nature of IMF's proposed approach to present and former shareholders was indistinguishable from that of any third party seeking to provide services to shareholders by reason of their status as such.

Implications of the IMF decision

In the light of the *IMF case* and previous judicial authority on s 177, it seems clear that a restrictive interpretation is to be given to the circumstances in which a person may rely on the exemption in s 177(1A)(a) to approach a company's current or former shareholders using information about them obtained from the company's register of members.

To be able to rely on the exemption, it will be necessary to establish that there is a close connection between the proposed communication with shareholders and their actual shareholdings or the exercise (or enjoyment) of rights attaching to their shares. Examples of shareholder communications that would satisfy this requirement include:

- a candidate for election as a director of a company circulating information in support of his or her election
- a third party providing material relevant to, or intended to influence, shareholder decisions about how to vote on a proposal being put forward by the company and
- a person contacting shareholders in relation to whether or not they should accept a takeover bid for the company.

The *IMF case* suggests that it is only in very limited circumstances (if at all) that commercial service providers will be able to rely on the first exemption to market their services to a company's shareholders using contact details (or other information) obtained about them from a company's register of members. To be able to do so, it would not be sufficient for any such service provider to demonstrate that the services being offered have some connection with the contacted person's status as a current or former shareholder of the company. There would need to be a demonstrable connection between the proposed communication with a person and the person's actual holding of shares or the exercise or enjoyment of the rights attaching to those shares.

Whether a sufficient connection exists in any given situation will need to be assessed on a case-by-case basis in the light of the particular circumstances.

Should a company give a third party access to its share register where the information is likely to be used for a prohibited purpose?

An issue that arises from the prohibitions on the

use and disclosure of register information is what a company (or its share registry) should do if a third party requests access to (or a copy) of the company's register of members in circumstances where:

- it is apparent from the request that the third party intends to use (or disclose) information obtained from the register to contact or send material to the company's current or former shareholders for a purpose that is unrelated to their shareholdings in the company and to the exercise of the rights attached to their shares or
- it is unclear whether there is a sufficient nexus between the intended use of the register information and a person's holding of shares or the exercise of the rights attached to their shares (as interpreted having regard to the narrow construction adopted in the *IMF case*).

Unless the company approves the disclosure and use of the register information, a company's legal obligations in these circumstances are not clear. This is because:

- on the one hand, s 173 imposes an obligation on a company to allow anyone to inspect or receive a copy of the company's register of members (following payment of any applicable fee) and
- on the other hand, s 177(1)(b) prohibits any person from disclosing information obtained from a company's register of members where the person knows that the information is likely to be used to contact or send material to the company's current or former shareholders for a prohibited purpose.

The provisions are silent on the intended relationship between a company's obligations under s 173 and the prohibition on the disclosure of register information under s 177, and there are conflicting interpretations of this issue. On one view, the prohibition in s 177(1)(b) does not apply to a company, at least to the extent that the company is disclosing register information in compliance with s 173. On this view, a company would be obliged to give a person access to (or a copy of) its register of members even if the company knew the person was likely to use the information for a prohibited purpose: a failure to do so would expose a company to legal action for contravention of s 173.

A contrary view is that the restrictions in s 177 do apply to a company in relation to its own register of members and that its obligations under s 173 are subject to, and to be read down to the extent of, the prohibition under s 177. There is some judicial support for this view in one of the few judgments on s 177(1)(b)². However, the

judgment is not definitive on this issue. On the basis of this view, a company should not give a third party access to (or a copy of) its share register knowing that the third party is likely to use the information to contact or send material to current or former shareholders for a prohibited purpose as to do so would cause it to contravene s 177(1)(b).

Depending on the particular circumstances, it may be possible for a company to avoid this legal issue by approving the proposed disclosure and use of its register information and thereby invoking the second exemption outlined above (that is, s 177(1A)(b)). However, it would be appropriate for this approval to be given only if the company is satisfied, on reasonable grounds, that giving the approval would be in the best interests of its shareholders as a whole. In addition, the National Privacy Principles would need to be taken into account in determining whether it would be appropriate and permissible for the company to give such approval.

If the company does not consider it appropriate and in the best interests of shareholders to approve the proposed disclosure and use of the register information, then the appropriate course of action may be for the company to refuse to allow the relevant third party to have access to its register on the basis that to do so would expose the company (and its officers) to an unacceptable risk of contravention of the prohibition in s 177(1)(b). However, a company needs to be aware that this approach carries the risk that the third party may bring court proceedings against the company seeking an order to enforce s 173. If any such court proceedings are initiated, it may be appropriate for the company to make a counter-claim seeking an injunction to restrain the third party's use of the register information for a prohibited purpose.

If a company provides a third party with access to (or a copy of) its register of members to a third party under s 173 in circumstances where there may be a risk that the information might be used to approach its current or former shareholders for a prohibited purpose, it may be appropriate for the company to:

- draw the third party's attention to its obligations under s 177(1) and
- expressly state that the company does not give its approval under s 177(1A)(b) for the third party to use or disclose the register information for a purpose that is not permitted by s 177(1A)(a) (ie the first exemption).

Notes

1 (2004) 211 ALR 231

2 See *O'Brien and Others v Sporting Shooters Association of Australia (Victoria)* (1999) 32 ACSR 635 at 639 ●