



**Australian
Privacy
Foundation**

Access to Share Registers and the Regulation of Unsolicited Off Market Offers

Submission to Commonwealth Treasury on the May 2009 Options Paper

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The Australian Privacy Foundation

The Australian Privacy Foundation is the main non-governmental organisation dedicated to protecting the privacy rights of Australians. The Foundation aims to focus public attention on emerging issues which pose a threat to the freedom and privacy of Australians. Since 1987, the Foundation has led the defence of the right of individuals to control their personal information and to be free of excessive intrusions. The Foundation uses the Australian Privacy Charter as a benchmark against which laws, regulations and privacy invasive initiatives can be assessed. For further information about the Foundation and the Charter, see www.privacy.org.au

Introduction

APF welcomes the Options Paper as a serious and constructive attempt to address a difficult policy issue. While our objectives lead us to favour limitations on access to share registers to protect the privacy of individuals, we also recognize the competing public interest in allowing access for appropriate purposes in the interest of accountability and good governance. While the Options Paper correctly identifies wider benefits of access than just facilitating trade in shares, we submit that it ‘undervalues’ the public interest in the media and public interest groups being able to find out about the ownership of public companies, and therefore the patterns of influence and interest, including in relation to political donations. Access can be an important tool in analysis of privacy intrusive practices in the private sector. We note that on page 4 the practice of ‘requesting a copy of member registers in order to determine the shareholding of individuals and therefore estimate their wealth’ is noted as an undesirable purpose – we submit that this could rather be seen as a legitimate public interest purpose, particularly in relation to larger parcels of shares.

We therefore submit that further consideration be given to setting a threshold – either of percentage of total shareholdings, or of value – for the ‘balance’ between privacy and access in relation to share registers. The arguments in favour of access are most persuasive in relation to significant shareholders, while for most individuals with small shareholdings it is difficult to see why the other public interests should outweigh their privacy interests. The rules about access to and use of shareholder information do not have to be ‘one-size-fits-all’.

We also note that there is currently no provision in the Corporations Act for individual shareholders to apply for suppression of their addresses in Share Registers if they have

reasonable grounds to fear for their safety. Suppression would limit access by third parties for some purposes but would need to accommodate legitimate contact for some governance purposes such as in the course of acquisitions or mergers – one solution to this tension would be to provide for independent intermediaries to contact ‘suppressed address’ shareholders on behalf of bona fide third party users. We submit that there should be a consistency between the share register provisions and policies for ‘suppressed addresses’ in other laws such as the Telecommunications Act (silent lines) and Electoral Acts (silent electors).

Options

Access test

We support Option A - the introduction of a ‘proper purpose test’ for access– as an additional privacy safeguard. However, we believe that the legislation should set out criteria for what constitutes a proper purpose and, arguably more importantly, what is *not* a proper purpose – such as making unsolicited offers to purchase shares at significantly less than market value (thereby addressing at the same time the protection of retail investors considered later in the Options Paper.

We submit that the initial judgement of compliance with a proper purpose test should be by the company to whom a request for access is made (whilst requiring them to take a declaration by the requester at face value unless they have reason to believe it to be false). Requesters denied access should be able to challenge the denial in a low-cost forum – initially we suggest in an approved external dispute resolution scheme.

Fees

Of the sub-options in B, we reject B.3 and B.4 as being likely to result in unreasonably high fees, and B.5 as unworkable – many applicants would not be in a position to negotiate fairly. We favour reasonable cost (B2) over marginal cost (B1) which is too difficult to calculate, but suggest that the reasonable cost of access to electronic share registers should in most cases be minimal. Companies need access to share registers for their own purposes, and the administrative cost of processing fees is likely to be higher than the reasonable or true marginal cost of access. Where this is the case allowing a fee to be charged acts only as a deterrent. We do not think that charges are an efficient or effective way of deterring inappropriate access and use, which should be addressed by public interest or proper purpose tests together with an effective monitoring regime and meaningful sanctions and penalties. Serious consideration should be given to requiring access that passes the proper purpose test to be provided without charge.

Format, medium and inspection on computer

We submit that while the language of the Act should not be hostage to short term changes in technology, it is reasonable to distinguish online inspection of computerised share registers as a particular mode of access, to be preferred as the main and initial means by which applicants can inspect a register. It should be possible to devise technological controls that restrict searches and facilitate ‘proper purpose’ uses while preventing or at least making very difficult other uses which would fail the ‘proper purpose’ test. The Act should require that where share registers are computerised, online access through the Internet, and meeting specified criteria, must be provided. Where there is a public interest in allowing applicants to obtain a copy of a set of data about shareholders (beyond what can be obtained by an online search), the legislation should require companies to provide the data in one of a number of common data formats – not any format requested as this could be unreasonable.

Protection of retail investors from unsolicited share offers

Most of the issues in this section of the Options Paper are outside the scope of our interest in privacy protection. Unsolicited contact (whether by mail, telephone, email or other channels) is however perhaps the most commonly recognized form of privacy intrusion, usually with a subsidiary information privacy question of ‘how did they get my name/contact details?’.

The Privacy Act, the Do Not Call Register provisions of the Telecommunications Act and the Spam Act all provide some protection against unsolicited communications, but the many exemptions mean that unsolicited share offers (USOs) would commonly be allowed.

It is no solution to allow companies to establish a register of members not wishing to receive USOs – this would defeat the public interest in allowing a free market in shares, and would be likely to be ‘marketed’ aggressively by some companies as a defensive mechanism which would be ‘anti-competitive’. However, we see no reason why both companies themselves and third parties should not be required to respect clearly expressed preferences not to receive unsolicited communications in general.

It is currently arguable as to whether either NPP 2.1(c) of the Privacy Act has this effect. Section 177 of the Corporations Act seems to clearly prevent unsolicited contact by third parties but subject to a potentially broad exception where the ‘use or disclosure ... is ‘relevant to the holding of the interests recorded in the register or the exercise of the rights attaching to them’ (s.177 (1A)(a)). A clearer definition is required of what amounts to ‘relevant’ for the purposes of this section.

It is however clear that s.177(1A)(b) allows any communication approved by the company itself. Both calls and electronic communications to shareholders by a company itself would be also be allowed under the Do Not Call Register provisions and the Spam Act respectively by virtue of the ‘pre-existing business relationship’ exceptions.

The effect of s.177(1A) is that both ‘relevant’ contact by third parties and any contact by or approved by a company itself would be ‘authorised by law’ thereby invoking the exception in NPP2.1(g), with the result that the direct marketing controls in NPP2.1(c) would not apply.

The Corporations Act should make it clear that any clearly expressed preference not to receive unsolicited communications in general (including expressed by entry on the Do Not Call Register) must be respected by companies, except in relation to specified regulated documents. when communicating either with their own shareholders or with shareholders of other companies, using information obtained in whole or in part from a share register.

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Please note that postal correspondence takes some time due to re-direction – our preferred mode of communication is by email, which should be answered without undue delay.