

22 August 2017

Committee Secretary  
Senate Economics Legislation Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600

*via email: economics.sen@aph.gov.au*

Dear Mr Fitt

**Inquiry into the Corporations Amendment (Modernisation of Members Registration) Bill 2017**

Thank you for the opportunity to present at the hearing of the Senate Economics Legislation Committee into the Corporations Amendment (Modernisation of Members Registration) Bill (**Bill**) held on 2 August 2017, and for the opportunity to reflect on topics discussed during our appearance.

We reiterate the comments set out in our submission dated 25 July 2017, which provides our substantive response to issues raised by the Bill.

In this letter we focus on the concept of using an independent entity as a conduit for the distribution of information to members by a person seeking to communicate with them using details on the company's register of members (**Register**), with key points and suggestions set out below.

**1. The AICD considers communication between and with members of companies for a proper purpose to be integral to good governance**

The AICD considers that the ability to communicate effectively with company members about matters relevant to their interests and rights is of fundamental importance to corporate governance.

We acknowledge that the cost of managing direct mail-outs to members using the information currently held on a Register is likely to be prohibitive for individuals acting in a personal capacity, as noted by Mr Brett Stevenson. As the Committee is aware, company members have existing opportunities to exercise their rights including, depending on the type of company and any relevant threshold, the right to ask questions at general meetings, to require the company to move members' resolutions, or to request a meeting of members (for example, to spill the board).

Companies may also elect to circulate information where they consider this is in the best interests of the membership, and will do so where required by law (for example, members' resolutions and statements per ss 249N and 249P, *Corporations Act 2001* (Cth) (**Corporations Act**)).

**2. While there are protections to guard against the improper use of information on Registers, these are limited.**

Currently, companies are required to maintain Registers<sup>1</sup> of member details including addresses.<sup>2</sup> Breaches of this requirement are strict liability offences. A company must allow anyone to inspect the Register – members at no charge and others on payment of a fee up to the maximum prescribed in the regulations.<sup>3</sup>

Companies must also provide a copy of the Register to any member or other person who requests it, subject to the applicant paying any relevant fee, providing their name and address, listing each purpose and those purposes not being a ‘prescribed purpose’ (see below).<sup>4</sup>

These provisions mean that Registers are quite open in terms of general access.

The information held on Registers – currently, the member’s name, address, date of holding and holding balance – would be considered personal information under the *Privacy Act 1988* (Cth) and in other circumstances, subject to the strict requirements of that Act.

Section 177 of the Corporations Act prohibits a person from using information obtained from a Register to contact or send information to a member unless it is relevant to the holding of the interests recorded in the Register or the rights attaching to them, or has been approved by the company.

This broad description of a proper purpose was subject to abuse<sup>5</sup> and Parliament introduced further qualifications by way of defined ‘improper purposes<sup>6</sup>’ in 2010, being:

- Soliciting a donation from a member of a company;
- Solicitation of a member by a stockbroker;
- Gathering information about the personal wealth of a member of a company; and
- Making an off-market ‘low-ball’ offer for shares held by a member.

These welcome reforms established a limited set of clear improper purposes for use of information on Registers.

Assuming, however, that an applicant does not list an improper purpose as a reason for requesting a copy of a Register, and proposes a purpose relevant to member interests or rights, the company must provide a copy of its Register. Once the Register is provided, there are no practical limitations on how the personal information of company members is stored or used by the third party. If misuse occurs, remedies would be sought after the fact (noting that criminal sanctions can apply, if proven). The AICD is concerned that if email addresses are added to the Register (whether as a compulsory, or opt-in, measure) under the current legislative settings, the opportunity for abuse increases substantially, as discussed with the Committee.

Issues that, in our view, warrant further consideration given the nature of personal information held on Registers include:

- Privacy expectations of company members and whether specific privacy obligations should attach to parties obtaining copies of Registers, including holding information securely and destroying it within a certain period of time; and
- Whether further guidance on improper purposes is warranted to avoid misuse, for example through regulatory guidance by ASIC.

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<sup>1</sup> Section 168 Corporations Act.

<sup>2</sup> Section 169 Corporations Act.

<sup>3</sup> Section 173(2) Corporations Act.

<sup>4</sup> Section 173(2) Corporations Act, and reg 2C.1.03 *Corporations Regulations 2001* (Cth) (**Corporations Regulations**)

<sup>5</sup> The practices of David Tweed were discussed during Committee hearings as one example.

<sup>6</sup> Regulation 2C.1.03 Corporations Regulations.

**3. The Committee's suggestion of a third party distribution option for contact with company members may have merit, and there is a precedent for this model in the Corporations Regulations.**

The Committee discussed the option of introducing a third party to manage the logistics of communication to members, rather than requiring the release of the Register details to an applicant who would seek to manage that communication directly.

This was partly in response to the concerns raised about the increased risk of 'spam' activity, cyber fraud attempts or harassment were email addresses to be added to Registers.

The AICD considers that this concept could resolve the privacy and security issues relevant to members of companies and Register access, if introduced with an appropriate framework of checks and balances. If email addresses are included on Registers (for example, on a voluntary basis), this would be a worthwhile addition to the legislative framework.

The introduction of a third party distribution model would not, however, resolve all our concerns about the Bill, discussed separately in our original submission (refer, in particular, to paragraphs (a), (d), (e) and (f)).

As a starting point, the AICD envisages a framework would likely include:

- Guidance on the types of distribution entities that would be appropriate (these might be agreed between the parties, set by the company or defined in regulatory guidance by ASIC);
- Guidance on the circumstances where a third party distribution model might be used (this could be at the election of the company on a case by case basis);
- The applicant bearing the cost of the third party distribution (as per the status quo, where applicants would currently bear the cost of contacting members using the register details);
- A requirement for all members to be contacted even where they have not provided electronic addresses, to avoid disenfranchising members who opt for hard copy communication (per the concerns flagged by the Australian Shareholders' Association);
- The company being the decision-making body on whether the application is for a proper purpose, and retaining the right to request an extension of time for review from ASIC (per s 173(3)) – that is, no 'filter' rights for the third party distribution body. This could be supported by greater guidance in the regulations or from ASIC on proper or improper purposes to assist companies in assessing requests; and
- The third party distribution body being a logistics provider only.

The AICD considers this model would provide company members with a greater degree of comfort on the use of their personal information on Registers and should not be overly complex to establish.

We noted for the Committee's reference the existing regime that applies in relation to access to Registers of certain types of companies, being mutual Authorised Deposit-taking Institutions (**ADIs**) such as credit unions.

While this model is specific to the mutual ADI sector, and does not envisage email contact, it is an example of where the law has been amended to require a third party distribution model to handle communication with members using information on the Register, to deal with privacy and commercial concerns.

In relation to those companies, the Corporations Regulations amend the application of s 173 to create alternative arrangements for contacting members using the information on a Register. The regulations provide that contact with members will occur via a third-party service provider

(for example, a mailing house), rather than requiring copies of the Register to be provided to members or other applicants.

The rationale for the third party distribution model in this case was the heightened concern that mutual ADIs had about sensitivity of their member register, which is also their customer list. In addition, there were arguments that for some bonded credit unions serving specific industries (such as police services, teachers, or military personnel) there were additional privacy and security concerns that the relatively open regime of access to Registers under the Corporations Act did not adequately deal with. The relevant amending Corporations Regulations are reg 12.8.06 and reg 2C.1.05 (**attached**, with relevant explanatory memorandum). At a high level the process works as below.

The mutual ADI, on receipt of a request for access to its Register, can:

- Require the applicant to agree in writing that they will use information for a proper purpose and secure a commitment that the applicant will not divulge member details to other parties;
  - Refuse access to inspect the Register or receive a copy if it is not satisfied that the application is for a proper purpose or in the interests of the members as a whole (the applicant can appeal to ASIC, which can approve access for a proper purpose in writing);
  - If the application is for communication for a proper purpose (whether determined by the company or by ASIC), the company can elect that the communication be sent by a third party service provider nominated by the company, with all costs paid by the applicant;
  - The regulations set out timeframes for the application, review and mail-outs to be completed.
- 4. Companies can elect to circulate material to members, but should not (with the exception of existing obligations in the Act) be required to do so.**

As noted above, the Corporations Act requires that companies circulate certain resolutions and related material proposed by members at the company's expense. Companies can also elect to circulate material to members at their discretion if they determine it is in the interests of members as a whole. The Committee canvassed the concept of mandating new obligations on companies to circulate material from members directly, where this is clearly for a proper purpose. The AICD does not support this proposal. We do not consider it appropriate to add this cost to companies rather than applicants as a mandatory requirement, and believe that there could be unintended consequences that would require separate consultation and review.

We hope our response is of assistance to the Committee. If the Committee has further questions, please contact Lysarne Pelling, Senior Policy Adviser, on (02) 8248 2708 or [lpelling@aicd.com.au](mailto:lpelling@aicd.com.au).

Yours sincerely



**LOUISE PETSCHLER**  
General Manager, Advocacy