2008-2009-2010

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CORPORATIONS AMENDMENT (NO 1) BILL 2010

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Minister for Financial Services, Superannuation and Corporate Law, the Hon Chris Bowen MP)
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Do not remove section break.
Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>ASIC Act</td>
<td>Australian Securities and Investments Commission Act 2001</td>
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<tr>
<td>ASIC</td>
<td>Australian Securities and Investments Commission Regulations 2001</td>
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<td>Bill</td>
<td>Corporations Amendment (No 1) Bill 2010</td>
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<td>Corporations Act</td>
<td>Corporations Act 2001</td>
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<td>Corporations Regulations</td>
<td>Corporations Regulations 2001</td>
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<td>Crimes Act</td>
<td>Crimes Act 1914</td>
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<tr>
<td>TIA Act</td>
<td>Telecommunications (Interception and Access) Act 1979</td>
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</table>
General outline and financial impact

Outline

This Bill amends various acts to change the way people access information kept on company registers. The measures relating to access to registers will:

- Require persons seeking a copy of a register of members to apply to the company, stating the purpose for which they will use the register.
- Provide that where a register is maintained on a computer that it should be able to be inspected on a computer.
- Provide for the regulations to prescribe the formats in which a copy of the register can be provided.

The Bill also amends the Corporations Act 2001 (Corporations Act) and the Australian Securities and Investments Commission Act 2001 (ASIC Act) and Telecommunications (Interception and Access) Act 1979 in relation to market offences and the Australian Securities and Investment Commission’s (ASIC) powers to investigate offences. These measures:

- Increase the magnitude of criminal penalties that can be imposed for breaches of the insider trading and the market manipulation provisions in Part 7.10 of the Corporations Act.
- Enable an interception agency, such as the Australian Federal Police (AFP) to apply for telecommunications interception warrants in the course of a joint investigation into these offences.
- Enhance ASIC’s search warrant power, to enable ASIC to apply for a search warrant under the ASIC Act without first having to issue a notice to produce the material.

The Bill will also clarify the criminal liability under section 1041B of the Corporations Act in accordance with the requirements of the Criminal Code Act 1995 (Criminal Code).
**Date of effect:** On proclamation.

**Proposal announced:** The measures were announced in the Minister for Financial Services, Superannuation and Corporate Law’s Press Releases No. 8 of 28 January 2010 and No. 9 of 3 February 2010.

**Financial impact:** Nil

**Compliance cost impact:** The compliance cost will be low for the access to registers measures and nil for the market offences and ASIC powers measures.

**Summary of regulation impact statement**

**Regulation impact on business**

**Impact:** The impact on business will be minimal for the access to registers measures and nil for the market offences and ASIC powers measures.

**Main points:**

- The proper purpose test will provide clear guidance and limitations on when a copy of a register may be provided.

- Specifying the format in which a copy must be supplied will have a neutral effect on business.

- Ensuring that a register may be accessed on a computer where it is maintained will reduce the regulatory impact on business.
Chapter 1
Access to registers

Outline of chapter

1.1 The Bill limits the instances in which a copy of a register of members of a company or registered scheme may be obtained; provides that where a copy of the register is provided, that the copy be provided in a prescribed format; and where the register is maintained on a computer that a person seeking to inspect the register does so on a computer.

Context of amendments

1.2 The provisions dealing with the maintenance of and access to registers of companies and registered schemes are currently found in Chapter 2C of the Corporations Act. For ease of reference, any reference to a company register should be read as including a reference to a registered scheme where appropriate.

1.3 A company’s register of members is required to contain members’ names, postal addresses and shareholding details. Currently, anyone may request a copy of a company’s register without providing any indication of the purpose for which they intend to use the information. Increasingly, members contact details are being used for a number of purposes that are not considered proper or appropriate. There is currently no mechanism in the legislation to limit access to appropriate purposes.

1.4 The Corporations Act currently provides that a person seeking a copy of a register may specify a particular format, but the current provision does not require the company to provide the copy in the format requested, often leading to copies that are inappropriate for the requestors needs or difficult to use.

1.5 The current provision relating to a register maintained electronically provides that the person seeking access is entitled to request that a copy of the register be printed. In these instances, a company is not able to recoup the cost of producing a copy.
Summary of new law

1.6 The Bill amends the Corporations Act to require a person seeking a copy of the register to apply to the company and state the purpose for which they intend to use the information contained in the copy of the register. The company can refuse to provide a copy where the purpose is an improper purpose as provided in the Corporations Regulations.

1.7 The Bill also amends the Corporations Act to provide that where a register is maintained on a computer that it is inspected on a computer and allows for formats of electronic copies of the register to be prescribed in the Corporations Regulations.

Comparison of key features of new law and current law

<table>
<thead>
<tr>
<th>New law</th>
<th>Current law</th>
</tr>
</thead>
<tbody>
<tr>
<td>A person seeking a copy of a register will need to apply to a company and indicate the proposed use of the information contained in the register. The company has seven days to comply with the request or deny access to the copy of the register.</td>
<td>A person seeking a copy of the register only needs to request a copy from the company. The company has seven days to comply with the request.</td>
</tr>
<tr>
<td>The penalty for misuse of information contained in a register will be 50 penalty units.</td>
<td>The penalty for misuse of information contained in a register is 10 penalty units and/or three months imprisonment.</td>
</tr>
<tr>
<td>A person seeking to inspect a register maintained on a computer will do so on the computer, unless they wish to apply for a copy of the register.</td>
<td>A person seeking to inspect a register maintained on a computer may request a print-out of the register and is not required to pay the fee applicable for a copy of the register.</td>
</tr>
<tr>
<td>A person seeking an electronic copy of the register may receive it in the format prescribed in the Corporations Regulations.</td>
<td>A person seeking an electronic copy of the register must receive it on a ‘floppy disk’ if so requested, but the data need only be readable and need not be formatted in a particular way.</td>
</tr>
</tbody>
</table>

Detailed explanation of new law

1.8 The proper purpose test will specifically target improper uses of a register. The test will not permit specific uses; instead it will exclude undesirable uses of the information on a register.
1.9 Applicants will be required to submit an application containing prescribed information (including their name, address, corporation and the proposed use of the register) which will be inserted in the Corporations Regulations. [Schedule 1, Items 6 and 8]

1.10 Where an application states more than one purpose, if any of these is an improper purpose specified in the Corporations Regulations, then the request to provide a copy will be refused.

1.11 The Regulations specify a number of improper purposes. Where an applicant applies for a copy of the register for an improper purpose, the company can refuse to provide a copy.

1.12 There are relatively few improper purposes targeted by the proper purpose test, however, where an improper purpose becomes evident it is important that the law be able to swiftly respond. The specification of improper purposes in the Corporations Regulations enables the law to keep pace with changes to the use of a register or members and to be amended more swiftly than if improper purposes were specified in the Corporations Act. Any changes to the Corporations Regulations would be subject to the approval of the Ministerial Council for Corporations, prior to being made by the Governor-General.

1.13 It is an offence for an applicant to use information obtained from the register for an improper purpose specified in the Corporations Regulations or disclose the information knowing it is likely to be used for an improper purpose. [Schedule 1, Item 9]

1.14 Where a company denies an applicant access on the basis of one of the prescribed improper purposes, there is scope for judicial review of the decision under section 1324 of the Corporations Act.

1.15 The offences provisions under section 137.1 and 137.2 of the Criminal Code will also apply where someone knowingly makes a false or misleading statement or produces a false or misleading document in relation to an application.

1.16 The Bill will remove the current requirements in the Corporations Act regarding the format of an electronic copy of a register and allows for formats to be prescribed in the Corporations Regulations. This will avoid references to superseded technology in the Act, as the Corporations Regulations are able to more quickly incorporate changes. [Schedule 1, Item 7]

1.17 The Bill provides that where a register is maintained electronically, it is to be inspected electronically. Where a person requires
a hard copy of the register, they will be required to apply for a copy of the register. [Schedule 1, Item 4]

1.18 Subsection 177(1) of the Corporations Act requires that information contained in a register must not be used to contact or send material to a person unless the information is relevant to the interest held by the person or is approved by a company.

1.19 Items 8 and 9 to Schedule 1 of the Bill make it an offence for a person to use the information obtained from a copy for an improper purpose or to disclose that information knowing it will be used for such a purpose. This offence is an offence of strict liability will maximum penalty of 50 penalty units, which will operate as an appropriate deterrent for a breach of this provision. [Schedule 1, Item 19]

1.20 The penalty for a breach of subsection 177(1), which is an offence of strict liability, is currently 10 penalty units and/or three months imprisonment. Given the inherent similarities of these offences, it is appropriate that the penalties be consistent, and for this reason, the penalty for a breach of subsection 177(1) will be amended by the Bill to a maximum of 50 penalty units and will address the concern that imprisonment is not an appropriate sanction for an offence of strict liability. The provision will now comply with the Commonwealth Guide to Framing Offence Provisions. [Schedule 1, Item 19]

Application and transitional provisions

1.21 The provisions contained in this Bill commence on proclamation.

1.22 The amendments made to require applications to be made to a company for a copy of the register and requiring that the intended not be for an improper purpose applies to requests made after commencement. [Schedule 1, Item 18]

Supporting legislation

1.23 Amendments will be made to the Corporations Regulations, to provide improper purposes and to prescribe the form of an application for a copy of the register.
Chapter 2
Aevum Case Changes

Outline of chapter

2.1 The Bill amends section 1019G of the Corporations Act to clarify that any unsolicited offer that is made to purchase financial products off-market must remain open for at least one month from the date of the offer.

Context of amendments

2.2 Subsection 1019G(2), of the Corporations Act states that an unsolicited offer to purchase financial products off market (predominantly the acquisition of shares), may be withdrawn at any time, but not within one month of the date of the offer. This has been interpreted to mean that such an offer must remain open for at least one month from the date the offer is made.

2.3 In 2004, National Exchange Pty Limited (National Exchange) made an unsolicited and off-market share offer to members of Aevum Ltd for $0.35 per share, compared with the market value estimate of between $0.90 - $1.29 per share. Aevum brought an action against National Exchange in the Federal Court regarding the formulation of the offer, asserting that the offers were not sent as soon as possible after the date of the offer and that they were not expressed to remain open for at least one month.

2.4 The Federal Court found that National Exchange contravened:

- section 1019E(2) of the Corporations Act in that its written offer was not sent to shareholders as soon as practicable after the date of offer; and

- section 1019G(2) of the Corporations Act in that the offers were not expressed to remain open for at least one month.

2.5 In hearing the case, the Federal Court Judge noted that the wording of section 1019G(2) was written in terms of the withdrawal of an offer and not that an offer must remain open for at least one month, and
that perhaps this should be amended, to reflect this intention of the provision.

2.6 This amendment provides clarity in the wording to avoid further misreading or misinterpretation of the relevant provision.

2.7 This amendment, amongst others, was canvassed in an options paper Access to Share Registers in the Regulation of Unsolicited off Market Offers, issued in May 2009. Submissions received were in favour of the proposed amendment.

Summary of new law

2.8 The provision has been amended to make it clear that the offer must remain open for a period of at least one month from the date of the offer. The related existing provision addressing how long the offer must remain open has also been moved into this subsection.

Comparison of key features of new law and current law

<table>
<thead>
<tr>
<th>New law</th>
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</tr>
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<tbody>
<tr>
<td>The amendment substitutes new wording to make it clear that an offer made under this Division must remain open for at least one month from the date of the offer. Consequential minor amendments have also been made to two other subsections to ensure the correct cross reference to this revised provision.</td>
<td>The provision notes that an offer made under this Division may be withdrawn at any time, but not within one month of the date of the offer.</td>
</tr>
</tbody>
</table>

Detailed explanation of new law

2.9 Division 5A in Chapter 7 of the Corporations Act sets out the legal requirements for making an unsolicited offer (ie. offers other than those made on a licensed financial market) to purchase financial products off-market. Division 5A principally establishes a disclosure regime in relation to these offers. To date these kinds of offers have only been made to acquire shares.
2.10 Section 1019G sets out the rules regarding the duration and withdrawal times when making these offers. Currently the ‘offer may be withdrawn by the offeror at any time, but not within one month of the date of offer,’ which previously had been interpreted as requiring that an offer must remain open for at least one month of it being made.

2.11 However, in Aevum ACN 087 648 691 v National Exchange Pty Limited ACN 006 079 974 [2004] FCA 1781, the Court found this provision to be ambiguous and suggested consideration be given to revising the wording to clearly state that an offer must remain open for at least one month.

2.12 Proposed subsection 1019G(1) provides revised wording to achieve more clarity and to avoid further doubt about how long an offer made under this Division must remain open. [Schedule 1, Items 13 and 14]

Application and transitional provisions

2.13 These amendments apply to offers made after this schedule commences. [Schedule 1, Item 20]

Consequential amendments

2.14 Subsequent amendments to references to the substituted provision are also to be made to subsections 1019K(1)(b) and 1021)(3)(c). [Schedule 1, Items 13 and 14]
Chapter 3
Penalties for market offences and ASIC powers

Outline of chapter

3.1 The Bill increases the magnitude of the penalties that can be imposed for breaches of the insider trading and market misconduct provisions in Part 7.10 of the Corporations Act.

3.2 The Bill amends the current ASIC search warrant power in the ASIC Act to permit ASIC to apply for a search warrant without first having to issue a notice to produce for the material sought.

3.3 The Bill also amends section 1041B of the Corporations Act to clarify how criminal liability is imposed on persons who breach this provision.

Context of amendments

3.4 Insider trading and market manipulation offences cause serious harm to the fair and efficient functioning of Australia’s financial markets. These markets function best when information is widely dispersed and investors have confidence in the fairness of markets. It is essential that the penalties associated with these offences reflect the serious impact that a breach can have on Australia’s financial markets.

3.5 The penalties for insider trading and market manipulation offences contained in the Bill also reflect that the benefit that can be gained from engaging in this conduct often far outweighs the maximum penalty that can currently be imposed for a breach.

3.6 The search warrant power in the ASIC Act currently requires that ASIC first issue a notice to produce the documentary evidence sought. Due to the risk of destruction of evidence, this power is therefore rarely used. Warrants are instead executed under the Crimes Act 1914 (Crimes Act) and, as a result, the evidence obtained can only be used in criminal proceedings. Information obtained using an ASIC Act warrant can be used to enforce whatever penalty ASIC deems most appropriate, either civil or criminal.
3.7 Section 1041B of the Corporations Act provides that it is an offence to engage in any activity (including specified types of transactions) which is likely to create a false or misleading appearance of active trading. The fault elements for this offence are not expressly identified in section 1041B. This has resulted in confusion regarding the interaction of this offence with the Criminal Code and there has been debate on whether the relevant fault element applies to the act itself (that is, undertaking a specified type of transaction) or to the result of that act (that is, creating a false or misleading appearance).

Summary of new law

3.8 The Bill amends the maximum level of criminal sanctions that may be imposed on both individuals and body corporates for breaches of the insider trading and market manipulation provisions in the Corporations Act.

3.9 The Bill amends the search warrant power in the ASIC Act so that a warrant may be applied for without ASIC first issuing a notice to produce the material sought.

3.10 The Bill inserts a fault element into section 1041B.

Comparison of key features of new law and current law

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<tbody>
<tr>
<td>The maximum criminal penalties for an individual who breaches insider</td>
<td>The maximum criminal penalty for insider trading is five years imprisonment and/or 2,000 penalty units.</td>
</tr>
<tr>
<td>trading or market manipulation provisions are 10 years imprisonment and/or the greater of 4,500 penalty units or three times the profit gained or loss avoided.</td>
<td>The maximum criminal penalty for market manipulation offences is five years imprisonment and/or 200 penalty units.</td>
</tr>
<tr>
<td></td>
<td>The maximum penalty for a corporation that breaches the insider trading provisions is 10,000 penalty units.</td>
</tr>
<tr>
<td></td>
<td>The maximum penalty for a corporation that breaches the market manipulation provisions is 1,000 penalty units.</td>
</tr>
</tbody>
</table>
### Penalties for Market Offences and ASIC Powers

<table>
<thead>
<tr>
<th><strong>New law</strong></th>
<th><strong>Current law</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>ASIC will be able to apply for a search warrant without issuing a notice to produce the material.</td>
<td>ASIC must first issue a notice to produce the material it seeks. Where the material is not produced, ASIC may then apply for a search warrant.</td>
</tr>
<tr>
<td>The fault elements for the two physical elements of the offence in section 1041B are made explicit.</td>
<td>There is a lack of clarity as to which fault elements apply to the physical elements of the offence in section 1041B.</td>
</tr>
</tbody>
</table>

### Detailed explanation of new law

3.11 The Bill increases the maximum criminal penalty for the following offences to 10 years imprisonment and/or; the greater of 4,500 penalty units, or three times the profit gained or loss avoided for:

- Market manipulation;
- False trading and market rigging – creating a false or misleading appearance of active trading;
- False trading and market rigging – artificially maintaining a trading price;
- Dissemination of information about illegal transactions;
- False or misleading statements;
- Inducing persons to deal in financial products; and
- Dishonest conduct in relation to a financial service or product.

**[Schedule 1, Item 20]**

3.12 The maximum criminal penalty for a body corporate that breaches the insider trading and market manipulation provisions will be the greater of:

- 45,000 penalty units;
- three times the profit made or loss avoided;
• or ten percent of annual turnover during the relevant period.

[Schedule 1, Item 20]

3.13 The Bill amends the ASIC Act to remove the requirement that a notice to produce must be issued and not complied with before ASIC can apply for a search warrant.

3.14 The Bill clarifies the fault elements of the offence in section 1041B in accordance with the requirements of the Criminal Code. That is, criminal liability for such an offence would require:

• intention with respect to the act itself; and
• intention, knowledge or recklessness with respect to creating a false or misleading appearance.

[Schedule 1, Item 15]

Application and transitional provisions

3.15 The provisions contained in this Bill commence on proclamation.

3.16 The amendments made to the search warrants power in the ASIC Act apply in relation to warrants issued after commencement.

[Schedule 1, Item 22]
Chapter 4
Amendments to the Telecommunications (Interception and Access) Act 1979

Outline of chapter

4.1 The Bill includes the insider trading and market misconduct provisions in Part 7.10 of the Corporations Act in the list of serious offences in section 5D of the Telecommunications (Interception and Access) Act 1979 (TIA Act).

Context of amendments

4.2 Insider trading and market manipulation offences cause serious harm to the fair and efficient functioning of Australia’s financial markets. These markets function best when information is widely dispersed and investors have confidence in the fairness of markets.

4.3 The offences related to market misconduct have been identified as offences which should be included in the definition of ‘serious offence’ in section 5D of the TIA Act. However, the current level of criminal penalty imposable has been identified as insufficient.

4.4 Insider trading and other market offences are difficult to investigate as these offences by their very nature involve complex networks of people, technological sophistication and avoidance of paper and traceable communications. In addition, the transactions often occur in real time, meaning that telephone conversations are often the only evidence of the offence.

Summary of new law

4.5 The Bill amends the TIA Act to include the following offences in section 5D of the TIA Act:

- Market manipulation;
- False trading and market rigging – creating a false or misleading appearance of active trading;
• False trading and market rigging – artificially maintaining a trading price;
• Dissemination of information about illegal transactions;
• False or misleading statements;
• Inducing persons to deal in financial products; and
• Dishonest conduct in relation to a financial service or product.

Comparison of key features of new law and current law

<table>
<thead>
<tr>
<th>New law</th>
<th>Current law</th>
</tr>
</thead>
<tbody>
<tr>
<td>An interception agency will be able to apply for telecommunications interception warrants in the course of investigations into insider trading and market manipulation offences.</td>
<td>Telecommunications interception warrants are not currently available for the investigation of insider trading and market manipulation offences.</td>
</tr>
</tbody>
</table>

Detailed explanation of new law

4.6 The Bill will amend the TIA Act to include the insider trading offences and those in Part 7.10 of the Corporations Act as serious offences for the purpose of section 5D of the TIA Act. [Schedule 1, Item 21]

4.7 This will enable an interception agency to apply for a telecommunications interception warrant in the course of investigations into these offences, including investigations assisted by ASIC.

Application and transitional provisions

4.8 The provisions contained in this Bill commence on proclamation.
Chapter 5
Regulation Impact Statement

BACKGROUND AND PROBLEM IDENTIFICATION

5.1 The provisions dealing with the maintenance of, and access to, registers of companies and registered schemes are currently found in Chapter 2C of the Corporations Act 2001 (Corporations Act). All companies and all registered schemes are required to set up and maintain:

- a register of members;
- a register of option holders and copies of options documents — if the company or scheme grants options over unissued shares or interests; and
- a register of debenture holders — if the company issues debentures.

5.2 Companies and registered schemes may also engage a specialist firm to maintain their registers. These requirements also generally apply to firms maintaining registers on behalf of another company.

5.3 Historically, companies have been required to keep registers of their members, which were considered public documents. Company member registers provide necessary information to assist current and future members to exercise their membership rights, and members and interested third parties to engage in commerce.

5.4 The legitimate and beneficial reasons for accessing a member register are now much wider than the original objective, which was to enable creditors to discover the identity of members and the extent to which they were liable to contribute to the company’s capital. Access to the register of members facilitates good corporate governance through member engagement and participation. The Parliamentary Joint Committee on Corporations and Financial Services expressed the view that public access to member registers was essential to ensure transparency and preventing target companies from blocking legitimate offers to members from being made.

5.5 Reasons for members accessing the register may include:
• members checking that their personal details are accurately recorded on the register;

• members communicating with other members about their potential rights to bring or join an action against the company for relief against oppression or to bring a statutory derivative action;

• members or interested parties writing to existing members with an offer to purchase shares;

• members or interested parties canvassing a small number of members to identify sellers, as a step preliminary to a takeover bid;

• members contacting members in order to influence company management about the operation of the company, or to obtain support for a members’ resolution; and

• candidates contacting members about their election as directors.

5.6 A company generally keeps its register of members at its registered office. The register is required to contain members’ names, postal addresses and shareholding details. This information is generally discoverable by the company when individual members, or their representatives, report their membership interests to the company for registration either on subscription or transfer of shares.

5.7 Currently, a company must allow anyone to inspect or copy the register, however, the Corporations Act restricts the use of information obtained from a register.

5.8 A person can only use or disclose the information if it is relevant to the holding of the interests recorded in the register or the exercise of the rights attaching to them, or if the company consents. For example, the use of information on the register for the direct marketing of goods or services would be prohibited. The restrictions on use of the information contained on the register, and the sanctions applying to misuse, are designed to protect members from undue intrusion.

5.9 Legitimate reasons for accessing registers have become broader since these provisions were introduced into the Corporations Act. Additionally, developments in other areas of the law, such as privacy, have raised concerns that the balance between the right to access the register and the expectation of privacy in relation to personal information should be revised. The permissive nature of the current provisions has
given rise to undesirable uses of the register. Amongst these uses are: organisations, such as charities, soliciting donations; brokers soliciting for clients; and making off-market low-value offers to purchase shares (unsolicited share offers, or USOs).

5.10 Offers to purchase shares generally occur on-market, or through legitimate commercial off-market offers including takeover bids, buybacks, share sale facilities, offers to wholesale investors, and foreign-regulated takeover bids. However, a number of entities are in the business of offering to purchase shares off-market and unsolicited from shareholders for amounts that are usually substantially less than the going market rate.

Objectives

5.11 The proposed changes will eliminate uses of the register which are considered to be improper.

Options

Option A: No action

5.12 This option would maintain the status quo, meaning there would be minimal restrictions placed on gaining access to copies of the register.

Option B: Proper purpose test

5.13 This option would result in a requirement that access to registers can only be gained if it is for a ‘proper purpose’.

5.14 The Corporations Act would be amended to require a person seeking a copy of a register to make a request to the company that includes: the person’s name and address (for an individual); 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.

5.15 The Australian Securities and Investments Commission (ASIC) would publish guidance on what purposes would be considered proper. The guidance material produced by ASIC would be similar to that issued in the United Kingdom by the Institute of Chartered Secretaries and Administrators for the UK proper purpose test.
5.16 A non-exhaustive list of ‘improper purposes’ would be set out in the Corporations Regulations 2001 (Corporations Regulations). The improper purposes for accessing a register that have been identified to date are set out below.

- Specific groups in the community, such as charities, using the register information to solicit donations from shareholders.
- Gathering information about the personal wealth of shareholders.
- Brokers using register information to solicit clients.
- Making off-market offers to purchase securities in a listed company, other than for the purposes of a takeover.

5.17 If a company refuses to provide a copy of its register, the applicant would have 20 days within which to apply to the court for review of the company’s decision if they believe that their intended purpose is proper. The court would review requests for copies of the register for which the stated purpose does not fall squarely within the specified improper purposes. The court would also take into account the guidance material produced by ASIC. When the court has determined whether a copy of the register was sought for a proper purpose, it would make an order that the company either comply, or not comply, with that request and similar requests. The court may also order costs in favour of the company or the applicant.

Impact analysis

Option A: No change

Impact on corporations

5.18 There is no impact on corporations if the status quo remains. Corporations will be required to provide a copy of their register whenever one is requested.

Impact on shareholders

5.19 If the status quo is retained, shareholder details will continue to be available to anyone that requests a copy of the register, regardless of the intended use of the information.
**Impact on a person seeking a copy of the register**

5.20 There would be no impact on a person seeking a copy of the register if the status quo is maintained.

**Option B: Proper purpose test**

**Impact on corporations**

5.21 Many submissions to the *Access to Registers and Unsolicited Off-market Offers to Purchase Shares* Options Paper indicated that a proper purpose test would be likely to decrease costs and complexity for corporations dealing with requests for access. This is because currently, although there is no option to refuse access, companies nonetheless look for ways to limit access. A proper purpose test would provide clear guidance on the instances in which a company could refuse to provide a copy of its register. It is also expected that a requirement to fulfill a proper purpose test to obtain access to a register would result in fewer requests being made, as people would desist from seeking access where their purpose is considered improper.

5.22 There is no hard data on the number of requests that are currently made to companies, in particular, there is no hard data on the number of improper requests. Anecdotally, improper requests are uncommon but when they do occur they may create significant disruption. For example, they can result in a large number of shareholders having to deal with unsolicited offers to purchase their shares, and the company then has to respond to shareholder complaints and provide information to those who may have received the offers.

**Impact on shareholders**

5.23 Some shareholders, in particular those vulnerable and less educated investors targeted by USOs, would benefit from no longer receiving these offers. Consumer research conducted by ASIC indicated that most investors who accept USOs do not realise the offer they are accepting will result in them selling their shares for significantly below market value, despite the required consumer warnings. Conversely, some shareholders might be adversely affected by the requirement to fulfill a proper purpose test to access registers if they treat USOs as a means of easily disposing of their shares, regardless of the fact they obtain less than market price.

5.24 More generally, shareholders will benefit from the increased protection of their personal information. Under the current laws, there have been significant levels of complaint by shareholders that their
privacy rights are being infringed by persons accessing their contact
details for improper purposes. While it is currently an offence to use
information on a member register to direct-market to shareholders, the
way in which the current provision is framed enables organisations
seeking donations and brokers seeking clients to by-pass this restriction.
Implementing a proper purpose test for access to registers will prevent
member details from being used in this way and ensure that shareholder
privacy is protected.

**Impact on a person seeking a copy of the register**

5.25 Under the current laws, a person seeking a copy of the register
must request it in writing. The proposed change will not alter this
requirement; however, the person will need to include some additional
information relating to their reasons for seeking access. This should only
minimally increase the compliance burden and would be unlikely to
significantly impact people seeking access to a register.

5.26 Six individuals have been identified as being in the business of
making USOs through various corporate entities. Generally, the ability to
make USOs is dependent on the offeror securing a copy of a company’s
register which details the shareholding and contact information for
potential offerees. This option would adversely affect these individuals.
There is, however evidence that USOs are not being made as frequently as
in the past. However, it should also be noted that these offers have never
been made with great frequency. In *AXA Asia Pacific Holdings Limited v
Direct Share Purchasing Corporation Pty Ltd* (AXA case) there had been
two requests for the register in a 12-month period, both by a corporation
in the business of making USOs.

5.27 Treasury has been advised that one major bank received 12
requests for a copy of its register over a two-year period. Of those
requests, one was from an offeror of USOs, four were from charities, and
two were from investment (brokerage) firms. The other requests were
from shareholders and companies seeking missing estate funds. Given the
low numbers of requests for copies of registers, the overall impact of this
change will not be great.

5.28 There would be no impact on a shareholder seeking a copy of
the register in order to exercise their rights as a shareholder.

**Consultation**

5.29 In May 2009, the former Minister for Superannuation and
Corporate Law released the Options Paper which considered a number of
ways in which the issues presented by USOs could be addressed, including by restricting access to company registers.

5.30 The option to introduce a proper purpose test received strong support from a majority of stakeholders. The proper purpose test that is now being proposed has changed slightly from that in the Options Paper by specifying improper purposes.

5.31 It is now proposed that improper purposes be specified in the Corporations Regulations. The four purposes that have been identified so far as improper uses of register information are: specific groups in the community (such as charities) soliciting donations from shareholders; brokers soliciting clients; obtaining information about the personal wealth of shareholders; and making off-market offers to purchase securities (other than for a takeover or an unlisted company). It is therefore proposed to undertake public consultation by way of a proposals paper which would include this revised version of the proper purpose test.

Preferred option

5.32 The preferred option is Option B, the introduction of a proper purpose test.

Strategy to implement preferred option

5.33 The proposed changes would be implemented by amending the Corporations Act and the Corporations Regulations. ASIC would also have a role in providing guidance material on the proper purpose test.
RELATED ISSUES — FEES FOR COPIES OF THE REGISTER

Background and problem identification

5.34 The law currently provides that where a person requests a copy of a member register that is kept on computer, the fee chargeable is ‘up to a reasonable amount that does not exceed the marginal cost to the company of providing and inspection’. The concept of ‘marginal cost’ is intended to allow companies to set fees with respect to their particular operational costs of providing access to its register and with regard to the reasonableness of the fee. This is meant to ensure that companies do not frustrate access to their register to an extent that access does not occur.

5.35 In the AXA case, the Court held that, based on the current framing of the provision, the appropriate fee for a copy of the register is $250. However, this fee does not cover the cost of producing a copy of the register for the majority of companies. Additionally, since the AXA decision was handed down in 2008 there has been an increase in requests for copies of member registers which relate to purposes not within the policy intent of the law.

5.36 The construction of the current regulation attempts to balance two competing policy objectives of facilitating rapid and easy access by the public to a company register in order to promote good corporate governance and commerce, and managing the associated compliance costs for companies.

Objectives

5.37 The proposed amendments would ensure certainty and transparency in the fee that would be applicable for obtaining a copy of a register, and would manage the compliance costs for corporations.

Options

Option A: No change

5.38 The existing law would be retained without amendment.
Option B: Tiered fee structure

5.39 A tiered fee structure would be prescribed in the Corporations Regulations.

5.40 The first tier would apply to a company with up to 5,000 members and impose a flat fee of $250. The $250 fee determined in the AXA case is based on the assessment by Justice Finkelstein of a reasonable fee, which took into account expert evidence from an economist, an IT professional, and a state manager with Computershare.

5.41 The second tier would apply to a company with between 5,000 and 20,000 members and impose a fee of $250 plus $0.05 for each member in excess of 5,000. For a company with 20,000 members, a copy of the register would cost $1,000.

5.42 The third tier would apply to a company with more than 20,000 members and impose a fee of $1000 plus $0.01 for each member in excess of 20,000. A copy of the register of a company with 500,000 members would cost $5,800.

5.43 A cost of $0.05 per additional member recognises that there are marginal costs associated with providing additional details. The reduction of this marginal cost to $0.01 where a company has over 20,000 members reflects the economies of scale in producing a copy of the register of a company that has a large number of members.

5.44 This option also reflects the general view that there should be consistency in the fees applied. A number of submissions suggested that $0.05 per member was a reasonable amount to charge, in contrast to the takeovers fee, which was generally seen to be too high at $0.10 per member. By adopting a tiered approach, the fee payable recognises that the cost of producing the register should not be an impediment to obtaining a copy of the register. The three-tiered structure reflects that adopting a set price per name should not operate to prevent access to copies of the register.

Impact analysis

Option A: No change

Impact on corporations

5.45 There is no benefit to corporations or shareholders if no change is adopted.
Impact on those seeking copies

5.46 People seeking copies would continue to pay $250 for a copy of a member register in accordance with the decision in the AXA case, regardless of the number of members and cost of producing a copy.

Option B: Tiered fee structure

Impact on corporations

5.47 The proposed fee structure would better reflect the cost of producing a copy of a register to a corporation and therefore reduce the net cost of complying with requests.

5.48 The proposed fee structure would also provide certainty as to the fee payable for a copy of a register. This would reduce complexity and cost for companies in determining an appropriate fee. It would also eliminate the risk of substantial disputes arising between the parties as to the fee that should be payable – which carries associated costs for the company and those seeking access.

5.49 It is likely that the increase from $250 would reduce the incidence of requests made for copies of registers and the consequent frivolous communications that are made to large numbers of shareholders.

Impact on those seeking copies

5.50 The cost of obtaining a copy of a register would be increased where the relevant company has over 5,000 members. However, the cost would still be significantly less than prior to the AXA decision. In that case, AXA requested that Direct Share Purchasing pay a fee of $17,195.39 for a register with in excess of 344,000 members, which was the accepted standard at that time. Under the tiered structure a fee of $4240 would be payable for a register of that size.

5.51 The imposition of a clearly defined fee will substantially reduce the potential for companies to obstruct access for legitimate purposes (but which may be against the interests of the company or its directors). It will therefore have a positive impact on the ability of persons asserting their legitimate rights in respect of the company.
Consultation

5.52 The issue of the fee payable for a copy of a register was considered in the Options Paper. Six options were proposed, however, the submissions did not produce a consensus on a preferred option.

5.53 All respondents were in favour of changing the current regime. The concepts of reasonable cost, market cost, and a negotiated fee were seen not to address the criticism in the AXA case of the complexity inherent in the use of these terms. Problems were identified with all of these options, as set out below.

- If the status quo were maintained, the introduction of a proper purpose test would resolve the issue of inappropriate access, but companies would still be left with the decision that $250 is considered the reasonable cost.

- Removal of the ‘marginal cost’ element of the current test would leave the concept of reasonableness, which generally requires an objective evaluation of the particular circumstance of each case.

- Removal of marginal cost may avoid the complexities identified in the AXA case, but the use of reasonableness alone would not provide sufficient guidance for companies to determine what costs should be included when seeking to recover fees.

- Allowing companies to pass on the full cost of access in the absence of a reasonable qualifier would permit companies to frustrate access by setting a high price for it.

- The introduction of a market fee, whereby members and interested parties would negotiate a price with a company, may result in removal of regulator requirements on companies, particularly where they are greater than the transaction costs associated with negotiation. On the downside, companies may be able to manipulate prices so as to preclude optimal access to the register.

- Requiring companies to disclose to members their policy for negotiating costs of accessing its register is likely to impose additional compliance costs on companies and lead to unsatisfactory outcomes for small investors, who do not have the same bargaining power as large investors.
Corporations Amendment (No 1) Bill 2010

• Aligning the fee with the current takeover fees would be simple to comply with and could be readily reviewed to ensure that it reflects current market prices associated with providing access. However, it would not represent a reasonable option for the majority of investors. For example, the cost of a copy of the Commonwealth Bank’s register, with a current membership of 770,000, using the takeover prescribed fee, would be $77,000.

5.54 Although submissions generally favoured an option that would create a degree of certainty in the fees payable, such as corporations passing on the full cost of producing a copy or aligning the fee with the takeovers fee, such options would impede legitimate uses of registers. This is why Treasury has developed a three-tiered fee structure which creates a balance between the decision in the AXA case, and the costs incurred by companies in preparing member registers.

Preferred Option

5.55 The preferred option is Option B, implementation of a tiered-fee structure.

Strategy to implement the preferred option

5.56 The applicable fee is prescribed in Schedule 4 of the Corporations Regulations, implementing this change would require amending the schedule.

RELATED ISSUES — FORMAT OF COPIES OF THE REGISTER

Background and problem identification

5.57 The Corporations Act currently provides that where an electronic copy of the register is requested, companies must provide the data in a readable electronic format. However, there is no requirement to format the data for the requestor’s preferred operating system. The Options Paper noted that there would be benefits and reduced costs for a person who requests an electronic copy of the register if they received the
data in their preferred format. This would accord with the policy intent of access to registers.

5.58 The requirement to provide the data in a readable electronic format was originally intended to reduce costs to companies that had a different operating system from the requestor. Given the advances in technology and the convergence of operating systems since the current provisions were enacted, reduced compliance costs may no longer be a significant factor to warrant retaining this condition. The Options Paper proposed that the law be amended to require an electronic copy to be provided in the format requested, unless both parties agree to a different format.

Objectives

5.59 The proposed change would ensure that corporations are not able to interfere with legitimate uses of member registers by providing copies of the register in a format unsuited for further use.

Options

Option A: No change

5.60 The existing law would be retained without amendment.

Option B: Specify formats for copies of member registers

5.61 This proposal would amend the Corporations Act to include a regulation making power that would enable a number of formats and device mediums to be prescribed in the Corporations Regulations. The current reference to ‘floppy disk’ would also be removed.

Impact Analysis

Option A: No change

Impact on corporations

5.62 There would be no impact on corporations by retaining the status quo.
**Impact on those seeking copies of registers**

5.63 Under the current law, a person seeking a copy of the register can receive the copy in whatever format the company chooses. In practice, companies generally attempt to thwart use of the information for purposes they disagree with (even if the purpose is ‘proper’) by providing the register in a format that is not readily useable, such as Portable Document Format.

**Option B: Specifying formats for copies of member registers**

**Impact on corporations**

5.64 Corporations would have to comply with a request for a copy of their register in the format specified in the Corporations Regulations. This may increase costs where the format is unsupported. The prescribed formats would be those currently supported and will be developed in consultation with industry. The net effect for corporations will be a cost saving, as they will not be required to comply with requests in unsupported formats.

**Impact on those seeking copies of registers**

5.65 There will be a decrease in costs for persons seeking copies of the register because the information will be provided in one of the readily useable specified formats.

**Consultation**

5.66 The issue of what format register copies should be provided in was considered in the Options Paper. Submissions generally appreciated that the format of an electronic copy of the register should not be used to frustrate access. However, generally the submissions favoured including either a specific format in the regulations (such as Microsoft Excel), or a reference to an industry standard. All submissions supported the removal of references to outdated technology and favoured the use of a more technology-neutral term, such as portable electronic storage device, which would encompass CD-ROM, DVD-ROM, and USB memory drives.

**Preferred Option**

5.67 The preferred option is Option B, specifying formats for copies of member registers
Strategy to implement preferred option

5.68 The Corporations Act would state that copies are to be provided in the format requested, which must be from the list of specified formats in the Corporations Regulations.

RELATED ISSUES — ACCESS TO A REGISTER MAINTAINED ON A COMPUTER

Background and problem identification

5.69 A person wishing to view a register maintained on a computer may demand a printout of the register, unless both parties agree to inspection on the computer. This requirement can be expensive for a company, even when a person only intends to inspect the register and does not intend to retain the hard copy. Companies may not be able to recoup the costs associated with preparing the hard copy as they can where a person requests a copy of the register.

5.70 The current law fails to reflect the increasingly computerised nature of record keeping and increasing levels of computer literacy. The provisions also expose a company to the costs associated with maintaining the register on computer and in hard copy.

Objectives

5.71 This proposal would amend the Corporations Act so that where a register of members is kept on a computer, a person seeking to inspect the register does so on the computer.

Options

Option A: No change

5.72 The existing law would be retained without amendment.
Option B: Accessing registers maintained electronically on a computer

5.73 It is proposed that the Corporations Act be amended to have as the default position for a register that is maintained electronically that it is to be viewed on a computer. This will ensure that companies are not subject to undue costs of providing access in hard copy. The changes would reflect the modernisation of record keeping and facilitate costs savings associated with improvements to technology. In addition the possibility of copies of the register being obtained without payment of the prescribed fees will be avoided.

Impact Analysis

Option A: No change

Impact on corporations

5.74 Corporations would continue to be required to print a copy of their member register where requested.

Impact on those accessing the register

5.75 If no change is adopted, there would be no impact on those accessing the register.

Option B: Accessing registers maintained electronically on a computer

Impact on corporations

5.76 There would be a reduction in costs to corporations as they would no longer be required to produce hard copies of the register where access has been requested.

Impact on those accessing the register

5.77 There would be little change for those seeking access to the register as this change does not affect access, only the manner in which the register is viewed.

Consultation

5.78 All submissions that addressed this proposal supported the register being inspected on a computer where it was maintained
electronically, provided that adequate security procedures were implemented to protect the details of members. This is primarily an issue where a register contains additional information to that required under the Corporations Act. None of the submissions indicated that there would be difficulties in addressing these security concerns.

Preferred Option

5.79 The preferred option is Option B, accessing registers maintained electronically on a computer.

Strategy to implement preferred option

5.80 The Corporations Act would be amended to remove the reference to a register being printed and to instead provide that a register be inspected in the format in which it is maintained.
## Schedule 1 — Amendments

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