

21 July 2017

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

By email: economics.sen@aph.gov.au

Dear Mr Fitt

Inquiry into Corporations Amendment (modernisation of members registration) Bill 2017

Governance Institute of Australia (Governance Institute) is the only independent professional association with a sole focus on whole-of-organisation governance. Our education, support and networking opportunities for directors, company secretaries, governance professionals and risk managers are unrivalled.

Our members have primary responsibility to develop and implement governance frameworks in public listed, unlisted and private companies, as well as in the not-for-profit (NFP) and public sectors. We represent the company secretaries of most of Australia's largest public and private companies, all of whom are involved in maintaining registers of members and considering requests to access and use those registers. Our members have had to respond to numerous requests over time for access to and use of the information in the register for which they have responsibility, and have also had to respond to shareholders who have strongly objected to the access and use of that information. Our members have been at the forefront of advocating for shareholder privacy and protection and supported the introduction of the proper purpose test in 2010 embedding the anti-hawking provisions of the Corporations Act 2001 (the Act) in order to protect shareholders and companies from predatory behaviour of persons requesting copies of company registers.

Governance Institute also advocates that any amendments to the Act should be technology neutral and supports legislative changes which allows for innovation in shareholder communication, engagement and corporate reporting. We are on the record as supporting technology neutrality in the distribution of meeting materials and have provided submissions to Treasury on this matter. We attach our submission to Treasury dated 16 June 2016 to this letter. The importance of amendments to the Act being technology neutral is of even greater importance today given the rapid pace of innovation in digital communications. We note for example, the consideration by ASX of distributed ledger technology in its CHES replacement project.

Governance Institute thanks the Senate Committee for the opportunity to provide our views on this proposed amendment to the Act.

We note that the second reading speech in support of the amendment refers to the current situation facing the members of CPA Australia and the desire of the members of that professional membership association to contact fellow members in a timely and economical

fashion. We appreciate the policy reason behind the suggested amendment to the Act as it relates to the membership of the CPA. The CPA is a professional organisation made up of members who are required to pass qualifying examinations before they can join and to pay annual fees for registration to enable them to undertake their profession. Members practice the profession of accountancy and their conduct as certified accountants is regulated by the organisation. Members face many of the same professional and commercial issues and come together to discuss and advocate on matters of concern to them. It would not be surprising that CPA would hold the email addresses of a substantial number of its members who would almost necessarily require an email address to undertake their profession. The small change proposed to section 169 of the Act seeks to facilitate greater communication between members of a professional membership organisation such as the CPA. However, some of the transitional difficulties and privacy concerns outlined in relation to listed companies later in this submission would also apply. Of course, it would be up to members of CPA to comment on whether such an amendment would be appropriate for that organisation only.

Due to the way the amendment is drafted, the proposed change impacts all companies covered by the Corporations Act, whether they be public companies limited by guarantee (which captures membership organisations, charities, sporting associations and registered clubs for example), proprietary companies and public companies (both listed and unlisted).

The proposed change would also impact millions of Australians holding shares directly in listed and unlisted companies.

Notwithstanding our very strong support for the Act to be fit for purpose for the 21st Century and to embrace technology, we consider that the proposed change, in its current form, has many unintended and undesirable consequences which we wish to bring to the Committee's attention.

The requirement to maintain the share register is mandatory

The proposed amendment is to Part 2C.1 of Chapter 2C of the Act which deals with the maintenance and contents of company registers.

Section 168 provides that a company or registered scheme must set up and maintain a register of members. The register of members must contain amongst other things, the member's name and address (section 169).

Failure to maintain a register in accordance with section 169 is a strict liability offence.

Under section 173 of the Act a company or registered scheme must allow anyone to inspect a register and, subject to the protections contained in section 177, provide a copy of the register to those who apply for it in accordance with the process set out in section 173. Alternatively, a Court may authorise a person to inspect a Company's books for a proper purpose and in good faith in certain circumstances.

The interplay of these sections means that maintenance of members' details on a company register is subject to strict liability and members' details contained in a register are open to public scrutiny.

The effect of the proposed change will be to create a mandatory requirement for the register of all companies to contain the email addresses of its members. The proposed amendment is also in absolute terms ie there are no carve outs or exceptions and no transitional arrangements. There are certain important practical and legal consequences which flow from the proposed amendment as currently drafted. We will focus in this submission on those issues which impact particularly on listed companies as these entities frequently have hundreds and thousands of shareholders on their registers and will be impacted the most by this proposed change. However, all companies will be impacted significantly by the proposed amendment.

No listed company currently holds the email addresses of all of its members and as a consequence would be in contravention of the proposed amendment from day one of its enactment

The current proposal makes the maintenance of email addresses on the register a mandatory requirement. We note that in the second reading speech, Senator Xenophon argued that 'This amendment is needed to take into account that most communication between companies and members is via email'. As discussed below it is not the case that most communications between listed public companies and its members is via email. No listed company currently holds the email addresses of all its shareholders. Accordingly, if the amendment was passed, all listed companies would be in contravention of the provisions on day one of the changes. This is the case irrespective of the size and sector of the listed entity and despite considerable and costly efforts on the part of listed entities to collect email addresses of their shareholders.

While the proposed amendment would require the collection and recording of shareholders email address, it does not amend current default requirements in the legislation for companies to send certain information to shareholders in hard-copy via mail (unless they elect to receive them electronically) - for example:

- a notice of meeting under section 249J(3) of the Act (if the member has not nominated otherwise);
- payment statements as required under the relevant taxation legislation.

Accordingly, current issues encountered by companies in relation to collecting email addresses, and encouraging shareholders to receive company information electronically, are likely to continue despite the proposed amendment in its current form (as outlined further in this submission).

Various of our members have provided us with details of the number of email addresses held by the ASX listed companies for whom they work. Some of these details have been provided on a no names basis. By way of example, we are aware of:

- An ASX NL company which has email addresses for 46% of its shareholders
- An ASX listed investment company with approximately 120,000 shareholders, of which a vast majority are smaller retail investors, only holds e-mail addresses for 43% of those shareholders, leaving 57% where the company holds no email address details.
- An ASX top 20 company with over 570,000 members which holds email addresses for 50.4% of its shareholders.
- An ASX top 20 company which currently holds email addresses for approximately 45% of its shareholders.
- AMP Limited, an ASX listed company with over 770,000 members and which has a large number of retail shareholders, holds email address details for only 34% of its shareholders (approximately 260,000 email addresses).

Information received from Computershare Limited indicates that it administers more than 5.5 million holding account records where there is no email address recorded (being approximately 50% of holdings across all clients).

If the proposed amendment was enacted, companies would need to expend considerable sums asking for their members' email addresses. By way of example, AMP has estimated the costs of collecting and processing the remaining 500,000 email addresses it does not currently hold to be a minimum of \$800,000 including mail costs and printing. This is an unnecessary financial impost which would be borne by all shareholders and would not necessarily result in large numbers of email address details being provided.

A substantial number of shareholders either do not have or do not wish to provide their email address details

It is the experience of our various members that a large number of shareholders simply do not respond to requests to provide an email address and to elect to receive communications electronically. There are many reasons why shareholders fail to provide company registries with their email address details. The most compelling reason is that they do not have an email address. By way of example, we are advised that the average age of an AMP shareholder is 75 years. In AMP's experience, many older shareholders do not have an email address. The proposed amendment has no provision for the case of a shareholder with no email address or who fails to provide an email address. In those instances, the company would be in breach of the proposed provision with no way of attaining compliance.

Many shareholders fail to provide email addresses even when considerable efforts have been made by companies to obtain them. By way of example, AMP's email address rate of 34% is despite it running campaigns over the last 10 years to increase the number of email addresses held. These campaigns have had mixed results. In 2016, AMP ran a year-long campaign to collect the email addresses of its shareholders, with only 40,000 shareholders providing their email address. Computershare Limited has advised that in its experience, email collection campaigns to shareholders will typically achieve a success rate of approximately 10% of the holders communicated to (the precise rates will vary depending on a range of factors, including whether for example an incentive or prize is offered to responding holders).

Therefore, we anticipate that on day one of any such proposal coming into force, no registry of an ASX listed company would be compliant with section 169 of the Act and in most instances would never be able to achieve compliance. We also anticipate that some shareholders will not provide their email addresses because they will not want their email address to be publicly available. This would be a significant legal issue for companies and their registry providers.

Companies may need to obtain shareholder consent to include current email address details in the publicly available register of members

Companies are not currently required to place their shareholders' email address details on the share register. Email addresses which are currently held by share registries have been requested and supplied to facilitate communication between the registries and shareholders to administer their shareholdings in the company. Actions such as the issue of notices of meeting and notification of dividend payments are facilitated by way of email communication where an email address is provided. The email address details are stored by the registry against the shareholder's holding and do not form part of the statutory shareholder register under section 169. While shareholders may be happy for the registry to administer their holding by using the email address provided for that purpose, they may not be happy for their personal email address to be added to a public register. If required by law to have an email address on the register they may choose to use a different email address for that purpose.

Governance Institute is of the view that, in addition to seeking the email address details of shareholders who have not previously provided their email address details, if it becomes mandatory for email addresses held by a company to be placed on the company register, companies may want to obtain the consent of their members for whom they hold an email address to place that email address or an alternate email address on the register of members. While such a request would not incur the costs of printing and postage, it evidences the complexity of the proposed amendment and what steps companies would have to undertake to attempt compliance.

Other practical difficulties of maintaining the statutory register if email addresses are mandatory

Governance Institute considers that listed companies would face potentially significant practical issues and costs maintaining their registry details going forward in the event the proposed amendment was enacted.

We are advised, for example, that AMP experiences a bounce back rate of 5000 emails after each email broadcast (out of its total email population of 260,000). This is due to emails no longer being valid or mail boxes being full and rejecting emails (for example, this is common when sending emails to hotmail and gmail accounts). People frequently change email addresses as they change their internet provider or change jobs.

We query what obligations would be placed on companies to pursue email bounce backs and keep email address details updated? Currently the obligation to keep companies apprised of change of email address lies with the shareholder as in order to facilitate email communication with the company in which they have invested, it is in a shareholder's best interests to keep their email address details up to date. However, if the email address becomes a mandatory requirement on the register of members, companies may be held accountable for failure to follow up with a member's email address where a bounce back indicates that it is no longer valid. This may place listed public companies in the onerous position of chasing up potentially thousands of bounce backs each time an email broadcast occurs at potentially significant cost.

Privacy concerns of shareholders

We note the comments in the second reading speech by Senator Xenophon concerning section 173 of the Act that 'There are important protections and safeguards that exist within section 177 of the Corporations Act 2001 which deter from improper use and disclosure of the information contained on the register'.

Governance Institute has long advocated for such shareholder safeguards and in particular the introduction of the 'proper purpose' test. We have also advocated for reform to legislation to provide for more acceptable privacy rights for shareholders.

Today, shareholders can amount to millions of geographically dispersed individuals participating in wealth acquisition. The addition of shareholders' email addresses as a mandatory item on the share register raises significant concerns of shareholder privacy. We note that the provisions of section 14 of the Privacy Act (1988) which requires that personal information be stored securely to prevent its loss or misuse is at odds with placing a person's name and email address on a register which can be inspected by anyone who makes a request.

Cyber security issues

Some of our members have recently experienced requests for copies of their company register from a reputable university for use in academic research. Upon further investigation, these requests were later found to have been fraudulent and the register was not provided. Companies have limited recourse to resist the production of their register if they receive an application in accordance with section 173 of the Act together with the prescribed fee. Governance Institute is concerned that the passing of this amendment may give rise to increased fraudulent requests for company registers. While we note the legislative provisions against the improper use of share register details, we are of the view that providing a third party with the email addresses of, for example, a large ASX listed company with hundreds of thousands of members has the potential for great harm if used for malicious purposes. Due to the ease of email communication, someone with malicious intent could engage in cyber attacks against the shareholder bases of large companies quickly and cheaply. Cyber criminals already have the capacity to mock up emails which look as if they are issued by legitimate sites. The recent spate of mock emails which appeared to originate from the NSW Department of Roads and Maritime Services are a case in point. A cyber attack against a company's register could take place before the relevant company had time to respond or warn its members, causing reputational damage to the company concerned and enormous disruption to its day to day operations. Another consequence of spam, phishing or cyber attack is that it often renders the recipients' email address unusable as the provider shuts down the account, causing

considerable inconvenience to those affected The threat of phishing emails would be a significant issue for companies such as AMP, CBA and Telstra which between them have millions of small retail shareholders.

We would recommend that the Committee consider carefully the risks involved.

Impact on proprietary companies on changes to member register

Section 178A of the Act requires a proprietary company to notify ASIC of changes to the member register. Failure to notify changes under the section is a strict liability offence. An amendment to section 169 would arguably impact on section 178A and require proprietary companies to notify ASIC each time an email address detail is added to or altered in the register (subject to the carve out contained in section 178B for proprietary companies with more than 20 members). The company secretary of a proprietary company has corporate responsibility for contraventions of section 178A (subject to the defence under section 188(3)). This would clearly be an unworkable situation.

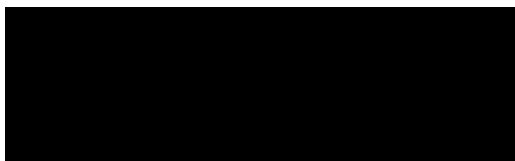
Currently, register particulars notified to ASIC are included in the ASIC database and details are searchable to anyone who undertakes a company search. It is arguable that the proposed amendment would result in the email addresses of all shareholders in proprietary companies becoming publicly available to anyone who undertakes a search of the ASIC database. This outcome would give rise to unintended privacy concerns for shareholders and arguably give unnecessary rise to ASIC's compliance campaigns under s 348A of the Corporations Act.

Conclusion

Governance Institute is supportive of methods which increase the use and popularity of electronic communication between companies and their shareholders. We have made recommendations in our previous submission to Treasury as to how changes to the Corporations Act could facilitate the ability of companies to obtain email details from shareholders to use electronic communication methods. While we support legislative changes to facilitate electronic communication between companies and their shareholders we do not consider that placing shareholder email details on the company's public share register to be the method which should be adopted. We therefore are unable to support the proposed amendment in its current form.

Governance Institute would welcome speaking to the Senate Inquiry on these matters, should public hearings be held, and the opportunity to be involved in further deliberations.

Yours sincerely



Steven Burrell
Chief Executive

Attachment: Letter to Daniel McAuliffe, Manager, Corporations & Schemes Unit, The Treasury dated 16 June 2016.