



Questions on notice

1. **Senator XENOPHON:** Can you tell us what resources are being put into the investigation?

Ms Eccleston: It might be more appropriate for me to take these questions on notice.

Senator XENOPHON: Is there one person working on it one hour a week, or are there half a dozen people working on it 60 hours a week? What sort of resources?

Ms Eccleston: I could not give you an accurate picture, so it is more appropriate that I take it on notice.

Senator XENOPHON: Can you give me a broad picture? Can you give me a thumbnail sketch of how extensive or otherwise the investigation may be into the CPA?

Ms Eccleston: I think it is more appropriate that I take this on notice. I can comment that we are doing an investigation and that we do resource our investigations appropriately. But, beyond that, I do not think it is appropriate for me to comment.

RESPONSE: Staffing of any investigation will vary over time according to its particular stage and what needs to be done. ASIC considers its investigation is sufficiently resourced.

2. **Ms Eccleston:** We have been aware of some resistance by some members to receiving emails rather than by post. Last year, Treasury was doing a consultation in relation to technology neutrality and the law.

Senator XENOPHON: What has happened to that? Can you tell us, from your point of view?

Ms Eccleston: I am sorry, but you would have to talk to Treasury.

Senator XENOPHON: ASIC has not had discussions with Treasury in respect of that recently?

Ms Eccleston: Not recently, no.

Senator XENOPHON: When you did last—

Ms Eccleston: That I am aware of.

Senator XENOPHON: If you could take that on notice.

Ms Eccleston: I will take that on notice.

RESPONSE: Submissions to Treasury's *Technology Neutrality in Distributing Meeting Notices and Materials Proposals Paper* closed in June 2016. At the time of the hearing none of the staff members at ASIC who had specific responsibility for this matter had had contact with Treasury since August 2016. However, after the hearing Treasury did make contact with ASIC concerning this law reform proposal. We recommend that direct contact with Treasury is sought if you wish for further information about this matter [REDACTED]

3. **Senator XENOPHON:** More money for investigations into bodies like the CPA. In terms of the protections that exist now to deter improper use and disclosure of information contained on a company register, does ASIC have any views as to whether those proper purpose tests ought to be modified, amended or in any way reviewed in the context of that? We heard from the Governance Institute of Australia. I think they made some interesting and valid points that it is not all-encompassing, that you could be seeking to contact members about something else that is not prescribed in the legislation but perhaps ought to be or ought to be subject to some fetters.

Ms Eccleston: This is not something that we have internally dwelt upon, so I would like to take that question on notice, if I could.

RESPONSE: ASIC does not see a current need to amend or review the proper purpose test. The explanatory memorandum for the Corporations Amendment (No. 1) Bill 2010, which introduced the proper purpose test noted that the specification of improper purposes in the Corporations Regulations enables the law to be amended swiftly if an improper purpose, which is not already prohibited by the law, becomes evident. This has occurred once in the



past. In addition, ASIC is not currently aware of any improper purposes that have become evident but are not already prohibited by the law.

4. **Senator XENOPHON:** Of course. We heard, I think, from the Governance Institute in relation to a fraudulent request purporting to be from a university for information on member shareholdings when in fact it was not a university at all. It was a fraudulent request from a scammer. I am not suggesting Mr Tweed was involved. Are there concerns about adequate penalties and safeguards to protect against that fraudulent use of a company register or those purporting to access that company register?

Ms Eccleston: Again, I would like to take that on notice. One thing I would say is that the company has to provide the register within seven days. They can approach ASIC to seek relief if they think that seven-day period is not sufficient. So we would be encouraging companies to come and approach us if they have some real concerns about needing to investigate whether the proper purpose is there.

RESPONSE: Sections 137.1 and 137.2 of the *Criminal Code* creates offences for providing false or misleading information or documents. These sections may be relevant where a request for a copy of the register is fraudulent. It is also an offence for a person to use information obtained from a copy of the register for an improper purpose or to disclose that information knowing it will be used for such a purpose. Under s177(1b), this offence is a strict liability offence with a maximum penalty of 50 penalty units, which was considered to be an appropriate deterrent for a breach of this provision when the laws were amended in 2010. Under s177(2), a person who contravenes s177(1) or (1AA) is liable to compensate anyone else who suffers loss or damage because of the contraventions.

Recently concerns were raised with us about share register requests being made to create a data set across the market that could be used for potential commercial gain. For instance, to help inform potential investors in a range of companies what the retail holding is the likely retail vs institutional holding proportion of various company. However, ASIC did not consider that a purpose that was clearly problematic as it did not have an adverse effect on shareholders and was analogous to academics accessing data for research purposes.

Apart from this, ASIC is not currently aware of any significant concerns in the market about these penalties and safeguards being inadequate.

5. **Senator XENOPHON:** I want to explore that final line of questioning. A company approaches you saying, 'We've got this request. We don't think it's a proper purpose. We want an extension of the seven days.' Do you have an inquiry both of the company and those making the request to try to determine whether it is for a proper purpose within the provisions of the Corporations Act? How does it work in practical terms?

Ms Eccleston: It is actually quite tricky because all that we have is a power to extend the time period. We cannot actually say that the register should not be provided. In one instance a number of years ago, what we ended up doing was extending the time period and then there was law reform to make sure that there was an amendment to clarify that the purpose for which the register was sought was not a proper purpose.

Senator XENOPHON: Which matter was that?

Ms Eccleston: It actually was the one that Judith Fox referred to, yes.

Senator XENOPHON: Yes. Do you think it would be helpful—you may want to take this on notice—for ASIC to be able to go beyond that and look behind whether it is a proper purpose or not, to be some form of arbiter, perhaps subject to judicial review? You would be able to make a determination based on a more forensic examination of the facts of the circumstances if a company is saying, 'We don't want to provide this information.'

Ms Eccleston: Can I take that on notice?

Senator XENOPHON: Sure.



RESPONSE: ASIC does not currently have a power to exempt a company from the requirement to provide a copy of the shareholder register to an applicant, where a valid application has been received. We do however have a power to provide an extension of time.

In one previous case, where provision of a copy of the register was likely to result in shareholder detriment (but the purpose for which it was sought did not strictly fall within one of the prescribed purposes), we provided an extension of time to enable law reform to be implemented. An exemption power in respect of these provisions could enable ASIC to respond to situations not contemplated by the law, but where regulatory detriment is likely to result, more quickly.

However, given we have only been able to identify one instance in recent years where law reform was necessary to prevent misuse of the register and we are not aware of any other improper purposes becoming evident (which are not already prohibited), there may not be sufficient supporting factors to warrant law reform to provide ASIC with exemption powers.

Furthermore, the fact that ASIC does in contrast have an exemption power in relation to a register of debenture holders (see s173(6)), supports the idea that the legislative scheme is designed to minimise the risk that a company may seek to take steps to resist providing the register of members save where a specified improper purpose exists.

6. **Senator XENOPHON:** And is the money a set amount, or does it vary from company to company?

Ms Eccleston: I am sorry. I do not have the exact—

Senator XENOPHON: Could you take that on notice?

Ms Eccleston: I will, yes.

Senator XENOPHON: I imagine that there would have to be some reasonableness in the fee being sought.

Ms Eccleston: Yes.

Senator XENOPHON: Take on notice how the mechanics of that work.

Ms Eccleston: Yes. I suppose I am flagging that you would not want to have provisions that would lead to companies trying to tactically resist providing member registers. At the same time, obviously, we want companies to have the opportunity to ensure that they are providing them only for proper purposes. I will take your broader question on notice.

RESPONSE: The 7 day time frame in which companies must provide the copy of the register only commences when both a valid application and any fee required by the company (up to a prescribed amount) is paid. The prescribed amount for the supply of copies of the register is \$250 plus:

- (a) for each member about whom information is provided in excess of 5,000 members and up to 19,999 members – \$0.05; and
- (b) for each member about whom information is provided at 20,000 members or more -- \$0.01.

7. **Senator DASTYARI:** I have only one question. You may have answered it already. I had to take a telephone call outside, so my apologies if I missed your answering this. The sentiment from Senator Xenophon's bill is something that every witness we have had has supported. It is the idea of how you allow members in these organisations to have better communication with each other for legitimate reasons. We heard evidence this morning about a specific example of the CPA. Other people can assess the details of it. From my perspective, it highlighted what on face value are very legitimate concerns of members. They felt they had been restricted in their ability to be able to raise these concerns about internal governance structures. The fact that they were wanting to highlight concerns about governance structures of the same bodies responsible for stopping that



communication occurring creates a circular loop that is really concerning. At the same time, there are legitimate concerns about what you do with an email list.

Take the CPA, which has 160,000 people. That is very valuable information. It is worth a lot of money. Again, you can put all the provisions you want, but once that list goes offshore or once someone emails a two megabyte Excel file to somewhere overseas, it is gone forever. It does not matter about tracing it and all these kinds of things. We heard this morning—I am not sure if you have a position on it—that boards have a responsibility, under certain requirements, to contact their members on behalf of other members. Clarity around the regulations in that space is something that was raised this morning as a topline idea. Does ASIC have a position on that?

Ms Eccleston: No. We do not have a position on that. I think I will have to take that on notice. But I can see why that might be an interesting area to explore.

RESPONSE: It is important to remember that the members' register may be sought for a variety of reasons, not all of which involve a particular member seeking to contact all other members. It would therefore be important that any amendment to the Corporations Act recognised this rather than seek to impose a regime that would apply to all requests for the members' register.

ASIC does not have a policy position on whether one way risks associated with providing member's email addresses to a person requesting the members' register might be managed by having the company at first instance pass on a communication.

However, we do note some analogous provisions in the Corporations Act where a company is required to send communications on behalf of a group of members:

1. Members requesting the company to call a general meeting

Under s249D a company must call a general meeting to consider a resolution proposed by members if requested by 5% of the members.

2. Members' resolutions at general meetings

Under s249N, the following members may give a company notice of resolution that they propose to move at a general meeting:

- (a) Members with at least 5% of the votes that may be cast on the resolution; or
- (b) At least 100 members who are entitled to vote at a general meeting.

Under s249O, if a company has received such a notice, the resolution is to be considered at the next general meeting occurring more than 2 months after the notice is given. The company is required to give all its members notice of the resolution at the same time, or as soon as practicable afterwards, and in the same way, as it gives notice of a meeting. The company is responsible for the cost of doing this, if the company receives the notice in time to send it out to members with the notice of meeting.

However, a company does not need to give notice of the resolution if it is more than 1000 words long or defamatory or if the members making the request are to bear the expenses of sending the notices out (i.e. the notice was not provided in time to be sent out with the notice of meeting)—unless the members give the company a sum reasonably sufficient to meet the expenses that it will reasonably incur in giving the notice.

3. Members' statement

Under s249, members with at least 5% of the votes or at least 100 members may request a company to give to all of its members a statement provided by the members making



the request about a resolution that is proposed at a general meeting or any other matter that may be properly considered at a general meeting. The company is required under s249P(6) to distribute the statement at the same time, or as soon as practicable afterwards, and in the same way, as it gives the notice of general meeting.

However, a company does not need comply with the request if the statement is more than 1000 words long or defamatory, or if the members making the request are to bear the expenses of the distribution (i.e. the statement was not provided in time to be sent out with the notice of meeting)—unless the members give the company a sum reasonably sufficient to meet the expenses that it will reasonably incur.

Each of the above obligations requires at least 5% of the members or 100 members to support the resolution or statement. This ensures that only matters that have the interest of a significant number of members impose a requirement on a company to incur costs in communicating with its members. The fact that this obligation is imposed in connection with a general meeting, which does not occur very often also means that the risk of it being used frequently and vexatiously is minimised.