



IMF (Australia) Ltd

**SUBMISSION TO THE DEPARTMENT OF THE
TREASURY IN RELATION TO SECTION 177(1A)
OF THE CORPORATIONS ACT**

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*SUBMISSION TO THE COMMONWEALTH DEPARTMENT OF TREASURY IN RELATION TO
SECTION 177(1A) OF THE CORPORATIONS ACT*

Executive summary

1. Chapter 2C, Part 2C.1 of the *Corporations Act* 2001 (“the Act”) contains provisions relating to the maintenance, inspection and use of registers that are required to be kept by companies and registered schemes concerning their members, option holders and debenture holders.
2. Section 173 of the Act permits anyone to inspect a register and to require the company or scheme to provide them with a copy of the register.
3. Section 177(1) of the Act prohibits the use or disclosure of information from a register, however s177(1A) permits the use or disclosure either when the company agrees or the use or disclosure is relevant to the holding of the interests recorded in the register or the exercise of the rights attaching to them.
4. The effect of these provisions is that the privacy of a person’s details contained in a register is greatly limited.
5. Recent litigation resulting in a restrictive view of the exemptions contained in s177(1A) of the Act has shown that its provisions are confusing, with particular criticism of its wording delivered by the High Court of Australia.
6. An analysis of this recent case law, principally from the *Sons of Gwalia* litigation that related to a litigation funder’s efforts to contact shareholders about proposed legal proceedings for the shareholders, highlights the issues and reveals why the legislation is in need of change.
7. As a funder of litigation, IMF submits that the ability to use information contained in a share register should be permitted in circumstances where it is relevant to any action that may be taken arising out of the acquisition, holding or disposal of the interests recorded in a register. It is reasonable to conclude that this would either be of benefit to a shareholder or would be likely to be welcomed by a shareholder.
8. This is obviously a matter of particular interest to IMF. However because of the significant proportion of the Australian public that hold shares in publicly listed companies, this is clearly also a matter of general public interest and which accords with the public policy of providing access to justice.

Proposal

9. It is proposed that s177(1A) of the Act be amended to clarify and, if necessary extend, the circumstances in which the use of information from registers prohibited by the provisions of s177(1) of the Act may be made.

Public registers

10. Section 168 of the Act requires a company or registered scheme to set up and maintain a register of members, option holders and debenture holders (as relevant).
11. Sections 169-171 of the Act contain provisions setting out the detailed information that must be contained in a register. It must include a member's name and address and other details of their shareholding/option holding/debenture holding.
12. Section 173(1) of the Act permits "*anyone to inspect a register*" of shareholders, debenture holders or option holders.
13. Section 173(3) of the Act provides that the company or scheme must give a person a copy of the register.
14. There are no restrictions whatsoever on obtaining a copy of the register. That copy includes the shareholders or debenture holders name and address and the number of shares, debentures or options they hold.
15. It follows from this that there is no restriction whatsoever as to the privacy of this information.

Use of information on registers

16. Section 177(1) of the Act, which originates from the *First Corporate Law Simplification Act* 1995, prohibits the use or disclosure of information from a register of shares, options or debentures.
17. By way of exception to this prohibition, s177(1A) of the Act permits the use of information contained in a register in certain defined circumstances.
18. The wording of s177 of the Act is as follows:

“(1) A person must not:

- (a) use information about a person obtained from a register kept under this Chapter to contact or send material to the person; or*
- (b) disclose information of that kind knowing that the information is likely to be used to contact or send material to the person.*

Note: An example of using information to send material to a person is putting a person's name and address on a mailing list for advertising material.

(1A) Subsection (1) does not apply if the use or disclosure of the information is:

(a) relevant to the holding of the interests recorded in the register or the exercise of the rights attaching to them; or

(b) approved by the company or scheme.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1A), see subsection 13.3(3) of the Criminal Code.

(1B) An offence based on subsection (1) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the Criminal Code.

(2) A person who contravenes subsection (1) is liable to compensate anyone else who suffers loss or damage because of the contravention.

(3) A person who makes a profit from a contravention of subsection (1) owes a debt to the company or the scheme. The amount of the debt is the amount of the profit.

(4) If a person owes a debt under subsection (3) to the scheme:

(a) the debt may be recovered by the responsible entity as a debt due to it; and

(b) any amount paid or recovered in respect of the debt forms part of the scheme property.

Parliamentary intention

19. The predecessor of s177 of the Act was 216J of the *Corporations Law*, which was enacted by the *First Corporate Law Simplification Act 1995*. In his second reading speech, the Attorney-General made the following comments¹ regarding s216J:

“In response to concerns about the use of information from registers to invade the privacy of securities holders, such as through the compilation of mailing lists to send correspondence to them, the bill introduces a new provision which prohibits the misuse of information on those registers. Substantial sanctions, including criminal penalties and an account of profits, will become available in this area for the first time. This will represent a significant and practical safeguard for the privacy of those listed in these registers.”

¹ Hansard 8 February 1995, p709

20. The concern about mailing lists was reflected in the note to s 216J which is also found in s177(1) of the Act (see above). What is described in this note as inappropriate is contact which has nothing to do with their status as shareholders.
21. The Explanatory Memorandum accompanying the *First Corporate Law Simplification Bill 1995* contained the following commentary about the use that the provision authorises:
- “However, the prohibition does not operate if the use or disclosure of the information is relevant to the holding of the securities concerned. It does not interfere with the use of the information for purposes such as contacting shareholders in relation to takeovers or in order to influence company management about the operation of the company. In addition, the prohibition does not operate if the use or disclosure of the information is approved by the company.... Shareholders may be expected to hold the company's management accountable for any approval given.”*
22. Two examples were given in the Explanatory Memorandum as to when the prohibition would not operate on the basis that the use or disclosure of the information would be relevant to the holding of the securities concerned. The first example concerned contacting shareholders in relation to a takeover and the second example concerned contacting shareholders in order to influence company management about the operation of the company. The second example may also involve the exercise of voting rights attaching to the (share) interest at a general meeting of a company.

Uncertainty in the legislation: the case law

23. As a result of uncertainty regarding the meaning of the exemption contained in s177(1A)(a) of the Act, IMF instituted legal proceedings in the Federal Court seeking a declaration allowing it to use the shareholder's names and addresses from the register of shareholders in Sons of Gwalia Ltd (the “company”) to invite them to join in a representative legal action against the company. The proposed legal action against the company related to its alleged misleading and deceptive conduct and breach of continuous disclosure obligations. The declaration was sought because the company would not consent to IMF's use of the register information in this manner.
24. At first instance in the Federal Court², Justice French found (underlining added):

“56. A controlling word in the exemption provided by s 177(1A)(a) is the word ‘relevant’. Like the words ‘related to’ it may be widely or narrowly construed. On one view it covers any use of information which is connected in any way to a person's status as a shareholder of the company. On another view it may be more narrowly construed as requiring some narrower legal connection to the actual

² IMF (Australia) Ltd v Sons of Gwalia Ltd (Administrators Appointed) [2004] FCA 1390

ownership of the shares and the enjoyment of the rights which that ownership confers. On that narrower basis the use of information in connection with the past acquisition or disposal of interests would not ordinarily be relevant to the holding of the interests.

57. In my opinion the range of 'relevant' uses of register information is to be construed in the narrower sense more closely connected to the actual holding of shares and the exercise of rights attaching to them. That is not to exclude the possibility that information relating to past shareholders may be used to communicate with them in a case in which they have grounds to bring or join in an action against the company for relief against oppression or to bring or to intervene in a statutory derivative action – see *Westgold* (at 109). It is, in my opinion, however, contrary to the purpose of the prohibition, which protects shareholder privacy, to construe the exemption as permitting unsolicited approaches to shareholders using information on the register with a view to selling shareholders services simply on the basis that they are connected with their status, past or present, as shareholders in the company.

25. This judgment throws up the following anomaly – s177 of the Act would allow shareholders to be contacted in relation to joining a representative oppression action against the company (because an oppression action relates to the holding of the shares) whereas the same section would not allow those same shareholders to be contacted in relation to an action against the company based upon false and misleading statements by the company or its failure to comply with its continuous disclosure obligations (because such an action is based upon the acquisition of the shares).
26. An appeal from this decision was made to the Full Court of the Federal Court, which was dismissed³ by a majority of 2:1. In the majority, Moore, J differed in his reasoning to that of French, J at first instance. The relevant part of his reasoning was as follows (underlining added):

“13. The purpose of the amendment was to protect privacy and, in my opinion, the construction of the section should give primacy to that object. It is consistent with that approach to confine the field of operation of the exception to that marked out by the ordinary and natural meaning of the words used.

*14. For my part, and notwithstanding the approach of the learned primary judge, the resolution of this appeal does not turn on whether the expression "relevant to" has a narrow or broad meaning, even accepting, as the appellant submitted, that the word "relevant" should be given its usual meaning of "bearing upon, connected with, pertinent to the matter in hand": see also *Grosvenor Hill (Qld) Pty Ltd v Barber* (1994) 48 FCR 301 at 305.*

³IMF (Australia) Ltd v Sons of Gwalia Ltd (Administrators Appointed) [2005] FCAFC 75

The information must have relevance, in that sense, to the act of holding the interest or to the exercise of relevant rights.

15. In the present case, the proposed conduct is not, in my opinion, relevant to the holding of an interest or the exercise of rights attaching to them in the way discussed earlier. The proposed litigation has no bearing, even indirectly, on whether the shareholders will or will not hold shares in Sons of Gwalia Ltd (Administrator Appointed) ("the Company"). While participation in the proposed litigation may depend on a person being a shareholder in the Company and involves the exercise of rights, in a broad sense, because the shares are held, they are not rights attaching to the shares. There is not the necessary and direct connection between the right and the shareholding."

27. Justice Emmett, also in the majority, reasoned in this manner (underlining added):

"63 An object of the Act is to create rights for compensation for shareholders and other persons who suffer damage as a result of contraventions of the Act. Accordingly, s 177(1) may not inhibit use of information in order to communicate with members concerning their potential rights, as shareholders, to bring or join in an action against a company for relief against oppression or to bring or intervene in a statutory derivative action. Such a use could be characterised as being for the purpose of communicating with a shareholder about a subject that is connected with the fact that that person holds the shares in respect of which the person is registered. It might also be characterised as being for the purpose of communicating about a subject that is connected with the exercise of rights attaching to such shares. However, it does not follow that a communication about the circumstances in which a person agreed to acquire shares in, or to become a member of, a company can be characterised as being connected with the fact that that person holds the shares, in respect of which the person is registered, or with the exercise of rights attaching to such shares.

64 The use of information in the Register contemplated by IMF is to send an invitation to participate in the Proceedings, which are for the prosecution of claims against the Company and its directors bearing upon, connected with, or pertinent to, the purchase by members of shares in the Company. Such Proceedings have nothing to do with the holding of, or the exercise of rights attaching to, shares in the Company. It may be that becoming the holder of shares in the Company was an essential step in the cause of action, in that it was the parting with the price paid for the acquisition of the shares that gave rise to any loss or damage suffered by a member. It is the acquisition of shares that gave rise to the possible Claims. The shares could be sold and might already have been sold. That would have crystallised the loss or damage. That is to say, the Claims exist whether or not shares in the Company are held by a person.

65 An invitation to retain solicitors to commence and prosecute a proceeding in relation to that acquisition is not relevant to the holding of, or the exercise of rights attaching to, the shares. Such a construction of s 177(1A) is not a restrictive one. It may be that the primary object of s 177 is to prohibit the use of information obtained from a register in order to engage in marketing activities. That, of course, is precisely what is involved in IMF's proposal. The proposal involves marketing the services of IMF and Jackson McDonald in connection with proposed litigation. The proposed use does not bear upon and is not connected with the holding of shares or the exercise of rights attached to shares. Nor is the proposed use pertinent to the holding of shares or the exercise of rights attached to shares."

28. However in the minority, Justice North reasoned (underlining added):

"35. ...I accept the submission of Mr Gageler SC, who appeared with Mr JC Giles for the appellant, that the prohibition in s 177(1) and the exception in s 177(1A) are part of a wider legislative context which seeks to achieve a balance between two policies – the right of the public to know about, and use, information from the register, and the policy that shareholders should be free from undue intrusion from the use of such information. The primary judge emphasised the purpose of s 177(1) to protect the privacy of the shareholder. In construing s 177(1A) it was necessary to allow for the wider legislative context which involved balancing that interest against the right of public access to, and use of, information on the register. I agree with the submission of the appellant that the primary judge failed to allow for the wider legislative context.

36 The terms and scope of the second part of s 177(1A)(a) provides further contextual support for a wider view of the word relevant than that accorded by the primary judge. It relates to the use of information relevant to the exercise of rights attaching to the shares. The first part of s 177(1A)(a), with which this judgment has until now been concerned, relates to the use of information relevant to the holding of shares. The distinction made here is between the passive function of "holding" and the active "exercise" of rights attaching to, the shares. If the company uses information from the register to send a dividend cheque to a shareholder, the use of information is relevant to the holding of the shares. If the company uses such information to send a proxy voting form to a shareholder, the use of the information is relevant to the exercise by the shareholder of the right to vote. But, for example, one right possessed by a shareholder is the right to dispose of the shares. Consequently, it is permissible under the second part of s 177(1A)(a) to use information from the register to contact a shareholder in relation to the sale of shares. A broker could use the information from the register to contact a shareholder to offer a competitive rate of brokerage on the sale of those shares. Or, if the shares were subject to a takeover offer, an investment advisor could use the

information from the register to approach the shareholder to offer advice on whether to sell the shares in accordance with the takeover offer. The primary judge regarded such approaches by a broker or investment advisor as outside the scope of the first half of s 177(1A)(a) because he thought that the legislature did not allow such a degree of intrusion into the privacy of the shareholder. Yet that very use would fall within the second part of s 177(1A)(a). Consequently, it cannot be said that the legislature contemplated the degree of privacy protection relied upon by the primary judge. A wider reading of the first part of s 177(1A)(a) is warranted by the statutory context.

...

40 In argument, a question was raised as to whether the proposed use of information was relevant to the shareholders' acquisition of shares, rather than to their holding of shares. The proposed use is relevant to the holding of shares because the right to sue for losses resides only with the owner of the shares. The services offered by the appellant were offered to the holders of the shares only because the shareholders are entitled to bring proceedings to recover their loss. In that sense, the proposed use by the appellant is relevant to the acquisition of the shares. But the fact that the approach has relevance to the acquisition of the shares does not mean that it does not also have a relevance to the holding of those shares.

41 Thus, the ordinary meaning of the words in the first half of s 177(1A)(a) read in their full statutory context, covers the use of information from the register by the appellant to send current shareholders the October letter. The only reason the appellant wishes to approach the shareholders is because they are the persons holding shares in the respondent, and the services offered by the appellant relate to the loss that they may have suffered as holders of the shares. The appellant has an interest in the use of the information for its own commercial purposes. This interest is accommodated by the fact that s 177(1) allows open public access to the information on the register. The shareholders' interest in privacy is not unduly compromised, because the information which the appellant wishes to send to the shareholders concerns their interests as shareholders. Shareholders would likely have a real interest in receiving the October letter, and would not regard the use of information from the register for this purpose as an undue intrusion into their privacy."

29. Accordingly three judges (for differing reasons) found against the proposed use of information from the company's register, whilst one judge found quite strongly to the contrary.

30. Special leave to appeal to the High Court was then sought, but this was refused⁴ on the ground that there were considered to be insufficient prospects of success. Justices Gummow and Heydon considered that the statutory construction to be found in the judgement of Justice Emmett in the Full Court of the Federal Court was correct.

31. During the course of the special leave application hearing, Mr Justice Gummow commented:

“The trouble is that this is an imperfectly thought out piece of legislation, to be frank.

...

There are going to be anomalies in whatever view one takes of it, I suspect.”

32. After three separate court hearings, this statement from a justice of the High Court aptly summarises the current state of the legislation and indicates why there is strong reason for the legislation to be amended.

33. Mr Justice Gummow also said to counsel during the course of the special leave application that the amendment of s177 of the Act should be added to the list of amendments during the course of the CLERP Legislation.

The public interest argument for change

34. At present the Act enables anyone to learn about the fact that a particular person is a shareholder of a particular company, the address of that person and the number of shares held by the person at any particular time.

35. This has been a provision of Companies/Corporations legislation for many years and is an acknowledgement of the public interest in the contents of a register.

36. The privacy protection that was introduced by s216 J of the *Corporations Law* and which is now contained in s177 of the Act affords a person the privacy from direct approach. The privacy is therefore of a limited nature and is balanced against the right of the public to use information from a register in the defined circumstances of s177(1A).

37. A very large percentage of the Australian population now hold shares in publicly listed companies. The provisions of this legislation must therefore be a matter of wide public interest.

⁴ IMF (Australia) Ltd v Sons of Gwalia Ltd (Administrators Appointed) [2005] HCAtrans 891 (26 October 2005)

38. History has shown that shareholders are often wronged in such a way that the damage caused to them is the same damage caused to all or many other shareholders in the same company by the same wrongful act.
39. The cost of litigation is such that, individually, shareholders can realistically take no action but collectively they can take action in the form of a representative proceeding. The law has accepted that access to justice through litigation funding is now a well recognised matter of public policy⁵.
40. The major stumbling block for shareholders in this situation is that they need to be able to identify each other and to communicate with each other in relation to potential proceedings.
41. It also seems reasonable to conclude that the use of information from a register to advise shareholders (or debenture holders) of the possibility of joining in a legal action to help them recover losses arising out of their acquisition, holding or disposal of the shares (options or debentures), no matter what strict legal interpretation is used, is likely to be of interest to those shareholders.

Top 20 shareholders v small shareholders

42. Information regarding a listed company's top 20 shareholders must be publicly disclosed in its annual report, thereby enabling these shareholders to be contacted. (i.e. the top 20 can be contacted by reference to the annual report whereas the small shareholders cannot be contacted other than by use of the register). Often it is the case that the top 20 shareholders hold at least 60% of the shares in a listed company.
43. It is therefore actually unfair to small shareholders that they cannot be told about a legal action to be taken by the top 20 shareholders.

IMF's interest

44. IMF has found that there is often significant interest in the funding of litigation in actions for large numbers of shareholders. By way of example, in the course of the litigation being funded by IMF against Sons of Gwalia Ltd to date, despite the inability to contact shareholders through the use of the share register, some 750 individuals with claims totalling \$68M have agreed to have IMF fund a claim on their behalf. There are several thousand more shareholders who remain entitled to join in the action.
45. It could be argued that the use of the media or through public advertising is sufficient to enable shareholders to learn of their ability to join in a legal action, however IMF's experience has shown that this has very much a scatter gun effect and many small

⁵ *Fostif Pty Ltd v Campbells Cash and Carry Pty Ltd* [2005] NSWCA 83 at 99-101 and 105.

shareholders still fail to hear about the contemplated action. It also adds significantly to costs which are often ultimately borne by the shareholders.

46. There may be arguments that changing the law will result in an ‘explosion in litigation’ or that there will be ‘ambulance chasing’. These notions have now been strongly dismissed by the courts⁶:

*“These changes in attitude to funders have been influenced by concerns about access to justice and heightened awareness of the cost of litigation. Governments have promoted the legislative changes in response to spiralling costs of legal aid. Courts have recognised these trends and the matters driving them. “Ambulance chasing” still has negative connotations in many quarters, but it is now widely recognised that there are some types of claim that will simply never get off the ground unless traditional attitudes are modified. These include cases involving complex scientific and legal issues. The largely factual account in the book and film **A Civil Action** has demonstrated the social utility of funded proceedings, the financial risks assumed by funders, and the potential conflicts of interest as between group members in mass tort claims propounding difficult actions against deep-pocketed and determined defendants.”*

47. Although receiving material such as (for example) advertising the sale of cars would undoubtedly be considered annoying and an invasion of a person’s privacy, to learn of information that may enable a person to be compensated arising from their share holding, should not be considered to be in the same category. It is submitted that receipt of such information would still accord with Parliament’s intention as expressed in the Explanatory Memorandum accompanying the *First Corporate Law Simplification Bill 1995*.

Proposed amendment

48. It is proposed that s177(1A) of the Act be amended to include a new sub-paragraph in the following (or substantially the following) terms:

(1A) Subsection (1) does not apply if the use or disclosure of the information is:

“relevant to any action that may be taken arising out of the acquisition, holding or disposal of the interests recorded in the register.”

49. This could be included as sub-paragraph (b) to s177(1A) of the Act so that the existing sub-paragraph (b) then becomes sub-paragraph (c) or alternatively it could become a new sub-paragraph (c).

50. The wording used in this proposed amendment:

⁶ *Fostif Pty Ltd v Campbells Cash and Carry Pty Ltd* [2005] NSWCA 83 at 100.

- (a) clarifies the legislation whilst taking into account the reasoning of the various judges in the *Sons of Gwalia* decisions and the *Westgold*⁷ case;
 - (b) acts on the High Court's criticism of the legislation; and
 - (c) maintains the adequate restrictions imposed on the use or disclosure of information from a register and still prevents the breach of privacy that Parliament contemplated through the use of commercial mailing lists.
51. Permitting an extension to the prohibition in s177(1A) of the Act to clarify this situation would still adequately safeguard a person's privacy whilst enabling them to be informed of legal rights they may be able to exercise (and which they may not even realise they have). The balance between the public's right to know about and use information from a register and a person's right to be free from undue intrusion from the use of such information will still be maintained.

IMF (Australia) Ltd

52. IMF (Australia) Ltd ("IMF") is a professional litigation funding company that has been listed on the Australian Stock Exchange since 2001.
53. Litigation funding in Australia involves the funding of legal claims and other related services. Litigation funding plays a significant role in providing access to justice and now frequently receives the approval of the courts. See for example *Fostif Pty Ltd v Campbells Cash and Carry Pty Ltd* [2005] NSWCA 83.
54. IMF is the holder of Australian Financial Services licence number 286906.
55. Further details about IMF can be seen on its website at: www.imf.com.au

⁷ *Westgold Resources NL v Precious Metals Australia Ltd* [2002] WASC 221