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23 July 2009

Ms Tracey Donohoe  
Corporations and Financial Services Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

By email: [unsolicitedoffercomments@treasury.gov.au](mailto:unsolicitedoffercomments@treasury.gov.au)

Dear Ms Donohoe

## **Access to Share Registers and the regulation of Unsolicited Off-Market Offers - Options Paper (May 2009)**

The Securities & Derivatives Industry Association, as the peak industry body representing wholesale and retail stockbrokers and investment banks, would like to make the following comments on the Government's Options Paper on Access to Share Registers and Unsolicited Offers.

The area of unsolicited offers has long been a concern to our Members and their clients. Whilst the regulation of unsolicited offers improved in terms of disclosure through reforms introduced in 2004<sup>1</sup>, there still appears to be an anomaly in terms of instalment offers. We therefore welcome the announcement by the Minister for Superannuation and Corporate Law on 29 May that immediate action to remedy this anomaly would be taken. Taking into account the fact that money loses value over time, instalment offers will need to be expressed in present value. We welcome this action.

In terms of the matters raised in the Options Paper, we would like to make the comments set out below.

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<sup>1</sup> Chapter 7 Division 5A of the *Corporations Act*

## 1. ACCESS TO COMPANY AND SCHEME REGISTERS

### Proper purpose test for access to registers

#### Issue

Currently there is no proper purpose test for access to share registers, only for the use of the information obtained.

#### Option A

That a proper purpose test be introduced for access to share registers.

***Comment:** Australia has a long history of transparency in share registers. Shareholders should not be able to 'hide' their identity from companies or regulators. Our system does not permit 'bearer' securities for this reason. However, there is no public benefit in disclosure of all shareholder details to all third parties as of right. Shareholder lists including their holdings can give an indication of the wealth of individuals or other entities which can be exploited for commercial purposes, either through unsolicited offers for those shares, or other unwelcome marketing activities. This should not be possible. We therefore support the introduction of a 'proper purpose' test as outlined in the Options Paper, which should achieve an appropriate balance between the need for transparency in shareholder registers and the right of shareholders to expect that their details will not be misused.*

### Fees for copies of member registers

#### Issue

The current fee regime of 'marginal cost' has been criticised for being overly complex and difficult to apply.

#### Option B.1

That the current marginal cost arrangement be retained.

#### Option B.2

That marginal cost be replaced with a concept of reasonable cost.

#### Option B.3

That a company be permitted to pass on the full cost of access to member registers.

#### Option B.4

That the fee for access be based on market cost.

#### Option B.5

That a company be required to negotiate the fee with members and third parties.

#### Option B.6

That the prescribed fee for access to member registers be aligned with the takeovers prescribed fee.

#### Option B.7

That a combination of the options above be adopted.

**Comment:** we support the reasonable cost (B2) fee regime. A good way of assessing fees could be by the introduction of a scale of fees based on the number of shareholders on a list, so that the larger the list, the greater the fee.

### Format and medium for electronic copies of registers

#### Issue

There is no current requirement for copies of a register to be provided in the format requested.

This is particularly an issue where copies are requested in a specific electronic format.

#### Option C

That the legislation be changed to reflect the advances in technology that make it reasonable for a format request to be complied with.

The references to outdated technology (floppy disk) be amended to a less specific format.

**Comment:** we support amendments to reflect advances in technology so that the format in which the information is to be provided is reasonable in the circumstances.

### Inspection of the register on computer

#### Issue

There is an anomaly in the current provision that enables someone inspecting a register on a computer to request a print-off, essentially providing them with a low cost copy of the register.

#### Option D

That the provision be altered to reflect increased levels of computer literacy and to avoid the situation where companies are required to provide a copy of the register without being paid the appropriate fee.

**Comment:** we support the proposal

## 2. OPTIONS TO PROTECT RETAIL INVESTORS

### Cooling off period

#### Issue

No formal cooling off period applies to allow targeted shareholders to withdraw from the contract/acceptance document once they have signed.

#### Option F.1

Provide a one-month cooling off period for the accepting shareholder to withdraw from the contract or acceptance document before the contract became binding.

#### Option F.2

Provide up to a three-month cooling off period for the accepting shareholder to withdraw from the contract or acceptance document before the contract became binding.

**Comment:** consistent with other cooling off periods provided for in the Act, we support a one-month cooling off period for the shareholder to withdraw.

### Consumer advisory warning

#### Issue

Those who accept these offers are often not aware of the risks involved.

#### Option G

That a consumer advisory warning be included with the offer document, highlighting the risks of acceptance.

**Comment:** *we support the proposal.*

### Inclusion of an ASIC leaflet

#### Issue

Those who accept these offers are often not aware of the risks involved.

#### Option H

That an ASIC information leaflet be included with the offer documentation setting out the risks of acceptance of the offer.

**Comment:** *we support the proposal.*

### Companies procure brokers to purchase shares

#### Issue

Consumers who accept low value offers may not be aware that there are other low cost means of selling their shares.

#### Option I

That a pre-emptive right be given to companies to intervene in sales that do not reflect the market value of shares. Companies would have the option of organising a broker to purchase the shares for market value, instead of the sale at the low-value price proceeding.

**Comment:** *companies whose shares are targeted by unsolicited offers are often helpless in terms of protecting their shareholders. Giving companies the right to take action would provide a useful means for companies, at their discretion, to take action for the benefit of shareholders.*

### 'Do not contact' register

#### Issue

Some retail investors are concerned about the accessibility of their shareholder information.

#### Option J

That companies be encouraged to establish a register of shareholders who do not wish to receive USOs.

**Comment:** *as shareholder registers are often used for marketing and other commercial purposes, we support the establishment of 'do not call registers' to protect shareholders from unwelcome contact.*

**Prescribe format for the offer document**

**Issue**

Some offer documents may be unclear and difficult to understand.

**Option K**

That the format of offer documents be prescribed so that they can be more easily read and the risks understood.

**Comment:** *we support the proposal.*

**Alternative sale method**

**Issue**

Many shareholders are not necessarily aware that there are alternative means by which they can sell their shares at low cost, but at market price.

**Option L**

That offer documents include a list of brokers through which shareholders can sell their shares at market prices.

**Comment:** *a full list of brokers would be quite lengthy and may be confusing to shareholders. It should be sufficient if shareholders are referred to the SDIA website ([www.sdia.org.au](http://www.sdia.org.au)) 'Find a Broker' facility which will ensure that they are referred to a suitable broker.*

**Aevum case changes: Offers to remain open for at least one month**

**Issue**

It has been highlighted that the intention of the law for USOs to remain open for one month should be clearly stated in the legislation.

**Option M**

That the law be amended to clarify that offers must remain open for one month.

**Comment:** *we support the proposal*

**Aevum case changes: Unconscionable conduct provisions**

**Issue**

The current provisions regarding unconscionable conduct are generally not able to be applied to USOs.

**Option N**

That USO offerors be expressly subject to the unconscionable conduct provisions in the ASIC Act.

**Comment:** *we support the proposal*

**Aevum case changes: Change the meaning of financial services**

**Issue**

Provided that persons are meeting certain disclosure requirements, under 2C of the ASIC Regulations, that person is deemed not to be providing a financial service and therefore ASIC's unconscionable conduct provisions do not apply.

**Option O**

That the ASIC Act be amended to remove limitations on ASIC's ability to take a USO offeror to court.

**Comment:** ASIC ought to have unhindered powers to take action in these circumstances for the protection of the investing public. We therefore support the proposal.

We are grateful for the opportunity to raise these issues with the Government, and would be happy to discuss our submissions further at your convenience.

Yours sincerely,



**David W Horsfield**  
**Managing Director/CEO**

*ABOUT SDIA:* The Securities & Derivatives Industry Association is the peak body representing the interests of wholesale and retail market participants in Australia. SDIA was formed in 1999 at the time of the demutualisation of the Australian Stock Exchange. Currently we have 66 member organisations, which account for some \$4bn worth of trading daily on the ASX, which is approximately 98% of the market by value. In addition we have over 1300 individual members and are working to build the profession of stockbroking. Our member firms employ in excess of 25,000 people.