



**Access to share registers and the
regulation of unsolicited off-market
offers**

(Submission)

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About Us

National Seniors Australia (NSA) is the largest organisation representing Australians aged 50 and over with some 280,000 members.

NSA members are from metropolitan, regional and rural areas across all states and territories, and are broadly representative of the three key ageing cohorts: those aged 50-64; those aged 65-74; and those aged 75 and over.

NSA works to provide a voice and address the needs of this diverse membership:

We represent – to governments, business and the community on the issues of concern to the over 50s;

We inform – by providing news and information through our website, forums and meetings, our bi-monthly award winning magazine, a weekly E-newsletter and our Australia-wide branch network;

We provide opportunity – to those who want to use their expertise, skills and life experience to make a difference in indigenous communities and on our environmental legacy;

We support those in need – our Charitable Foundation raises funds to provide comfort and support for our most vulnerable older citizens;

We provide savings – through quality insurance, affordable travel and tours and discounts on goods and services.

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Introduction

National Seniors Australia welcomes the review of access to share registers and the regulation of unsolicited off-market offers as a long overdue step towards strengthening investor protections and privacy.

The importance of ensuring adequate protections for investors has been compounded by the global financial crisis, which has forced many retirees to look at ways of topping up their reduced income. Australian superannuation funds have experienced real losses of 27 per cent in 2008 - the second worst investment performance for private pensions out of 30 OECD countries.¹

A strong regulatory framework for unsolicited off-market offers also has important implications for retirement incomes more generally. Private pensions and other investments equate to around 45 per cent of total retirement incomes in Australia, compared to the OECD average of only 20 per cent.² Strengthened consumer protections will help to restore confidence in investments as a source of income in retirement, and in turn will assist in reducing reliance on the Age Pension.

National Seniors believes the following should be central considerations of the review:

Re-balance - The current balance between open and accessible share registers and protecting the privacy rights of individual investors is unfairly weighted against the latter. A high degree of concern amongst investors in regard to lack of privacy rights has ensued. NSA believes a more even balance can be achieved without adversely impacting on transparency, commerce and good corporate governance.

Procurement options - The development of a range of mechanisms through which individual shareholders can sell their shares without, or at low cost should be a priority for this review. Some investors accept unsolicited, undervalued offers because they provide a convenient and expedient means to sell their shares. The cost of engaging a broker can not always be justified in light of the value and number of shares on offer.

Financial literacy - Improving financial literacy and investor education should form a key part of any attempt to reduce the prevalence of unsolicited offers. Research suggests that, due to their comparatively low levels of financial literacy, senior Australians are amongst the most susceptible to nefarious financial practices. A 2008 ANZ Survey found individuals aged 60 years and older have lower than average levels of financial literacy, while those aged 70 and over have the lowest levels.³

Research – Further research into the reasons why shareholders accept unsolicited, undervalued offers would greatly assist in the development of effective protective measures. This should be an ongoing commitment for Government.

¹ OECD. *Pensions At A Glance*. 2009.

² Ibid.

³ ANZ Survey of Adult Financial Literacy in Australia. 2008.

Recommendations

- **NSA is broadly supportive of the introduction of a proper purpose test.** This support is, however, conditional on the safeguarding of access to share registers for company members, for legitimate purposes, and the provision of an accessible and affordable appeals process to ensure that companies cannot refuse legitimate requests from third parties.
- **NSA supports the development of a more transparent fee regime.** Maintaining free access for company members and ensuring that cost does not become a barrier to access for non-members should be central principles of this new regime. This will ensure good corporate governance and commerce.
- **NSA supports the introduction of a mandatory cooling-off period,** and believes that instructions on how to nullify an agreement should be mandatory on all offer documentation. Consideration should be given, however, to unintended consequences resulting from a long cooling-off period, as the upward trend of share values over time could increase the difference between the offer price per share and the market value.
- **NSA supports the inclusion of a mandatory warning statement in offer documentation.** To be consistent with the findings of the Colmar Brunton consumer testing this should include both short and long messages. The need to provide all the necessary information must also be balanced against the risk that a lengthy warning may discourage investors from reading it.
- **NSA broadly supports the proposal for companies to procure brokers to purchase shares,** however, concerns remain about the opportunities for companies to shift the broker incentive payment and transaction costs onto the consumer. NSA believes the development of a range of mechanisms for investors to sell their shares in a convenient and expedient fashion, at low cost, should be a priority of this review.
- **NSA supports the introduction of a 'do not call' register,** and believes that an opt-out clause would be particularly effective in allowing investors to exercise this preference. NSA would also like the review to consider a compulsory 'do not contact' register rather than relying solely on voluntary participation by companies.
- **NSA supports a prescribed format for offer documents,** as an appropriate means of ensuring that companies making unsolicited offers do not undermine the impact of the initiatives designed to protect retail investors.
- **NSA broadly supports the proposed alternative sale method.** Concerns remain, however, about the effectiveness of this proposal for those with a low number of shares, given the high costs associated with a broker.

1 – Access to company and share registers

1.1 Proper Purpose Test

NSA is broadly supportive of the introduction of a proper purpose test. This support is, however, conditional on the safeguarding of members' access to share registers, for legitimate purposes, to ensure good corporate governance. It is also essential that there is a well defined, accessible and affordable appeals process in place to ensure that companies cannot refuse legitimate requests from third parties.

Aside from preventing target companies from blocking legitimate offers to members, access to share registers is essential for individual shareholders. Particularly important is the need for members to be able to communicate with other members, such as to bring about a joint action against the company for relief against oppression, or to influence management about the company's operation. It is therefore vital that legitimate member access is not restricted, either directly or indirectly, by a proper purpose test.

The Corporations Act (2001) currently addresses the intended 'use' of the information contained in share registers, but does nothing to restrict 'access'. The Act restricts the use of information obtained from a register by mandating that 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.

NSA believes this approach is misdirected and has contributed to community concerns about investor privacy. The bulk of representation from NSA members on this issue focuses on the lack of privacy protections (see **Appendix A**). The focus on 'use' has also proven ineffective in protecting vulnerable investors from nefarious financial practices, such as undervalued, predatory, unsolicited off-market approaches.

1.2 Fees for copies of member registers

NSA is not qualified to provide informed comment on the various fee options contained in the options paper, however, it believes that allowing members to inspect registers without charge is essential for good corporate governance. To promote good commerce it is also essential that cost does not become a barrier to access for non-members, and that there continues to be an independent and accessible appeals process for cases of disagreement between companies and third parties.

1.3 Format and medium for electronic copies of registers

NSA is not qualified to provide informed comment on the preferred format for electronic copies of the register, except to reinforce the need for regulatory changes not to unfairly increase costs for companies, while at the same time minimising opportunities for companies to frustrate legitimate attempts by third parties to access registers.

2 – Options to Protect Retail Investors

2.1 Cooling-off period

The introduction of a mandatory cooling-off period would provide a much needed safeguard for shareholders who do not realise the implications of their decision at the time of signing offer documentation. This would also be consistent with the period currently applied to a range of other financial products, including insurance and superannuation. To ensure investors are fully aware of their rights in respect to cooling-off periods, instructions on how to nullify an agreement should be mandatory on all offer documentation.

NSA believes that a longer cooling-off period would provide a greater level of consumer protection. This must, however, be balanced against the possible unintended consequences for those who choose to accept undervalued offers on the basis that it provides a convenient and expedient mechanism to sell shares without the costs associated with a broker. A long cooling-off period may, given the upward trend of share values over time, serve to increase the difference between the price being offered per share and the market value.

2.2 Consumer advisory warning statement

The current requirement (under the Corporations Act) that market values be disclosed on offer documents goes some way to assisting the less financially literate to make an informed decision, however, there is clearly more that can be done. The inclusion of a consumer advisory warning in offer documents would be a very positive step in this regard.

NSA is particularly supportive of the inclusion of both short and long messages, which is consistent with the findings of the Colmar Brunton consumer testing. There is also a clear need for a lengthier consumer warning for offers under which payment is to be made over a considerable period of time. Instalment offers are especially difficult for investors to understand, particularly the calculation of their real value.

The need to provide all the necessary information to investors must also be balanced against the risk that a lengthy warning may discourage investors from reading it. To minimise this risk, it is important that warning statements are written in plain and simple language, and in a reasonable sized font.

In addition to this proposal, companies should continue to inform shareholders about the risks of unsolicited, off-market offers at their Annual General Meeting (AGM).

2.3 Companies procure broker to purchase shares

The current mechanisms by which individual shareholders can sell shares in a convenient and expedient manner, and at low cost, are limited. This has directly contributed to the prevalence of unsolicited, undervalued, off-market share offers as some investors choose to take a loss compared with market price, and avoid the expense of a broker. NSA believes the development of a range of mechanisms for individual shareholders to sell their shares without or at low cost should be a priority for this review.

Concerns remain under this proposal about the possibility of cost shifting onto the consumer. As discussed above, there are occasions when investors are better to accept below market price and avoid the expense of a broker when the number and value of shares are low. Without a guarantee that costs will not be shifted on to the consumer, this

proposal could leave some investors worse off. The lack of incentives for companies to participate in this process may also undermine the effectiveness of the proposal for companies to procure brokers to purchase shares.

2.3 *Do not contact register*

The feedback received from NSA members on this issue indicates a high level of community concern about the lack of privacy in relation to share registers (see **Appendix A**). There is also some confusion about the difference between privacy protections applying to share registers, and the protection of personal information more generally. The justification for this dichotomy on the grounds of good commerce is not widely understood.

Enabling members to indicate their preference to receive information only from the company itself, or a regulated document such as a takeover offer, would go a long way to addressing these concerns. To minimise the risk that shareholders may not be aware of their right to exercise this preference, NSA believes that an opt-out clause would work better. Under an opt-out, investors would automatically receive information only from the company or a regulated document unless they advised the company that they would like to receive unsolicited offers.

NSA believes that greater consideration should also be given to ensuring that companies actually take-up this proposal, such as making 'do not contact' registers compulsory.

2.4 *Prescribe a format for the offer document*

Prescriptions for offer documentation would provide a necessary safeguard against companies making unsolicited offers undermining the intended impact of the proposals discussed in the options paper. For example, a prescription could mandate that warnings be included at the top of offer documents, and be of a reasonable size.

2.5 *Alternative sale method*

As discussed in Section 2.2 above, the limited mechanisms by which individual shareholders can sell shares in a convenient and expedient fashion, at low or no cost is one of the principal factors in the growth in unsolicited, undervalued share offers. This is compounded amongst older age groups due to their typically lower levels of computer use, and their unfamiliarity with online share companies. Around 28 per cent of the population aged 65 and over use the internet, compared with the national average of 70 per cent.⁴

Providing shareholders with a public register of brokers who would be available to assist the transaction would be of some assistance to consumers, however, for the reasons outlined above it is important that investors are not simply directed to a website, and that information is also available over the telephone or in print.

Importantly, this proposal should not distract Government from looking at ways of increasing the mechanisms, by which shareholders can sell shares at no, or at low cost.

⁴ Australian Bureau of Statistics (ABS). 4102.0 Australian Social Trends. 2008.

Appendix A

In the development of this submission NSA sought comment from members, particularly with regard to their experiences with unsolicited, undervalued offers. The following comments provide a candid snapshot of the nature of this feedback.

Note - Names have been changed to protect members' privacy.

I am among many who have been deeply annoyed at receiving correspondence from people offering to buy my shares at well-below market value; if I want information, even about my husband's affairs, I am denied access to that information by the Privacy Act.

However, any Tom, Dick, or Harry is privy to my shareholdings, simply by requesting the shareholder register!

I find it incomprehensible that my privacy can be so public, and am firmly in favour of action - any action - taken against such bottom-feeders.

Jane, Western Australia, NSA Member

I have received several offers from these people or person and eventually wrote them/him a letter accusing him of moral fraud. I have not been worried since.

I imagine on paper I look like a likely sucker. I hold only a few shares, am a woman and single. I am disillusioned and amazed the methods he uses have not been advertised on such sensationalist programmes as Today Tonight.

I think one of the reasons people fall for the ploy is their ignorance of the work of stock brokers. They imagine the fees they charge are astronomical. This way they can get, they think, a fair return on their money without cost or embarrassment. The public needs educating.

Margaret, NSA Member

I was shocked to receive an unsolicited offer for a few shares that I hold which I believe were grossly undervalued.

I would have thought that the Privacy Laws would have prevented this.

Beryl, Victoria, NSA Member

I suggest that anyone making such unsolicited offers below market value should be subject to a substantial jail term for fraud.

John, QLD, NSA Member