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Shareholder Inspection Rights in Australia: Then And Now

Law Working Paper N° 652/2022
July 2022

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This paper can be downloaded without charge from:
https://doi.org/10.67929/ecgi-law-652-2022

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ECGI Working Paper Series in Law

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The authors are grateful to Mitheran Selvendran for excellent research assistance and to Monash University for providing funding for this research under a Network of Excellence grant on the topic, Enhancing Corporate Accountability.

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Abstract

Information asymmetry between shareholders and corporate managers can subvert contemporary calls for increased institutional investor oversight. In jurisdictions where controlling shareholders are common, information asymmetry can also arise between minority shareholders and controlling shareholders, impeding the monitoring of the latter by the former. Shareholder inspection rights provide an important corporate governance technique that can potentially address this problem and provide a basis for enhanced investor oversight and activism. This paper examines the trajectory of shareholder inspection rights in Australia. It describes and evaluates the effectiveness of an important development in the mid-1980s, which saw a shift from the highly narrow and prescriptive U.K. common law inspection right to a statutory regime that conferred broad discretion on the courts to decide whether inspection is appropriate in the particular circumstances. The paper analyses the evolution of this shift and the extent to which the operation of shareholder rights today reflects the original goals of the statutory inspection right. The paper also explores the interesting issue of how modern securities laws designed to promote market integrity for all investors should interact with laws granting inspection rights to individual shareholders, and also the extent to which modern securities law may alter the contours of the statutory shareholder inspection right. The paper argues that the Australian experience is valuable in providing international law makers and researchers with important insights into the efficacy of different models of regulating shareholder inspection rights and the interface of individual shareholder inspection rights with broad market-based disclosure rules. Shareholder inspection rights will inevitably become increasingly important in practice, given increasing shareholder activism and the growing focus of investors on ESG-related matters

Keywords: corporate governance, shareholders, inspection rights, institutional investors, activism, takeovers, securities law, disclosure.

JEL Classifications: G23, G30, G34, G38, K20, K22, N20, N25, N27

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SHAREHOLDER INSPECTION RIGHTS IN AUSTRALIA: THEN AND NOW

Tim Bowley and Jennifer G. Hill*

INTRODUCTION

Shareholder inspection rights have profound implications for corporate monitoring. Since the 2007-2009 global financial crisis, there have been calls for increased oversight by institutional investors as a check on sub-optimal board decision-making (Haldane 2015; Plender 2008) and this development underpins the international rise of stewardship codes since that time (Hill 2018).

However, the separation of ownership and management in public companies creates the potential for a significant information asymmetry to exist between shareholders and corporate managers. In the absence of effective mechanisms to enable shareholders to access corporate information, shareholders are likely to be frustrated in their attempts to monitor managers and make informed governance decisions (Parliamentary Joint Committee 2008: 8). Inadequate shareholder access to corporate information also potentially undermines corporate accountability because shareholders often require access to corporate records as a precursor to activism or litigation against incumbent corporate managers (Digby et al. 2020).

Historically, Anglo-Australian common law provided little assistance to shareholders in accessing a company's records. While recognizing the existence of shareholder inspection rights, the common law nonetheless strictly circumscribed those rights, effectively relegating shareholders to a role of 'bystanders' in corporate governance (Buxbaum 1985: 1683).

In 1985, prompted by concerns about the narrowness of the common law (Explanatory Memorandum 1985: [355]-[360]), Australia passed important legislative reforms which introduced a new statutory regime governing shareholder access to non-public corporate records. Although, for the sake of convenience, this chapter refers to the statutory regime as providing an inspection 'right', to some degree this is a misnomer. The statutory regime does

* The authors are grateful to Mitheran Selvendran for excellent research assistance and to Monash University for providing funding for this research under a Network of Excellence grant on the topic, *Enhancing Corporate Accountability*.

not grant a 'right' of inspection *per se*; rather, it provides a shareholder with standing to apply to the court for an order authorizing such inspection. The legislation thus regulates shareholder inspection not by strictly delineating the circumstances in which inspection can occur but by conferring a broad discretion on the courts to decide whether inspection is appropriate.

This chapter traces the shift in Australia from a common law inspection right to the introduction of the statutory regime in 1985 to the current iteration of the regime in s. 247A of the *Corporations Act 2001* (Cth) ('Corporations Act'). It highlights that the statutory inspection right is generally regarded today as a significant improvement over shareholders' previous common law rights. Still, it must be acknowledged that the overall number of reported cases involving the statutory inspection right is relatively low. The chapter explores this phenomenon and concludes that it does not appear to result from any deficiency in the scope of the statutory regime itself. Instead, it appears to reflect the fact that parties will often settle inspection applications before a court hearing; or they will bring such applications as part of their pursuit of other remedies with the consequence that their interlocutory inspection applications are not the subject of final reported court judgments.

The chapter also highlights a notable issue identified by the courts in the listed company context. Although the case law considering the statutory regime's application to listed companies has in general adopted a liberal approach, some courts have questioned whether a stricter interpretation of the inspection right is required in the context of listed companies. This concern has been prompted by an important development in another area of Australian law, namely, the introduction in 1994 of a 'continuous disclosure regime' for listed companies. The continuous disclosure regime requires listed companies to promptly disclose price sensitive information to the market and is designed to ensure a level informational playing field for *all market participants*. Its emphasis on a level informational playing field, however, sits uneasily with the statutory inspection right, which provides a means for a *single shareholder* to access non-public corporate information. The courts are yet to articulate a clear approach for resolving this tension in the listed company context. However, as the chapter shows, it is in fact possible to address this tension through the application of existing principles developed by the courts in relation to the inspection right.

I. AUSTRALIAN CORPORATE AND SECURITIES LAW: THE REGULATORY BACKGROUND

For the benefit of readers not familiar with Australian corporate law, it will be helpful to clarify some key features of Australian corporate law before proceeding to this chapter's substantive analysis.

Australian corporate law has its origins in English company law (Austin & Ramsay 2018: ch 2). It is principally comprised of common law and a federal statute — the Corporations Act. The Corporations Act regulates financial reporting, capital raising and takeovers as well as the formation of companies and their internal affairs. Unlike the U.S. position, there is no formal distinction in Australia between corporate and securities law (Dixon & Hill 2019).

The Corporations Act provides for the incorporation of both private and public companies. Public companies are permitted to issue shares in public offerings and may apply to have their shares admitted to trading on the Australian Securities Exchange ('ASX'), the principal Australian equities market. Companies admitted to the ASX are subject to the ASX Listing Rules, [1] which supplement the common law and statute with additional requirements concerning how listed entities conduct their affairs (ASX 2021a; Minter Ellison 2016).

Australian corporate law provides for the clear delineation of the roles and powers of shareholders and the board of directors. Its starting point is that the allocation of corporate power between shareholders and directors is a matter for a company's incorporators to address in the company's constituent rules (Austin & Ramsay 2018: ch 7). In practice, incorporators generally choose to give broad management power to a company's board. This leaves shareholders with a limited number of specific powers, such as the power to elect and remove directors, amend the company's constitution, and approve certain significant changes to a company's share capital (Austin & Ramsay 2018: ch 7). The courts have held that, in these circumstances, shareholders have no power to intervene in the board's exercise of management power; they cannot even pass U.S.-style non-binding precatory resolutions expressing an opinion on how management power is exercised (*ACCR v CBA* 2016).

[1] The ASX Listing Rules bind listed entities as a contract (ASX 2021a: 1). They are also made enforceable under the Corporations Act s. 793C, which permits the Australian Securities and Investments Commission ('ASIC'), the ASX or a person aggrieved by non-compliance to seek an order from the court requiring compliance with the ASX Listing Rules.

Such powers and rights as are given to shareholders must usually be exercised collectively through the general meeting. Where shareholders have concerns about the conduct of their company's affairs, the general rule is that such concerns should be addressed internally by the members in general meeting (*Foss v Harbottle* 1843). As a result, the common law placed strict limits on the situations in which a member could bring individual suit to complain about the conduct of a company's affairs, although this position has been mitigated in more recent times through the introduction of certain statutory members' remedies, including a statutory derivative suit (Corporations Act 2001, pt 2F.1A). As in the United Kingdom (Hannigan, infra), private enforcement by means of the statutory derivative suit remains relatively uncommon, but there has been a steep rise in the number of securities class actions since their introduction just over three decades ago (Dixon & Hill 2019). According to one prominent U.S. scholar, Australia's class actions regime may be one of the most liberal in the world (Miller 2009).

The Corporations Act requires companies to make certain fundamental information regarding their affairs publicly available. For example, a company must maintain, and make available for public inspection, its registers of its members, options and debentures (Corporations Act 2001, ch 2C). A company must also file with the Australian corporate and securities regulator other basic corporate information, such as details of its issued share capital (Corporations Act 2001, pt 2H.6). Filed information becomes available to the public via the regulator's website.[2]

However, the information disclosed pursuant to these requirements is generally administrative in nature, directed at very specific matters or, in the case of financial statements, a synthesis of underlying operational and financial information relating to prior periods. It may be of limited utility to a shareholder who harbors concerns about the behind-the-scenes conduct of their company's affairs.

A possible basis upon which shareholders might seek greater access to non-public corporate information is by means of private ordering in the company's constitution. Under Australian law, shareholders in general meeting have the power to adopt, amend and repeal their company's constitution (Corporations Act 2001, ss. 136(1)-(2)). Australian corporate law allows shareholders to initiate such constitutional changes without the need for board approval. It is therefore open to shareholders of an Australian company to include a provision in their company's constitution granting themselves broad inspection rights. Such a provision could be

[2] See ASIC, *Search ASIC's Registers — Companies and Organisations* <https://asic.gov.au/online-services/search-asic-s-registers/>.

a bespoke provision or one of the default constitutional rules contained in the Corporations Act.[3] It is unclear, however, to what extent Australian companies include such inspection rights in their constitutions. Industry commentary does not suggest it is common (Digby et al. 2020). Listed companies, in particular, tend to adopt constitutions of a relatively uniform nature which favour a board-centric allocation of corporate power (Austin & Ramsay 2018: [7.091]). Market evidence also indicates that shareholders of listed companies do not favour novel or bespoke constitutional provisions, including provisions relating to corporate disclosure. In recent years, social and environmental activists have sought to amend the constitutions of some listed companies to require greater disclosure of environmental, social and governance ('ESG') matters, such as the implications of climate change risk for a company's business model; however, these resolutions have, to date, received very low levels of voting support and have been unsuccessful (Bowley, forthcoming).[4]

The structure of capital markets, which varies greatly around the world (OECD 2021: 24), has significant implications for the utility of shareholder rights and for corporate regulation generally. The OECD classifies Australia as one of six jurisdictions (including the United Kingdom and the United States) with the least share ownership concentration (OECD 2021, 25). Nonetheless, scholars have pointed out that, in fact, Australia occupies an intermediate position on the spectrum of ownership concentration because it has significant levels of shareholding by both institutional investors and controlling blockholders (Chen et al. 2016: 21-2).

II. SHAREHOLDER INSPECTION RIGHTS IN AUSTRALIA: THEN

A SHAREHOLDER INSPECTION RIGHTS UNDER COMMON LAW AND EARLY COMPANIES LEGISLATION

Like a number of jurisdictions in the Asia-Pacific region (Varottil & Joshi, infra; Puchniak & Tang, infra; Donald, infra), Australian corporate law was historically based on English common law, which drew a sharp distinction between the inspection rights of directors and shareholders. It was long accepted that directors possessed a broad right at common law to

[3] The Corporations Act contains default constitutional rules (known as the 'replaceable rules') which a company can choose to govern its internal affairs. One of those rules (contained in s 247D) provides that a company's board or the members in general meeting may authorize a member to inspect the company's books.

[4] Although shareholders have not supported constitutional amendments requiring companies to make disclosures regarding ESG issues, they are, however, increasingly supporting non-binding resolutions requesting that companies make such disclosures or address other ESG issues (Bowley & Hill, forthcoming).

inspect corporate documents as a corollary to the duties imposed upon them. For example, early case law held that '[t]he right to inspect documents … is essential to the proper performance of a directors' duties' (*Edman v Ross* 1922: 361).

The common law did not adopt a similar approach to shareholder inspection rights. A shareholder possessed no general right of inspection at common law (*Burn v London and South Wales Coal Company and the Risca Investment Company* 1890) and certainly was 'not entitled as of right to range at will through the company's affairs' (*Edman v Ross* 1922: 358). The courts recognised a narrow inspection right, but only if the shareholder could point to 'some controversy, some specific purpose in respect of which the examination became necessary' (*R v Merchant Tailors' Co* 1831: 129).[5] The courts denied inspection on merely speculative grounds and considered that broad shareholder inspection rights would be undesirable from a policy perspective, since they would be disruptive to management and cause 'great inconvenience and much expensive litigation' (*R v Merchant Tailors' Co* 1831: 127).

Company law statutes sometimes granted shareholders access to a particular type of document, such as a register of debenture holders (*Mutter v Eastern and Midlands Railway Co* 1888), and many of the older cases deal with inspection applications of this kind. Even in circumstances where the shareholder had a statutory right to inspect a specific document, there was controversy as to whether such 'right' was absolute or discretionary. In one early U.K. decision, the court took the latter approach, holding that the applicant must show that the object of seeking disclosure was legitimate and reasonable (*R v Directors of the London and St Katharine Docks Co* 1874). Later cases, however, held that an applicant in these circumstances was not obliged to state the reasons for seeking access (*Holland v Dickson* 1888; *Mutter v Eastern and Midlands Railway Co* 1888).

In sum, shareholders traditionally did not possess a general common law or statutory right to inspect a company's non-public records, including accounting records (*Baldwin v Lawrence* 1824; *Burn v London and South Wales Coal Company and the Risca Investment Company* 1890). Although it would theoretically have been possible to include such a right in a company's constitution (*Emmott v Queensland Mercantile Co* 1892), it appears that then, as now, this was rarely done (Explanatory Memorandum 1985: [356]).

[5] The correctness of the narrow formulation of shareholders' common law inspection rights in *R v Merchant Tailors' Co* was accepted in later case law. See, e.g., *Mutter v Eastern and Midlands Railway Co* 1888, 106; *Edman v Ross* 1922, 358; *Rowland v Meudon Pty Ltd* 2008, [23].

B AUSTRALIA'S INTRODUCTION OF A STATUTORY SHAREHOLDER INSPECTION RIGHT

A radical change to shareholder inspection rights occurred in the mid-1980s, when Australia adopted a new statutory provision, s. 265B of the Companies Code ('s. 265B').[6] Section 265B allowed a shareholder to apply to the court for an order authorizing a registered company auditor or a legal practitioner to inspect and make copies of the company's books on the applicant's behalf. The court could only make an order when satisfied that the application was made 'in good faith' and for a 'proper purpose' (*Re Claremont Petroleum N.L.* 1989).

Whereas the common law regulated shareholder access to non-public corporate information by narrowly defining the scope of shareholders' inspection right, s. 265B adopted a different approach. Instead of providing shareholders a right of inspection *per se*, it gave a shareholder standing to apply to the court for an order authorizing access. Provided the shareholder could discharge the onus of proving 'good faith' and 'proper purpose', s. 265B granted the court a broad discretion whether to authorize inspection and therefore effectively made the court a gatekeeper to differentiate between meritorious and unmeritorious applications. The Explanatory Memorandum relating to s. 265B noted that the reform would leave it to the courts to determine the meaning of a 'proper purpose' for inspection but gave two examples of 'proper purpose' drawn from American case law, namely — (i) ascertaining whether allegations of mismanagement are established and (ii) determining a fair market value for shares in companies with pre-emption rights (Explanatory Memorandum 1985: [360]).

The introduction of s. 265B led to a spate of shareholder inspection cases, many of which were in the takeover context and involved applications for access to company documents by control-seekers. According to one early decision on s. 265B, the provision itself gave 'little guidance with respect to the principles to be applied' (*Re Claremont Petroleum N.L* 1989: 58). The statutory reform created, therefore, a metaphorical crossroad for the courts. It was unclear whether the courts would adopt a restrictive approach to inspection akin to that under common law or, alternatively, adopt the view that the statutory inspection right constituted a sharp break with the past.

Early case law following the 1985 reforms highlighted the tension between these divergent approaches. In one decision, the company argued in favor of a narrow construction of s. 265B,

[6] Section 265B was introduced into the Companies Code by the Companies and Securities Legislation (Miscellaneous Amendments) Act 1985 (Cth), s. 77. It was replaced several years later by s. 319 of the *Corporations Act 1989* (Cth), which was in substantially the same terms as s. 265B.

whereby access would depend upon whether the applicant shareholder could show some specific and/or personal right that could only be protected by the making of such an order (*Re Augold N.L.* 1987: 308-9). It was also argued in several other cases that the courts should require the applicant shareholder to prove some special interest, not shared by other shareholders (*Biala Pty Ltd v Mallina Holdings Ltd* 1990; *Re Claremont Petroleum N.L.* 1989), and one judge stated 'I have some doubt whether s. 265B really takes the matter any further than did the common law' (*Barrack Mines Ltd v Grants Patch Mining Ltd* 1988: 616).

In spite of these retrograde signals, one influential decision, the 1987 case, *Unity APA Ltd v Humes Ltd (No 2)* 1987, adopted a bold and liberal construction of the new section. In doing so, the judge, Beach J., explicitly based his construction on U.S. law, relying heavily on vol. 18A of the second edition of *American Jurisprudence*.[7] The inspection of corporate books had often been viewed in the United States as one of the 'fundamental rights' of stockholders (Bartels & Flanagan 1953). The underlying rationale for this approach was the proposition, referred to in numerous U.S. cases, that the shareholders are the equitable owners of the assets of the corporation and are therefore entitled to reliable information concerning the management and financial position of the company (*Guthrie v Harkness* 1905: 155; *State ex. Rel. G.M. Gustafson Co v Crookston Trust Co* 1946; *Nationwide Corp. v. Northwestern National Life Insurance Co* 1958; *Campbell v Ford Industries, Inc* 1976).

Yet, this was not a proposition accepted under Anglo-Australian law. Although there were some 19th century U.K. cases suggesting that the company's books and property belonged to its shareholders (*Re Joint Stock Discount Co* 1866), this approach was superseded by the modern view that a shareholder has no proprietary interest in any of the company's assets (*Macaura v Northern Assurance Co* 1925; *R v Portus; Ex parte Federated Clerks Union of Australia* 1949: 434-5; *Salomon v A Salomon & Co* 1897). Also, in spite of the liberality of many U.S. decisions on shareholder inspection rights, commentators have warned that it is necessary to maintain a clear 'line of demarcation' between examination of the company's stockholder lists versus examination of the company's books and records, because U.S. courts were far more generous in ordering inspection of the former than the latter (Bartels & Flanagan 1953; Note 1955). Notably, one contemporaneous Delaware Court of Chancery decision

[7] At 477, Beach J. cited para [348] of the second edition of *American Jurisprudence*, which stated 'It is well established that a stockholder has the right to inspect the books and records of the corporation. This right has been said to exist independently of statutes securing such a right to stockholders, and such statutes are generally regarded as supplementing, rather than abrogating, the common-law right'.

concerning an application under § 220 of the Delaware General Corporation Law ('DGCL') highlighted that U.S. courts were far more reticent about providing access to the company's books and records on the basis that statutory inspection rights could not be used 'as a means to invade the corporate board room' (*Radwick Pty Ltd v. Medical Inc* 1984). During the 1980s and 1990s, applications under § 220 of the DGCL for inspection of documents were, in fact, rare and most § 220 requests related to stockholder lists (Huang & Thomas 2020: 930).[8] Nonetheless, Beach J. based his interpretation of s. 265B on a wholesale adoption of the more liberal approach of U.S. courts in relation to inspection of stockholder lists.[9]

Irrespective of whether the interpretation of U.S. law adopted in *Unity APA Ltd v Humes Ltd (No 2)* [1987] VR 474 was correct, the generous approach adopted in that case and other decisions of that period set the tone for later judicial decisions. These cases viewed s. 265B as 'remedial' (*Re Augold* 1987), enabling the court to make inspection orders in circumstances where this would not have been previously possible, a view of the statutory inspection right that persists today (*Rasley (Singapore) Pte Ltd v Financial & Energy Exchange Ltd* 2020: [26]). The 'proper purposes' precondition to inspection was also interpreted broadly in favour of the applicant, encompassing, for example, inspection for the purposes of commencement of litigation against the company or removal of the incumbent directors from office. Nor was the presence of hostility between an applicant and corporate management perceived to constitute a bar to inspection (*Humes Ltd v Unity APA Ltd (No 1)* 1986).

III. SHAREHOLDER INSPECTION RIGHTS IN AUSTRALIA: NOW – THE LOGIC AND STRUCTURE OF SECTION 247A

The statutory inspection right has been refined in the intervening years albeit without materially altering its core characteristics. It is now found in s. 247A of the Corporations Act.[10] Section 247A has also been influential in Asia. Hong Kong's shareholder inspection right, for example, was directly modelled on that provision (Donald, infra) and Australian case law on shareholder inspection rights is regularly cited in Hong Kong.[11]

[8] In recent times, however, there has been growing use of § 220 of the DGCL in relation to books and records requests under the Delaware courts' 'tools at hand' doctrine for the purposes of shareholder litigation (Cox et al. 2020; Cox & Thomas, infra).

[9] Shareholders of Australian companies have an absolute right of access to a company's share register. See Corporations Act ss. 169, 173.

[10] Section 247A was enacted under Part 2F.3 of the *Company Law Review Act 1998* (Cth). This Act repealed s 319 of the *Corporations Act 1989* (Cth), which was the successor to s 265B of the Companies Code.

[11] A number of leading Australian decisions are cited in numerous first instance and appellate cases in Hong Kong. Heavily cited decisions include *Barrack Mines Ltd v Grants Patch Mining Ltd* 1988 (see http://www.austlii.edu.au/cgi-bin/LawCite?cit=[1988]%201%20Qd%20R%20606).

Like the original Australian statutory provision, s. 247A gives a shareholder standing to apply to the court for access to a company's non-public records and uses the court as a gatekeeper by giving it a broad discretion whether to authorize inspection. Section 247A also only permits a court to exercise its discretion to authorize inspection if the applicant can demonstrate 'good faith' and 'proper purpose'. There is, however, one difference between the provisions worthy of note: whereas the original provision only permitted inspection by a company auditor or legal practitioner nominated by the applicant, the current version allows the court to authorize inspection by the applicant or any other person. The key features of s. 247A are examined below. As the discussion will demonstrate, the courts in overall terms have continued to construe the inspection right generously.

A. STANDING

Section 247A is a mandatory provision of the Corporations Act which applies to all types of companies incorporated under the legislation. Standing to apply for inspection under the section is provided to a 'member' of a company, which is defined as a person who is registered as a member in the company's register of members (Corporations Act 2001, s 9, s 231). In the case of a company with share capital, an applicant must therefore be registered in the company's share register as a holder of shares in the company (*Maddocks v DJE Constructions Pty Ltd* 1982).[12] A person who has only an underlying beneficial interest in shares, such as an investor holding shares through a nominee, will not fall within this definition. It has also been held that a court will not grant an inspection order unless the applicant remains a member as at the date the court makes the order (*Leadenhall Australia Pty Ltd v Cape Lambert Resources Ltd* 2018).

B. BOOKS OF THE COMPANY

Inspection under s. 247A relates to 'books of the company'. The legislation defines 'books' broadly; it includes any register, other record of information, document, and financial reports or records (however compiled, recorded or stored) (Corporations Act 2001, s 9). As the legislation uses the phrase 'of the company', the courts have held that books must belong to the company, in the sense of forming part of its property; as a result, an inspection order will

[12] The standing requirement under s 247A therefore excludes a person who believes they are entitled to be registered as a member but who has not been so registered by the company. Such a person would need to bring legal proceedings to compel the company to register them before they could apply under s 247A. See Austin & Ramsay, [21.050]–[21.080].

not extend to books that are in a company's possession but which do not belong to it (*Areva NC (Australia) Pty Ltd v Summit Resources (Australia) Pty Ltd* (*No 2*) 2008, [8]-[9]; *Sun Hung Kai Investment Services Ltd v Metals X Ltd* 2019, 365; *Re Cromwell Property Securities Ltd* 2019, 565-68). The courts have held, therefore, that proxy forms completed and lodged by shareholders with a company in advance of a shareholder meeting are not 'books of the company' (*Sun Hung Kai Investment Services Ltd v Metals X Ltd* 2019; *Re Cromwell Property Securities Ltd* 2019). According to these judgments, proxy forms relate to the exercise of voting rights by a member; they come into a company's possession merely as a result of a Corporations Act requirement that sees the company play an administrative role in receiving and holding proxy forms ahead of a shareholder meeting. On this basis, proxy forms do not belong to the company and are therefore not 'books of the company' (*Sun Hung Kai Investment Services Ltd v Metals X Ltd* 2019; *Re Cromwell Property Securities Ltd* 2019).

That point aside, the definition of 'books of the company' is broad enough to mean that an applicant, in practice, is unlikely to find that corporate records to which they are seeking access are not 'books'. Members have been permitted, for example, to inspect a company's insurance policies (*Hanks v Admiralty Resources N.L.* 2011), non-public financial statements (*London City Equities Ltd v Penrice Soda Holdings Ltd* 2011), hedging arrangements and communications with bankers (*London City Equities Ltd v Penrice Soda Holdings Ltd* 2011), board papers (*Acehill Investments Pty Ltd v Incitec Ltd* 2002), and information relevant to scrutinizing a board's determination that a proposed disposal of the company's assets was superior to an alternative proposal for those assets (*Hanks v Admiralty Resources N.L.* 2011).

C. THE COURT'S DISCRETION UNDER SECTION 247A

The key feature of s. 247A is that it grants members standing to apply to the court for an order authorizing inspection of company books. Whether inspection occurs is therefore a matter for the court (*Ingram v Ardent Leisure Ltd* 2020, [4]). The legislation provides one important direction to the courts concerning how they exercise their discretion. Like the original statutory inspection provision, s. 247A(1) provides that a court may only make an order permitting inspection if it is satisfied that the applicant is acting in good faith and for a proper purpose. This is a necessary, but not sufficient, condition for inspection. The courts have made it clear that even where an applicant demonstrates good faith and propriety of purpose, a court may still decline to authorize inspection by reference to any other considerations it considers relevant. This section explores how courts approach their role as gatekeeper under s. 247A.

1. The Requirement for an Applicant to Act in Good Faith and for a Proper Purpose

The courts treat good faith and proper purpose as a composite requirement and assess it objectively (*Mesa Minerals Ltd v Mighty River International Ltd* 2016, [22]; *Knightswood Nominees Pty Ltd v Sherwin Pastoral Company Ltd* 1989, 155–57). The onus of proof is on an applicant to demonstrate their bona fides and propriety of purpose (*Mesa Minerals Ltd v Mighty River International Ltd* 2016, [22]).

In order to demonstrate good faith and a proper purpose, an applicant must articulate a substantive purpose for their inspection; that is, they must adduce evidence to show that inspection is for a purpose that is not fanciful, artificial or specious (*Ingram v Ardent Leisure* 2020 [78]; *Rasley (Singapore) Pte Ltd v Financial & Energy Exchange Ltd* 2020, [28]). Further, the purpose must 'be germane to the applicant's status as a shareholder or reasonably related to it' (*Ingram v Ardent Leisure* 2020, [58]). The courts have held that this requirement will be satisfied where an applicant seeks access in order to obtain information to determine the value of their shares for the purpose of exercising a right of pre-emption under the company's constituent documents (*Tinios v French Caledonia Travel Service Pty Ltd* 1994). It is also satisfied where an applicant seeks access to company books in order to investigate some apprehended wrongdoing or inappropriate conduct involving their company. The courts have stressed that in this situation an applicant does not need to establish that they have a particular cause of action arising from such conduct (*Sun Hung Kai Investment Services Ltd v Metals X Ltd* 2019, 364; *Praetorin Pty Ltd v TZ Ltd* 2009, [40]). It will suffice, instead, if the applicant outlines a basis for a reasonable apprehension or suspicion that a wrong has occurred (*Hanks v Admiralty Resources N.L.* 2011, [39]; *Praetorin Pty Ltd v TZ Ltd* 2009, [64]–[65]; *McNeill v Hearing & Balance Centre Pty Ltd* 2007, [17]) or that their investment may be adversely affected by the relevant conduct (*London City Equities Ltd v Penrice Soda Holdings Ltd* 2011, 525).

Inspection sought for a purpose not related to a member's capacity as a member will not be authorized. On this basis, the courts have refused to authorize inspection to facilitate the applicant launching a takeover for the company (*Re Augold N.L.* 1987). As a result of such decisions, s 247A is not considered to be particularly useful for parties proposing to engage in

mergers and acquisitions (Levy 2012: 82–3). In addition, courts have refused to authorize inspection to obtain information to compete commercially with the company (*Knightswood Nominees Pty Ltd v Sherwin Pastoral Company Ltd* 1989, 156), to overcome a claim for legal professional privilege claimed in other legal proceedings (*Czerwinski v Syrena Royal Pty Ltd* 2000), or to pursue a claim against the company which arises from events unconnected to the applicant member's rights and entitlements as a shareholder (*Ingram v Ardent Leisure* 2020). The courts have also stressed that the applicant's purpose must be consistent with the fundamental relationship established under Australian law between shareholders and their company (*Sun Hung Kai Investment Services Ltd v Metals X Ltd* 2019). As noted earlier, that relationship sees shareholders playing a limited role in the management of their company in the absence of clear constitutional rules to the contrary. Accordingly, the courts have held that inspection will not be granted where a member merely has reservations about the commercial merits of actions taken by a company or wishes to second-guess business judgements by the company's managers (*Re Augold N.L.* 1987, *Praetorin Pty Ltd v TZ Ltd* 2009, [36]–[37]), or where members are simply trying to put themselves in the same informational position as directors out of curiosity or officiousness (*Ingram v Ardent Leisure* 2020, [59]; *Praetorin Pty Ltd v TZ Ltd* 2009, [64]).

It has also been suggested, on this basis, that the statutory inspection right will not assist contemporary shareholder activists who seek access to corporate records in order to challenge directors' decisions in relation to a company's social or environmental policies (Black 2006, 252). However, in 2021 the Federal Court ordered inspection under s. 247A to shareholders in an Australian bank to enable the shareholders to determine whether the bank's decisions to finance significant oil and gas projects were consistent with its disclosed sustainable lending policies (*Guy Abrahams v Commonwealth Bank of Australia* 2021). In recent years, there has been increasing investor and public scrutiny of how companies address environmental, social and governance ('ESG') issues and a growing recognition that such issues can be directly relevant to shareholder value (Bowley & Hill, forthcoming). Against this background, courts may in fact be prepared to entertain s. 247A applications relating to shareholder concerns about how companies are addressing or disclosing ESG risks.

Provided the applicant's primary purpose is a proper one, it does not matter if an inspection might benefit the applicant for some other purpose (*Mesa Minerals Ltd v Mighty River International Ltd* 2016, [22]).

2. The Court's Overriding Discretion to Authorize Inspection

Even if an applicant demonstrates its good faith and propriety of purpose, the court still has an overriding discretion to determine whether to authorize inspection (*Humes Ltd v Unity APA Ltd (No 1)* 1986; *Vinciguerra v MG Corrosion Consultants Pty Ltd* 2007, [37]). The decided cases do not always separate out the considerations relevant to the exercise of this discretion from considerations relevant to the court's determination of the applicant's good faith and propriety of purpose.[13] It is therefore unclear precisely what principles inform the court's exercise of its overriding discretion.

One commentator has suggested that general equitable considerations would be relevant, such as whether an applicant has 'unclean hands' or has unreasonably delayed their application (Mantziaris 2009, 630-31). However, such matters are just as (if not more) apposite to the determination of an applicant's good faith and propriety of purpose.

It appears clearer that policy-related matters are relevant here. Some cases, for example, have referred to a desire not to permit s. 247A inspection to undermine pre-trial discovery processes.[14] A further example of the relevance of policy considerations is provided by the decision in *Ingram v Ardent Leisure* 2020. In that case, the applicant shareholder sought access to the company's litigation insurance policies in order to determine the availability, quantum and conditions of any insurance cover that would respond to a class action claim that the applicant was seeking to bring against the company. The court refused the application because the applicant's purpose was to facilitate a class action claim which sought to vindicate rights that had accrued to the applicant in its capacity as an acquirer of shares in the company rather than in its capacity as a member of the company. The court noted that, even if it had found that the applicant was acting for a proper purpose, it would have exercised its overriding discretion against authorizing inspection. The court was concerned about the ramifications for the corporate insurance market if the usual confidentiality of insurance policies could be circumvented by litigants under s. 247A (*Ingram v Ardent Leisure* 2020, [81]-[84], [98]).

[13] See, e.g., *Mesa Minerals Ltd v Mighty River International Ltd* 2016 in which, at [22], the court lists 13 principles relevant to s. 247A applications. The first 12 relate to the determination of good faith and propriety; the thirteenth simply states that '[t]he Court has a residual discretion whether to order inspection' without any further explanation.

[14] See, e.g., *Acehill Investments Pty Ltd v Incitec Ltd* 2002, [29], [39] and *Re Tolco Pty Ltd* 2016, [27] where this issue appears to be expressed as an overarching consideration. Cf *London City Equities Ltd v Penrice Soda Holdings Ltd* 2011, 581, which considers this issue when assessing the applicant's good faith and propriety of purpose. Cf Cox et al 2020 which highlights the use of § 220 of the DGCL as a pre-filing discovery tool in mergers and acquisitions litigation and notes how this can facilitate the bringing of meritorious claims in this area.

The principles that guide the court's overriding discretion under s. 247A represent an issue that warrants more careful consideration. On occasion, courts have referred to quite contentious or difficult policy considerations which have gone unscrutinised in subsequent decisions and commentary. For example, in *Cescastle Pty Ltd v Renak Holdings Ltd* 1991, the court appeared to express a general preference in favour of substantial, long-term shareholders:

> [T]he court will look far more kindly on an application by a substantial shareholder, a fortiori one who has held his shares for some time, than in respect of an application made by a person who has held a few shares for a short period of time (*Cescastle Pty Ltd v Renak Holdings Ltd* 1991, 117).

Although this proposition has recently been supported by the Federal Court of Australia (*Rasley (Singapore) Pte Ltd v Financial & Energy Exchange Ltd* 2020, [25]), it is arguably too broad. Why, for example, should a court look less 'kindly' on an application brought by an individual investor who recently acquired a shareholding which is small in absolute terms but significant relative to the investor's personal wealth? A preferable approach would be to consider the size of an applicant's shareholding in connection with the inquiry regarding the applicant's bona fides and propriety of purpose, where it can be assessed by reference to the applicant's overall circumstances.

D. AUTHORIZING INSPECTION

If a court is satisfied that inspection is appropriate, inspection will be confined to such books as reasonably relate to the purpose of inspection (*Re Style Ltd* 2009, [71]). The courts have indicated that their overriding discretion under s. 247A, described above, extends not only to the issue of whether to authorize inspection, but also to what documents inspection should relate (*Majestic Resources N.L. v Caveat Pty Ltd* 2004, [21]).

Under s. 247A(1), the court may permit either the applicant member or a third person acting on behalf of the applicant to undertake the inspection. A person permitted to inspect books may make copies of them unless the court orders otherwise (Corporations Act 2001, s. 247A(2)). Section 247C provides that where third persons inspect books on behalf of an applicant, they must not disclose information obtained during the inspection except to the applicant or to the regulator. Interestingly, the legislation does not impose a confidentiality obligation on the applicant itself. In practice, courts will impose a confidentiality obligation on the applicant

pursuant to its power to make ancillary orders under s. 247B (Austin & Ramsay 2018, [11.440.9]).

E. INSPECTION TO FACILITATE DERIVATIVE CLAIMS, CLASS ACTIONS AND OTHER SHAREHOLDER LITIGATION

The statutory inspection right can be particularly relevant for shareholders seeking to commence litigation against their company. According to a senior practitioner-commentator, the most common litigation context in which shareholders use s. 247A is in connection with derivative claims for breach of directors' duties and oppression actions under the Corporations Act (Mantziaris 2009, 624). Shareholders seeking to bring a class action against their company may also rely on the statutory inspection right. In the recent decision in *Ingram v Ardent Leisure Ltd* 2020, the lead applicants in a class action brought proceedings under s. 247A to inspect certain insurance-related documents of the company for the purpose of determining the viability of the class action.[15]

The statutory inspection right was specifically drafted to ensure that it would be available to assist litigants in derivative proceedings. Under the Corporations Act, derivative proceedings can be brought by a member, former member, a person entitled to be registered as a member,[16] and officers and former officers (Corporations Act 2001, s. 236(1)). As noted above, s. 247A(1) only provides standing to apply for an inspection order to registered members. In order to facilitate the bringing of derivative proceedings, ss. 247A(3)–(5) supplement the regime in s. 247A(1) by providing the wider class of persons who may bring a derivative claim with a comparable right to apply to the court for an order authorizing inspection of company books.

There have been some judicial suggestions that s. 247A cannot be used by shareholders as a substitute for discovery of documents in connection with another claim against their company (Mantziaris 2009, 624). However, it appears relatively clear that this is not a position taken uniformly by the courts and that s. 247A orders are routinely made to facilitate the prosecution of such other proceedings (*Re Victory ASAP Pty Ltd* 2018; *Ingram v Ardent Leisure Ltd* 2020; Mantziaris 2009, 624).

[15] The court dismissed the application on the basis that the applicants sought inspection, not in their capacity as shareholders, but in relation to alleged wrongs that were done to them in their capacity as potential investors. However, the judgement indicates (at [3] and [79]) that the court was not suggesting that s. 247A could never be used in connection with class action proceedings.

[16] And also by members, former members and persons entitled to be registered members of the company's related bodies corporate.

IV. SECTION 247A IN PRACTICE

Section 247A is regarded as a useful shareholder tool which is a material improvement over shareholders' common law right.[17] It is difficult, however, to obtain a clear picture of how frequently s. 247A is utilized by shareholders. A search of the principal Australian case citator[18] reveals only 15 applications under s. 247A between 2017–20 (inclusive). Nine of the applications were successful, either in whole or in part.

It is likely that this data does not capture all occasions on which shareholders seek to rely on s. 247A. In particular, it would appear that applications may be threatened or brought but settled by the applicant and company before the application is heard by a court.[19] As the statutory inspection right has now existed for over three decades and is the subject of detailed judicial commentary, parties and their advisers will have a reasonable sense of how courts interpret and apply the provision. The likely outcome of an inspection application may be reasonably apparent in many circumstances, prompting parties to reach a settlement regarding inspection before an application is heard by the court. The fact that Australia generally adopts a 'loser pays' litigation model also provides an incentive for parties to avoid unnecessary litigation (DLA Piper). Even in cases that proceed to trial, it is sometimes apparent that the parties reached agreement before trial on a number of categories of books requested by the applicant, leaving only a handful of disputed matters to be resolved by the court (*Santos QNT Pty Ltd v Tamboran Resources Ltd* 2017; *Simba Global Pty Ltd v Ifota Pty Ltd* 2019; *Re Sunnyside Bettoni Pty Ltd (No 2)* 2020).

Another possible explanation for the relatively low number of decided cases is that some s. 247A applications may be made on an interlocutory basis in connection with a shareholder's claim for another remedy and are not reported separately or in the final judgement delivered in the main proceedings. As noted in Section III(E) above, it is apparent from reported cases that s. 247A orders are made in the course of other proceedings brought by shareholders against a company.

[17] See, e.g., Mantziaris 2009, 621 ('a powerful discretionary remedy which has moved far beyond its general law counterpart'); Hill 1987, 659 ('[s247A] has considerably broadened shareholders' rights'). See also Digby et al., 2020 (noting how s. 247A can be used by shareholder activists 'to help them build a case against the incumbent board or management').

[18] CaseBase, a LexisNexis product.

[19] A view shared by Mantziaris 2009, 624.

A further possible explanation is that shareholders who are contemplating bringing proceedings against their company may seek to establish a basis for their claim by relying, instead, on pre-trial discovery court rules that provide a functional equivalent to inspection under s. 247A. However, while noting this possibility, a practitioner commentator comments that litigants are unlikely to favour pre-trial discovery over s. 247A. This is because pre-trial discovery rules impose a higher threshold test, namely, a requirement that an applicant demonstrate that they have reasonable cause to believe that they may have the right to claim relief from the court (Mantziaris 2009, 624).

V. SECTION 247A, LISTED COMPANIES AND THE CONTINUOUS DISCLOSURE REGIME

A. THE CONTINUOUS DISCLOSURE REGIME

Law reform in 1994 established a mandatory disclosure regime applicable to Australian listed public companies known as the 'continuous disclosure regime' (Dixon & Hill 2019). This regime obliges listed companies to provide prompt public disclosure of material information relating to their affairs. The regime is co-regulatory in nature, relying on a combination of statutory rules in the Corporations Act and listing rules made by the ASX. The keystone of the regime is Listing Rule 3.1 of the ASX Listing Rules. Listing Rule 3.1 imposes an obligation on listed entities to notify the ASX 'immediately' of information that a reasonable person would expect to have a material effect on the price or value of the entity's securities.[20] Information provided to the ASX is made publicly available through the ASX's Market Announcement Platform (ASX 2021c). Listing Rule 3.1 is given statutory backing by the Corporations Act, which imposes an obligation on listed entities to disclose information that is not generally available in accordance with applicable listing rules (Corporations Act 2001, s. 674(2)). The Corporations Act also imposes liability for any disclosures made that are misleading (Corporations Act 2001, s. 1041H).

The policy behind the continuous disclosure regime is to promote market integrity and efficiency. The regime pursues this policy by ensuring that material information is disclosed promptly and in a way that makes it accessible to all market participants (ASX 2021b, 4), thereby minimising the risk of selective disclosure of material information and insider trading (Dixon & Hill 2019, 1081-82). The regime does not, however, ensure that companies make full disclosure of all material information known to them (ASX 2021b, 6). It provides some

[20] In this context, 'immediately' means promptly and without delay, not instantaneously: ASX 2021b,14.

significant exceptions in recognition of the fact that full transparency may unduly harm companies' legitimate commercial interests and/or result in the disclosure of 'un-ripened' and therefore potentially unreliable information. Specifically, Listing Rule 3.1A provides that an entity is not obliged to disclose information if:

> (i) the information is confidential;
>
> (ii) the information falls into one of the following categories: it concerns an incomplete proposal, is insufficiently definite to warrant disclosure, is generated for internal management purposes, it is a trade secret, or disclosure of it would breach the law; and
>
> (iii) a reasonable person would not expect the information to be disclosed.

The elements in (i), (ii) and (iii) are cumulative.

A breach of the continuous disclosure regime will expose a listed entity and its officers to regulatory enforcement by the corporate and securities regulator (Dixon & Hill 2019). In addition, investors who have suffered loss as a result of a breach of the continuous disclosure regime can bring proceedings against the entity and/or its officers for compensation (Dixon & Hill 2019).

As a result of its strict requirements and the range of sanctions for non-compliance, the continuous disclosure regime is generally regarded as being particularly strict by international standards (Dixon & Hill 2019, 1082-83; Golding & Kalfus 2004).

Interesting questions arise concerning the impact of the continuous disclosure regime, which involves broad public disclosure obligations, on the use of s. 247A by individual shareholders in listed companies. The next section explores the relationship and interplay between these two distinct pathways to disclosure of corporate information.

B. SECTION 247A IN THE SHADOW OF THE CONTINUOUS DISCLOSURE REGIME

It is debatable whether the continuous disclosure regime has significantly reduced the need for listed company shareholders to rely on s. 247A. As noted above, the continuous disclosure

regime does not ensure *full* disclosure of material information concerning a listed company. The exceptions to disclosure contained in Listing Rule 3.1A are not insignificant. Some commentators argue they are too generous, resting on indefinite concepts that in practice provide corporate managers with ample latitude to withhold information from disclosure (Dixon & Hill 2019, 1083-84; Yablon & Hill 2000, 95-96). Even where a listed company makes disclosure, it will generally take the form of commentary prepared by management which may filter or omit the underlying information.[21]

In these circumstances, s. 247A provides a mechanism for concerned shareholders to probe behind a listed company's public disclosures. Notably, of the 15 reported cases concerning s. 247A applications between 2017–20, almost half of them involved listed entities. In these cases, shareholders sought, among other things, further information to assess whether a company's capital raising by private placement had breached the law (*Leadenhall Australia Pty Ltd v Cape Lambert Resources Ltd* 2018) and access to proxy voting information ahead of a shareholder meeting (*Sun Hung Kai Investment Services Ltd v Metals X Ltd* 2019). Indeed, in *Re Orinoco Gold Ltd* 2019, the shareholder was authorized to inspect books for the purpose of determining whether there were grounds to commence proceedings against the company for non-compliance with the continuous disclosure regime.

Although this indicates that s. 247A has continuing utility in the listed company context, its availability in that context gives rise to a notable policy tension. On the one hand, the continuous disclosure regime seeks to provide market participants with equal access to material information regarding listed companies, minimize selective disclosure, and thereby promote market integrity. On the other hand, s. 247A provides a means for a single shareholder to access non-public corporate information.[22] Indeed, some judgments have made it clear that there is no basis for a court to deny inspection under s. 247A simply because inspection would provide a shareholder with information that leaves the shareholder in a more advantageous position than other shareholders in the company (*Acehill Investments Pty Ltd v Incitec Ltd* 2002; *Hanks v Admiralty Resources N.L.* 2011).

[21] There is no requirement, for example, for a disclosure concerning a material transaction to provide a copy of the underlying transaction agreement: ASX 2021b, 27.

[22] In the unlisted company context, a successful applicant under s. 247A will also find themselves in a position where they have access to non-public information regarding their company that may not be available to other shareholders in their company. However, this asymmetry gives rise to a unique regulatory tension in the listed company context owing to the existence of the continuous disclosure regime which is underpinned by a clear regulatory intent to prevent selective disclosure in the listed company context.

This tension was noted by the court in *Praetorin Pty Ltd v TZ Ltd* 2009. In that case, a shareholder sought access to an agreement that gave effect to a financing transaction which the company had announced to the market. The shareholder sought to inspect the agreement in order to assess the appropriateness of the transaction and, in turn, determine whether it should retain or sell its shares in the company. Barrett J. observed that such a purpose was inconsistent with the continuous disclosure regime, which aims to put all listed company investors on a level informational footing when they make trading decisions. Barrett J. therefore refused to exercise the court's discretion to permit inspection of the transaction agreement (*Praetorin Pty Ltd v TZ Ltd* 2009, [78]-[81]).

Barrett J. returned to this concern in *Smartec Capital Pty Ltd v Centro Properties Ltd* 2011 where he observed that the court's discretion is likely to be more sparingly exercised in the case of an ASX listed entity. According to Barrett J., a listed company shareholder is likely to have a reduced need to inspect books under s. 247A because of the existence of the continuous disclosure regime. This observation presupposes that there will generally be a sufficiency of information in the market that makes inspection under s. 247A unnecessary. For the reasons explained above, the continuous disclosure regime does not ensure full disclosure of corporate information and it should not therefore be assumed that it makes s. 247A otiose.

Barrett J. also cited the policy tension noted above as another reason why the court's discretion is likely to be more sparingly exercised in the case of an ASX listed entity (*Smartec Capital Pty Ltd v Centro Properties Ltd* 2011, [76]). Barrett J. did not, however, provide explicit guidance about how a court should address this tension in a s. 247A application and subsequent case law has not considered the implications of Barrett J.'s comments in any detail.[23]

The tension is not, however, unresolvable. The good faith and proper purpose requirement in s. 247A arguably provides a means to strike an appropriate balance between the provision and the continuous disclosure regime. Although Barrett J. did not say as much, his approach in determining the application in *Smartec* highlights the point. Counsel for the shareholder in *Smartec* had submitted that the requirement that the applicant must demonstrate good faith and propriety of purpose does not require an applicant to point to a specific legal wrong or cause of action (*Smartec Capital Pty Ltd v Centro Properties Ltd* 2011, [65]). While accepting this,

[23] In *Hanks v Admiralty Resources N.L.* 2011, [40], the court noted *Praetorin Pty Ltd v TZ Ltd* 2009 but distinguished it on the facts. In *Re Tolco Pty Ltd* 2016, [25], the court simply cited *Smartec Capital Pty Ltd v Centro Properties Ltd* 2011 with approval and did not explore its implications.

Barrett J. made it clear that an applicant must still provide a cogent articulation of a reasonable apprehension regarding inappropriate conduct in a company's affairs. He carefully scrutinized the six 'concerns' that had been articulated by the applicant as providing grounds for inspection and rejected five of them as not meeting this threshold standard (*Smartec Capital Pty Ltd v Centro Properties Ltd* 2011, [86]-[88]). In cases where this standard is satisfied — that is, where the applicant advances a sufficiently particularized apprehension regarding the conduct of a listed company's affairs — the authorization of inspection arguably does not create any troubling tension with a policy of ensuring the integrity of the listed equities market. Although the applicant in such a case obtains non-public information not available to the rest of the market, they do so in order to investigate a reasonably articulated apprehension about inappropriate conduct. Applying s. 247A in a way that facilitates meaningful shareholder monitoring also promotes market integrity. Any remaining risk in such a case that the applicant may be tempted to misuse information gained through their inspection of company books can be addressed by the court imposing confidentiality and restriction-on-use obligations under its power to make ancillary orders pursuant to s. 247B.[24]

This approach does mean, however, that some purposes found by the courts to be 'proper' in the unlisted company context may not be proper in the listed company context. For example, in the unlisted company context courts have authorised inspection to facilitate an applicant's decision whether to trade their shares (eg, *Tinios v French Caledonia Travel Service Pty Ltd* 1994). It is difficult to see how, in the listed company context, this could be reconciled with the market integrity objectives of the continuous disclosure regime which was introduced in order to avoid the situation where certain market participants are able to trade with an informational advantage resulting from selective disclosure.

In summary, although the continuous disclosure regime has significantly altered the informational balance between shareholders and listed companies, it has not made shareholders' statutory inspection right redundant, as evidenced by the fact that applications for inspection against listed companies make up a significant proportion of reported cases in recent years. Listed company shareholders still resort to the statutory inspection right to probe behind public disclosures and elicit undisclosed corporate information. However, there has been a recognition in this case law of a clear conceptual tension between shareholders' statutory inspection right

[24] Such a shareholder would also be subject to the insider trading laws contained in Corporations Act 2001, Pt 7.10.

and the continuous disclosure regime. This is a valid observation although, as explained above, the tension can be managed through the application of existing principle; that is, by the courts being careful to ensure that an applicant has discharged the burden of demonstrating a 'proper purpose' that is not inconsistent with the clear intent of Australian securities regulation to promote market integrity.

VI. CONCLUSION

Shareholder inspection rights constitute an important feature of contemporary corporate governance. Such rights provide investors with information, which enables them to engage meaningfully with their company, thereby enhancing accountability. Australian shareholders' inspection rights have evolved significantly from the position provided historically under Anglo-Australian common law. The statutory inspection right abandons the narrow and prescriptive approach of the common law in favour of granting the courts a broad discretion to determine whether inspection is appropriate. The statutory right is regarded as a significant improvement over the common law and evidence indicates that it is of assistance to shareholders in practice. Its application in the context of Australia's highly evolved 'continuous disclosure' laws is, however, an issue that has not yet been conclusively addressed by the courts.

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