

CAN SHAREHOLDERS AND MEMBERS ACCESS DOCUMENTS?

Is a shareholder entitled to inspect the books of a company? What information can a shareholder or member of a registered scheme access? What about legal professional privilege?

The latest case arising from the tragic 2016 Dreamworld incident has once again focused the spotlight on the rights of access to a company's books and records. Here, Selina Nutley and Siobhan Luck sum up what you need to know about gaining access to documents as a company shareholder or member of a registered scheme.



SELINA NUTLEY
Special Counsel
Commercial Disputes
& Funds Management



SIOBHAN LUCK
Lawyer
Commercial Disputes

THE RIGHT TO INSPECT

The Corporations Act provides that a shareholder can apply to the court for an order allowing access to books and records of the company. However, the court must be satisfied—

- the applicant is acting in good faith, and
- the inspection is for a proper purpose.

WHAT IS A PROPER PURPOSE?

The 'proper purpose' test, which is determined on a case-by-case basis, is intertwined with the requirement for the applicant to act in good faith.

Also, the purpose of the shareholder application must relate directly to the shareholder's rights in their capacity as a shareholder and not in any other capacity.





THE COURT HAS DETERMINED THE DOCUMENTS MUST BELONG TO THE COMPANY OR SCHEME, RATHER THAN JUST BEING IN ITS POSSESSION, AND MUST RELATE TO THE PURPOSE.

Examples of what constitutes a proper purpose include—

- investigating whether a company director has breached their duties
- determining whether the company has paid dividends otherwise than out of profits or funded the defence by directors of their board positions
- where a shareholder perceives the conduct by the company will diminish the proportion or value of their shareholdings
- a shareholder seeking to ascertain the value of the company for the purposes of exercising a right of pre-emption
- determining whether oppression proceedings or a shareholder derivative action should be commenced.

However, the applicant must demonstrate there is a case for investigation in relation to the shareholder's concerns.

The provision is not designed to assist a shareholder who simply wishes to engage in an undirected fishing expedition.

WHAT INFORMATION IS ACCESSIBLE?

Once the above test has been established, the court will look at what information is accessible to the shareholder.

The Corporations Act widely defines 'books' to include—

- a register
- any other record of information
- financial reports or records (however filed, compiled, recorded, or stored)
- a document.

However, the court has determined the documents must belong to the company or scheme, rather than just being in its possession, and must relate to the purpose.

LEGAL PROFESSIONAL PRIVILEGE

Documents which are subject to legal professional privilege will not be required to be provided for inspection, but the court may require a party to list these documents to allow the applicant to object.

CONSIDERATION FOR SHAREHOLDERS

Although this process provides a mechanism for shareholders to obtain documents, the first place a shareholder should look for their rights is the shareholders agreement.

The above application can be restrictive as to the documents which are provided, is subject to the court's determination as to their appropriateness for disclosure, and comes at a cost.

Where possible, shareholders should carefully consider the initial drafting of shareholders agreements to allow for broader

rights for accessing information. Whilst parties cannot contract out of the statutory obligations to provide shareholders access to records, they can expand the scope of what documents are accessible.

CONCLUSION

If you have any questions about gaining access to documents as a member of a company or registered scheme, then please contact the authors or a member of our team who can help explain the steps you need to take. Our lawyers can also assist with drafting shareholders agreements.