

Association of Building Societies and Credit Unions

## MEDIA RELEASE

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### **ASIC DECISION OVERTURNED IN FEDERAL COURT, NEW RULES FOR MUTUAL MEMBER REGISTERS ON THE WAY**

The Federal Court has overturned two of the purposes sought to be approved by ASIC for an outside party to obtain the names and addresses of members of a Queensland credit union.

The court upheld three other purposes approved by ASIC, but raised serious concerns about the impact of one of these purposes on the operations of the credit union.

"This case demonstrates a failure by ASIC to understand the concept of directors' duties," said Adrian Lovney, CEO of *Abacus – Australian Mutuals*, the peak industry body for credit unions and mutual building societies.

"The case also highlights the need for reform of the legal framework for accessing the member registers of mutual companies like credit unions," Mr Lovney said.

"Fortunately, the case is likely to be a one-off because a new legal framework is proposed to better protect member register information."

The case involved Capricornia Credit Union appealing against ASIC's approval of purposes for Mackay PBS, a listed company, to gain access to Capricornia's member register.

Capricornia and Mackay PBS both provide retail banking services in regional Queensland. Because Capricornia is a mutual, its member register is also its customer list. Members of mutuals are both customers and owners of their mutual.

"No company should be required to hand over its customer list to a competitor," Mr Lovney said.

"We have had a very constructive series of consultations with the Federal Government on this issue and a solution acceptable to all stakeholders is now very close.

"The Parliamentary Secretary to the Treasurer, Chris Pearce, recognises that the member register of a mutual company is quite different from an ordinary company's member register.

"Member registers of mutuals are already subject to distinct treatment under the Corporations Act. We have been consulting with the Government about a model that better ensures the confidentiality of member register information," Mr Lovney said.

Under the model proposed by Abacus, a trusted third party would facilitate lawful contact with members of mutuals. New regulations being finalised by the Parliamentary Secretary to the Treasurer seek to introduce these changes for mutuals. The State and Territory Attorneys General are being consulted on the proposed changes.

Of the purposes sought by Mackay PBS to be approved by ASIC in this case, a full bench of the Federal Court has thrown out one as unlawful because it is in conflict with directors' duties and another because it involved ineffective or unlawful activity.

Commenting on one of the other purposes approved by ASIC, the court said "it is not every day that one company proposes to campaign for a change in the constitution of another."

"Such conduct may cause serious damage to the way in which the target company operates. Such a purpose may be capable of approval, but we would have expected some recognition of the disruption which the process might cause," the court said in its judgement.

"Another matter of concern is that ASIC's approval of [the purpose] enables Mackay to facilitate amendments to Capricornia's constitution which may have the effect of substantially changing the relationship between its board and its members. Mackay's directors have a responsibility to act in the best interests of that company. Neither they nor Mackay itself have or has any duty to uphold the best interests of Capricornia. Those interests are the primary concern of its board. The capacity of that board to protect those interests will inevitably be weakened if Mackay's [purpose] is carried into effect," the court said.

"These were all matters for consideration by ASIC and by the [Administrative Appeal Tribunal]. We assume that appropriate weight was given to them. It is not for us to assess the merits of their decisions. We are concerned only to determine whether or not the Tribunal made an error of law," the court said.

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