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The Secretary  
Parliamentary Joint Committee on Corporations  
and Financial Services  
Department of the Senate  
Parliament House  
Canberra ACT 2005

Dear Committee,

## **Inquiry into Exposure Draft of Corporation Amendment Bill (No. 2) 2005 (Bill)**

Thank you for the opportunity to comment on this important reform proposal.

### **Background**

While companies and regulators are still adjusting to the post-CLERP 9 regulatory landscape, the Government has recently announced its attention to introduce further significant corporate governance reform. On 7 February 2005, Treasury released an Exposure Draft of a new *Corporations Amendment Bill (No 2) (2005)* for consultation. According to the Explanatory Memorandum, the measures contained in the Draft Bill are intended to 'facilitate increased shareholder participation in corporate governance, while reducing the associated costs of such participation. Specifically, the Bill facilitates avenues for communication other than the requisition of meetings.' (Explanatory Memorandum, [1.1]). As I discuss below, while there is virtue in the proposals contained in the Draft Bill, aspects of the Draft Bill need to be closely considered before being accepted and introduced into law.

### **100 Member Rule**

The major change proposed in the Draft Bill is to remove the so-called '100 member rule' under s 249D(1)(b) of the *Corporations Act 2001* (Cth). Section 249D(1) of the Act

provides that the directors of a company must call and arrange to hold a general meeting on the request of:

- (a) members with at least 5% of the votes that may be cast at the general meeting; or
- (b) at least 100 members who are entitled to vote at the general meeting.

Section 249D(1)(b) has always been a controversial provision, and is quite unique with most other jurisdictions (including the UK, Canada and New Zealand) having a percentage threshold for members to requisition a special meeting, but not a numeric threshold. Setting the numeric threshold at 100 means that a mere fraction of one percent of a large public company's members can requisition a special meeting of the company, with the company then incurring enormous costs (both in terms of time and cost) in organising the special meeting. Further, there is no minimum amount of shares that a member needs to hold to be included under the '100 member rule', thereby providing the opportunity for union or environmental group representatives (for example) to purchase shares in a company, split the shares between 99 other representatives, and then requisition a meeting- at the company's expense- to protest against the company's activities. The NRMA is one company that has incurred incredible expense due to activist members utilising s 249D to pursue their various causes. On the other hand, the 100 member rule is certainly effective in facilitating, and promoting the virtues of, shareholder participation.

The Government first proposed the removal of s 249D(1)(b) in exposure draft legislation released in December 2002. In its June 2004 report on the then CLERP 9 Bill, the Federal Joint Parliamentary Committee on Corporations and Financial Services also recommended that the 100 member rule be abolished (see Recommendation 24 of Part 1 of the Committee's report).

The February 2005 Draft Bill contains numerous proposals to increase shareholder participation by encouraging avenues for communication other than the requisition of meetings. While proposing to remove s 249D(1)(b), along with consequential amendments, the Draft Bill seeks to facilitate shareholder participation through lowering the numerical threshold requirement for members to give a company notice of a resolution that they intend to bring at a general meeting, and for members to request a company to give all members a statement by the requesting members- usually regarding a resolution to be moved or a matter to be discussed at the company's general meeting. In other words, the initiatives in the Draft Bill are designed to encourage shareholder participation through avenues other than requisitioning a special meeting.

Section 249N presently allows members holding 5 per cent of the votes that can be cast at a general meeting, or 100 members that are entitled to vote at the general meeting, to give the company notice of a resolution that they propose to move at the general meeting. The Draft Bill proposes to amend s 249N(1)(b) of the Act to reduce the minimum number of members that can give a company notice of a resolution from 100 to 20. Section 249P provides for distribution of members' statements at general meetings. The provision

allows members holding 5 per cent of the votes that can be cast at the meeting, or 100 members that are entitled to vote at the general meeting, to request the company to give all its members a statement provided by the members making the request. Similar to s 249N, it is proposed to amend s 249P(2)(b) in order to reduce the minimum number of members that may request a company to distribute a statement to members from 100 to 20.

The Draft Bill also proposes to introduce a new s 249O(2A) and s 249P(6A) to make clear that companies are required to send members' resolutions and members' statements to members using the same method that the member has nominated for receiving notices of a general meeting- including by an electronic facility (such as e-mail) that the member has nominated.

While the Explanatory Memorandum accompanying the Draft Bill states that the above amendments are designed to 'increase shareholder participation by encouraging avenues for communication', it must certainly be questioned whether this is in fact the case. Although the threshold requirement for members to bring a resolution at the general meeting, or to distribute a members' statement is proposed to be lowered, the issue is whether this actually will encourage many more resolutions and statements- 100 members is not substantially greater than 20 members, particularly in large public companies with hundreds of thousands of members. Wouldn't 20 members intent on requisitioning a member, be able to attract a further 80 members, or split their shares to reach the 100 member threshold? Further, what happens if there is a major governance problem (such as a stalemate in the boardroom) in a large public company that surfaces many months before the next scheduled general meeting which, if not resolved, could be detrimental to the long-term interests of the company?

By abolishing the 100 member rule in s 249D, aggrieved shareholders may find it impossible to meet the alternative 5% threshold, and therefore will be unable to requisition a special meeting. By the time of the next general meeting, the company may be severely damaged by the problem. Making an alternative method of participation easier to use will not solve the problem. It is this potential for shareholder participation to be curtailed, that has caused shareholder groups, in particular the Australian Shareholders Association, to raise their opposition to the abolition of the 100 member rule, notwithstanding the other initiatives proposed in the Draft Bill. Accordingly, before doing away with the 100 member rule, serious consideration needs to be given to whether its abolition will come at a cost to effective corporate governance that cannot otherwise be addressed.

### **Proxy Voting**

The Draft Bill also proposes to make amendments to s 250A of the Act which regulates proxy voting at company meetings. Currently, under s 250A(4)(c), only the chair of a meeting is required to vote each and every proxy they receive according to their terms (and has a discretion with undirected proxies as to how they will be voted). Other proxy

holders (including, for example, directors who may be soliciting proxies for their re-election as a director of the company- as demonstrated by the controversial practices of Solomon Lew at the 2002 general meeting of Coles Myer Ltd) are under no obligation to vote all or some of their proxies. This allows for the ‘cherry-picking’ of votes- a practice where a proxy holder (other than the chair) chooses not to vote a number of directed proxies for a motion but chooses to vote the proxies directed against the motion (or vice versa)- perhaps to serve their own personal interests.

To prevent ‘cherry-picking’ from occurring, the Draft Bill proposes to amend s 250A(4)(d) to provide that where a proxy, who is not the chair, votes on a poll (where all the proxies count, as distinct from a vote on a show of hands) they must: (1) vote all directed proxies, and (2) vote them as directed. That is, the proxy is not obliged to vote on a poll (as this was considered to be too burdensome a requirement, a view which I do not support), but if they do vote, they must vote all their proxies.

Under proposed new s 250A(5)(d) a person will be guilty of an offence under s 250A(4)(d) if the person (appointed as proxy) agreed to act, or held themselves out as willing to act, or the company held the person out as willing to act with the person’s consent, as proxy. The prevention of ‘cherry-picking’ is an important reform, and one which I have supported in the past. As stated in the Explanatory Memorandum to the Draft Bill, this practice ‘disenfranchises shareholders and may unfairly influence the outcome of voting in a poll’ (Explanatory Memorandum, [2.29]). That said, if the Draft Bill proposes that the obligation to vote all shares only applies to persons who have consented to act as proxy (or have been held out as such), then I believe that no distinction should be retained between chairs and non-chairs. Each should be required to vote on a poll, and vote as directed. As I noted in an article published in the *Company and Securities Law Journal* in 2003 (“The Obligation of Proxies to Vote as Directed: The Present State of Play and the Need for a Resolution” (2003) 21 *Company & Securities Law Journal* 262-272), no other major jurisdiction distinguishes between chairs and non-chairs in terms of the obligation to vote proxies. Accordingly, this aspect of the Draft Bill should be reconsidered before the content is finalised and presented to Parliament.

I would be happy to comment further at any public inquiry convened by the Committee. If you have any questions in relation to my submission, please contact me on (03) 9244-6431.

Yours faithfully,

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