



**CHARTERED SECRETARIES
AUSTRALIA**

Leaders in governance

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Tim Bryant
Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
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Canberra ACT 2600

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Dear Mr Bryant

***Consumer Credit and Corporations Legislation
Amendment (Enhancements) Bill 2011***

Chartered Secretaries Australia (CSA) is the independent leader in governance and risk management. As the peak professional body delivering accredited education and the most practical and authoritative training and information in the field, we are focused on improving organisational performance and transparency.

Our Members are all involved in governance, corporate administration and compliance with the Corporations Act (the Act), with primary responsibility to develop and implement governance frameworks in public listed and public unlisted companies, as well as in private companies.

We know that the deadline has passed for submission to the Parliamentary Joint Committee on Corporations and Financial Services (the PJC) on its inquiry into the Consumer Credit and Corporations Legislation Amendment (Enhancements) Bill 2011 (the Bill). Indeed, we realise that a public hearing was held earlier this week. Due to key staff being on leave at the time of the inquiry we were unable to provide a submission during the consultation period, but hope you will be able to consider our views on this issue at this late stage, as we are extremely keen to see the anomaly in the Corporations Act resolved so that retail shareholders are not disenfranchised and their voting rights are maintained.

Background

When the executive remuneration legislation was originally issued as an Exposure Draft in January 2011, CSA had raised the issue that the original wording would disenfranchise many shareholders from being able to exercise their voting rights. We had pointed out that the vast majority of undirected proxies that are lodged, particularly by retail shareholders, appoint the chairman as their proxy. By prohibiting the chairman from voting the undirected proxies, these shareholders would have been disenfranchised. Their choice to appoint the chairman as their proxy to vote on their behalf is a vote of confidence in the chairman and the board, yet the original draft legislation prevented the voting intentions of these shareholders from being realised. It denied the shareholder the right to exercise their vote, unless they could either

physically attend the meeting or appoint another proxy to exercise that right for them. We noted at that time that the legislation was forcing shareholders to:

- direct all proxies and not have the choice to leave them undirected (yet the legislation did not demand this, and this had not been subject to public debate), or
- not have the choice to express confidence in the board and appoint the chairman as their proxy. The government understood the issue and responded positively, although a drafting error remained that Consumer Credit and Corporations Legislation Amendment (Enhancements) Bill 2011 is now seeking to address.

In passing the Corporations Amendment Act, Parliament did not rectify an anomaly in the Act which prohibits the chairman from voting undirected proxies on the remuneration report even where there is express shareholder authorisation. This means that while the chairman will be able to exercise undirected proxies on remuneration-related resolutions (other than the remuneration report and the spill resolutions) with shareholder consent, there is no corresponding carve-out for the vote on the remuneration report or the spill resolution. The Consumer Credit and Corporations Legislation Amendment (Enhancements) Bill 2011 was introduced into the House of Representatives on 21 September 2011. The Bill includes proposed further amendments to the Act to allow the chairman to vote undirected proxies on the resolution to adopt the remuneration report where the proxy appointment expressly authorises the chair to exercise the proxy as the chairman decides.

The government has recognised the special role of the chairman as acting on behalf of shareholders. In the second reading speeches in the Senate on the Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Bill 2011 (the Bill), the Honourable Senator Don Farrell stated that

Key management personnel and their closely related parties would also be prohibited from voting undirected proxies on the remuneration report and spill resolution, except when they are acting as the chair of the meeting and the shareholder has indicated their informed consent on their proxy voting form for the chair to exercise the proxy. This exception for the chair is intended to apply to the non-binding vote required under section 250R of the Corporations Act.

The Honourable Senator Nick Sherry made a similar statement in his second reading speech of the Bill. On 11 August, the Parliamentary Secretary to the Treasurer, the Hon David Bradbury MP, issued a media release noting that: 'The government will be introducing amendments to the Corporations Act 2001 in the Spring Parliamentary sittings to provide further certainty around aspects of the new executive pay reforms. The amendments will clarify the ability of the chair, who is a member of the key management personnel, to vote undirected proxies in the non-binding vote where the shareholder provides their explicit consent for the chair to exercise the proxy.'

The Consumer Credit and Corporations Legislation Amendment (Enhancements) Bill 2011 contains those amendments to the Corporations Act.

To attempt to provide for shareholders not being disenfranchised under the current legislation, the Australian Securities and Investments Commission (ASIC) released Information Sheet 144 in August this year providing guidance to companies on how to deal with the anomaly in the legislation. These options include:

- making no change to the company's usual proxy form and flagging for shareholders in the notice of meeting that the chairman will not vote any undirected proxies on the remuneration report resolution
- changing the company's proxy form so there are more directed proxies, which can be counted in the vote on the remuneration report — ASIC encouraged companies to

consider ways in which this might be done and noted that a number of legal advisers are proposing as one option the inclusion of clear, prominent and express wording in the proxy form to the effect that, unless the shareholder indicates otherwise by ticking either the 'for' or 'against' box, the shareholder will be directing the chairman to vote in accordance with the chairman's clearly stated voting intention

- suggesting shareholders consider nominating a proxy other than a member of the company's KMP for the purposes of the remuneration report resolution, and
- applying to ASIC for relief in relation to a specific resolution.

While this guidance has been greatly appreciated, uncertainty as to how best to ensure that shareholders' undirected proxies can be voted remains. Stakeholders (that is, companies, shareholders, legal advisers, the regulator) agree that the preferred outcome is for the legislation to clarify that the chairman of the meeting can vote undirected proxies on the remuneration report and spill resolution when the shareholder has indicated their informed consent on their proxy voting form for the chairman to exercise the proxy.

CSA's recommendation

CSA, like the government, is very keen to ensure that shareholders can exercise their voting rights. We are also keen to ensure that the intent of the legislation can be achieved.

CSA recommends that the Consumer Credit and Corporations Legislation Amendment (Enhancements) Bill 2011 be passed, to ensure that shareholders' voting rights are maintained.

Yours sincerely

Tim Sheehy
CHIEF EXECUTIVE