Australasian Investor Relations Association

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The Secretary
Parliamentary Joint Committee on Corporations and Financial Services
SG.64
Parliament House
CANBERRA ACT 2600

Dear Sir

Submission on Exposure Draft of the Corporations Amendment Bill (No. 2) 2005

The Australasian Investor Relations Association (AIRA) was established in 2001 to provide listed entities with a single voice in the public debate on corporate disclosure issues and to advance the awareness of and best practice in investor relations in Australia and New Zealand.

The Association's 60 corporate members currently represent over $470 billion of market capitalisation or over 50% of the total listed on the Australian Stock Exchange.
AIRA is concerned about and wishes to make submissions on the following aspects of the proposals reflected in the Exposure Draft of the Corporations Amendment Bill (No. 2) 2005 (the Bill) and some other related issues as requested in the committee's terms of reference for its inquiry.

100 Member Rule

AIRA supports the Bill's proposal to abolish the calling of a general meeting by directors when requested by 100 members (100 member rule). AIRA considers that this provision currently provides minority shareholders with disproportionate influence.
AIRA is not opposed to minority groups having an opportunity to voice their concerns. It appreciates that the proposed introduction of the 20 member rule for placing notices on the agenda of an Annual General Meeting (20 member rule) is a "trade-off" for the abolition of the 100 Member rule. It submits, however, that the proposed 20 member rule is likely to be seriously detrimental to the orderly conduct of Annual General Meetings and to dealing with business at them which is truly relevant to the company's business and concerns and to doing so within a reasonable timeframe.

(a) In the context of large listed companies with thousands of shareholders, 20 members is really a 'very small' minority group. AIRA is concerned that this rule will give such groups the potential to significantly 'hijack' an Annual General Meeting away from its primary purpose of allowing shareholders to ask questions of directors in relation to the company directors to report to shareholders on the company's performance and to dealing with business which is important to rights of shareholders and the company's affairs.

(b) The proposal, if enacted, may be used as a method of publicising the agendas of minorities of little or no relevance to the important business of the company. AIRA considers that there is a real risk that companies will be deluged with motions on all sorts of subjects of dubious relevance to anything within the powers of the general meeting. Notices may really just try to dictate policy or actions to management which are a matter for the directors to whom argument could be put directly. Many motions of interest groups may just try to attract general publicity when there is no substantial support for what is moved or little of relevance to the specific company.

(c) We understand that the argument for abolishing the 100 member rule is that it provides minority shareholders with a 'disproportionate influence'. We submit that, if adopted, the 20 member rule would confer an even greater 'disproportionate influence' on an even smaller minority group.

(d) The proposal has the potential to cause unnecessary delays at meetings and unduly protracted meetings such that members with real concerns may leave the meeting before it is completed and before issues relevant to the performance of the company are discussed. In attempting to enhance shareholder participation, the rule may ultimately lead to reduced participation by shareholders. An Annual General Meeting needs to be of reasonable length so as not to exhaust shareholder patience and their available time. It is not an appropriate forum in which to raise any and every employment, social, economic, consumer and environmental issue of concern to particular groups or associations.

Accordingly, AIRA submits that the current wording of the Bill should be amended to ensure that there is some control over the appropriateness and relevance to the company of resolutions or statements distributed for consideration by shareholders. Of course, decisions of the courts establish that a matter within the power of the directors to manage the company and not with the constitutional authority of a general meeting can in advance be ruled out of order, but the line can be difficult to draw and subject to challenge. Ruling a motion out of order is quite likely to provoke disorderly conduct on the part of an aggressive small group.
We acknowledge that sections 249O (5) and 249P(9) of the Corporations Act 2001 (Cth) also provide that a company need not give notice of the members' resolution or comply with the request to distribute the members' statement if:

(i) the notice of the members' resolution or the members' statement is more than 1000 words long or defamatory; or
(ii) the members making the request do not give the company a sum reasonably sufficient to meet the expenses that the company will reasonably incur in complying with the request (this only applies if the members making the request have not provided the request to the company in time to send it out with the notice of meeting).

However, AIRA submit that these limits do not go far enough. Its preferred position is that the same 5% rule for the requisitioning of special general meetings should apply to attempts to put a motion on the agenda.

If the 20 member rule is to be adopted, the carve outs will need to be expanded so that the company can address issues of relevance and appropriateness.

In AIRA's view, the 20-member proposal, if it is to be adopted, should at least be subject to a "sunset" provision, or statement that its operation will be reviewed, say, two years after it commences to operate.

Direct voting by shareholders of Australian listed companies

AIRA is of the view that voting on resolutions proposed in the Notice of Meeting at shareholder meetings of listed companies could be by direct voting. AIRA endorses direct voting by way of post, facsimile, electronic communication and telephone voting (see submission on telephone voting below), where it could be of benefit to shareholders. If direct voting were to be adopted by companies, the process of voting by a show of hands could be limited to procedural matters arising in the course of meetings and not be available for matters that are the subject of the Notice of Meeting.

AIRA submits that direct voting in the manner suggested above:

- circumvents the problems raised by proxy voting, a number of which are identified in the Bill (e.g. cherry picking);
- is simpler, more efficient and leads to greater transparency;
- encourages participation for those shareholders who cannot attend the meeting in person and whose views may not otherwise count towards the final determination. In this regard we submit that proxy voting does not always represent a key element in shareholder decision-making for those who do not attend general meetings as a member's views may still not count toward the final determination if a proxy holder does not vote the proxy; and
- would ensure that the results for all resolutions notified to shareholders accurately reflect the shareholdings of all investors, including institutions, unlike the current show of hands provisions.

The Parliamentary Joint Committee on Corporations and Financial Services in its paper on CLERP (Audit Reform and Corporate Disclosure) Bill 2003 recognised that institutional investors represent an increasing percentage of shareholders (or unitholders) registered on share or unit registers. Despite this, it appears that institutions have a poor record when it comes to voting. AIRA submits that voting on a show of hands presents significant difficulties for institutional investors despite the proposals set out in the Bill which, if implemented, would alleviate "cherry picking". Institutional investors are at a particular disadvantage when it comes to voting by a show of hands as it is usual for the constitution of a company to provide that on a show of hands every member present has one vote despite the fact that institutions often hold a large proportion of shares. Institutional investors may be more willing to participate if they could be certain that their vote would count on matters that are the subject of the Notice of Meeting.

AIRA also supports previous submissions to the Parliamentary Joint Committee on Corporations and Financial Services in relation to the untapped potential of telephone voting as a vehicle for making voting simple, flexible and convenient, thereby facilitating increased shareholder participation.

Despite advocating the inclusion of direct voting as an option for listed companies, AIRA recognises the value of the meeting as a forum at which relevant questions can be asked of, or directed to, directors in connection with the activities of the company. Accordingly, AIRA does not intend to suggest that the meeting itself should be abolished, rather that it can be run more efficiently and facilitate increased shareholder participation if direct voting is adopted.

Disclosure of proxy voting

AIRA does not support the proposal to repeal section 250J(1A) of the Corporations Act which relates to the disclosure by the Chairman to the meeting of proxy voting. It points out, incidentally, that the section states a "replaceable rule". The Explanatory Memorandum states that it is mandatory. It is not. In AIRA's experience, many companies have not included it in their constitutions. Yet, notwithstanding the fact that many company constitutions do not adopt the replaceable rule, it has become a widespread practice of the chairperson of both listed and unlisted entities to announce the proxies held and how they appear to be directed or otherwise. Those present at general meetings now commonly expect the figures to be put up. It is anticipated that many members will object to a failure to disclose them if the practice changes.

We submit that the disclosure of whether any proxy votes have been received and whether the proxy votes are in favour of or against each resolution gives a good general indication of shareholder sentiment even though it cannot accurately inform the meeting how proxy votes are actually to be cast. Accordingly, we submit that from a corporate governance perspective section 250J(1A) should be retained. If it is not adopted in a constitution, it is not mandatory to comply with it but, in practice, a Chairperson these days, especially of a listed company, invariably does disclose the votes. Failure to do so in the future could raise a storm of protest from the floor.

To deal with the concern that the figures shown in advance of the actual poll may not be an accurate reflection of the eventual voting results and that members not understanding that might be misled or confused, the Chairman should state the preliminary figures may not be an accurate indication of the vote on the actual poll.

We note the concerns raised in the Explanatory Memorandum in relation to the interpretation of section 250J(1A). However, we submit that the better approach to this issue therefore is for the provision to be amended requiring the Chairperson to state that the information is an indication of how the proxies lie, but is likely to differ from the actual result.

To ensure uniform practice, consideration could be given to making the section, or a version of it, compulsory at least for all listed entities. Consideration should also be given to how the rule can be drafted so as to ensure a reasonably uniform, effective and fair way of presenting the information.

AIRA acknowledges that the parameters for calculating the percentage would need to be clearly defined so that percentages are calculated on a uniform and consistent basis, so far as possible. There are currently limits on the extent to which uniformity can be achieved. Unlisted companies, for example, often do not have provisions to mark and "abstain" box against a resolution.

As a matter of general principle, it is desirable that the pre-poll statement on the proxies show:

(a) the total number of proxy votes received;

(b) the number and percentage of proxy votes received in time which direct a vote for and those which direct a vote against the resolution and where there is provision to mark an "abstain" box, the number and percentage of those; and

(c) the number and percentage of undirected proxy votes held by the Chairperson.

Directed proxies not appointing the Chairperson

AIRA generally supports the intention behind the introduction of section 250A(5). However, we submit that section 250A(5), as currently drafted, contains a technical oversight which may have a significant negative impact on a person who is not aware that he or she has been appointed as a proxy.

In order to be guilty of an offence under sections 250A(5)(b) and 250A(5)(d) a person must be aware of his or her appointment as a proxy. However, a person may be guilty of a strict liability offence under section 250A(5)(a) even where the person is not aware of his or her appointment.

It appears to us that the same policy considerations that apply in respect of the "awareness" requirement in sections 250A(5)(b) and 250A(5)(d) apply equally in respect of section 250A(5)(a). Accordingly, we submit that in order to achieve consistency and fairness section 250A(5)(a) should be amended so that a person is not guilty of an offence under that section unless the person is aware of his or her appointment as a proxy.

Further, it is arguable that a proxy who decides to exercise his or her personal votes should not, just because of that, be required to vote proxies unless he or she has agreed or undertaken to do so or made himself or herself available to do so. It is doubtful that a member should be able to thrust an obligation to vote by proxy in a particular way on to a person who does not wish to.

Disclosure of the percentage of shareholder votes

AIRA submits that as a matter of good corporate governance listed companies should be required, under section 251AA, to also disclose to the ASX the percentage of the ordinary share capital that has voted in favour of and against each resolution at the end of the meeting. AIRA submits that from a transparency point of view it is important that shareholders, the market and government have access to this information as it is often very difficult to obtain a clear view of shareholder sentiment and trends in shareholder voting when only the number of shares voted is disclosed.

Overseas disclosure

AIRA supports the deletion of section 323DA of the Corporations Act. Listing Rule 3.1 already requires all listed companies to disclose any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities, including a copy of a document containing market sensitive information that the entity lodges with an overseas exchange or other regulator which is available to the public. In those circumstances AIRA considers that section 323DA leads to unnecessary duplication and administrative burden and the transmission through the ASX of information that is not material, often peculiar to SEC or other requirements and which does not assist the market to be better informed.

Relevant interests

The Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act amended the Corporations Act 2001 to require listed companies and responsible entities for listed managed investment schemes to maintain a register of notices about relevant interests from 1 January 2005. Pursuant to subsection 672DA(9) of the Corporations Act information on relevant interests received by the company or responsible entity must be entered onto the register within 2 business days of receipt.

In practice, the relevant interest register of many listed companies is maintained by third party agencies that receive the notifications of relevant interest directly and place them on the register before officers of the company are even aware of receipt. Moreover, it is frequently in the interests of the company to obtain an external analysis of the relevant interests held, and such an analysis can take up to three weeks to complete. In those circumstances, AIRA is concerned that the current time-frame that obliges relevant interests to be disclosed on the register within 2 business days of receipt may lead to a disjunction between the information actually known to the company and that which is publicly available on the register. This provides the opportunity for front-running by other investors before the company is in a position to analyse the information itself.

Accordingly, AIRA recommends that the time requirement in section 672DA(9) be extended to 30 days to facilitate an alignment of time in which a full analysis of the relevant interests can be completed before the company discloses the relevant interests on the register for public inspection. It is submitted that this amendment is not contrary to the aim of the section which is to make information already collected available to the wider market. We understand that such an amendment would also be in line with international standards on this issue, particularly the US and the UK.

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AIRA appreciates the opportunity to provide comments on the Exposure Draft Bill and would appreciate the opportunity to be involved in any further consultation, including appearing before the Committee.

Yours sincerely

IAN MATHESON
Chief Executive officer