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7 April 2005

MACQUARIE BANK

The Secretary
Parliamentary Joint Committee on
Corporations and Financial Services
Department of the Senate
Parliament House
Canberra ACT 2600

By email: corporations.joint@aph.gov.au

Dear Sir,

Inquiry into the Exposure Draft of the Corporations Amendment Bill (No.2) 2005

Macquarie Bank Limited (MBL) appreciates the opportunity to provide comments to the Parliamentary Joint Committee on Corporations and Financial Services' Inquiry into the draft Corporations Amendment Bill (No.2) 2005 (the Bill).

Enclosed is a copy of MBL's submission to Treasury in relation to the proposals in the Bill.

Please do not hesitate to contact me on (02) 8232 3273 should you have any queries in relation to MBL's submission.

Yours faithfully

Dennis Leong
Company Secretary

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5 April 2005

The General Manager
Corporations and Financial Services Division
The Treasury
Langton Crescent
PARKES ACT 2600

By Facsimile: (02) 6263 2770

Dear Sir,

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

Thank you for the opportunity to comment on the proposals contained in the Exposure Draft of the *Corporations Amendment Bill (No.2) 2005* (the Bill).

Macquarie Bank Limited (MBL) acknowledges that the measures proposed in the Bill are intended to facilitate increased shareholder participation in corporate governance, while reducing the associated costs of such participation. As an organisation which is committed to best practice corporate governance, MBL is generally in support of the proposition of improving the effectiveness of shareholder participation and, in particular, is in support of the following proposals contained in the Bill:

- Removing the "100 member rule" (subject to the comments below);
- Facilitating the electronic circulation of members' resolutions and members' statements;
- Ensuring that the voting intentions of members are carried out by appointed proxies by preventing the 'cherry-picking' of proxy votes;
- Amending the requirements relating to the disclosure of proxy votes; and
- Removing the requirement for companies to disclose information reported to overseas exchanges.

MBL does, however, wish to make some comments in relation to the proposal to remove the "100 member rule". In addition, MBL has serious concerns in relation to the proposals to reduce the threshold (from 100 members to 20 members) for

allowing members' resolutions to be brought to Annual General Meetings (AGMs) already scheduled; and for the distribution of members' statements. Our comments in relation to these proposals are set out below.

1. Removal of the "100 member rule"

MBL welcomes the proposed removal of the "100 member rule" from section 249D of the *Corporations Act 2001 (Cth)* (the Act), which currently requires a company to call a general meeting, at the expense of the company, when requested to do so by at least 100 members who are entitled to vote at the general meeting.

In so far as it relates to listed public companies, MBL believes that there is general support for this measure. We also believe that the measures proposed in the Bill will strike a more appropriate balance between the rights of different shareholders in listed companies. However, we note that the Bill is not confined only to listed companies or to companies with a share capital. The proposal also appears to apply to companies which do not have a share capital, including many mutuals. In our view, the removal of the "100 member rule" for these companies[1] may have unintended consequences that adversely affect the governance regime for mutuals. Accordingly, we submit that the Government should reconsider the extension of the Bill to companies that do not have a share capital.

MBL believes that mutuals require different treatment for two main reasons:

(i) In contrast to companies with a share capital, mutuals are not subject to the discipline or prospect of takeovers as Chapter 6 of the Act applies to companies that have issued voting shares. This means that mutuals do not benefit from the improved corporate efficiency and enhanced management discipline that is the primary goal of a takeover regime.

Consequently, the ability of the members of a mutual to request a general meeting is of much greater significance for the effective governance of their company. The only way in which a change in the control of a mutual can be effected is by submitting a proposal to the mutual's members in general meeting. If this discipline were to be removed, mutuals would be largely immunised from the threat of a change of control. In our view, this would significantly reduce investor protection and remove a strong incentive for the directors and managers of mutuals to use capital efficiently.

In these circumstances, we submit that the law should not be amended in a way that would create significant obstacles for members of a mutual who wish to call a general meeting of their company.

[1] In this submission, we generally refer to these companies as "mutuals" although our submission relates to all companies that do not have a share capital.

(ii) Given that mutuals do not have a share capital, it is usual for each member to have one vote. This is very different from the position for listed public companies where larger shareholders will normally have one vote for each share held.

If the "100 member rule" were to be removed for mutuals, this would mean that a general meeting of a mutual could only be requisitioned by 5% of the total number of members (based on a headcount test).[2]

Given that mutuals often have a large number of members, this would mean that it would be very difficult, if not impossible, to requisition a meeting of a large mutual. In the case of some of Australia's larger mutuals, the proposed change would mean that one would need more than 50,000 individual signatures to requisition a meeting.[3]

In these circumstances, MBL submits that the "100 member rule" should only be removed in respect of listed public companies and not in respect of companies that do not have a share capital.

In this regard, we note that the position of mutuals was expressly considered by the Parliamentary Joint Committee on Corporations and Securities in its *Report on Matters Arising from the Company Law Review Act 1998*. This report recommended the removal of the "100 member rule". However, at paragraph 15.22, it also recommended that mutual companies should be subject to "different provisions".

We also note that the Corporations and Markets Advisory Committee's report on *Shareholder Participation in the Modern Listed Public Company (Company Meetings) (June 2000)* only recommended removal of the "100 member rule" for listed public companies with a share capital (see paragraph 2.19).

MBL recognises that some mutuals have suffered the cost and inconvenience of frequent requisitioned meetings. However, we do not believe that this cost and inconvenience justifies the removal of the "100 member rule" for these companies for the reasons outlined above.

It may be appropriate to consider other measures to mitigate the cost and inconvenience of a meeting if it is called by members of a mutual who have less than 5% of the company's voting power. Given that our concern is primarily in relation to the ability to propose a significant change in the control of a mutual, we

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[2] We note that the Press Release by the Parliamentary Secretary to the Treasurer on 7 February refers to the new test as one that would require members to hold a "minimum of 5 per cent of total voting shares" to requisition a meeting. This overlooks the effect of the rules on mutuals that do not have voting shares.

[3] The practical difficulty of obtaining a large number of signatures is compounded for bodies that are subject to Part 12.8 of the Companies Regulations because regulation 12.8.06 restricts access to their register of members.

would support a requirement that the requisitioning members post a bond to cover the company's reasonable costs, in the event that the resolutions put to the meeting by the requisitioning members do not achieve a threshold level of support.[4]

2. Twenty Member Proposals (Proposed changes to sections 249N and 249P of the Act)

Although MBL is not opposed to minority groups having an opportunity to voice their concerns, it is considered that the "20 member proposal" (in the context of large companies like MBL with 44,000 shareholders) is a 'very small' minority group, and that this rule will give such groups the potential to significantly 'hijack' AGM's away from their primary purpose of allowing shareholders to ask questions and hear about the company's performance. Further, we are of the opinion that the arguments for abolishing the "100 member rule" in relation to the calling of meetings (i.e. that the "100 member rule" provides minority shareholders with 'disproportionate influence' and that it fails to recognise the substantial size differences between companies) are equally, if not more, applicable in relation to the "20 member proposals". If adopted, the "20 member rule" will confer even more of a 'disproportionate influence' on an even smaller minority group.

In addition, we are of the view that there is a real risk that companies will be deluged with motions of no real relevance, and that, if adopted, the "20 member rule" has the potential to cause delays at meetings in dealing with irrelevant items, such that members with real concerns will often leave the meeting before it is completed. Consequently, in attempting to enhance shareholder participation, the rule may ultimately lead to reduced participation through frustration of the vast majority of shareholders.

We would strongly recommend that the threshold for submission of members' resolutions and members' statements remain at 100 members or indeed be increased to a number reflecting the size of the company's membership (e.g. the square root of the number of members).

Nevertheless, if the "20 member rule" were to be adopted, it seems appropriate for the Bill to be amended to ensure that there is some control over the appropriateness and relevance to the company of members' resolutions and members' statements. MBL acknowledges that there are already certain exceptions in subsections 249O(5) and 249P(9) of the Act, which provide that the 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

[4] This measure was considered to be unworkable or burdensome by CAMAC (para 2.21). However, in the limited circumstances proposed by us, we believe it would be an acceptable compromise.

(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 is only applicable if the members making the request are required to bear the expenses on the basis that they have not provided the request to the company in time to send it out with the notice of meeting).

We are of the view that these exceptions do not go far enough. If the "20 member rule" were to be adopted, then these carveouts should be expanded to address issues of irrelevance and inappropriateness, including any members' resolution or statement which seeks to fetter the proper discretion of a board. Given that the management of a company is vested in its board of directors, we believe that there should be express carveouts for these matters.

In addition to the above, we are of the view that, if adopted, the "20 member proposals" should be subject to a 1-2 year 'sunset' clause so as to gauge the impact of the legislative amendment on the market.

Please do not hesitate to contact me should you have any queries in relation to this letter.

Yours faithfully

Dennis Leong
Company Secretary