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Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
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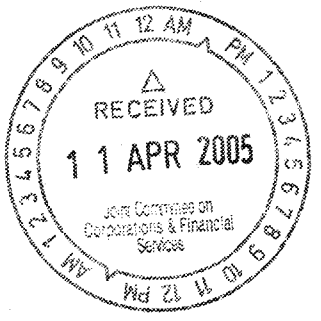

Dear Sir

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

The Australian Institute of Company Directors (AICD) welcomes the opportunity to provide a submission on the exposure draft of the Bill. We agree with the philosophy underlying the Bill, namely, that meetings of company members, particularly AGMs, provide a valuable forum for their participation in the governance and performance of those companies on matters that are important to members generally.

However, AICD is concerned that although the proposed amendments are intended towards furthering that objective, the changes to ss.249 N & 249P are likely to defeat it by increasing the power of narrowly-based sectional interest in effect to capture the agenda of company meetings with matters lacking significant shareholder support. The objectives of special interest groups can sometimes be political, and those objectives are more appropriately pursued in the political arena, not the business arena.

Specific Comments

AICD makes the following specific comments on the Bill.

S.249D – Removal of 100 member rule

AICD supports the proposed amendment to s.249D, and the reasons put forward in the Explanatory Memorandum (EM) for the proposal. However, AICD notes with interest that the 5% threshold of members entitled to vote is equal to or lower than the threshold in corresponding legislation in comparable overseas jurisdictions.

Thank you for the opportunity to put our views forward on these important matters. We would be happy to present at any public inquiry convened by the Committee. If you have any questions in relation to our submission, please contact me on (02) 8248 6602.

Yours Faithfully

Ralph Evans
CEO

Ss. 249N and 249P – Reduction of 100 to 20 members

Although in purely financial terms the potential expense of complying with these provisions is substantially less than complying with s.249D, the expense is still material. In addition to the cost, the value of meetings to the general body of company members could be diminished by having the meeting's agenda crowded by resolutions and statements seeking to advance, not the interest of members generally, but those of narrow special interest groups. Those interest groups could be represented by persons holding no more than one share in the relevant company.

Most members do not have unlimited time to spare for company meetings and the crowding of a meeting's agenda could dissuade some from attending the meeting at all. Seen that way, the proposed amendments to these provisions, far from increasing member participation at company meetings, are more likely to reduce it.

The EM (para. 2.3) justifies the repeal of the 100 member rule in s.249D by the propensity of special interest groups to use it "for publicity purposes or to influence negotiations with the company" thereby gaining "disproportionate influence". It is difficult to see why those comments do not apply equally to ss.249N and 249P, and it is certainly hard to discern from them any sound reason to amend both sections by reducing the 100 members threshold to 20 (particularly since each member need hold only one share).

It is important that the thresholds adopted ensure that a request is backed by a significant number of company members, and is therefore usefully put for the consideration of members generally, even if they subsequently reject it. The AICD therefore maintains that in both provisions the 100 member rule should be retained, subject to the powers under existing ss.249N (1A) and 249P (2A) to prescribe by regulation a different number.

Attached to this submission is an appendix setting out the history of ss. 249N and 249P back to the adoption of the *Uniform Companies Acts* in 1962. It will be seen that the requirement for a minimum average paid up shareholding of $200 remained in operation from then until 30 June 1998. Of course, the purchasing power of $200 at the end of that period was greatly less than at the beginning, but even so, the requirement was one of a genuine shareholding.

S.250A – Proxy voting

AICD does not object in principle to the proposed requirement that a non-chair proxy holder, who has been held out with consent as, or has agreed to act as, a proxy, and is aware of the appointment, should vote in accordance with any directions in the proxy, if the proxy holder votes in any other capacity.

However, the AICD does not consider that a person who fails to vote on a poll in the exercise of a proxy appointment, of which the person had no knowledge at all, should be treated as having contravened proposed s.250A(4), notwithstanding that the contravention would not amount to an offence because of proposed s.250A(5)(d). The consequences, if any, of such a contravention are uncertain. The AICD therefore proposes that s.250A(4)(d) should be amended by inserting after "chair" the words "and is aware of his or her appointment as a proxy", and that proposed s.250A(5)(d) be amended accordingly.

S.250J (IA) – Disclosure of proxy voting

AICD supports this provision being repealed and the reasons for it set out in the EM.

S.323DA – Disclosure of information filed overseas

AICD supports this provision being repealed and the reasons for it set out in the EM.

APPENDIX

The Legislative Background to Corporations Act 2001 (CA) ss.249D, 249N and 249P

Section 249D

Section 249D can be traced as far back at least as the *Companies Act* 1938 (Vic). Enacted as s.137 of the *Uniform Companies Act* with effect, in New South Wales, Queensland and Victoria, from 1 July 1962, it provided that a general meeting of a company had to be convened by the company's directors on requisition of the holders of one-tenth of the paid up capital of the company carrying the right to vote.

UCA s.137 was amended by the *Companies Act* 1971 (Vic), and corresponding legislation in each other State except Tasmania, with effect from 1 March 1972 to provide in addition that a general meeting of a company could be convened on the requisition of 200 members of the company.

The equivalent of UCA s.137 in the *Companies Act* 1981, and the corresponding State and Territory *Companies Codes* was s.241, which provided that a general meeting had to be convened by the directors of a company on the requisition of not less than 200 members, or of members holding 5% of the paid-up capital or entitled to 5% of the voting rights.

The 200 member rule in s.231 was in turn amended by s.74 of the *Companies and Securities Legislation (Miscellaneous Amendments) Act* 1983 to substitute for the 200 member requirement, in the case of a company with a share capital, 100 members holding shares with an average per member of $200.00 paid up on them.

With effect from 1 January 1991, s.241 was re-enacted as s.246 of the *Corporations Law* in substantially identical terms, and remained in force in those terms until 30 June 1998.

Sections 249N and 249P

These sections can be traced back to s.140 of the *Companies Act* 1948 (UK), inserted on the recommendation of the Cohen Committee Report in 1945, and enacted in Australia in substantially identical terms as UCA s.143. The number of members as necessary for a requisition under UCA s.143 was:

(a) any number of members representing not less than one-twentieth of the total voting rights of all the members having a right to vote at the relevant meeting; or

(b) not less than 100 members holding shares in the company on which there had been paid up an average sum, per member, of not less than $200, expressed until 1966 as £100.

UCA s.143 was re-enacted in substantially identical terms as s.247 of the *Companies Act* 1981 with effect from 1 July 1981, which in turn was re-enacted, in substantially identical terms, as s.252 of the *Corporations Law* with effect from 1 January 1991, and remained in force in those terms until 30 June 1998.

It will be seen that the two requirements for entitlement to make a requisition under the predecessors of ss.249N and 249P:

- a member or members holding at least 5% of the voting rights
- 100 members with an average shareholding paid up to at least $200

remained constant from 1 July 1962 until 30 June 1998.

It may be noted that the value of $200 in 1998 was but a fraction of its value in 1962, so that inflation alone increased very substantially shareholder access to the rights now conferred by ss 249N and 249P. Nevertheless, it required a requisitioning shareholder to have more than a purely nominal shareholding.

Second Corporate Law Simplification Bill – Exposure Draft – June 1995

Section 249D, as contained in this Bill, provided that the directors of a company must call and hold a general meeting on the request of:

(a) members who hold at least 5% of the votes that may be cast at the general meeting; or

(b) 200 members who are entitled to vote at the general meeting

Section 249N and the equivalent of s.249P in the Bill were amended in the same way.

Interestingly, the Simplification Task Force justified deletion of the requirement of a minimum paid up value of shares to be held by the requisitioning shareholders "because it is not consistent with the abolition of par values". With respect, that reason does not appear to be correct: the Second Simplification Bill, although abolishing the notion of par value, preserved the notion of part paid shares and therefore, implicitly, that of paid up value.

Be that as it may, it was presumably the absence of a shareholding requirement that directed the Task Force to propose an increase in the requisite number of requisitioning members from 100 to 200.

Second Corporate Law Simplification Bill 1996

It was in this Bill that the 100 member rule, as now contained in ss.249D, 249N and 249P, first appeared. In the apparent absence of an explanatory memorandum or any Parliamentary debate on the Bill, it is not clear why the 200 rule proposed by the Simplification Task Force was changed to a 100 member rule.

Company Law Review Act 1998

The enactment of this Bill with effect from 1 July 1998 brought ss.249D, 249N and 249P into operation in their present form. The EM accompanying the Bill for this Act merely notes without elaboration the change to a 100 member rule.

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