



19 September 2007

Mr David Sullivan
The Secretary
Parliamentary Joint Committee on Corporations and Financial services
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Parliament House
CANBERRA ACT 2600

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Dear Mr Sullivan

Inquiry into shareholder engagement and participation

CPA Australia would like to thank the Committee for the opportunity to respond to the inquiry's terms of reference. Our comments are presented in general terms and we would like to make supplementary comment in one specific area. We have examined the various background to the inquiry which we understand stems primarily from matters dealt with in CLERP 9. Prior to this, CASAC had in June 2000 released a report 'Shareholder Participation in the Modern Listed Company' which formed the basis of some of the content of those parts of CLERP 9 dealing with company / shareholder relationships.

CLERP 9 Proposal for Reform Paper No. 9 CORPORATE DISCLOSURE - Strengthening the financial reporting framework

Whilst the September 2002 CLERP 9 Proposals for Reform overwhelmingly dealt with aspects of auditing, accounting standards and disclosure, it did contain a smaller separate part (Part 11) dealing with shareholder participation and information. Each of the proposals contained in Part 11 is repeated below and we are of the view that each of the key elements have been dealt with in the reform process:

Proposal 36

The Government will establish a Shareholder and Investors Advisory Council, to be chaired by the Parliamentary Secretary to the Treasurer, which will consult on all disclosure-related reforms to ensure they meet the needs of retail investors.

Proposal 37

To encourage shorter, more comprehensive notice of meetings; the Government will amend the law to introduce a 'comfort provision' to protect disclosures made in good faith in a short-form notice of meeting; and best practice guidelines concerning notices of meetings should be developed by the ASX Corporate Governance Council in consultation with ASIC.

Proposal 38

The proposed best practice guidelines on notices of meetings will include a section dealing with the explanatory material for 'bundled resolutions'. The guidelines will include material on best practice for: explaining 'bundled resolutions', including the primary purpose, impact and material implications;

- *providing access to fuller information on the component resolutions for those shareholders who seek it (for example, through company websites);*
- *describing categories of resolution that should not be bundled but always dealt with as a separate item, with a separate explanation provided (for example, transactions affecting executive remuneration).*

Proposal 39

The Government will facilitate improved shareholder participation by electronic means (including electronic proxy voting, internet broadcasting and related technologies) by: removing unnecessary legislative hurdles to the use of technologies, subject to the need to maintain the rights of shareholders who are not internet users; and request the ASX's Corporate Governance Council, in consultation with ASIC, to prepare guidelines for their use.

Proposal 40

The Government will amend the law to require the annual directors' report for listed companies to disclose, with respect to each director holding office during the reporting period, details of all other directorship positions held currently and over the past two reporting periods.

Proposal 41

The Government will: amend the law to permit members to elect to receive annual reports and notices electronically; and support best practice guidelines concerning electronic distribution of annual reports developed by the ASX's Corporate Governance Council in consultation with ASIC.

CLERP (Audit Reform & Corporate Disclosure) Bill

The next phase of the reform process was the release in September 2003 of the exposure draft of the CLERP (Audit Reform & Corporate Disclosure) Bill and accompanying commentary. Schedule 8 of the bill introduced a number of amendments to the Corporations Act 2001 under the heading 'Shareholder participation and information'. The amendments can be grouped into the following four categories.

1. Notices of meeting

Section 249L has been amended to include a new subsection 249L(2) which requires that notices of member meetings be worded and presented in a clear, concise and effective manner. Additionally, s 249LA was introduced to permit regulations to be made that identify certain kinds of information that need not be included in a notice of meeting if conditions are met.

A number of amendments have been effected to facilitate electronic distribution of notices of general meetings to members and directors. Sections 249J(3)(c)(ca) and (cb) in conjunction with 249J(3A) were introduced to enable companies to offer members the option of accessing notices by means of a wider range of electronic facilities. In turn, subsection 249J(5) was included stating that a notice under these new facilities is to be taken to be given on the business day after the notice is made available.

These amendments gave effect to a substantial part of the content of CLERP 9 Proposals 37 and 39.

2. Electronic distribution of annual reports

Section 314 requires the sending of full annual reports, and in some circumstances concise reports, to members. Consistent with the above developments relating to notices, s 314 has been amended to include subsection (4) to (6) which enable a member the ability to be notified of the availability, and to access, either full or concise reports by an elected electronic means.

This amendment gave effect to CLERP Proposal 41.

3. Proxy voting

A limited number of minor amendments have been made respectively to ss 249X (Who can appoint a proxy), 250A (Appointing a proxy), 250B (Proxy documents), 250BA (Proxy documents – listed companies) and 250D (Body corporate representative). These amendments have enabled the appointment of bodies corporate as proxies, electronic authentication of proxy appointments and the electronic submission of proxy forms.

4. Listed companies - notification of directorships

Subsection 300(11) was introduced to include special rules for listed companies regarding the inclusion of information in annual reports. Section 300(11)(e) was introduced requiring inclusion of details of directorships of other listed companies in the three prior years.

This amendment gave effect to CLERP 9 Proposal 40.

It is noteworthy also that aside from these legislative responses, a number of matters proposed in Part 11 of CLERP 9, in particular Proposals 37 and 38, have been dealt with by way of promulgation of non-binding guidance from the ASX CGC. Finally, it is observed here that Proposal 36 concerning the establishment of a Shareholder and Investor Advisory Council has not advanced.

With the three or so year lapse of time since the enactment of these reforms, it is possible to now make observations as to their effectiveness. In particular, in relation to the more streamlined approach to notices of meetings, the limited judicial consideration of these provisions would indicate that they are functioning quite effectively in terms of the objective of the reform. Two decisions of the New South Wales Court of Appeal are relevant; *ENT Pty Ltd v Sunraysia Television*¹ in which Austin J granted an application restraining the conducting of a meeting where there had been a material deficiency in disclosed information and *McLaughlin v Dungowan Manly Pty Ltd*² in which Barrett J based on an assessment of balance of convenience concluded that alleged deficiencies in resolutions did not present a prospect of hardship.

PJCCFS Inquiry into Exposure Draft - CLERP (Audit Reform & Corporate Disclosure) Bill

On 8 October 2003 the PJCCFS resolved to inquire into and report on the exposure draft bill, CLERP (Audit Reform and Corporate Disclosure) Bill, and relevant related matters. After receiving submissions and conducting public hearings, the Committee in June 2004 released its report. In Chapter 8 'Enhancing Shareholder Participation' the following four recommendations were made:

Recommendation 21

The Committee recommends that the law be amended to ensure that the voting of shareholders through their proxyholder are carried out according to their instructions.

¹ (2007) 61 ASCR 626

² (2006) 59 ACSR 686

Recommendation 22

The Committee recommends further that the provisions governing voting at meetings be reviewed by CAMAC with a focus on matters that have been raised during the inquiry but which the Committee has not examined in depth. Including the disclosure of voting – numbers for, against and abstentions on each resolution before the meeting.

A check of CAMAC's website indicates that no referral on these matters has been made.

Recommendation 23

The Committee recommends as a best practice, institutional investors:

- *include a discussion of their voting policies in their annual report which includes how they manage conflicts of interest in regard to their investments; and*
- *disclose their voting record in the annual report.*

Recommendation 24

The Committee recommends that the 100 member rule for the requisitioning of a general meeting be removed from section 249D of the Corporations Act.

Matters arising out of the PJCCFS 2003 inquiry

Amongst these recommendations the one which on its face is the most clearly dealt with by way of legislative reform, but which has nonetheless caused significant consternation, is Recommendation 24. CPA Australia notes that the removal of the 100 member rule has received the support of a wide constituency of professional bodies and bipartisan support at the political level from both the majority and separate Labor minority reports of the PJC inquiry. Similarly, it has been the view of CAMAC (formerly CASAC) that the 100 member rule was both problematic and out-of-step with overseas practice and should thus be removed. CPA Australia is of the view that whilst the 100 member rule does not appear to have recently caused substantial inconvenience and cost outside of such matters as the extensive NRMA litigation,³ its presence does pose a risk of disruptive and vexatious shareholder behaviour.

Aside from the above matters which pertain to the evolving aspects the shareholder participation and information aspects of CLERP 9, we have more broadly reviewed recent case law development in a number of aspects of corporation law which, more broadly, impact upon member relationships with their companies. In no instances were major shortcomings in the law apparent. The aspects considered included the operation of the oppression remedy⁴, the contractual nature of the corporate constitution⁵ and the division of corporate powers⁶, though on this final point it is noted that whilst operating as a replaceable rule⁷ there did exist scope for departure from the long accepted and judicially supported vesting of management powers with directors.

³ See for example *NRMA v Parkin* (2004) 49 ACSR 386

⁴ Part 2F.1 Oppressive conduct of affairs

⁵ Section 140

⁶ Section 198A powers of directors.

⁷ Section 135

In conclusion, we note that the Committee has sought comment on shareholders' capacity to assimilate and make assessments in relation to financial disclosures. CPA Australia suggests that this issue could be considered in the broader context of changing expectations of company engagement with a widening constituency of stakeholders and the utility of non-financial disclosures. It seems unlikely that the emergence of a more clarified position with respect to directors' capacity to engage in social responsibility based decision making will give rise to any disharmony with legally defined powers and protections afforded to shareholders. Nonetheless serious questions remain around how best to serve the legitimate information expectations of a widening number of groups having a legitimate interest to the conduct of companies. CPA Australia will in the coming months, through sponsored research, be seeking to develop a greater understanding of the contrasting roles and utility of financial and non-financial reporting. As these projects evolve, we would be very pleased to share by way of supplementary submission significant insights with the Committee.

If you have any queries or wish to discuss any aspects of our submission, these can be directed to Mr John Purcell, CPA Australia's Policy Adviser – Corporate Regulation on 03 9606 9826.

Yours sincerely

A handwritten signature in black ink, appearing to be 'GR', written in a cursive style.

Geoff Rankin FCPA
Chief Executive Officer

cc: J Purcell