23 May 2008

The Committee Secretary
Parliamentary Joint Committee on Corporations & Financial Services
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Secretary,

Thank you for the opportunity to provide a supplementary submission to the Joint Parliamentary Committee's inquiry into shareholder engagement and participation. The matters canvassed in this submission arose during our appearance before the committee.

1. Barriers to the right of shareholders to elect directors.

The committee asked us to review company constitutions to identify potential barriers to the ability of shareholders to nominate and elect non-board endorsed candidates. The major barrier that emerges from this review is a standard clause contained in most listed company constitutions that enables the board to determine the maximum number of directors within the confines of the minimum and maximum number of directors set by the constitution. Two typical clauses are given below (with the most relevant passages in bold, emphasis added):

"8.1 Appointment and removal of directors
(a) The minimum number of directors is 3. **The maximum number of directors is to be fixed by the directors**, but must not be more than 10 unless the company in general meeting determines otherwise. The directors must not determine a maximum which is less than the number of directors in office at the time the determination takes effect."

Source: West Australian Newspapers Holding Limited constitution from company website

"Number of Directors
62. Unless otherwise determined by the Company in general meeting, **the number of Directors (not including alternate Directors) must be the number, not being less than three nor more than fifteen, which the Board may determine** but the Board may not reduce the number below the number of Directors in office at the time of the reduction. All Directors are to be natural persons."

Source: Woodside Petroleum Limited constitution from company website

These clauses, which are typical of listed company constitutions, allow the board in a contested election – typically when a shareholder has nominated a candidate - to declare that the maximum number of directors is the number of directors presently on the board. For the non-board endorsed candidate this means that in order to be elected they must receive not only a majority of the votes cast on their election but also more votes than the board endorsed candidate seeking election at the same meeting. This power under the constitution may be used in cases where the number of directors on the board is much lower than the maximum number allowed under the constitution.

RiskMetrics (Australia) Pty Ltd

ABN: 88 081 368 327 AFSL Licence No. 297008

Level 4, 190 Queen Street • Melbourne Vic 3000 • Tel. +61 3 9642 2062 • Fax +61 3 9642 2092

www.issproxy.com/global/australia

As this power to fix the maximum number of directors is contained in company constitutions, it has been 'assented' to by shareholders (although in many cases the relevant clause may have been in the constitution since listing, and is deemed to have been accepted by shareholders when they bought into the IPO).

It would be open to the Parliament to amend the Corporations Act to state that only the general meeting (that is shareholders) has the right to set the maximum and minimum number of directors that may hold office at any time. Such a provision would still allow the board to determine the number of directors on the board at any time within the limits set by the constitution. This determination would however be subject to the will of shareholders by removing a board's ability to declare a cap on the number of directors that is outside the cap imposed under the constitution.

It is worth noting that this type of amendment would not confer a new right on shareholders. Shareholders - in general meeting - have the inherent right, unless modified or excluded by the company's constitution, to determine the maximum number of directors that their company may have. The suggestion made here would merely have the effect of restoring this right to shareholders.

2. Listed company elections

One potential barrier to shareholders' effective engagement with listed companies are the inherent flaws in the current voting system for company elections. A number of these flaws were covered in IFSA's submission to the inquiry and evidence given by IFSA to the committee on its 15 April 2008 hearing in Canberra. One additional issue arose as a result of questions asked of RiskMetrics by the committee, which was the oversight of company voting results, given this process is overseen by those elected under the voting system – that is, the board (or board-appointed agents such as auditors or share registries).

In this regard, RiskMetrics would like to draw the committee's attention to ACSI's original submission to the inquiry. This submission noted that section 342 the UK *Companies Act*, following reforms in 2006, allows members holding 5 percent of the securities entitled to vote on a resolution to call for an independent report on the results of a poll. A similar provision in the Australian *Corporations Act* would allow shareholders with concerns over a result at a meeting to immediately call for an independent review of the result. RiskMetrics also suggests that such an amendment should also empower members with 5 percent of the securities able to be voted to appoint an independent body to conduct voting on the resolution. At present, shareholders' only recourse is to ask ASIC to investigate the result after it has been declared.

In our evidence to the inquiry, we also noted the incongruity of allowing those with an interest in the outcome of a vote to act as the overseers of the vote (either directly or through the appointment of agents). This has the potential to create doubts over the integrity of close vote results. RiskMetrics notes that in other non-parliamentary elections – such as those for trade union officeholders – the Australian Electoral Commission conducts the election to avoid officeholders overseeing their own election.

We have also, at the request of the committee, attached as an appendix examples of the rationale given by the ASX for granting waivers to its 'one share, one vote' Listing Rules. Please do not hesitate to contact me on any matter raised in our submissions or in our evidence to the committee,

Yours sincerely,

Martin Lawrence

Appendix

These are examples of the ASX's stated rationale for why waivers were granted to Listing Rule 6.9 (the rule states that on a resolution put to a poll, each security has one vote). The two waivers allowed the external manager of these listed entities to appoint directors to the board (in the case of Macquarie Media Group, to appoint three-quarters of the directors who would otherwise be elected by securityholders).

Macquarie Media Group

"Unquoted, limited voting, non-participating special shares issued to manager of company and responsible entity of trust as part of stapled structure - special shares redeemed and transferred if responsible entity changes - shares repurchased and or transferred in the event of de-stapling."

Waiver granted 17 November 2005, see page 22 of the November ASX Listing Rule Waiver register for November 2005, available at
http://www.asx.com.au/supervision/rules_guidance/listing_rules_waivers.htm.

MFS Diversified Group

"Unquoted, limited voting, non-participating special share issued to responsible entity of trust as part of stapled structure - super-voting rights on election of directors - share is transferred to new responsible entity if responsible entity changes - share redeemed in the event of destapling - shareholder democracy exercised by rights of stapled security holders to change responsible entity."

Waiver granted 3 April 2006, see page 15 of the April 2006 ASX Listing Rule Waiver register, available at
http://www.asx.com.au/supervision/rules_guidance/listing_rules_waivers.htm.