

26 April 2007

The Secretary  
Senate Standing Committee on Economics  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

Email – [economics.sen@aph.gov.au](mailto:economics.sen@aph.gov.au)

Dear Sir

## **Inquiry into Private Equity Investment**

The Australian Institute of Company Directors (AICD) appreciates the opportunity to provide our submission to the Committee. Private equity investment is a topical issue and we welcome an examination of trends and its impacts.

AICD is the principal professional body representing directors in Australia and has over 21,000 individual members. Our members are directors of a wide range of corporations: publicly-listed companies, private companies, not-for-profit organisations, and government and semi-government bodies.

### **General Comments**

As a body representing directors, we are not in a position to quantify the effects and trends associated with private equity investment. However, we do want to make comment on one of the matters referred for consideration, namely, the appropriate regulatory or legislative response to this market phenomenon. Specifically, we want to made comment on the role of private equity in corporate control transactions and its impact on directors and senior managers.

AICD has for some time expressed concern more generally about the impact of incremental regulation on public companies. Such regulation includes public reporting and governance requirements which do not apply to private companies. It is often said that this additional regulation and scrutiny makes private companies and private equity investment more attractive vehicles for maximising shareholder return.

In response to the growth of regulation of public companies, their boards tend to adopt a conformance and compliance focus, rather than a performance focus. This detracts from the board's important role of overseeing the strategic direction of the company. It also reduces the board's ability to encourage the company to undertake reasonable

commercial risks. This can have the undesirable outcome of reducing the possible return to shareholders.

Partly in recognition of this impact, the Federal Government is undertaking a process of review of regulation through the Banks Taskforce and the Corporate & Financial Services Regulation Review. The Government should be commended on this initiative. More consolidation and streamlining of regulation are possible in order to make the public company entity a more attractive investment vehicle. After all, it is the vehicle that provides the broadest investment opportunities for all market participants.

## **Specific Comments**

### ***Term of Reference (e) - An assessment of the Appropriate Regulatory or Legislative Response required to this Market Phenomenon***

The Committee may be aware that the Takeovers Panel has recently released for comment an Issues Paper and Draft Guidance Note on insider participation in control transactions. The Issues Paper and Draft Guidance Note were precipitated by the rise of private equity investment in corporate control transactions. Insider participation in corporate control transactions is more likely when private equity is available as a vehicle. We enclose a copy of our submission to the Panel for your information.

A common thread to the views expressed in our submission is that prescriptive rules for insider participation are not appropriate in the context of corporate control transactions including those with private equity investment. Any prescription should be described as 'best practice' to retain the necessary flexibility for particular circumstances.

Directors and senior management of a target company already have fiduciary obligations arising under common law and statute that should underpin their actions in the corporate control transaction context. An April 2007 AICD Company Director journal article authored by Colin Galbraith (attachment to our Panel submission) seeks to clarify directors' and senior managers' obligations in the context of corporate control transactions. Therefore, any guidance, such as that proposed by the Panel, must be in addition to and not instead of, the position under general law. AICD suggested that the Panel's Guidance Note state upfront that the directors and senior management of a target company have certain fiduciary obligations and that those obligations must be complied with.

More generally, AICD considers that there is sufficient statute and common law to properly oversee director's, officer's and senior manager's involvement in private equity investment transactions. There is no need to add further to the comprehensive

array of common law and statute. To do so, would work against the efforts of the Federal Government in reviewing regulation and legislation with the objective of reducing ‘red tape’.

Please contact Gabrielle Upton on (02) 8248 6635 should you have any queries in relation to our submission.

Yours faithfully

Ralph Evans  
**Chief Executive Officer**