

**CORPORATIONS AMENDMENT BILL (No. 2) 2006**

EXPLANATORY MEMORANDUM

EXPOSURE DRAFT

Circulated by authority of the Honourable Chris Pearce MP,  
Parliamentary Secretary to the Treasurer



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# CORPORATIONS AMENDMENT BILL (No. 2) 2006

## 1

### Outline

1.1 The measures included in this Exposure Draft Bill are intended to facilitate shareholder participation in corporate governance, while reducing the associated costs of such participation.

1.2 The Government is mindful that shareholders, particularly minority shareholders, must retain effective mechanisms to examine the affairs of the company and voice concerns to the company and its members. Shareholder participation is vital in ensuring accountability of the company's board and management.

1.3 However, some avenues for shareholder participation can impose significant costs on companies. The need to encourage shareholder participation must be balanced against the need to manage the associated costs to the company (and through it other shareholders).

1.4 In December 2002, the Government announced its intention to remove the rule allowing 100 members to requisition special general meetings of companies ('the 100 member rule') because of increasing public concern about the impact of the rule on the conduct of company business. Draft amending legislation containing the proposed amendment to section 249D of the *Corporations Act 2001* ('Corporations Act') was released for public comment on 24 December 2002. The exposure draft legislation was entitled the *Corporations Amendment Bill 2002* ('the 2002 Exposure Draft').

## Outline

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1.5 The 2002 Exposure Draft also included amendments to implement, in part, the Government Response (tabled on 18 December 2000) to the October 1999 *Report on Matters Arising from the Company Law Review Act 1998* of the Parliamentary Joint Committee on Corporations and Securities (now the Parliamentary Joint Committee on Corporations and Financial Services - PJC), and various reports of the Corporations and Markets Advisory Committee (CAMAC — formerly the Companies and Securities Advisory Committee, CASAC). In addition the PJC, in the context of its review of the Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003 ('the CLERP 9 Bill'), recommended the removal of the 100 member rule (Recommendation 24).

1.6 After careful consideration of the submissions received on the 2002 Exposure Draft and the various recommendations of CAMAC and the PJC, the Government substantially revised the content of the 2002 Exposure Draft. The Government released the exposure draft Corporations Amendment Bill (No 2) 2005 for public comment on 7 February 2005 (2005 Exposure Draft), which sought to balance the impact of the removal of the 100 member rule by improving shareholder access to other mechanisms for participation.

1.7 On 8 December 2005, the Parliamentary Secretary to the Treasurer, the Hon Chris Pearce MP, announced that the Government will proceed with legislative reforms to improve rules for shareholder meetings. The announcement followed an extensive consultation period.

## **SUMMARY OF THE KEY AMENDMENTS IN THE BILL**

### ***Corporations Amendment Bill 2006***

1.8 This Bill will:

- Remove the 100 member rule from sections 249D and 252B of the Corporations Act;
- Facilitate the electronic circulation of members' resolutions and members' statements (sections 249O and 249P);
- Ensure the voting intentions of members are carried out by appointed proxies by prohibiting the 'cherry-picking' of proxy votes (subsections 250A(4) & (5));
- Amend the requirements relating to the disclosure of proxy votes (subsection 250J(1A)); and
- Remove the requirement for companies to disclose information reported to overseas exchanges (section 323DA).

**AMENDMENTS WITHDRAWN FROM EARLIER EXPOSURE DRAFTS**

1.9 The following amendments contained in the 2002 Exposure Draft have been withdrawn from this Bill following consideration of submissions received:

- Removal of the provision which allows a single director of a listed company to call a meeting of members (section 249CA);
- Removal of the requirement for companies to include in their annual reports details of compliance with environmental regulation (paragraph 299(1)(f)); and
- Reduction of the period of notice for meetings of listed companies from 28 days to 21 days (section 249HA).

1.10 The following amendments contained in the 2002 Exposure Draft have been progressed in the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004*:

- Clarification of the requirements for disclosure of remuneration details in the directors' annual report (section 300A and subsection 300(1)); and
- The addition of a requirement that the annual reports of public companies disclose the qualifications and experience of their company secretaries (subsection 300(10)).

1.11 The following amendments contained in the 2005 Exposure Draft have been withdrawn from this Bill following consideration of submissions received:

- Reduction of the threshold allowing members' resolutions to be brought to Annual General Meetings already scheduled (section 249N); and
- Reduction of the threshold for distribution of members' statements by the company along with the notice of meetings (section 249P).

## 2

### Schedule 1 Amendments

*Calling a company general meeting or a meeting of members of a managed investment scheme when requested by members — sections 249D and 252B*

#### **Current provision**

2.1 Section 249D allows company members with 5 per cent of the votes that can be cast at the general meeting or 100 members who are entitled to vote at the general meeting to requisition a general meeting at the expense of the company.

2.2 Section 252B allows members of a managed investment scheme with 5 per cent of the votes that can be cast on a resolution or 100 members who are entitled to vote on the resolution to requisition a meeting of the members of the scheme.

#### **Principal change**

2.3 Herein, discussion of public companies and their members includes managed investment schemes and their members unless otherwise differentiated. The discussion throughout this Explanatory Memorandum is equally applicable to both entities and the provisions governing them respectively.

2.4 The 100 member rule allows relatively small groups of members to requisition general meetings of large companies. This can expose large companies (and, indirectly, their members) to significant costs.

2.5 A particular concern is that the rule allows for special interest groups to threaten the imposition of large and unnecessary costs on companies, for publicity purposes or to influence negotiations with the company, to the

## **Schedule 1 Amendments**

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detriment of the vast majority of members. The 100 member rule has been criticised for giving disproportionate influence to minority shareholders, failing to recognise the substantial size differences between companies and for being out of step with comparative laws in other countries.

2.6 CASAC recommended the removal of the 100 member rule from section 249D in its Final Report *Shareholder Participation in the Modern Listed Public Company*, June 2000. CASAC noted that all comparable overseas jurisdictions employ only an issued share capital test, with a threshold of 10 per cent for the United Kingdom, between 5 and 20 per cent in Europe and 5 per cent in both Canada and New Zealand.

2.7 A recommendation to remove the 100 member rule was also made by the PJC in its October 1999 Report. The PJC reiterated this recommendation in Part One of its Report into the CLERP 9 Bill, tabled on 4 June 2004. The PJC noted the disappointment expressed by some witnesses that the CLERP 9 Bill did not address the 100 member rule issue, and that most who commented favoured its replacement with a higher threshold such as 5 per cent of members. In its inquiry into the 2005 Exposure Draft, the PJC again supported the removal of the 100 member rule, but suggested a 1 per cent threshold test be introduced for mutual companies.

### **Proposed amendments**

2.8 Item 1 will repeal subsection 249D(1) and substitute a new subsection 249D(1) in the same terms as current paragraph (1)(a). This will have the effect of repealing paragraph (1)(b) which contains the 100 member rule.

2.9 Item 2 will repeal subsection 249D(1A). Subsection 249D(1A) currently provides a regulation making power for the purposes of paragraph 249D(1)(b). As paragraph 249D(1)(b) will be repealed, subsection 249D(1A) is no longer required.

2.10 Item 11 will repeal subsection 252B(1) and substitute a new subsection 249D(1) in the same terms as current paragraph (1)(a). This will have the effect of repealing paragraph (1)(b) which contains the 100 member rule.

2.11 Item 12 will repeal subsection 252B(1A). Subsection 252B(1A) currently provides a regulation making power for the purposes of paragraph 252B(1)(b). As paragraph 252B(1)(b) is proposed to be repealed, subsection 252B(1A) is no longer required.

*Electronic circulation of members' resolutions and members' statements  
— sections 249O and 249P*

**Current provisions**

2.12 Subsection 249O(2) of the Corporations Act provides that the company must give all its members notice of members' resolutions in the same way as it gives members notice of a meeting. Subsection 249P(6) provides a similar requirement for members' statements. Section 249J contains requirements for distribution of notices of general meetings to members and directors.

2.13 Subsection 249J(3) provides that a company may give the notice of a meeting to a member personally, by post, by fax, electronic address or by other means provided in the company's constitution. The Corporations Act was amended by the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* to also allow companies to offer members the option of accessing notices by a wider range of electronic facilities (subsection 249J(3A)).

2.14 Members are able to nominate an electronic 'notification means' and also an electronic 'access means', which a company can use to distribute notices as an alternative to traditional forms of distribution. Under this facility, companies are able to distribute a notice of meeting by, example, sending a short e-mail to a member advising that a notice of general meeting is available for viewing or download from the company website.

**Principal change**

2.15 New provisions will ensure that if a member has already nominated a preferred electronic means to receive a notice of meeting, they will also receive members' resolutions and statements in the same way.

2.16 Requiring companies to send members' resolutions and statements using the same method that the member has nominated for receiving notices of meeting will ensure that related communications accord with their preferred communication medium. The amendments will also have the effect of reducing mailing costs to the company. Mailing costs associated with general meetings can be a significant expense to the company, depending on the size of its shareholder base.

2.17 These provisions will facilitate members' rights to be informed about, and participate in, general meetings, whilst minimising costs to companies and members.

## **Schedule 1 Amendments**

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### ***Proposed amendments***

2.18 Item 3 inserts a new subsection 249O(2A) to ensure that if a company gives a member notice of the meeting by sending it to the member by particular electronic means, the company must also give the member notice of the resolution by the same electronic means.

2.19 Item 4 inserts a new subsection 249P(6A) to achieve the same result in relation to members' statements.

*'Cherry-picking' of proxy votes — subsections 250A(4) and 250A(5)*

**Current provisions**

2.20 Currently under the Corporations Act only the chair of a meeting is obliged to vote each and every proxy given to him or her according to their terms (paragraph 250A(4)(c)). The chair retains discretion with undirected proxies. Other proxy holders are under no obligation to vote all or some of the proxies, although if they do so they must follow the instructions in the proxy instrument and accord with the framework set down in subsection 250A(4).

**Principal change**

2.21 Proxy voting is a key element in shareholder decision-making in the modern listed company, because most shareholders do not attend general meetings. 'Cherry-picking' of proxy votes is a practice whereby a proxy holder, with directed proxies, chooses not to vote the directed proxies for a motion but chooses to vote the proxies directed against a motion (or vice versa). This disenfranchises shareholders and may unfairly influence the outcome of voting in a poll.

2.22 The Government considers that imposing a blanket obligation on all persons put forward by the board to vote proxies is too onerous. It is good corporate governance to seek to ensure that persons appointed to vote as proxies vote those proxies according to the proxy terms. However it is also possible that persons (other than the chair) may be unknowingly appointed as proxies. There may also be legitimate circumstances where a person other than the chair is unable to vote on a poll at all.

2.23 However, the situation is different where a proxy is capable of voting and deliberately withholds some votes that are contrary to their personal views, but lodges other proxies favourable to their views ('cherry picking').

2.24 To ensure that the voting intentions of shareholders who appoint proxies are preserved, the Corporations Act will be amended to provide that where a proxy holder votes on a poll the proxy holder must vote each and every other valid directed proxy appointment they hold and vote them as directed. The amendments also provide that, to be guilty of an offence, the proxy holder (except where the proxy holder is the chair) must have agreed to act or have been held out by the company, with their consent, as being willing to act, and that the proxy holder must have been aware of the appointment.

2.25 The penalty for the offence will continue to be 5 penalty units as per Item 66 in Schedule 3 of the Corporations Act.

## Schedule 1 Amendments

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### ***Proposed amendments***

2.26 Item 5 will amend paragraph 250A(4)(d) to provide that where a proxy, who is not the chair, votes on a poll in any capacity they must vote all directed proxies (appointed validly under subsection 250A(1)) and vote them as directed. The amendment effectively mandates voting of valid directed proxies on a poll once the proxy has decided to vote once on a poll. The remainder of the framework under subsection 250A(4) in relation to voting by a show of hands and in relation to voting by the chair will continue to apply unchanged.

2.27 Item 9 inserts a new subsection 250A(8) which clarifies that the reference in paragraph 250A(4)(d) to the proxy holder voting on a poll in any capacity includes the proxy holder voting in the exercise of the proxy holder's own rights as a member of the company, and in the exercise of the proxy holder's rights under another proxy appointment whether it is left undirected or not.

2.28 Item 8 also recasts the offence provision in subsection 250A(5). New paragraphs 250A(5)(a) and (b) would apply where there is a vote by a show of hands. Paragraph 250A(4)(a) states that a proxy holder need not vote but if the proxy holder does so, they must vote as directed.

2.29 Paragraph 250A(4)(b) then provides that if the proxy holder has two or more appointments that specify different ways to vote on the resolution, then the proxy holder must not vote on a show of hands. The new paragraph 250A(5)(b) incorporates an awareness element for the situation where a proxy holder votes on a show of hands where they have two conflicting directed proxies. If the proxy holder has one directed proxy and votes on a show of hands as permitted, and is unaware of a conflicting directed proxy they have been appointed, the person will not be guilty of an offence.

2.30 The new paragraph 250A(5)(c) in Item 8 applies to the chair as a proxy holder. The chair is obliged to vote all proxies on a poll and vote them as directed. There will be no requirement that the chair be aware of the appointment for the chair to be guilty of contravening paragraph 250A(4)(c). This is consistent with the previous position under subsection 250A(5).

2.31 The new paragraph 250A(5)(d) applies to voting on a poll by a proxy holder other than the chair. Such a person who contravenes paragraph 250A(4)(d) will be guilty of an offence if the person agreed to act, or held himself or herself out as willing to act, or the company held the person out as willing to act with the person's consent, as being willing to act as a proxy. The person must have also been aware of his or her appointment as proxy.

*Disclosure of proxy voting — subsection 250J(1A)*

**Current provision**

2.32 Subsection 250J(1A) provides that before a vote is taken at a meeting of shareholders, the chair must inform the meeting whether any proxy votes have been received and how the proxy votes are to be cast. For listed companies, disclosure of certain information regarding proxy votes is required in the minutes of a meeting (section 251AA).

**Principal change**

2.33 This amendment adopts the recommendation of the PJC to repeal subsection 250J(1A). Similarly, CASAC pointed out that subsection 250J(1A) is flawed in its June 2000 Report entitled *Shareholder Participation in the Modern Listed Public Company*. The provision is unclear and the information that it purports to require to be disclosed is inherently uncertain. Proxies, other than the chair, are not obliged to vote (subject to the ‘cherry picking’ amendments contained in this Bill). Also, shareholders who appoint proxies may attend the meeting and vote, thereby negating the proxy. Given this, the chair cannot accurately inform the meeting how proxy votes are to be cast.

2.34 The Government notes that, in the absence of subsection 250J(1A) mandating that the chair inform the meeting whether any proxy votes have been received and how the votes are to be cast, the chair will still be free to put the question to shareholders at the AGM and allow them to determine when such information is to be revealed.

**Proposed amendment**

2.35 Item 10 will repeal subsection 250J(1A).

## **Schedule 1 Amendments**

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### *Disclosure of information filed overseas — section 323DA*

#### **Current provision**

2.36 Section 323DA of the Corporations Act requires Australian listed companies to report information required to be disclosed by the New York Stock Exchange, the Securities and Exchange Commission of the United States of America or any other prescribed securities exchange in a foreign country.

#### **Principal change**

2.37 The PJC recommended that the Corporations Act should not require companies to report such information. Two of the reasons given by the PJC were that the only additional information disclosed under the provision is non-material and that it is preferable for the Australian Stock Exchange (the ASX) and various accountancy bodies to provide for disclosure requirements of listed companies rather than the Corporations Act.

2.38 It is proposed to delete section 323DA of the Corporations Act.

#### **Proposed amendment**

2.39 Item 15 will delete section 323DA.

*Updating references to Patents/Trade Marks/Designs legislation —  
Section 279(5)*

**Current provision**

2.40 Subsection 279(5) provides that sections 280 to 282 of the Corporations Act do not affect the operation of certain Acts, including the *Designs Act 1906*, the *Patents Act 1952* and the *Trade Marks Act 1955*.

**Principal change**

2.41 It is proposed to update cross-references to the above statutes in subsection 279(5) of the Corporations Act.

**Proposed amendment**

2.42 Item 13 will replace the reference to the *Designs Act 1906* with a reference to the *Designs Act 2003*.

2.43 Item 14 will replace the references to the *Patents Act 1952* and the *Trade Marks Act 1955* with references to the *Patents Act 1990* and the *Trade Marks Act 1995* respectively.

## **Schedule 1 Amendments**

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### *PART 10.6 Transitional provisions relating to the Corporations Amendment Bill (No 2) 2006*

#### ***Item 1472 Application of new subsections 249D(1) and 252B(1)***

2.44 The amendment made by items 1 and 11 will apply only to a request that is made after the commencement of that item.

#### ***Item 1473 Application of changes to sections 249O and 249P***

2.45 The amendments made by items 3 and 4 will apply only to general meetings held on or after commencement.

2.46 This has the effect that if a notice of meeting has been sent by the company before commencement, the amendments will still be applicable if the meeting will be held after commencement. However, subsection 249O(1) of the Corporations Act provides that if a company has been given notice of a resolution under section 249N, the resolution is to be considered at the next general meeting that occurs more than two months after the notice was given. Subsection 249O(1) will continue to apply unamended.