Corporations Legislation Amendment (Deregulatory and Other Measures) Bill 2014

The Corporations Legislation Amendment (Deregulatory and Other Measures) Bill 2014 **(**draft Bill) comprises a package of minor deregulatory proposals to repeal and streamline the *Corporations Act 2001* and the *Australian Securities and Investments Commission Act 2001* to improve the efficient operation of the Corporations Law, reduce compliance costs for business and benefit business productivity generally. The net impact of the proposals on business is expected to be deregulatory.

The proposals, details of which are provided below, comprise:

(i) removing the obligation to hold a general meeting on the request of 100 shareholders;

(ii) requiring companies to include a general description of their remuneration governance framework, to the extent that it is not included elsewhere in the annual report;

(iii) removing the requirement to disclose the value of options granted to key management personnel, replacing it with a requirement to disclose the number of lapsed options and the year in which they were granted;

(iv) relieving certain disclosing entities from the obligation to prepare a remuneration report;

(v) amendments to the test for payment of dividends (the dividends test);

(vi) transferring the remuneration setting responsibility for the offices of the Financial Reporting Council (FRC), Australian Accounting Standards Board (AASB), and the Auditing and Assurance Standards Board (AUASB) to the Remuneration Tribunal;

(vii) improving the efficiency of the Takeovers Panel, by allowing the Panel to perform Panel functions while overseas;

(viii) exempting certain companies limited by guarantee from the need to appoint or maintain an auditor; and

(ix) minor technical amendment to clarify that directors may vary their financial year by up to 7 days, regardless of the length of previous years.

The Bill is expected to be introduced in the 2014 Autumn/Winter Sittings of Parliament.

Amendments to the Corporations Act 2001 (Corporations Act)

Removal of the 100 Member Rule (section 249D)

1. Directors of a company must arrange a general meeting, paid for by the company, at the request of members with a total of 5 per cent of voting shares, or 100 members entitled to vote at the annual general meeting (the 100 member rule).

2. In large corporations, 100 members may hold a very small percentage of voting shares – often below 1 per cent. The 100 member rule therefore allows holders of an insignificant percentage

of voting shares to force a company to incur the costs of holding a general meeting. Because a successful vote at a general meeting will usually require over 50 per cent support, it is exceedingly unlikely that any resolution proposed by the 100 members will receive the required support.

3. The proposed amendment removes the 100 member rule from section 249D of the Corporations Act. Groups of small shareholders will continue to be able to require directors to hold a general meeting if they hold at least 5 per cent of voting shares, and groups of 100 shareholders will continue to be able to place matters on the agenda of general meetings.

The test for payment of dividends (section 254T)

4. Section 254T of the Corporations Act currently provides that dividends may not be paid unless certain conditions are met, including that a company has positive net assets following the payment of a dividend, that the payment is fair and reasonable, and that the payment does not materially prejudice the company's ability to pay its creditors (collectively, the net assets test). The net assets test was introduced to address concerns that changes to the accounting standards impacted upon the calculation of profits, limiting the company's ability to pay dividends under the previous, profits-based dividends test.

5. Stakeholders have highlighted that the operation of Part 2J of the Corporations Act limits a company's ability to make a distribution out of anything other than profit, and that 'net assets' is not an effective measure of company solvency. Chapter 2J of the Corporations Act restricts the payment of distributions from capital (rather than profit) by imposing additional conditions on such reductions (capital maintenance provisions). Additional conditions apply where a reduction in capital is selective (affecting only certain shareholders) as opposed to equal (where all shareholders participate equally).

6. Further, the current requirement for assets and liabilities to be calculated in accordance with the accounting standards places a compliance burden on companies that are not otherwise required to apply accounting standards.

7. The proposed amendments replace the net assets test with a pure solvency test, and exempts dividend payments from the capital maintenance provisions to the extent that they are 'equal reductions' in capital (as opposed to 'selective reductions' which may benefit some shareholders more than others, and require additional approvals under current law).

8. The proposed amendments mirror the provisions listed under section 256B of the Corporations Act, in order to clarify that the 'equal reduction' requirement is applied in a manner that is consistent with the policy objective of expanding the circumstances in which dividends may be paid to shareholders. For example, this ensures that shareholders who use dividend reinvestment plans remain within scope of the changes.

9. The proposed amendments further require directors to include details about the source of dividends paid and the company's dividend policy in the Annual Director's Report when paid out of sources other than profits. The additional reporting obligations are an important integrity measure and ensure that shareholders have the information they need about a company's dividend policy to make informed investment decisions. These reporting obligations are expected to impose no net increase in company compliance burdens, as they replace the current requirement for companies to formally seek shareholder approval by a resolution at the Annual General Meeting in order to distribute share capital.

10. The proposed amendments are not designed to change existing taxation arrangements.

Determining a company's financial year (section 323D)

11. Following legislative amendments in 2010, stakeholders raised concerns regarding the interaction between the operation of subsection 323D(2) and 323D(2A)(b).

12. Subsection 323D(2) requires entities to have a financial year of 12 month, or that is longer or shorter than 12 months by up to 7 days. Stakeholders were unclear whether, where an entity takes advantage of this provision, it would trigger the 5 year period in which an entity is precluded from applying the relief offered by section 323D(2A).

13. Similarly subsection 323D(3) requires an entity to synchronise its financial year end with its parent entity when it becomes a controlled entity. Stakeholders were unsure whether this provision triggered the 5 year period in which an entity is precluded from applying the relief offered by section 323D(2A).

14. The proposed amendment does not change the operation of the current law. However, it seeks to put beyond doubt that an entity that has synchronised its financial year as part of a consolidated group (for the purposes of section 323D(3) or section 323D(4)) is not precluded from being able to access the relief offered by section 323D(2A); and does not violate the condition provided for under paragraph 323(2A)(b). Such entities should be able to elect to determine that a subsequent financial year has a duration of less than 12 months – provided that the financial year synchronised met the requirements of section 323D(3) and 323D(4).

The audit appointment requirements of certain companies limited by guarantee (section 327)

15. In 2010, legislative amendments removed the need for certain companies limited by guarantee to have their financial reports audited. However, these companies are still required to appoint an auditor and fill vacancies in the auditor position.

16. A company that does not need to be audited will not need to appoint, or maintain, an auditor.

17. The proposed amendment exempts small companies limited by guarantee, and companies limited by guarantee that elect to have their accounts reviewed rather than audited, from the need to appoint or maintain an auditor.

Improving disclosure requirements in Remuneration Reports for disclosing entities (section 300A)

18. Section 300A of the *Corporations Act 2001* requires the directors' report of a listed entity to include a remuneration report for the key management personnel (KMP) to be set out in a separate and clearly identified section. Remuneration disclosure requirements allow shareholders to make an informed decision on the appropriate remuneration of senior management. While shareholders are entitled to quantitative information on remuneration, shareholders also require higher level information to assess the remuneration strategy of a company.

19. The proposed amendment reflects existing industry practice by requiring listed disclosing entities to include in the remuneration report a general description of their remuneration framework, to the extent that it is not included elsewhere in the annual report.

20. Sub-paragraph 300A(1)(e)(iv) of the Act requires disclosure of the value of options that were held by KMP but lapsed during the reporting year because a condition required for the options

to vest was not satisfied. Sub-paragraph 300A(1)(e)(vi) requires disclosure of the percentage of the value of the person's remuneration that consists of options.

21. Item 15 of the Corporations Regulations 2M.3.03 already requires disclosure of the number and value of any options that have been granted during the reporting period and the number of options that have vested during that period. Consequently the information required under the Act can already be deduced from the information required under the Regulations.

22. The proposed amendment will remove the requirement to report the value of lapsed options and the percentage value of remuneration consisting of options, and replaces this with a requirement to disclose the number of lapsed options and the year in which the lapsed options were granted. This reform is expected to provide information that is of more use to shareholders.

23. The current requirement to produce remuneration reports under Section 300A also extends to unlisted disclosing entities that are companies. The preparation of a remuneration report is less relevant for unlisted disclosing entities because they are not required to hold an annual general meeting, put their remuneration report to a non-binding resolution to shareholders for adoption of the remuneration report or be subject to the 'two-strikes' test.

24. Given its limited use by stakeholders, the proposed amendment will reduce compliance burdens for businesses by removing the requirement that unlisted disclosing entities prepare a remuneration report.

Amendments to the Australian Securities and Investments Commissions Act 2001 (ASIC Act)

Improve the efficiency of the Takeovers Panel

25. The Takeovers Panel is a peer review body that regulates corporate control transactions in widely held Australian entities. Panel members are appointed from the private sector, and generally hold senior roles in banks, law firms, and significant corporations.

26. Members of the Panel are currently unable to perform Panel functions while outside of the country. This can reduce the Panel's efficiency due to the need for panel members to travel to fulfil other professional obligations.

27. The proposed amendment will allow the Panel to perform its functions (eg. participate in teleconferences) while some members are overseas. This amendment will not however alter the substantive powers of the Panel and will only remove the geographical restriction on the exercise of existing powers.

Extend Remuneration Tribunal jurisdiction

28. Sections 235A, 236B(6), 236F(8), and 236F(9) of ASIC Act provide that the Minister is responsible for determining the terms and conditions of the offices held by the Chairs and Members of the Financial Reporting Council (FRC), and the Chairs of the Australian Accounting Standards Board (AASB) and the Auditing and Assurance Standards Board (AUASB). Sections 236B(6) and 236F(9) of the ASIC Act also provide that the FRC is responsible for determining the terms and conditions of the offices held by the Members of the AASB and the AUASB.

29. The Remuneration Tribunal is an independent, specialist body responsible for the remuneration setting of public offices within its jurisdiction. In January 2008, the Remuneration Tribunal

proposed that the Chairs and members of the three bodies be brought within the jurisdiction of the Remuneration Tribunal by amending current legislation.

30. The proposed amendment will bring responsibility for determining the remuneration of Chair and member positions of FRC, AASB and the AUASB into the Remuneration Tribunal's jurisdiction, to improve the efficiency and consistency of the remuneration-setting process.