KING&WOOD MALLESONS

Crowd-Sourced Equity Funding and Compliance Costs for Small Businesses

11 September 2015

To General Manager, Financial System and Services Division, The Treasury

From King & Wood Mallesons

Consultation Paper – crowd-sourced funding and reducing costs

This is a submission in response Federal Government's consultation paper ("**Consultation Paper**") released on 4 August 2015 on whether the Corporations Act 2001 (Cth) should be amended to reduce compliance costs and facilitate crowd-sourced equity funding ("**CSEF**") for proprietary companies.

We welcome the opportunity to comment on the Consultation Paper. It is crucial to support early-stage and growth companies and enable them to access the risk-capital they need rather than restrict it to traditional or private offerings.

Australia's legislative framework needs to be internationally competitive. Other jurisdictions will move swiftly to facilitate CSEF and reduce compliance costs. Australia has a window of opportunity to be a regional hub for start-up activity supported by innovative capital markets frameworks – but that opportunity may soon close.

In our submission:

- We support reducing the compliance burden on less active, small proprietary companies
- We like to see some greater transparency through technological solutions, for more active small proprietary companies
- We strongly support making capital raising more flexible, across the board and including for active small proprietary companies – but there are simple ways to achieve this
- We identify areas of the Corporations Act to be amended, and comment more generally on a new legislative framework.

Consideration also needs to be given as to the form of the legislative framework for reforms in this area. Like the start-up space itself, legislative reform needs to be capable of greater adaptability and flexibility to accommodate and respond to market developments over time. It is better to make use of ASIC class orders for specific requirements or regulations, to allow greater flexibility for revision, than primary legislation.

We've referred to "Chapters" and "Parts" and "Sections" of the Corporations Act in our submission.

Key observations

- **The proposed public company reforms by themselves will not create effective early-stage funding solutions for start-ups or ramp-ups.**
- **It is not an imperative to create true retail equity crowd-funding solutions for start-ups – the risk profile is wrong for unsophisticated retail investors**
- **There is a critical need to improve fundraising flexibility for proprietary companies.**
- **Public company regulation is not practicable and too expensive for start-up and ramp-up businesses. The reforms proposed to public company fundraising will have little practical impact.**
- **Recommendations:**
  - **Increase the shareholder limit** for proprietary companies to up to (at least) 200 shareholders, if not higher. The comparable threshold in the U.S. is 2000 shareholders.
  - **Remove the restriction on use of disclosure documents** (Offer Information Statements and Prospectuses) by proprietary companies.
  - **Significantly reduce the advertising restrictions** on offers of securities, provided relevant warnings are given.
  - **Increase the limits on the small offer exemption** ("20 / $2 million in 12 months"), eg to 50 investors and $5 million in 12 months.
  - **Permit Offer Information Statements** to be used more than once – they should be able to be used multiple times, for $5 million each time.
  - **Adapt the "sophisticated investor" test** to allow qualified, licensed crowd-funding platform providers and fund managers of angel and venture capital funds, to be permitted to assess whether investors are appropriately experienced to invest under prospectus exemptions.
  - **Provide investor education** about what protections to look for in an early stage investment. For example - transparency; participation rights that can provide an opportunity for dilution protection; safeguards regarding related party payments, distributions and excessive remuneration packages; technology protections; liquidity opportunities.
  - **Encourage use of suitable investment channels** that promote investor protections – for instance by raising investment limits for companies and investors using those channels. High quality, licensed gatekeepers can screen business for "investor readiness", can facilitate an investor composition that will support success, and screen out or limit exposure of less experienced investors.
  - **Facilitate provision of a national set of standard documentation** to reduce establishment and investment costs, provide some benchmarks for basic investor protections, and improve the quality of basic constituent documents. For example, a company constitution, shareholders agreement; series A subscription agreement; series B subscription agreement.
  - **Rethink the limitation of CSEF reforms** to offers of "ordinary shares" – it should at least address series A and series B convertible preference shares or convertible notes. The apparent simplicity of ordinary shares does not deliver retail investor protections – that is the least protected form of capital in a highly speculative investment.
  - **Rethink the way regulation adapts to the market** – new technologies and start-ups are developing their business models and offerings using lean methodology

Appropriateness of the shareholder limit

1 Should the law be amended to increase the permitted number of non-employee shareholders in a proprietary company and what would be an appropriate limit?

- Yes – the limit for proprietary companies should be increased to at least 100 shareholders. That would fit neatly with the “start” of enhanced disclosure obligations under Part 1.2A, and would deliver much-needed flexibility to proprietary companies.
- A more profound change, which would deliver better traction, would be to increase the limit to 200 shareholders. There would be no need to change the threshold for enhanced disclosure obligations – creating a balance between flexibility and obligation.
- For start-ups, more flexibility to raise capital using the proprietary company structure makes sense. Public company regulation is too great a step-up in obligations and costs.
- That flexibility does not have to be targeted at unsophisticated retail investors – unless they have some connection with the start-up, they are unlikely to be the right investor base for an early-stage business.
- However, there is no reason to strictly limit involvement of investors within the personal network of the start-up, or to limit involvement of sophisticated and professional investors.

Do companies with more than 50 non-employee shareholders have a sufficiently diverse ownership base with limited access to information or ability to influence the affairs of the company to justify the greater governance requirements currently placed on them?

- There are a lot of small proprietary companies that are used exclusively for “private” purposes. Once those are set up – it is hard to get up to date information about them, and we’re fine with that. It’s also fine when those are used within corporate groups, that report on a consolidated basis
- When small proprietary companies go looking for external investment, at the moment it is hard to get reliable information about them.
- If proprietary companies want to raise significant external investment – it makes sense to bring forward some reporting requirements to increase transparency, but tailored to early stage companies, once they reach a certain threshold.
- That should not require early conversion to a public company.

2 What are the benefits and risks? For example, would raising the limit expose risks to shareholder protection?

- Raising the limit of investors will not significantly increase the risks to shareholder protection.
- A key risk is a lack of information or transparency about small proprietary companies – there is plenty of information available for large proprietary companies.
- That “sliding scale” already exists – it could be readily adapted to a situation where a proprietary company raises significant external capital.
- Other risks include the lack of external audit or review – but that is unlikely to be of practical value until a company grows significantly, so the costs involved would impose a burden for no true benefit.
- The benefits are that a proprietary company structure has a reporting framework that can adapt better to an early-stage business – both in terms of simplicity, and cost.
- Better access to capital at an early stage, and better exposure to external investors at an early stage impacts more than just solvency and growth. It can drive early disciplines and good corporate practices that improve compliance cultures and better prepare a company for expansion of the business
- Being a proprietary company does not disrupt accountability principles – directors are still subject to directors’ duties, and other sources of director liability and accountability.

3 Have there been changes to market practice or the broader operating environment such that shareholders and investors now have greater access to management or information about a company's performance?

- Sophisticated investors will often use documentation similar to the United States "standard" venture capital documents that creates a level of transparency for private company investments.
- Technology is also transforming ease of access to company information. Companies use websites actively, and can easily make documents available and distribute documents.
- Regulators can also make basic information more readily available online, and can make lodging information easier and cheaper, to preserve investor access to information.

What are the ways by which management now remains accountable to shareholders or shareholders otherwise have access to information about a company?

- For private company investments – this is principally driven by contractual provisions negotiated at the point of investment.
- This is not practical for unsophisticated retail investors, but is typically driven by the involvement of more sophisticated investors and intermediaries as well as the availability of "sample" documents from various sources.
- At the moment, for unlisted companies – ASIC remains the primary source of corporate information.
- There is little information available from ASIC, past the point of incorporation, for small proprietary companies.
- There is more substantial information available, for a fee, from ASIC for large proprietary companies or unlisted disclosing entities.
- Credit checks can be run, but the results are often inconclusive.
- PPSR searches can also be run – these are comprehensive but can be baffling and clouded by mistakes in filings.
- Court searches can be run, but this is a cumbersome process and can be expensive.
- There are currently few, if any, service providers that offer comprehensive search services across all data sources – and search costs can mount up.
- However, all of these information sources may be transformed in coming years by greater availability of information from other sources or the entry of broader search service providers, as the extent of digitisation and democratisation of data increases.

4 If the shareholder limit were increased, how should the law treat public companies which become eligible to be registered as proprietary companies but have issued shares under a disclosure document?

- If they have just used an Offer Information Statement (i.e. this allows them to raise up to $5 million) – they should be able to opt to convert back to a proprietary company.
- If they have issued a prospectus – but have raised less than, for example, $15 million, they should be able to convert back to a proprietary company form.
- There should be a greater requirement for transparency and reporting for proprietary companies that have used a disclosure document to raise say $15 million – but it should not be too onerous. The reporting framework for "large" proprietary companies could be applied at an earlier stage, in those circumstances.

Small scale offerings and other exceptions to the disclosure requirements

5 Should the law be amended to increase the 20 investor limit and/or the $2 million cap? What would be an appropriate limit? Should the $2 million cap be linked to increase in line with the consumer price index (CPI)?

- Yes – it should be raised to at least 50 investors and $5 million in any 12 month period.
- That would allow start-ups and ramp-ups to use their personal networks
- The cap should not be linked to CPI increases – that is confusing, and the need to check the current limit creates cost. The cap should be set by regulation and refreshed from time to time.

6 What are the benefits and risks of increasing the 20 investor limit and/or the $2 million cap? Who would benefit or bear the risk? Could there be unintended consequences from altering these limits, for example in terms of the definition of a sophisticated investor?

- The risks are not great – it still requires a personal relationship or link between the company and the investor. The amount of capital is not that great – but it would assist with that critical early stage funding, using personal networks.
- The benefits are that it is flexible, low cost and allows start-ups to draw on support from personal networks at a stage in their life-cycle when the costs of raising small amounts of capital can be prohibitive.
- The sophisticated investor test is less relevant where there is a personal link.

7 Could other exceptions to the requirement to issue a disclosure document provide benefits to small proprietary companies if amended?

- Yes – greater flexibility to permit licensed intermediaries to assess the suitability of a sophisticated investor would greatly facilitate crowd-funding platforms, with quality controls and accountability through licensing structures and education.
- That would have the benefit of improving flexibility, without seeking to channel truly unsophisticated retail investors into risky early stage investments.
- While it is not an exception to the disclosure document requirements, greater use can also be made of the Offer Information Statement provisions – a simple form of disclosure document that is limited to use for the first $5 million. An Offer Information Statement should be able to be used at any time to raise further small tranches of capital.

Increasing flexibility in capital raising

8 Would increasing the shareholder limit for proprietary companies and/or expanding the small scale offerings exception to the disclosure requirements provide small proprietary companies with sufficient additional flexibility to raise capital?

- Those reforms would be critical, but should also include greater flexibility around assessment of "sophisticated investors" by suitably licensed intermediaries.
- These reforms should be accompanied by changes to the advertising restrictions. Reforms in the US now permit more flexibility around general solicitation.
- Pre-prospectus advertising rules are unduly restrictive, and the inclusion of simple warnings should be enough.
- The prohibition on proprietary companies using disclosure documents should be removed.
- Offer Information Statements should be able to be used more flexibility for small capital raisings.

Crowd-sourced equity funding

9 Should proprietary companies be able to access CSEF? What are the implications for the corporate law framework of permitting proprietary companies to do so?

- There is not a compelling case for small proprietary companies to access CSEF, if that means accessing an unsophisticated retail market. Early stage investments of this kind can often be highly speculative, with significant risk of failure.
- There appears to be no policy reason why large proprietary companies should not be able to access CSEF.
- The implications for the corporate law framework are that:
  - the limit of 50 non-employee shareholders would have to be varied to give CSEF any traction; and
  - the prohibition on use of a disclosure document would have to be removed.

10 If the shareholder limit is not changed for all proprietary companies, should proprietary companies be able to access CSEF?

- The CSEF reforms should be available to proprietary companies, but they are not the primary solution to early stage funding.
- They are helpful to promote some equality of access to opportunities for retail investors, but other reforms have to proceed in parallel.

If so, should the shareholder limit be changed specifically for proprietary companies using CSEF? What are the benefits and risks of this approach? Would the benefits outweigh the additional complexity of increasing the shareholder limit for a subset of proprietary companies?

- No – the change to the shareholder limit should not be weighted towards bringing unsophisticated retail investors into highly speculative investments. They may be better served by investing initially through funds that diversify the risk of their investment across a range of opportunities.
- It is important to change the shareholder limit across the board.

If the shareholder limit were to be increased only for proprietary companies using CSEF, is 100 non-employee shareholders an appropriate cap?

- It would be a good start – but it would be better to use a higher cap of at least 200 non-employee shareholders. If the proportion of unsophisticated retail investors is a concern – there could be a "staggered" cap of up to 100 retail investors, but a higher threshold for other investors.
- By comparison – in the United States – following the JOBS Act reforms, a company can have up to 2000 members (with no more than 499 of those being less sophisticated – not "accredited" – investors) before it has to become an SEC registrant (the equivalent, effectively, of becoming a public company).
- These changes would not have to be set in stone – they could be prescribed by regulation or class order which would permit greater flexibility to trial the higher limits.

11 Should any increase in the shareholder limit solely for proprietary companies using CSEF be temporary, based on time and size limits? What are the benefits and risks of this approach?

- No – that sort of complexity will only create cost and unintentional non-compliance. Better to keep it simple – it would not be out of line with the approach in the United States mentioned above.

If the increased shareholder limit is temporary, what arrangements should apply when a company is no longer eligible for the higher shareholder limit (owing either to the expiry of the time limit or exceeding the caps on company size)? Should it be required to convert to a

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public company? Or should it have the option to conform with the general proprietary company obligations, including the non-employee shareholder limit?

- No. Given the large proprietary company reporting obligations, there does not seem to be a real imperative to force conversion into a public company after a period of time, or if the company grows in size but does not exceed the increased limit on the number or shareholders.

  The public company structure is well suited to listed entities – it is appropriate that companies should convert in preparation for listing. However, prior to that time – the large proprietary company reporting obligations provide the appropriate balance between flexibility and investor protections.

12 If permitted to access CSEF, should proprietary companies using CSEF be subject to additional transparency obligations when raising funds via CSEF? Do you agree with the proposals for annual reporting and audit? Should these be implemented by requiring proprietary companies that have used CSEF to comply with the obligations of large proprietary companies? Should any other obligations apply? Given the Government has committed to introducing a CSEF framework for public companies that will include certain reporting exemptions, what are the benefits of permitting proprietary companies to use CSEF when they would be subject to additional transparency obligations? Do you agree that these obligations should be permanent?

- The proposed public company CSEF reforms provide marginal capital raising flexibility. If the cost of extending that limited form of flexibility to small proprietary companies is the immediate application of onerous reporting obligations, it is unlikely to be effective. There is little utility in applying those sort of obligations to start-ups that have very little to report on, so the costs will deter use of the exception and will not deliver meaningful investor protection.
- The large proprietary company audit requirements are well suited to a business that has started to grow in size and sophistication, and so they should start to apply once the proprietary company achieves some scale. For instance – we have suggested they could start to apply at the point where the company has raised around $5 million using disclosure documents.
- The current levels at which increased reporting requirements apply are appropriate. However, as a trade-off for greater flexibility in fundraising capability and increased shareholding limit - they could start to apply earlier once a company has raised, say, $15 million. Before that – the costs outweigh any benefit, and there is limited practical utility.

13 Do you consider that an annual fundraising cap of $5 million, and eligibility caps of $5 million in annual turnover and gross assets, are appropriate for proprietary companies using CSEF? If not, what do you consider would be appropriate fundraising caps and eligibility criteria?

- Those fundraising caps are too low – small businesses need support in the zone of raising up to around $25 million, not just the first $5 million.
- $5 million may be an appropriate limit for anything raised from retail investors using CSEF exemptions – as long as there is greater flexibility to raise more from sophisticated and professional investors.

14 Are there any other elements of the CSEF framework for public companies that should be amended if proprietary companies were permitted to use CSEF?

- The various limits need to have some consistency. The proposals for public companies seem too marginal to deliver any practical benefit, and the public company framework is not well suited to early-stage investment.
- It is also not clear whether the CSEF framework is proposed to be a form of disclosure document, or a prospectus exemption – that should be clarified.

- There is a need to increase the flexibility of the advertising restrictions, in particular prior to lodgement of a disclosure document. It is worth noting recent reforms in the United States increased flexibility around general solicitation. Our provisions need to be revisited.

Making an annual solvency resolution

15 Should the requirement to make a solvency resolution be removed or modified? Is there a more effective way to remind directors of their obligations? For example, would aligning the timing of the resolution with tax or other obligations with fixed timing reduce the regulatory burden?

- For a small proprietary company that does not incur debts, a solvency resolution is not necessary.
- However, if a proprietary company is incurring debts and raising money from external investors – this obligation needs to stay in place.
- It is important for directors of an active proprietary company to be required to make a solvency resolution every year, to remind them of their obligations. While there are significant issues with Australia's insolvent trading liability regime – it is still a good corporate discipline to consider the solvency position of the company, and the process of checking this position each year is useful. It should not require an audit or external review, but it does require some basic record keeping.
- Part of the trade-off for increased flexibility to raise capital as a proprietary company needs to be a framework that supports the development of appropriate reporting and risk management frameworks as a company grows, and a good understanding of core directors' duties.
- However it would be more effective to align the timing of the various administrative obligations.

16 [NA]

17 What is the value to directors of the annual solvency resolution in reminding them of their ongoing solvency obligations?

- See above – if the company is active, this is a useful discipline.
- It has no utility for an inactive company or a proprietary company that does not incur debts.

18 Would removing the requirement to make a solvency resolution be likely to increase rates of insolvency or business failure among small proprietary companies? Would unsecured creditors be exposed to increased risk? Are there other risks associated with removing the requirement?

Could the risks be mitigated adequately by ASIC reminding directors periodically (say, annually) of their duty to prevent insolvent trading by the company? Are there other ways to mitigate the risks?

- Signing a declaration does tend to focus a director's attention on an issue.
- It may not increase the overall numbers of companies that fail, but it serves a useful purpose in forcing a director to come to terms with a company's financial position earlier than they otherwise would.
- It is easy to let a bad situation drift, in the genuine (if overly optimistic) hope that things will improve, but we expect that a good proportion of directors will not want to make a false statement. There are useful learnings from behavioural science that can be drawn upon in assessing this issue.

Maintaining a share register

19 What is the extent of the burden imposed on small proprietary companies to establish and maintain a share register, in terms of time and/or financial cost?

- The burden is not significant in terms or time or cost, and it does not require special expertise.

- Having said that – anecdotal evidence suggests that there are poor levels of compliance with this obligation. It is often only addressed (and has to be corrected) when the shareholders wish to sell the business or seek external investment.
- There is little utility in addressing poor compliance for inactive or non-trading small proprietary companies. However, these obligations have to be maintained for any proprietary company that wishes to raise external capital.
- Technology solutions may assist, and would definitely improve transparency, but the "paper based" registers are not difficult to maintain.

20 What is the value to small proprietary companies of maintaining a share register? Would companies need to maintain similar records even if the law did not require them to?

- Maintaining a share register is the only way to keep track of the shareholding, and to prove title to shares and composition of the register. That is important if the company is sold, if other investors subscribe for shares, or if the company seeks external debt finance.
- As noted above, there could be an alternative of online registration for proprietary companies that wish to raise external capital.

21 Should the requirement to maintain a share register be removed for small proprietary companies with up to 20 shareholders, given that ASIC's records duplicate the information in the share register of such companies?

- There is no need to have a requirement for paper records at all where there is an electronic record available from ASIC. If ASIC's electronic record keeping requirements are extended – then there would be greater latitude to remove requirements to maintain paper records.
- However, paper registers are advantageous and flexible when completing mergers and acquisitions or other investments – they permit immediate updating of a register, at the time that documents and payments are exchanged.
- If paper based records are no longer required – there should be the option to use them (at least until an electronic register can be updated), or greater flexibility of access to electronic registers.
- It is not practicable to attend the Business Services Centres to file documents that are critical to completion processes – this process is inefficient and increases costs and administration.

22 If the requirement were removed for small proprietary companies with up to 20 shareholders:

How could share ownership be transferred? Could transfer take effect via a different mechanism, such as on notification to ASIC or on acknowledgment from the company?

How would shareholders be able to ascertain the identity of the other shareholders of a company? Would it be reasonable to require shareholders to obtain the information from ASIC (including paying the required fee)?

Are there other situations or circumstances where small proprietary companies with up to 20 shareholders need to have an up-to-date share register?

- See above – electronic records would be a suitable alternative only if there were improvements to access and immediacy of updating and amending those records. The current access arrangements and filing arrangements are not suitable.

23 Alternatively, should the requirement for small proprietary companies to maintain a share register be modified? If so, how? For example, should small proprietary companies with up to 20 shareholders continue to retain a share register but no longer be required to notify ASIC each time shareholder details change?

- It is important to have the ability to check ownership of companies, unless they are non-trading companies. Even then – if they hold assets – at some point checking title will become important, and it is important that public records are up to date.

- With technology improvements – it is no longer acceptable for ASIC records to be weeks (let alone months) out of date.

24 Would removing/modifying the requirement to maintain a share register be likely to increase the risk of minority shareholder or property rights disputes for small proprietary companies? Are there other risks associated with removing the requirement?

- This would increase the potential for disputes. It would also make transactions in the small business sector more difficult, which will increase costs.
- The effort that this measure would save is not worth the disruption it will cause.

Facilitating the execution of documents

25 Does the current law cause problems and/or increase compliance costs for sole director/no secretary companies and their counterparties in executing documents? What is the extent of the burden imposed on sole director/no secretary small proprietary companies in terms of time and/or financial cost?

- Yes – there is uncertainty about how documents can be executed under section 127, which does increase cost and certainly increases significant administrative inconvenience.
- Our detailed submission on this question is set out in our joint law firm submission with Allens, Ashurst, Herbert Smith Freehills and Norton Rose Fulbright.

26 Is it appropriate to amend the law to specify that a company with a sole director and no company secretary may execute a document without using a common seal if the document is signed by the director or with a company seal if the fixing of the seal is witnessed by the director?

Are there any risks associated with this approach? Are there any alternative approaches?

- Yes – increasing simplicity of execution is desirable. The risks here are negligible.
- For further comment – see the detailed joint submission referred to above (Q25).

27 Is there an issue regarding split execution? What is the extent of the burden imposed on small proprietary companies in terms of time and/or financial cost?

What are the benefits and risks of specifying in the law that split execution is acceptable?

- Yes – there is debate over whether split execution is permitted by s127 and this is a significant nuisance. It makes sense to permit split execution and clarify that it is acceptable. There are no obvious risks here that justify the extent of the administrative inconvenience and cost that this issue can cause.
- For further comment – see the detailed joint submission referred to above (Q25).

28 Is there an issue regarding the execution of deeds by foreign companies? What is the extent of the burden imposed on small proprietary companies in terms of time and/or financial cost?

Should the UK approach be adopted in the Corporations Act? Should a similar approach be taken to other bodies corporate? What are the benefits and risks?

- Yes – this is a significant issue, and increases transaction costs (including legal costs in both jurisdictions) administrative difficulty and delay. This issue is not limited to small proprietary companies – it affects the whole market.
- For further comment – see the detailed joint submission referred to above (Q25).

Completing and lodging forms with the regulator

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Other ways to reduce compliance costs

30 *[NA]*

Other areas for reform to reduce compliance costs and red-tape

There are numerous aspects of the Corporations Act that could sensibly be reformed to streamline corporate processes, improve efficiency and remove costs, without comprising investor protection or regulatory effectiveness.

These include:

For corporate meetings and resolutions

- a standard rule (not a replaceable rule) for unanimous written member / board resolutions of proprietary and public companies (not just for single member companies)
- a standard rule that a written resolution satisfies any requirement under the Act for a meeting, and satisfies any requirement for a notice of meeting
- a rule that permits “online” meetings or voting processes (eg an online direct voting process) that satisfies any requirement for a meeting
- reduce the minimum period for notice of a meeting to 14 days (in line with the UK)

For capital raising generally

- consider permitting placements made with a cleansing notice to be extended to existing retail shareholders
- where two contemporaneous capital raisings require separate cleansing notices (eg placement and SPP; placement and rights issue) – consider allowing the first cleansing notice to cover both raisings
- include a prospectus, licensing, advertising and on-sale exemption for all company incentive plans (for employees and directors) – whether share plans, performance rights plans, option plans, and whether through trusts, registered managed investment scheme or otherwise with disclosure requirements to be set by class order or regulation (replacing the need for the existing class order, and building it into the Act)
- permit offer information statements to be used for any capital raising up to $5 million – not just the 1st $5m, as noted in submissions above
- permit any proprietary company to be involved in something that requires a prospectus, as noted in submissions above

Company processes

- clarify that resolutions to change the name of a company can take effect at a time specified in the resolution (subject to ASIC approval)
- clarify that a “foreign company” is not a “company registered under this Act” (which would make it subject to the whole Act, which is not intended), despite the requirement to be registered as a “foreign company”
- clarify the dividend rules – these still cause companies to incur significant legal and accounting costs arising from the confusion surrounding the processes to permit a dividend to be paid out of capital. It should, at least, that a payment of a dividend out of capital is a valid reduction of capital (albeit not a frankable dividend) – or set clear parameters around any limits on that
- introduce some greater flexibility around equal access buy-backs and equal capital reductions for adaptation for sweeping up small residual holdings

Other areas in need of reform

- extend exemptions to financial assistance to permit the most common (and inoffensive) “whitewash” scenarios, routinely encountered in ordinary course banking arrangements for corporate groups and acquisition finance
- recognition of corporate groups for the “own intentions” exemption for insider trading offences
- permit electronic signature of documents, notices, application forms and resolutions
- revisit directors duties in insolvency to bring them more into line with the rest of the world, and create space to encourage directors to remain engaged to pursue reasonable work-out scenarios
- where amendments to the Corporations Act have been effected by longstanding class orders, that have been tested and accepted as suitable (eg correction of drafting anomalies; modification to permit accepted market practices like accelerated issuance) – institute a programme of bringing these into the legislation over time so that the Act reflects the complete text of the law.

All of these matters cause companies to incur needless costs wrestling with inefficient processes, seeking routine regulatory relief to address known problems, or working through ambiguities or needless complexity in the legislation.

We are making these submissions on behalf of our firm, and the views expressed are our own and not those of any of our clients.

We would welcome the opportunity to discuss these submissions with members of the Treasury. Please contact:

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if there are any queries arising from these submissions.

Yours faithfully

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