OWNERSHIP MATTERS

Suite 4, Level 5, 167 Queen St, Melbourne VIC 3000 **T** +61 3 9602 4548 **www.ownershipmatters.com.au**

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Market Conduct Division
The Treasury
Parkes ACT
Email: takeoversregulation@treasury.gov.au

Corporate control transactions in Australia

Dear Director,

Thank you for the opportunity to make a submission on corporate control transactions in Australia. Ownership Matters (OM), formed in 2011, is an Australian owned governance advisory firm serving institutional investors. This submission represents the views of OM and not those of our clients.

This submission will comment only on the discussion questions where OM considers its views to be relevant. Our comments, ordered to correspond with the discussion questions listed in the consultation paper, are as follows:

6. What are your views on expanding the Takeovers Panel's powers to include approval of members' schemes of arrangement? What form (if any) should such a power take? Should a separate regime be established for members' schemes of arrangement for the purposes of a change in corporate control?

> While not opposed to the expansion of the Takeovers Panel's powers to include approval of members' schemes of arrangement OM notes that the Takeovers Panel is a peer review body with part time members appointed who have experience in takeovers and in business generally. Panel members also have other commitments – they are often company directors, lawyers or capital markets practitioners. The Panel typically seeks to decide one-off and specific disputes in an expeditious way by focusing on commercial and policy issues as opposed to matters of law. By widening the Takeovers Panel's scope to include the power to approve schemes, consideration ought to be given to the individuals determining such approval and whether they have the knowledge required to assess scheme approvals which may involve assessment of various legal, evidentiary and conceptual matters. Consideration would also need to be given to the time commitment that Panel Members would need to be able to make to review and approve a scheme which would involve review of disclosure (including the Scheme Booklet) against the 'material information' standard. As flagged in the discussion paper, widening the Panel's duties and remit would likely require a wholesale restructure of its membership and its legislative framework as well as a substantial increase in its funding.

Codifying the regime for 'control' members' schemes of arrangement would provide an opportunity to remove the perception that one key reason why bidders, and their advisors, find schemes such an attractive mechanism for control transactions is the much lower shareholder approval threshold required to undertake compulsory acquisition when completing a takeover via scheme: As noted in the discussion paper, in order to compulsorily acquire shareholdings not supportive of a takeover bid, a formal takeover requires 90% of all shares to have accepted the offer while a scheme merely requires the assent of 75% of shares voted, a majority of shareholders voting and the Court's satisfaction the meeting was fairly conducted.

It is proper that corporate law should impose a high threshold for the compulsory acquisition of a person's property on terms they have not been willing to accept and the 90% threshold for compulsory acquisition in the current takeover law strikes an appropriate balance. By contrast, the 75% approval threshold for a scheme of arrangement allows for takeovers to occur with a much lower level of support – of the 37 control transactions undertaken via scheme over the period 2017 – 2021 in the S&P/ASX 300, turnout ranged from 47% - 90% (adjusted to remove shareholders required to vote in a separate class). Our current dual-track takeover regime explicitly invites a bidder with a supportive management team to structure a transaction as a scheme in order to ensure an 11% shareholder would be unable to block a takeover if as few as 35% of shares supported the transaction, despite an 11% shareholder being able to ensure a formal takeover would be unable to proceed to compulsory acquisition.

Codifying the regime for conducting takeovers through a scheme of arrangement would allow the approval threshold to be substantially increased, for example, to 90% of shares voted, alongside with a minimum turnout requirement, such as 50% of shares on issue and able to vote. Given advocates of schemes have long argued the lower approval threshold required is not the reason why schemes are used to effect takeovers, increasing the required approval threshold for a takeover to be conducted under a scheme would not reduce the attractiveness of schemes relative to takeovers.

At the very least, there is a public interest in removing the regulatory arbitrage between schemes and takeovers, such that the compulsory acquisition of private property occurs at the same high threshold for approval. Investors should be able to invest their capital with confidence that they cannot be transacted out of it at a lower threshold determined by an agreement between directors and their suitors.

13. What other policy options could improve the efficiency and reduce the cost of control transactions, whether by takeovers scheme of arrangement?

Any review of the regulatory framework surrounding control transactions in Australia should consider the efficacy of independent expert reports. These reports, which have become a de facto requirement for any control transaction in Australia, serve minimal purpose to shareholders as they almost without exception reinforce the views of the board. Making it clear that such reports are not required outside of the narrow circumstances envisaged in s.640 of the *Corporations Act* would reduce costs and should not reduce the information available to investors given Australia's continuous disclosure regime. We have attached a recent piece of research by OM reviewing recent recommendations by independent experts in control transactions

in S&P/ASX300 entities. Making it clear such reports are not required would reinforce the responsibility of company directors to justify to shareholders their acceptance or rejection of the price a bidder is willing to pay.

In prior submissions to Treasury consultations we have noted a number of pieces of 'low hanging fruit' in relation to reforming shareholder meeting processes (including those of scheme meetings) that are worthy of consideration. The Parliamentary Joint Committee on Corporations and Financial Services' Report: *Better shareholders – Better company - Shareholder engagement and participation in Australia, June 2008* contains a number of worthwhile recommendations relating to the absence of a fully electronic audit trail for the lodgment of proxy votes. If Treasury is taking the time to consider schemes of arrangement and scheme meetings OM believes that Treasury should ensure that the infrastructure is in place to ensure that shareholder votes are properly counted and audited on schemes of arrangement. There is widespread industry support for reforms to the "proxy vote" process and counting system.

OM believes that ASIC should also attend scheme meetings to act as a scrutineer of the conduct of scheme meetings. In Australia the chair of a shareholder meeting has virtually unfettered power in relation to the conduct of shareholder meetings, including scheme meetings. Given that scheme meetings can have significant value implications for various parties the conduct of the scheme meetings is very important. For example, at the securityholder meeting to determine the proposed merger of Westfield Retail Trust with the Australian and NZ business of Westfield Group through the creation of a new entity, the chair of Westfield Retail Trust adjourned the meeting despite proxy votes lodged ahead of the meeting indicating that the proposal was not going to be approved by the requisite majority. The proposal was subsequently narrowly approved at a later date following adjournment.

Please feel free to contact us concerning any aspect of our submission. For the avoidance of doubt we are happy for our submission to be made public.

Yours sincerely,

Dean Paatsch & Martin Lawrence

Ownership Matters Pty Ltd