



20 March 2013

General Manager
Corporations and Capital Markets Division
The Treasury
Langton Crescent
PARKES ACT 2600

Per email: corporations.amendments@treasury.gov.au

Dear Sir/Madam

Corporations Legislation Amendment (Remuneration Disclosures and Other Measures) Bill 2012

The Law Institute of Victoria (**LIV**) welcomes the Federal Government's initiative to amend the law relating to dividends and to address anomalies and unintended consequences of its operation, as proposed in the *Corporations Legislation Amendment (Remuneration Disclosures and Other Measures) Bill 2012 (the Bill)*.

However, the LIV is concerned that there may be some ramifications which may not have been addressed in the amendments proposed by Treasury and invites Treasury to give further consideration to those important matters set out below.

Dividends declaration and payment

The LIV notes that as explained in paragraph 1.16 of the Explanatory Memorandum, the provisions of Part 2J of the *Corporations Act 2001 (Act)* continue to apply under the new dividends tests. The LIV remains concerned about the need to comply with Part 2J of the Act, for the reasons set out in its submission to Treasury and ASIC on 5 September 2011.

The LIV, in the submission noted above, highlighted important practical consequences of the provisions as previously drafted in connection with group structures. The reference to "company" contained in section 254T of the Act means that the net asset position of each company must be considered separately when determining whether to declare a dividend, and that group accounts should not be relied upon.

Section 254T of the Act, as amended under the current proposal, supports the position that each company's net asset position must be positive before a dividend can be declared and paid. The LIV has concerns with this amendment as it means that where an otherwise profitable and cash flow positive subsidiary has a net asset deficiency due to, for example, loans from the parent company, those loans may need to be capitalised to facilitate a net asset positive position before a dividend can be declared.

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Remuneration disclosures

The LIV is concerned that the new remuneration disclosure requirements under the Bill may increase the reporting burdens on listed companies, and make the disclosure system much more complex.

The new requirements include disclosure of each of the following for each member of the key management personnel (**KMP**):

- Past pay – amounts granted before the start of the year and paid during the year;
- Present pay – amount granted and paid during the year; and
- Future pay – amounts granted but not yet paid during the year.

The LIV believes that this may lead to some confusion for shareholders as it will likely result in remuneration being reported twice or three times and may give the impression that members of KMP are earning a higher remuneration than what is actually the case.

The LIV is also concerned that the requirements do not clarify how to report matters such as equity grants that may or may not have crystallised yet which could result in inconsistent reporting practices between companies.

Termination payments disclosures

The LIV notes that the Bill proposes a requirement to disclose termination benefits paid to KMP and any post-termination arrangements such as consultancy agreements or paid restraints entered into with those departing KMP.

The LIV is of the understanding that listed companies already undertake similar practices. The LIV believes the introduction of such statutory provisions may not make much of a difference in practice but may increase the reporting requirements and administrative burden. for those companies which enter into 'gardening leave' arrangements with outgoing executives.

Clawback disclosures

The LIV notes that the clawback disclosure requirements included in the Bill require a company to make disclosures where there has been a material misstatement or omission in the company's accounts in the last three financial years. Where this has been the case, a company will need to disclose whether the clawback has been applied and if not, why not. The LIV further notes that discretion as to whether the Company introduces clawback measures remains with the Board. As the proposed provisions do not appear to provide any additional reporting burden, the LIV does not oppose the introduction of such statutory provisions.

If you would like to discuss any of the matters raised in this submission please do not hesitate to contact me or Angela Gidley, Commercial Law Section Lawyer, on (03) 9607 9382.

Yours sincerely,



Reynah Tang
President
Law Institute of Victoria