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Executive Remuneration Inquiry
Productivity Commission
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By email: exec_remuneration@pc.gov.au

Dear Sir

Discussion Draft Report – Executive Remuneration in Australia

This letter contains ASIC's submission to the Productivity Commission's Discussion Draft Report "Executive Remuneration in Australia" released for review and submissions on 30 September 2009 (*Draft Report*).

1. Draft Recommendation 14

- 1.1. This submission addresses Draft Recommendation 14, which provides that ASIC "should issue a public confirmation to companies that electronic voting is legally permissible without the need for constitutional amendments – as recommended in 2008 by the Parliamentary Joint Committee on Corporations and Financial Services" (*2008 PJC Inquiry*).
- 1.2. Draft Recommendation 14 does not directly replicate the recommendations made in the 2008 PJC Inquiry. In the *Better shareholders – Better Company Shareholder Engagement and Participation* report, the PJC recommended "ASIC should clarify that companies are permitted to receive proxy votes electronically where it is not provided for in the company constitution" (paragraph 4.14, Recommendation 12).

- 1.3. It is apparent the term 'electronic voting' refers to the *appointment and authorisation of proxies* by electronic means. ASIC believes that the appointment and authorisation of proxies is permitted currently by the *Corporations Act 2001 (the Act)* and in most cases can be implemented without a company needing to amend its constitution.

2. **Background – appointment of proxies by electronic means**

2.1 The Act provides for:

(a) Electronic authentication of proxy appointments for all companies.

Subsection 250A(1) of the Act provides that an appointment of a proxy may be authenticated by electronic means as prescribed in the Regulations.

Regulation 2G.2.01 prescribes two requirements:

- (a) a method of identifying a member; and
- (b) an indication of a member's approval of the information communicated in the proxy documents (authentication).

Regulation 2G.2.01 also prescribes further requirements that must be complied with if a member appoints a proxy by e-mail or Internet-based voting. That is the member must be identified by "personal details" (e.g. name, address, date of birth). It also requires that the member's approval of the information must be communicated by a form of "security protection" (e.g. a confidential identification number such as a shareholder registration number or holder identification number). We understand that some companies have met this requirement by giving a "bar code" for electronic authentication in the notice of meeting.

(b) The electronic receipt of proxy documents for all companies, if the notice of meeting specifies how electronic receipt may occur.

Subsection 250B(3) of the Act provides a company receives a proxy appointment or proxy appointment authority when the document is received at, among other things, an electronic address specified for the purpose in the notice of meeting, and if the notice of meeting specifies other electronic means by which a member may give the document, when the document given by those means is received by the company.

(c) In the case of listed companies, express authority that a notice of meeting may specify a method of electronic receipt of proxies, and, that if it does, the notice of meeting will override the company's constitution (to the extent of any inconsistency).

Subsection 250BA(1) of the Act provides that in a notice of meeting of members of a listed company, the company may specify an electronic address for the purposes of receipt of proxy appointments and proxy appointment authorities, and other electronic means by which a member may give the company a proxy appointment or proxy appointment authority.

- 2.2 The *Company Law Review Act 1998* (the **1998 Act**) introduced subsections 250A, 250B(3) and 250BA. Paragraph 3.13 of the Explanatory Memorandum to the *Company Law Review Bill 1997* provides that:

"To be effective, all proxy documents must be given or transmitted to the company at least 48 hours before the meeting, or in a shorter period set out in the company's constitution or the notice of meeting. Proxy documents will be able to be transmitted to the company if the company specifies a fax number or electronic address in the notice of meeting. "

ASIC considers the Explanatory Memorandum to the *Company Law Review Bill 1997* (which became the 1998 Act), makes it clear that Parliament's intention was that companies generally be permitted to receive proxy votes electronically, whether or not this is provided for in the company constitution.

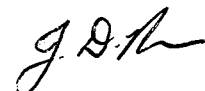
- 2.3 The above interpretation is consistent with the judicial approach taken in *Bisan Ltd v Cellante and Ors* (2002) 43 ACSR 322 which held (at paragraphs 23-24) "*the requirements of ss 249Y, 250A, 250B and 250BA of the Act would override any inconsistent provision in the corporate constitution.*"
- 2.4 ASIC notes that a number of companies already allow for electronic receipt of proxies.

3 Electronic voting facilitating the introduction of direct voting

- 3.1 The Draft Report noted that adoption of electronic proxy voting would facilitate the introduction of direct voting (section 11.6). In this context it is apparent 'direct voting' refers to *direct absentee voting by electronic means*.
- 3.2 ASIC supports the practice of direct voting in principle, and would be in favour of any legislative amendments that would facilitate its greater adoption in company meetings.

Please contact me on (03) 9280 3639 if you would like any further clarification on the matters above.

Yours sincerely



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