Law Council
OF AUSTRALIA
Business Law Section

Ms Melissa Liu
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Australian Securities and Investments Commission
Level 5, 100 Market Street
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Via email: melissa.liu@asic.gov.au

20 April 2015

Dear Ms Liu,

Consultation Paper 228, Collective Action by investors: Update to RG 128

We refer to ASIC's Consultation Paper 228 regarding ASIC updating its guidance on collective action by investors. The Corporations Committee of the Business Law Section of the Law Council of Australia (the **Committee**) welcomes the opportunity to comment on the Consultation Paper.

The Committee considers that ASIC's proposal to provide guidance in relation to the circumstances where collective action by investors is more or less likely to attract ASIC scrutiny is helpful and is likely to assist investors and advisors.

Submissions

B1 – We propose to update RG 128 to provide revised guidance on how the takeovers and substantial holding notice provisions apply to collective action by investors.

B1Q1: Do you agree with the approach we have taken? If you think that there is a preferable way of setting out our guidance, please suggest alternatives.

The Committee supports ASIC's approach of providing updated guidance. We suggest however that generally where the term "institutional investors" is used, it would be better (and less confusing, given proposed RG 128.20) to use "investors".

B2 – We propose to provide illustrative examples of conduct where collective action is unlikely (Table 1 of the draft updated RG 128) or more likely (Table 2 of the draft updated RG 128) to trigger an associate relationship or constitute entering into a relevant agreement resulting in the acquisition of a relevant interest.

B2Q1: Do you think that providing the illustrative examples in Table 1 and Table 2 of draft updated RG 128 is useful?

The Committee considers that providing illustrative examples is helpful. Ideally, the examples (and analysis) would be more detailed and extensive.

B2Q2: Do you agree with our inclusions and analysis in Table 1 and Table 2? Are there any other matters of practical guidance that should be included? Are there any matters that you think should be deleted? If so, please describe these matters and explain why you think they should be included or deleted.

In the first row of Table 1 we think it would be helpful to add that investors can discuss hypothetical circumstances and indicate what they would be currently minded to do in those circumstances, provided they stop short of reaching (or proposing to enter into) an understanding. We also query also whether the statement "as each investor is not bound to act in a certain way and retains its own discretion.." accurately identifies the key issue.

In the third row of Table 1 it is not clear to us why ASIC has included the qualification "usually in one-on-one or joint meetings … incentive schemes)". Presumably the third row is concerned with investors *collectively* making representations, in which case the crucial issue would appear to be whether they have a relevant agreement to act together in doing so.

In the first row of Table 2 we query whether the statement "It is also likely to be accompanied by an understanding … relevant interest" is necessarily correct. It is possible a shareholder could be willing to support consideration of an issue by the general meeting without finally deciding, or reaching an understanding with others, as to how to vote.

B3 – We propose to provide guidance on our approach to enforcement of the takeover and substantial holding provisions and taking action for unacceptable circumstances in the context of investor engagement: see draft updated RG 128.47–RG 128.52.

B3Q1: Do you find our proposed guidance useful? If not, why not?

It is not clear to the Committee that an assessment of whether collective action is "about good corporate governance only" provides an appropriate or sufficiently clear basis for determining that less scrutiny is required. Nothing in the Act suggests that the takeover laws or substantial holder disclosure requirements should be relaxed for those whose motives are to bring about good corporate governance. Such an approach might encourage persons seeking to increase their control to do so under cover of framing their demands in corporate governance terms. This is made easier by the fact that there is often room for considerable debate as to what constitutes "good corporate governance". The scope for corporate governance demands to be used for control purposes is illustrated by the way that the two strikes rule has encouraged activist use of non-binding votes on executive remuneration reports for collateral purposes.

A better approach, in our view, would be for ASIC to indicate that it is less likely to closely examine potential collective action where:

- it arises in the context of shareholders determining an issue, or raising an issue that can properly be determined, at a general meeting;

- the collective action involved is temporary, and is purely related to the resolution of that issue; and

- the collective action is not concerned with the acquisition of a substantial interest or the exercise of control and there is no ongoing undisclosed association between the shareholders involved.

The distinction in the draft Regulatory Guide between conduct that is less likely to attract ASIC scrutiny in RG 128.50 and conduct that is more likely to attract ASIC scrutiny in Table 3 is unclear in other respects also.

In Table 3 "Board control" is noted as conduct that may attract ASIC scrutiny. The text should perhaps make it clearer that the conduct with which ASIC is concerned is collective action to change the composition of the board to deliver control to new controllers. Seeking the appointment of a new independent director (with no connection with the shareholder) or indeed seeking to remove a director who is not performing are not matters that warrant ASIC scrutiny. Likewise, a request by an individual substantial shareholder (without collective action) for appropriate board representation should not attract scrutiny. It would also be helpful to clarify what is meant by the reference to "control transaction" in Table 3. If this contemplates joint bids, a cross-reference to RG 9 Part L should be added.

B4 – We propose to provide an overview of other legal considerations under the Corporations Act that can also arise in relation to investor engagement: see Section C of the draft updated RG 128.

B4Q1: Do you find the overview provided in Section C of the draft updated RG 128 useful?

Yes. However we suggest that:

- the section on confidential information avoid attempting to provide guidance re confidential discussions by a company with investors, beyond cross-referencing REP 393;

- a cross-reference to RG 25 be included in RG 128.68.

B5 – We propose to use the term 'collective action' to refer very broadly to a range of behaviour, including behaviour that is little more than investors being in contact with each other. This is consistent with the terminology in our existing RG 128.

B5Q1: Do you think that the term 'collective action' is understood in this broad sense by relevant users of this guide, or should we use terminology that has less of an implication that investors will be acting together for a common purpose? If the latter, what would be a better term or phrase to use?

We think ASIC's proposed used of "collective action" will be understood by users.

B6 – We propose to revoke the class order relief in [CO 00/455] because it appears that it is very rarely being used. Informal feedback received by ASIC suggests that institutional investors are not choosing to rely on the relief in the class order because: (a) institutional investors rarely seek to engage with companies at the meeting itself. Relevant investor engagement is usually done prior to or outside of meetings; and (b) the condition imposed in the class order to disclose details of the voting agreement to ASX is unpalatable.

B6Q1: Do you agree with our proposed revocation of [CO 00/455]? If not, why not?

We agree that the current form of CO 00/455 should be revoked.

B6Q2: Have you relied on the class order relief in [CO 00/455]? If yes, how often have you relied on the relief?

We are aware of a member of the Committee using the relief on one occasion. At the time, the Australian Securities Commission made it clear to that member that it was concerned to ensure that the institutional investors concerned in the collective action were not seeking to increase their control under the guise of a corporate governance issue.

B6Q3: Do you agree that institutional investors are reluctant to rely on the class order due to the reasons set out above?

The Committee believes that [CO 00/455] is not regularly relied upon because the conditions to which it is subject are not palatable to investors.

B6Q4: Are there any other reasons why institutional investors may be reluctant to rely on [CO 00/455]? For example, do you believe that institutional investors prefer to engage individually?

No to both questions.

B7 – We propose to not replace the class order relief in [CO 00/455] with another class order.

B7Q1: Do you consider any other ASIC class order relief would be desirable (either similar to [CO 00/455] or otherwise)? If so, please specify the possible scope and terms of such relief. For example, if class order relief for investors to collectively raise matters of corporate governance with the entity is desirable, how would 'corporate governance' be defined in the class order and on what terms would that relief be granted?

ASIC could consider class order relief to modify section 53, as applied to s12(2) by Regulation 1.0.18, to make the definition of "affairs" more tailored and relevant or to introduce exceptions (see eg Re National Foods Limited [2005] ATP 8 at [55]-[57]). Otherwise, we do not consider that other class order relief is desirable or necessary. For the reasons given in our response to B3Q1, we think the definition of "corporate governance" would be problematic.

B7Q2: Are there other steps we could take to facilitate investor engagement?

ASIC could facilitate (or encourage the government to facilitate) completion of CAMAC's unfinished work in relation to AGMs and shareholder engagement.

B8 – We propose to indicate that we may grant individual relief where the nature of the conduct is not concerned with the acquisition of a substantial interest in or control over an entity: see draft updated RG 128.53–RG 128.55. Any relief granted is likely to require disclosure to the market.

B8Q1: Do you agree with our proposal? If not, why not?

We submit that paragraph RG 128.54 is unnecessarily restrictive and should be deleted.

We note for completeness that in RG 128.55 the last phrase should read "we consider that in most cases the benefits to the market outweigh the burden involved in disclosure".

B8Q2: Are there any circumstances under which institutional investors are likely to apply for individual relief to facilitate collective action? If so, please outline these circumstances. What conditions of relief would be appropriate in these circumstances?

The cost and delay involved in doing so will be a significant disincentive, which makes it difficult to predict the circumstances in which investors will be likely to take this step.

B8Q3: In what ways (if any) do engagement practices of members of managed investment schemes differ from that of shareholders of companies?

At least in the case of listed managed investment schemes and listed companies, we consider that the practices and issues are broadly similar.

Conclusion and further contact

The Corporations Committee would be pleased to discuss any aspect of this submission. Please contact the Chair of the Committee, Bruce Cowley, if you would like to discuss this submission.

Yours sincerely,

John Keeves, Chairman
Business Law Section