

20 April 2015

Melissa Liu
Lawyer, Corporations
Australian Securities and Investments Commission
Level 5, 100 Market Street
Sydney NSW 2000

Email: policy.submissions@asic.gov.au

Dear Melissa

Consultation Paper 228: Collective action by investors: Update to RG 128

The Australian Institute of Company Directors (AICD) welcomes the opportunity to make this submission with respect to Consultation Paper 228, *Collective action by investors: Update to RG 128* (CP 228).

The AICD is the nation's leading organisation for directors, dedicated to making a positive impact on society and the economy by promoting professional director education and excellence in corporate governance. We have a significant and diverse membership of more than 36,000 from across a wide range of industries, commerce, government, the professions, private and not-for-profit sectors.

We congratulate the Australian Securities and Investments Commission (ASIC) on what is, in our view, a balanced and clear update to the existing regulatory guide on collective action by investors. It is a sensible attempt to recognise that there is increasing engagement between investors and companies on a range of governance issues that should not be caught by the takeover and substantial holding provisions of the law.

We also make the following comments:

- It is possible that investors who engage in collective action that would be acceptable under the Regulatory Guide could still nonetheless be engaging in conduct that breaches the *Competition and Consumer Act 2010*. As such, we ask that consideration be given to including a reference to this fact in the introduction to the Regulatory Guide, noting that investors should also be considering whether their proposed collective action would breach the *Competition and Consumer Act*;
- The examples provided of the types of collective action that are likely or unlikely to constitute "acting as associates" under the takeovers provisions of the *Corporations Act 2001* are in our view clear and provide meaningful guidance to investors on how to appropriately navigate these provisions when acting in concert with others; and
- That said, while identifying examples of conduct that ASIC regards as "less likely" to be examined by ASIC as constituting potential collective action in paragraph RG 128.50 of the Regulatory Guide is helpful, it is unlikely to provide significant comfort to investors as there is still a risk that engaging in the conduct will nonetheless expose them to possible prosecution. We appreciate the reasons behind ASIC decision to withdraw its Class Order CO 00/455 given that it was rarely relied on by investors. However, we would encourage ASIC to consider issuing a new Class Order that extends relief to the types of conduct referred to in paragraph RG 128.50, but that does not impose conditions similar to those in the CO 00/455 which investors found unpalatable.

We hope that our comments will be of assistance to ASIC. Please do not hesitate to contact Senior Policy Advisor, Gemma Morgan if you would like to discuss.

Yours sincerely

JOHN BROGDEN
Managing Director & Chief Executive Officer