Law Council
OF AUSTRALIA

Business Law Section

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Kim Demarte
Senior Specialist – Mergers & Acquisitions
Corporations
Australian Securities and Investments Commission (ASIC)
Level 7, 120 Collins Street
MELBOURNE, VIC 3000

By email: stub.equity@asic.gov.au

Submission – Consultation Paper 312: Stub equity in control transactions

The Corporations Committee of the Business Law Section of the Law Council of Australia (the **Committee**) welcomes the opportunity to provide this submission in response to ASIC's Consultation Paper 312 in relation to stub equity in control transactions, and the proposed form of legislative instrument (**CP312**).

Key points

- The Committee is not supportive of this proposal.
- As it stands - the proposal in CP312 is likely to compromise investor protection, rather than enhancing it.
- The Committee does not often object to a proposal in its entirety, and the Committee appreciates the policy arguments in support of the proposal. However, in our view the practical ramifications of the reforms would mean that the balance of public interest would weigh against the proposal.
- The Committee believes that the proposed reforms would drive M&A structures offshore, losing the benefit of the application of Australian law, to the detriment of investors and potentially the Australian tax base, and businesses that provide ongoing services to the acquiring entities. There are examples in the past of offshore structures having been used.
- These reforms are proposed where there is a takeover / scheme process – which has offered its protections in terms of disclosure, and approval or acceptance thresholds. Investors are fully informed.
- Regulatory intervention / policy changes will not deter the shift towards private capital and take-privates will continue to occur. Take-privates are seeking (and pay for) greater flexibility, reduction in red tape and operational efficiencies.
- Retail should have the opportunity to participate in take-private transactions, and their potential for value creation – the policy argument for creating deterrents or obstacles to this is not clear.
- There is some concern as to whether this sort of reform should properly made by ASIC legislative instrument, rather than Parliament, given it removes longstanding exemptions.

Responses to specific feedback questions raised in CP312

#	ASIC Feedback Questions	Committee Response
B1Q1	Do you agree with our proposal to prevent offers of stub equity in proprietary companies to retail investors under the exemptions for control transactions? If not, why not?	We do not support this reform. However, we acknowledge some tension between the existing policy underpinning: • the restriction on proprietary companies being involved in an offer requiring a prospectus; and • the longstanding prospectus exemptions for *any* securities offered as consideration for a control transaction. We assume this reform seeks to reconcile the policy between these two provisions. However, we note that parliament has also permitted broad offers of securities in proprietary companies under the crowd-funding regime, so "policy consistency" is not necessarily compelling by itself. To the extent that this reform causes take-private transactions to exclude retail investors, or to use offshore entities rather than Australian companies, we believe that the balance of public interest does not support this reform.
B1Q2	Do you have any comments on the form of the proposed legislative instrument in so far as it modifies Ch 6D?	No.
B2Q1	Do you agree with our proposal to prevent offers of stub equity where the terms of the offer require that scrip to be held by a custodian or subject to an agreement that avoids: (a) the application of the takeover bid provisions in Ch 6 or the disclosing entity provisions in Pt 1.2A; or (b) the 50 non-employee shareholder limit in s113(1)? If not, why not?	We do not support this reform. See key points, above. We consider that it will have the result of driving M&A into offshore vehicles, which is to the detriment of Australian interests and is not, on balance, in the best interests of retail investors. The use of custodians and nominee entities where retail investors are involved offers important administrative efficiencies, and can enhance protections for that group of investors.

B2Q2	Should particular types of custodian arrangement or securityholder agreement be excluded from the proposal? If so, please explain why.	Nominees for ineligible foreign holders. Depositary nominees. Trading custodians (e.g. used as part of the trading platforms in foreign exchanges).
B2Q3	Are there any modifications to the proposal which may address unintended consequences of restricting the use of mandatory custodian arrangements and securityholder agreements in this way? Could these be addressed by including further modifications or individual relief?	No – the practical consequences of these reforms will be the loss of ongoing Australian-based business.
B2Q4	Do you have any other comments on the form of the proposed legislative instrument in so far as it modifies Ch 6?	No.

Representatives of the Committee would be willing to discuss these observations with ASIC, if that would be of assistance.

Please contact Shannon Finch, Chair of the Corporations Committee (or) in the first instance.

Yours sincerely,

Rebecca Maslen-Stannage
Chair, Business Law Section