CHARTERED SECRETARIES
AUSTRALIA

Keeping good companies

8 March 2001

Mr James Gerraty
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Dear Mr Gerraty,

EXPOSURE DRAFT
PROPOSED LISTING RULE AMENDMENTS - 1 JULY 2001

Chartered Secretaries Australia (CSA) welcomes the opportunity afforded by ASX to comment on the above Exposure Draft in this submission, which is available for publication if ASX so elects.

Section 1: New names for admission categories

As has been its practice in the past, CSA believes that ASX is the appropriate authority to determine criteria for entities seeking admission to the official list (ASX Listing). CSA therefore does not propose to comment on this section, beyond saying that it does not regard any of these proposals as being unreasonable.

Section 2: Procedural requirements

CSA is cautiously supportive of the proposal to introduce greater flexibility to the Listing Rules by the introduction of "Procedural Requirements". However, great care must be exercised in determining the balance to be struck between those matters of policy which require full consideration, appropriate exposure and executive consultation before changes can be considered, and those matters which are primarily technical or administrative in nature.

CSA members well remember the so-called "pre-Christmas amendments" which achieved considerable notoriety some years ago. Those changes were clearly fundamental, and a similar approach under the guise of an administrative change could in no way be countenanced in the future.

Any amendment in relation to procedural changes should only be made after sufficient notice - say three months. It is noted that procedural requirements may be changed in consultation, when appropriate, with an expert group of interested parties. CSA would be pleased to be part of that process.

Dealing with the specific examples in this exposure draft, CSA comments as follows:

Appendix / Listing Rule 1A, 1B, 1C (pages 22 to 58)

As these matters all relate to admission to the official list, CSA has no objection to their proposed treatment.

Listing Rules 2.7 and 2.8 (page 58)

CSA has previously recorded its concern that the procedures applicable to the quotation of additional securities are not to be regarded as a means by which ASX attempts to obtain additional undertakings or information that was not required at the time of listing. The need for this information to be included in the procedures has not, in CSA's opinion, been made out, and we believe that these Rules should remain subject to the normal consultative process.

Listing Rule 3.8A, 3.10 and 3.20 (pages 59 to 62)

Again the need to transfer this information to the procedures has not been made out. These comments apply equally to Appendices 3A and 3B (pages 62 to 70).

Listing Rule 4.7B and Appendix 4C (Pages 70 - 71 and 74 - 78)

Refer comments dealing with admission to the official list above.

Listing Rule 4.10.3 and Appendix 4A (pages 71 to 73)

CSA supports the transfer of this information to the Guidance Notes.

Chapter 5 (pages 78 to 90)

With the proposed transfer of mining reports to "procedures", it would seem logical to also transfer the JORC Code in Appendix 5A.

Chapters 6, 7 and 8 (pages 91 to 117)

CSA agrees that it is desirable that timetables provide maximum flexibility. It therefore has no objection, subject to appropriate notice before implementation, to these provisions being transferred to the Procedures.

Chapter 9 (pages 117 to 131)

CSA has no objections to these proposals.

Chapter 18 (pages 132 and 133)

A definition which reads "requirements set and published by ASX from time to time" potentially raises more problems than it solves. The method of publication should be set out in the Rule, and there should be a provision that allows a company to rely on a previous published procedure where it is reasonable to do so. In particular, there should be exemptions where companies are already committed to a corporate action, for example in the publication or printing of the Annual Report, Notice of Meeting, scheme or new issue document or other relevant material. This problem would in part be overcome by specifying that a minimum of three months (or 90 days) will elapse before the new procedure becomes operable.

Section 3: Continuous Disclosure

CSA welcomes the proposal to nominate a person to be responsible for communication with ASX, and is appreciative of the wording of the Notes on pages 140 and 143 where specific reference is made to the role of Company Secretaries. In some large companies there may be justification for more than one person being appointed.

With respect to proposed Listing Rule 4.10.21, the question must be asked whether such a statement will add anything of value to assist investors. CSA believes the emphasis should be on bringing such disclosures to the notice of investors more rapidly: in particular, through the wider use of websites. For the majority of companies within CSA's knowledge, the practices will include a reliance on Audit and other Committees of the Board, as well as regular in-house briefings and compliance certificates, matters which are already within the ambit of existing corporate governance statements.

CSA agrees with the comments at paragraph 3.18, where it is stated that guidance principles may be used as "window dressing" and this would also seem to be a risk with statements made in the Annual Report about practices and procedures for ensuring compliance with Listing Rules 3.1 and 15.7.

CSA would not recommend proceeding with this proposal, as it is suspected it will lead to a variety of general statements which, over time, will be more or less identical for every Company.

Section 4: Trusts

CSA has no comments on these proposals.

Section 5: Backdoor Listings

CSA has no objection to this proposal.

Section 6: Issues of securities to related parties

CSA fully supports the proposal to enable three year approval for the issue of securities to directors under employee incentive schemes. Rule 10.15A.7 requires a statement in the notice of meeting that additional persons who become entitled to participate after approval, will not participate until approval is granted at a subsequent AGM. This seems unduly restrictive, particularly where the new director merely replaces an existing director. In addition, further flexibility could be considered so that a new additional director could participate on the same terms as previously approved for existing participants.

Section 7: Securities trading by directors and employees

In CSA's opinion, this provision is unworkable, and must be rejected in its proposed form.

While CSA would encourage an alternative to the present position to allow a company to report participation in its own corporate actions on behalf of its directors, (new issues / DRP / shares acquired through reinvestment of periodic director's fees), a company should not be held responsible for information which was not within its knowledge, particularly within such a short time frame. If a director decides not to inform the company, or where a director was not even aware of the consequences of a change in his or her holding until later (such as on a testamentary disposition or acquisition by a trust without his or her knowledge), the obligation must always remain firmly with the director.

There appear to be no regulatory sanctions for failure to conform. The notice period of two days is also impractical - two days from when the Company becomes aware of a transaction would be more equitable in an appropriate situation.

Furthermore, CSA questions the right of ASX to subvert a provision of the Corporations Law which, without qualification, places the onus on the director. In our submission, the right to alienate a provision which is so clear and unambiguous, must always remain the responsibility of Parliament.

CSA seeks assurance from ASX that no action will be taken in this respect without further detailed consultation.

Appendix 4A, which is coupled with the above proposal, is of a different nature, and CSA raises no objections to it proceeding as a discrete addition to the list of corporate governance matters to be considered.

Section 8: Debt Issuers

CSA has no comment on these proposals.

Section 9 - New class of quoted securities

This is another proposal where CSA considers the case for an amendment has not been made out. Re Timor Sea Petroleum NL was an extreme case involving a Scheme of Arrangement, where ASIC involvement was a necessity. Here the way the proposed new warranty is worded, it could be inferred that ASIC's opinion must be sought as a condition precedent to every new issue, a position which ASIC itself would hardly seem likely to welcome. A warranty demands a very high standard of confidence. If a problem does exist in such a limited sense, it is the law which should be changed, not the Listing Rules.

Section 10: Miscellaneous

While a heading such as this may imply only minor amendments, it includes a proposal of fundamental significance which CSA cannot support.

This is the proposed amendment to Listing Rule 14.11.

CSA questions whether ASX has any empirical evidence, or undertaken any surveys, to justify its comments under paragraph 10.87, as on the contrary, many larger holders, especially nominee and institutional holders, do submit open proxies. An example is contained in the separate submission prepared by one of our members, which it is appropriate to set out in full to give a better understanding of current registry and voting procedures.

> "The following is a statement typically found in a Notice of Meeting.
>
> 'Shareholders who return their proxy forms but do not nominate the identity of their proxy will be taken to have appointed the chairman of the meeting as their proxy to vote on their behalf. If a proxy form is returned, but the nominated proxy does not attend the meeting, the chairman of the meeting will act in place of the nominated proxy and vote in accordance with any instructions. Proxy appointments in favour of the chairman of the meeting, the secretary or any director which do not contain a direction will be used to support the election or re-election of Directors as described in item 2 of this Notice of Meeting and in support of items 3, 4, 5 and 6 as described in this Notice.'
>
> Item 4 in this instance was a proposed increase in directors' fees and contained the voting exclusion statement required by the current Listing Rules.
>
> The wording on the proxy form likewise gave effect to the statement in the Notice of Meeting.

CSA believes that a discretionary proxy to the chairman of the meeting ought to be able to be voted by the chairman in such circumstance, ie where it is made perfectly clear in what way the shares the subject of the proxy will be voted. By following the instructions on the proxy form, perhaps by not naming a proxy and by ticking neither the "for" or "against" boxes, the shareholder has made a decision to appoint the chairman and knows exactly how the shares will be voted. If it is the ASX's view that the shareholder has not read and understood the consequences of completing the proxy form in that manner, what is the basis for that view?

CSA suspects that this is the reason behind the proposal and is given gravitas by the illogical nature of the proposed wording.

If the reason for disallowing the chairman from voting shares as an open proxy holder is because he is seen as having a conflict of interest, what is the rationale for allowing him to vote where the shareholder has, for example, ticked a box on the proxy form giving the chairman of the meeting a discretionary vote (i.e. a "specific" direction for a discretionary vote "indicated by some positive action by the person entitled to vote")? Does not the conflict still exist, or does it somehow no longer matter?

The commentary in the Exposure Draft notes that a number of chairmen feel placed "in an invidious position" by the rule carveout. CSA queries if they would feel so placed if the Notice of Meeting made it clear how they would vote open proxies. Was this the case in these instances?

CSA wonders if ASX is aware of the extent of the disenfranchisement which would result from the proposed rule change. In any event, CSA is of the view that the number of shareholders denied a vote is just as relevant, if not more so, than the number of votes not able to be cast. Shareholders would agree. Open proxies are typically submitted by very small security holders and so the potential disenfranchisement effect of the proposed amendment is considered to be minimal. One member company reports that, on a proposed increase in aggregate directors fees put to the shareholders last year, 10,600 shareholders (representing 82.5 million shares) submitted open proxies to the chairman on this item of business out of 25,000 total proxies received (439.6 million shares).

It is believed that this is a typical pattern of proxy voting, and highlights the importance of allowing such votes to be valid. The Listing Rules Simplification of August 1995 included the following draft carveout:

'However, the entity need not disregard a vote if it is cast by a person in the exercise of a written proxy of another person entitled to vote which contains clear instructions as to how the vote is to be exercised.'

CSA pointed out to ASX then the importance of discretionary proxies to the chairman of the meeting, and the mechanics of how these proxies fell to the chairman and queried if this constituted a "clear instruction". This led to the present carveout in rule 14.11.

What would be the ASX's view if the wording on the proxy form was changed such that if no person is named, an open proxy would fall to the company secretary. In a directors' fee resolution (for example) would the company secretary be "a person whose votes should be disregarded in ASX's opinion (rule 11.9.2)?"

It follows from the above, that contrary to comments in the Exposure Draft, many shareholders prefer to leave their vote to the discretion of the Chairman, and have confidence in the Chairman. To disenfranchise such shareholders is wrong. If a shareholder elects to accept the discretion of the Chairman, that is a reasoned judgement. It is then up to the Chairman to decide which way to vote such shares or to abstain.

In addition, ASX will be well aware of the provisions of Section 251AA(1) of the Corporations Law which require a company to give a statement of the proxy voting intentions. That section provides in part (the underlining is CSA's):

"A company must record in the minutes of a meeting, in respect of each resolution in the notice of meeting, the total number of proxy votes exercisable by all proxies validly appointed and:

(a) if the resolution is decided by a show of hands - the total number of proxy votes in respect of which the appointments specified that:

(i) the proxy is to vote for the resolution; and

(ii) the proxy is to vote against the resolution; and

(iii) the proxy is to abstain on the resolution; and

(iv) the proxy may vote at the proxy's discretion; and ….. "

Whatever view ASX may hold of the law, is it now asking companies to accept that for the purposes of calculating voting percentages, open proxies in these circumstances are not to be counted as votes at all? If not, and such votes have to be taken into account in determining the relevant percentages, it is conceivable that a situation might arise where it is impossible for a resolution to be passed. Assume a company with an issued capital of 100 million shares, of which 40 million shares are covered by proxies. If 12 million of those votes are open to the Chairman, then despite the holders concerned being supportive of the company, a special resolution will fail. If the number exceeds 20 million shares, an ordinary resolution will fail.

In this respect, the definition of Special Resolution in the Corporations Law, and particularly sub-paragraphs (a)(ii) and (b)(ii) and the words which have been underlined, is as follows:

"'special resolution' means:

(a) in relation to a company, a resolution:

(i) of which notice as set out in paragraph 249L(c) has been given; and

(ii) that has been passed by at least 75% of the votes cast by members entitled to vote on the resolution; or

(b) in relation to a registered scheme, a resolution:

(i) of which notice as set out in paragraph 252J(c) has been given; and

(ii) that has been passed by at least 75% of the votes cast by members entitled to vote on the resolution."

If the amendment proceeds, it should be made clear in the Rules that any shares excluded from being voted by virtue of the above provision have not been cast, and therefore shall not be taken into account in determining the relevant voting statistics. Furthermore, it should be made equally clear in the Rules that a company in such circumstances may contact the shareholder concerned upon receipt of the proxy to seek clarification of the voting intentions, which can be re-transmitted by electronic means or in writing without the need to execute a fresh proxy appointment.

Based on American precedents with respect to voting abstentions, which CSA will gladly make available to ASX, it is believed that if this amendment is adopted, there is a real risk it will lead to litigation if a situation arises where the disqualified votes, if counted, would have resulted in a different decision from the one reached at the meeting, either on a show of hands or on a poll.

Other miscellaneous amendments

CSA agrees with the expanded method of giving annual reports to the ASX and the changes proposed in relation to incentive schemes.

Changes suggested by CSA

There is an inconsistency in Listing Rule 15.13A.1 in that the Listing Rule permits the sale of a non-marketable parcel of shares created after 1 September 1999. However, that relates only to the creation of a new holding. The Listing Rule does not permit the sale of a non-marketable parcel created by the transfer of shares from an existing holding which has the effect that a non-marketable parcel remains. It is suggested that Listing Rule 15.13A.1 be amended to read as follows: "The divestment provision only applies to securities to a holding that becomes a non-marketable parcel, whether as a result of a transfer to or a transfer from that holding of a parcel of securities. However, the provisions must not apply to a non-marketable parcel created before 1 September 1999.".

CSA would also appreciate the opportunity to discuss the timetabling issue for the nomination of directors under Listing Rule 14.3, before finalisation of the current amendments to the Listing Rules.

With the increasing trend of shareholder nominations to a wide variety of companies, including many which are most successful, together with longer notice period for AGMs and longer printing times for large share registers, the existing nomination notice period is too short. A recent case was that of CBA, where it was required to print an addendum to the notice of AGM and alter the proxy form at the last minute, all of which was a significant additional cost to shareholders. Had the notice of meeting been despatched earlier to allow shareholders additional time to consider the issues involved, it would have required a second mailing. This is contrary to the advocates of early advice, as it forces a company to delay its mailing until the cut off point has passed.

In the opinion of CSA, a nomination notice period of two months would overcome this problem and this would also give a logical alignment with the period under the Corporations Law for the putting of a resolution under Section 249(O).

The decision to nominate a director would seem to not be a spur of the moment matter, and those wishing to nominate would not be disadvantaged by adding about 8 business days to the current 35 business day period.

Please do not hesitate to contact me if you would like to discuss any of these points in more detail.

Yours sincerely

Ian L Falconer
CHAIRMAN
Legislation Review Committee
Chartered Secretaries Australia