

The Manager  
Corporate Reporting and Accountability Unit  
Corporations and Capital Markets Division  
The Treasury  
Langton Crescent  
PARKES, ACT 2000

7 February 2012

Dear Sir/Madam

## **Discussion Paper - Proposed Amendments to the Corporations Act**

Deloitte Touche Tohmatsu (“Deloitte”) is pleased to respond to the Treasury’s discussion paper on Proposed Amendments to the Corporations Act (the “DP”). We are supportive of the proposed amendments to the Corporations Act to address some of the issues that have arisen as a result of the amendments which were made in 2010.

### **Test for payment of dividends**

In our response dated 3 February 2010, to the Corporations Amendment (Corporate Reporting Reforms) Bill 2000, we expressed our support for the repeal of the “profits test” and its replacement with a “solvency test”, as it minimises the impact on an entity’s ability to pay dividends when there are changes in accounting standards, unlike the profits test which can be significantly impacted by such changes.

We note that option 2, as set out in the DP, whilst described as a solvency test, includes a requirement that the company’s assets must exceed its liabilities after the dividend is declared. We do not believe that this is necessary, and whilst assets are an indicator of solvency, there are instances where assets may be less than liabilities due to the constraints of the financial reporting framework which may not allow assets to be carried at fair value. We believe that when declaring dividends directors will consider the assets as part of the solvency assessment.

In our view, the solvency assessment should occur at the time that the directors declare/determine that a dividend will be payable and at the time that the payment is made.

### **Other Corporations Act issues in respect of the dividends test**

#### *Use of ‘declared’*

To the extent possible the Corporations Act should use terminology which is consistent with current practice, which is that directors determine that a dividend will be paid.

If the Act is amended to use the word “determine” then consequential amendments may be required to section 588G (1A).

## *Capital maintenance requirements*

There would appear to be confusion about the inter-relationship between section 254T of the Corporations Act and the capital maintenance provisions of the Act. We consider that a legislative amendment is needed to clarify that satisfying the test for paying a dividend in section 254T is a circumstance where a reduction in capital is “otherwise authorised” by the law.

## *Taxation issues*

In our response dated 3 February 2010, we noted the explanatory material stated that it was envisaged that minor consequential amendments may be required to the income tax law to ensure there was no change to the taxing arrangements as a result of the reforms.

As noted in the DP, some stakeholders have raised concerns about uncertainty that exists amongst the Australian business community in relation to dividend payments and whether or not they are capable of being franked for tax law purposes.

Notwithstanding the issuance of Draft Taxation Ruling TR2011/D8, there are continued concerns that the adoption of a solvency test, which we support, for the payment of dividends will continue to give rise to concerns as whether or not they can be franked.

We encourage co-operation within Treasury to ensure that taxation laws do not act as a disincentive for the payment of dividends by entities.

## **Other amendments**

### *Parent entity reporting requirements*

As noted in the DP, the issuance of Class Order CO 10/654 by ASIC was an interim measure, to allow entities who had regulatory or contractual obligations to include parent entity financial statements in the financial report and to relieve them of the requirement to present the summary parent entity information required by regulation 2M.3.01 of the Corporations Regulations.

We are supportive of amending subsection 295(2) to restore the ability of a company, registered scheme or disclosing entity that is required to present consolidated financial statements to also include parent entity financial statements as part of its financial report and to relieve them of the requirement to present the summary parent entity information.

A further issue that has arisen with respect to section 295 of the Corporations Act is its application to non-reporting entities. It is unclear if they are able to avail of the relief provided with respect to the preparation of parent entity financial statements where they prepare consolidated financial statements. The issue relates to the wording of section 295(2)(b) of the Corporations Act which links the preparation of consolidated financial statements to the requirements in the accounting standards. The relevant accounting standard is AASB 127 *Consolidated and Separate Financial Statements*, which states that consolidated financial statements are only prepared by reporting entities. This causes an issue for non-reporting entities who choose to prepare consolidated financial statements and would like to rely on the relief provided to reporting entities.

As Treasury seeks to clarify section 295(2) in respect of reporting entities we believe that it would be beneficial to also clarify the requirements, and relief available, for non-reporting entities. We recommend that non-reporting entities be allowed to rely on the relief provided and be required to disclose the additional parent entity information in the notes.

## *Changing the financial year of a company*

We agree with the proposed amendment in order to correct the inconsistency with subsection 323D(2).

We recommend that Treasury also review the requirements in 323D(3). We believe that there also needs to be an amendment to allow for entities who have changed their year end, to synchronise with that of their parent entity in accordance with section 323D(3), to change their year end again within a 5 year period in the event that the parent changes its year end.

## **Comments on other issues not addressed in the discussion paper**

### *Companies limited by guarantee*

Tier 1 companies limited by guarantee are no longer required to prepare a financial report however, section 327B requires all public companies, of which companies limited by guarantee are a subset, to appoint an auditor. We recommend that Treasury address this inconsistency. Furthermore, it is unclear whether the individual appointed under section 324BE, who is deemed to be a registered company auditor for the purpose of conducting a review of the financial report of a company limited by guarantee, is also deemed to be the auditor for the purpose of section 327B. Again, we encourage Treasury to clarify this.

If you have any questions concerning our comments please do not hesitate to contact me on 02 932 2 7288.

Yours sincerely

Caithlin Mc Cabe  
Partner  
Deloitte Touche Tohmatsu