

The Manager
Corporate Reporting and Accountability Unit
Corporations and Capital Markets Division
Australian Registry

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By email

[type address]

corporatereportingreforms@treasury.gov.au

cc: nfpreform@treasury.gov.au

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Submission on proposed amendments to the Corporations Act

The discussion paper on the proposed amendments to the Corporations Act arising from the *Corporations Amendment (Corporate Reporting Reform) Act 2010* (the **Reform Act**) notes that among the amendments made by the Reform Act were 'substantive changes to the reporting and auditing requirements applicable to companies limited by guarantee'.

The Treasury discussion paper has arisen out of calls by some stakeholders for changes to a number of the amendments made by the Reform Act.

I note that I have raised the following concerns in relation to the amendments to the Reform Act. These are not covered in the discussion paper but if, as a result of this discussion paper there will be further amendments to the Corporations Act, these amendments should be included.

I understand that as part of the not-for-profit reform agenda, a review is being conducted of companies limited by guarantee as a suitable structure for not-for-profits. I support this review and understand that as a result of the review there may be a number of changes to different aspects of the regulation of companies limited by guarantee as well as a transference of the regulator to the Australian Charities and Not-For-Profit Commission (**ACNC**). However, the issues raised by the Reform Act are causing difficulties in operation currently and could easily be amended in the proposed amending legislation, arising from this discussion paper.

Previously identified amendments required

The amendments requested are:

- 1 amendment to section 327A and subsequent sections to clarify that small companies limited by guarantee do not need to appoint an auditor. The current section 292 only provides that the rest of Part 2M.3 does not apply to small companies limited by guarantee, however the requirement to appoint an auditor is in part 2M.4
- 2 Small companies limited by guarantee should not be required to have annual general meetings where there are no agenda items. This requirement is nonsensical regulation causing unnecessary expenses to small companies limited by guarantee, if there are no agenda items and no financial statements for discussion by the members. However, I note that no amendment will be required to the AGM requirements for small companies limited by guarantee

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which are registered entities with the ACNC, if section 292(3) and section 293-294B of the *Corporations Act* are amended to reflect the requirements in the *ACNC Bill*. If no amendments are made, and the *ACNC Bill* is passed, small companies limited by guarantee will be required to prepare financial statements under the *ACNC Act* (appoint an auditor under the *Corporations Act* who will not be required to look at the financial statements as none will be required under the *Corporations Act*), lodge financial information with the ACNC but not be required to provide those financial statements to its members or ASIC or provide members with an opportunity to discuss the financial statements at the AGM.

- 3 Part 2M.4 provides detailed requirements as to the timing auditors must be appointed but does not cover the specific situation of companies limited by guarantee moving between categories ie moving during the financial year from revenue of less than \$1 million (a category 2 company or medium registered entity as it is referred to in the *ACNC Bill*) which only requires a review by an auditor that does not need to be a 'registered company auditor', to a category 3 company with revenue over \$1 million which requires all the usual auditing requirements. We suggest these requirements are inserted.
- 4 My submission on the Reform Bill of 2 February 2010 also referred to issues relating to the content of the Directors' Report. These issues appear to have been addressed in the *ACNC Bill* and I understand that the ACNC reporting requirements will be sufficient and acceptable to ASIC and therefore replace the current requirements in the *Corporations Act* applying to companies limited by guarantee which are also registered entities under the ACNC Act. If not, then these issues concerning the Directors' Report will require amendment.

Payment of dividends by companies limited by guarantee

We also request Treasury review and clarify a possibly unintended consequence of the transitional provision in section 1510B(1A) which states the restriction in section 254SA prohibiting companies limited by guarantee from paying dividends to its members only applies to companies limited by guarantee incorporated on or after 28 June 2010.

This appears to enable companies limited by guarantee incorporated prior to this date to amend their constitutions to allow the payment of dividends. In other words, a not-for-profit company limited by guarantee can amend their constitution to pay dividends, provided it was incorporated prior to 28 June 2010. I believe the intention of inserting the transitional provision in section 1510B(1A) was to enable companies limited by guarantee which were in existence at 28 June 2010 and which were able by virtue of their constitutions to pay dividends to their members, to continue to do so. I do not believe the intention was to enable previously not-for-profit companies limited by guarantee whose constitutions did not allow the payments of dividends to its members, to be able to amend the constitution to remove the not-for-profit requirement.

Yours sincerely

Alice Macdougall

Special Counsel

Freehills

+61 3 9288 1337

[type mobile number]

alice.macdougall@freehills.com

[type author name]

[type position]

[type brand]

[type phone number]

[type mobile number]

[type email address]