RSM! Bird Cameron
Chartered Accountants

RSM Bird Cameron
Level 12, 60 Castlereagh Street Sydney NSW 2000
GPO Box 5138 Sydney NSW 2001
T +61 2 9233 8933 **F** +61 2 9233 8521
www.rsmi.com.au

30 January 2012

Manager, Corporate Reporting and Accountability Unit
Corporations and Capital Markets Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: corporatereportingreforms@treasury.gov.au

Dear Sir

Discussion Paper: Proposed Amendments to the Corporations Act

RSM Bird Cameron appreciates the opportunity to make this submission to Treasury as part of the process of public consultation on a number of proposed amendments to the Corporations Act 2001.

We strongly support Treasury's continued consultation in this area, particularly with reference to issues surrounding dividend payment tests.

Test for Payment of Dividends

Our preference, of the options provided in the discussion paper, is for the implementation of Option 2, being a solvency test. Our reasons for this preference are based on deficiencies in the other options which we perceive to be as follows:

Option 1 – Retain section 254T as currently drafted

The main concerns we have seen in practice as a result of the current s254T requirement is the link to accounting standards, particularly for small proprietary companies who do not prepare financial statements in accordance with the Corporations Act 2001. The requirement to determine net assets in accordance with accounting standards adds complexity and costs to these entities in determining whether a dividend can be paid. Similarly, the issues that have been raised by a number of law firms with regard to the distinction between dividends and capital returns has also resulted in uncertainty for companies as to whether dividends may be deemed as unlawful capital returns if challenged under the Corporations Act 2001.

Liability limited by a scheme approved under Professional Standards Legislation

Birdanco Nominees Pty Ltd ABN 33 009 321 377 Practising as RSM Bird Cameron ABN 65 319 382 479

Major Offices in: Perth, Sydney, Melbourne, Adelaide and Canberra

RSM Bird Cameron is an independent member firm of RSM International, an affiliation of independent accounting and consulting firms. RSM International is the name given to a network of independent accounting and consulting firms each of which practices in its own right. RSM International does not exist in any jurisdiction as a separate legal entity.

Option 3 – Reinstating the profits-based test

The concerns with the previous profits-based test were also based on the link to accounting standards, particularly in an IFRS environment, and the lack of definition of profits in the legislation. This created uncertainty for companies as to how the test should be applied in practice, with most companies relying on case law for clarity around the requirements. We are also of the view that linking dividends to profits caused the focus to be on how profit is defined rather than also considering the overriding requirement for directors to consider the solvency of the company when declaring a dividend.

Option 4 – Allowing companies to choose from 2 alternatives

We do not support this option as it would create inconsistencies in practice between companies and also retain the deficiencies of options 1 and 3 by retaining the link to accounting standards (option 1) and the issues surrounding the distinction between capital returns and dividends (option 3).

Option 2, on the other hand has a number of benefits which we believe make it the most viable option. Firstly, consistency with New Zealand practice would be of benefit in the current standard setting environment of Trans-Tasman convergence. More importantly, this test would take away the burden placed on companies who are not required to prepare financial statements from essentially having to do so to determine if they can legally pay a dividend. We also support the removal of the link to accounting standards by linking net assets to either financial statements or accounting records.

The use of management style accounts does bring challenges of its own, however, and we encourage Treasury to consider some guidance around the use of such records, for example, that they must be prepared in a timely manner before the declaration. We also believe this would be a good opportunity for considering the need for education of directors in relation to solvency as this is an area where they may be uncertainty in practice. Further consultation will be required as to any implementation guidance to support changes to the legislation.

The solvency test also achieves consistency with the test for reductions of capital under s256B of the Corporations Act 2001. We do believe however that clarity is required around the interrelationship between the two sections of the Corporations Act which we discuss further below.

Other Corporations Act issues in respect of the dividends test

Use of 'declared'

We agree that clarity is required around the use of the terms 'declared' and 'determined' as this has caused a great deal of confusion in practice. We support bringing the terms used in sections 254T and 254U into line. Our view is that even if a solvency test is applied consideration should be given as to whether the use of the word declared in the suggested wording should be replaced with 'determined', or alternatively 'determined or declared'. If companies are determining dividends in practice, the use of the word 'declared' could be construed as implicitly requiring the declaration of a dividend.

Capital maintenance requirements

We believe that it is necessary for the legislation to clarify that paying a dividend under s254T is a circumstance 'otherwise authorised by the law'. Our reason for this is that when the law changed to the net assets test in 2010 there was a lot of discussion around whether dividends could be deemed to be unauthorised capital reductions. Most of the uncertainty arose from discussions in publications from the legal profession expressing that this may in fact be the case. As a result there is a great deal of uncertainty among companies as to whether a dividend can be legally paid where it would cause retained earnings to be negative but net assets are positive.

Application of test to group companies

We support a modification being made to the application of the dividends test to group companies as this is an area which currently causes significant uncertainty in practice.

Parent entity reporting requirements

We strongly support an amendment to the legislation to provide entities with an option to present parent entity financial statements within consolidated financial statements. We do not believe there should be any restriction on this option as it results in an entity providing information over and above that which is required by law.

We would also urge Treasury to consider addressing another issue which has caused uncertainty in practice. This relates to the application of s295(2) for entities preparing special purpose financial statements under the Corporations Act. Some commentators have expressed the view that entities who prepare special purpose financial statements cannot apply s295(2) as they interpret that such entities are not **required** to prepare consolidated financial statements. We believe that this is contrary to the intention of the legislation as it would not be logical to place a greater onus of disclosure on these entities who are entitled to provide reduced disclosures.

Changing the financial year of a company

We agree with the modification proposed by Treasury. However we would suggest consideration be given to introducing the amendment that was originally proposed in the 2010 amendments, that is that a company could change their year end without the approval of ASIC if it will not result in a period greater than 18 months. We believe the 2010 changes to the legislation have not served to reduce the regulatory burden on companies as it requires them to prepare financial statements for a 6 month period to effect the change or else to still obtain approval from ASIC. This increases the cost burden on companies, particularly in terms of additional audit costs. We believe that a longer period should be allowed for private companies at least.

Should you have any questions or wish to discuss any of our comments please contact me directly by email at jane.meade@rsmi.com.au or by phone on 02 8226 9518.

Yours sincerely

Jane Meade
National Technical Partner