UniSuper

28 October 2008

Manager, Market Integrity Unit
Corporations and Financial Services Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: shortsellingbill@treasury.gov.au

Dear Sir

Exposure Draft - Corporations Amendment (Short Selling) Bill 2008

We refer to the proposed legislation referred to above and wish to make the following submissions on behalf of UniSuper.

As you may be aware, UniSuper is the leading superannuation fund for employees in Australia's higher education and research sector. The fund has more than 435,000 members and $24 billion in assets (as at 30 June 2008), making it one of Australia's largest superannuation funds.

UniSuper is generally supportive of the Federal Government's proposal to improve the level of disclosure in relation to short selling. In contrast, we do not support the action taken by Australian Securities & Investments Commission to restrict covered short selling and have made separate submissions to that effect.

From the point of view of a large superannuation fund, we have three key concerns or comments with regard to the proposed legislation.

1. Superannuation funds appoint external investment management companies to invest portfolios on their behalf pursuant to discretionary mandates. Superannuation funds are therefore not involved in, and are unaware of, the decisions made by investment management companies to enter into particular transactions on their behalf, unless they make enquires after the event. That being the case, we consider that the disclosure obligation should be imposed on the investment management company or other financial services licensee that entered into the relevant transaction.

   If the disclosure obligation were to be imposed on the superannuation fund, the burden of monitoring every trade to identify any short sales would be onerous. Developing systems to ensure that disclosures are made would be an additional ongoing burden.

Fund: UniSuper
ABN 91 385 943 850

Trustee: UniSuper Limited
ABN 54 006 027 121

Administrator: UniSuper Management Pty Ltd
ABN 91 006 961 799
Australian Financial Services Licence No. 235907

Head Office
Level 37, 385 Bourke Street
Melbourne VIC 3000

Telephone 03 9910 6100
Facsimile 03 9910 6141

www.unisuper.com.au

Even if superannuation funds were to outsource the disclosure function to the investment manager, there would be an unfair risk of regulatory penalties being imposed on the superannuation fund in the event that one of its investment managers failed to make the necessary disclosure.

Even if a superannuation fund had not authorised any of its investment managers to engage in short selling, it is conceivable that an investment manager may enter into a transaction in breach of their mandate. It would be unfair for a superannuation fund to be penalised for breaching a disclosure obligation in circumstances where it had been reasonably assumed that there would be no short selling.

For these reasons, we strongly consider that the disclosure obligation should be imposed on the relevant investment manager or other financial services licensee in circumstances where they initiated the transaction, for example, pursuant to a discretionary mandate.

2. The investment managers used by superannuation funds manage separate portfolios of assets and are not aware of the securities comprising each other's portfolios.

   As a result, an investment manager will have no way of knowing whether or not a transaction that would constitute a short sale at the level of their portfolio is actually a short sale from the point of view of the superannuation fund. This is because a superannuation fund may have long positions in the same security in other portfolios managed by other managers. In the case of large superannuation funds, this is highly likely to be the case.

   We believe that the information that is relevant to the market is the level of short positions that particular investment managers are intending to create. That being the case, we consider that the legislation should clarify that the question of whether or not a transaction constitutes a short sale should be determined at the portfolio level rather than from the perspective of the underlying investor's total holding position. This is consistent with the submission above that the disclosure obligation should be imposed on the investment manager.

3. Many superannuation funds participate in securities lending programs in which they lend securities to other parties. Under these programs, securities that have been lent to third parties can be recalled at any time.

   It is conceivable that an investment manager appointed by a superannuation fund could enter into a transaction to sell particular securities that had been lent to third parties. This could occur quite frequently. However, the superannuation fund would be unaware of the transaction and unaware that the securities had been lent. The investment manager, on the other hand, would be aware of the transaction but unaware that the securities had been lent. The superannuation fund's custodian would ultimately be aware of both the transaction and the loan and would ensure that the relevant securities are recalled.

   In light of these information disadvantages and asymmetries, we strongly consider that there should be no disclosure obligation in relation to technical instances of covered short selling which occur when an investor with a long position sells the relevant securities while they are on loan. In this regard, we reiterate the onerous regulatory burdens that would be involved in complying with any obligation imposed on the superannuation fund.

We note that the Australian Securities & Investments Commission is sympathetic to this position and last month announced a no-action policy with regard to technical instances of covered short selling that occur in these circumstances during the period in which short selling is prohibited. The proposed legislation should provide for similar relief.

Except as indicated above, UniSuper supports the proposed legislation.

If you wish to discuss this submission further, please contact me on (03) 9910 6101 or David St. John, Chief Investment Officer on (03) 9910 6105.

Yours sincerely

Terry McCredden
Chief Executive Officer