Governance Institute of Australia

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Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

By email: economics.sen@aph.gov.au

Dear Senators

Corporations Legislation Amendment (Deregulatory and Other Measures) Bill 2014

Governance Institute of Australia (formerly Chartered Secretaries Australia) is the only independent professional association with a sole focus on the practice of governance. We provide the best education and support for practising chartered secretaries, governance advisers and risk managers to drive responsible performance in their organisations.

Our members are all involved in governance, corporate administration, risk management and compliance with the Corporations Act 2001 (the Act) with their primary responsibility being the development and implementation of governance and risk management frameworks in public listed and public unlisted companies, private companies, and not-for-profit organisations.

Support for the bill to repeal the 100-member rule

Our members strongly support the Corporations Legislation Amendment (Deregulatory and Other Measures) Bill 2014, which would repeal the rule allowing 100 members to requisition general meetings of companies (the 100-member rule) as set out in s 249D of the Act. Indeed, Governance Institute has been advocating for the repeal of s 249D of the Act for more than a decade.

In 2006 we led a coalition calling for the repeal of the 100-member rule. The coalition comprised our organisation, the Australian Institute of Company Directors, the Business Council of Australia, the Australian Shareholders' Association, the Investments and Financial Services Association (now the Financial Services Council), FINSIA, the Australasian Investor Relations Association and the Australian Employee Ownership Association. I have attached a copy of the coalition's letter to the then Parliamentary Secretary to the Treasurer, the Hon Chris Pearce MP. The coalition also wrote to the Attorney-General of each state and territory setting out our support for the repeal of the 100-member rule.

We also support the provision in the bill that allows for shareholders with five per cent of the votes that can be cast to requisition a general meeting.

We support the other measures set out in the bill, namely the relaxation of remuneration reporting requirements for unlisted reporting entities; the clarification of companies' ability to determine a financial year of less than 12 months; exempting certain companies limited by guarantee from the need to appoint an auditor; and clarifying the ability of members of the Takeovers Panel to work on the Panel while outside Australia and have no comment to make on these provisions.

Ongoing support for shareholder activism

It is often claimed that the repeal of the 100-member rule is intended to suppress shareholder activism. Governance Institute supports shareholder activism, which it believes is an essential component of corporate governance.

However, we are of the view that the opposition to the repeal of the 100-member rule often derives from a misunderstanding of the role of ss 249N(1)(b) and 249P(2)(b) in ensuring shareholders can bring matters to the attention of other members of the company at the annual general meeting (AGM).

Our members support shareholders being able to put issues on the agenda of an AGM and to instigate a debate at the meeting. This shareholder right is of particular importance to retail shareholders, who, unlike institutional investors, do not necessarily have the opportunity to meet with the company prior to the AGM.

We strongly support the retention of ss 249N(1)(b) and 249P(2)(b) that preserve the rights of shareholders (members) to use a 100-member test to put a resolution on the agenda of the AGM and request the company to distribute a statement to all its members. We believe these provisions protect the rights of small groups of members to have their concerns addressed, and that the continued support for the preservation of these rights is too often forgotten in the debate about the repeal of the 100-member rule.

Most resolutions put forward on the AGM agenda through the use of the 100 member rule in ss 249N(1)(b) and 249P(2)(b) have not been carried. However, the debate generated by such resolutions has been central to shareholder engagement with corporations, and Governance Institute strongly supports this.

It is important to confirm that the important shareholder rights set out in ss 249N(1)(b) and 249P(2)(b) will remain intact should the 100-member rule set out in s 249D be repealed.

The vexatious use of the 100-member rule in s 249D with attendant costs to shareholders

Governance Institute is opposed to the vexatious use of the 100-member rule in s 249D to call a general meeting (other than the AGM) at substantial cost to the company, *and therefore its shareholders*, when:

a) the avenue remains open of raising the issue of concern by placing a resolution on the agenda of the AGM and having statements relating to that resolution distributed to members at the cost of the company through the utilisation of ss 249N(1)(b) and 249P(1)(b), and
b) it has been noted by those who have called a general meeting (sometimes called an extraordinary general meeting, or EGM) that it is not expected that the resolutions put forward at the EGM will carry.

To subject corporations and their shareholders, the majority of whom are not expected to support the resolutions put forward at an EGM, to the expense of the meeting, is a mischief that we believe can be prevented through the repeal of the 100-member rule in s 249D.

We note that opposition to the proposed reform fails to comprehend that it is shareholders who bear the cost of the special meeting at which the resolutions put forward are not carried.

For example, Woolworths was forced to hold a general meeting to consider a resolution on $1 limits on poker machines. The meeting cost $500,000 to run but the resolution only received support from 2.5 per cent of the issued capital that was voted at the meeting (about 1.1% of the entire issued capital). Our members query how it can be anything other than vexatious to have 100 shareholders force a company such as Woolworths to call a special general meeting that had absolutely no chance of achieving anything other than costing shareholders significant sums of money.

We also support the provision in the bill that allows for shareholders with five per cent of the votes that can be cast to requisition a general meeting. This ensures that there is a level of shareholder support before other shareholders are subjected to the cost of a meeting.

The potential for abuse

The Parliamentary Joint Committee on Corporate and Financial Services in its report[1] on this matter clearly noted that, while there is little history of the rule being abused, its potential for abuse remains clear. Both political parties have noted that it is not necessary for parliament to wait until some quota of abuses is observed before reforming the provision. We firmly support this view.

Our members note that their companies at various times have been approached by special interest groups threatening the use of the 100-member rule in s 249D to call a general meeting unless the corporation negotiates with the special interest group on its particular issue. From our point of view, such a threat, with its attendant costs to shareholders despite the reality that any such resolution put forward by the special interest group would not be carried at the meeting nor receive the support of the majority of shareholders, constitutes mischief.

The threat of calling an EGM by splitting 100 shares, giving people one share each, then calling a meeting between annual meetings, toys with the company's profit and, consequently, the share price and dividend stream. It should be noted that these investors may not be on the register for the purpose of investing for gain but purely to gain access to the resources of the company to publicise their particular interests. Thus, it is shareholder return that is being threatened when the threat to invoke s 249D (the 100 member rule) is made.

Rationale against alternative proposals

We note that various groups have proposed alternatives to the 100-member rule. For example, the Australian Shareholders' Association has called for the Corporations Act to be amended so that only 10 signatures from shareholders with marketable shares are required for shareholders to place a resolution on the agenda of an AGM.

In support of their proposal, they cite the legal regime in the United States, which allows a single shareholder who has held $2,000 continuously over 12 months to put a resolution on the agenda at an AGM, and note that this is 'easier' than their proposal of 10 shareholders holding a marketable parcel of shares.

The US provision can only be understood within the full context of its legal regime governing shareholder rights (which are substantially fewer than those operating in Australia). The United States also has a very stringent and detailed 'no action' regime which allows companies to

[1] Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into the Exposure Draft of the Corporations Amendment Bill (No 2) 2005*, June 2005

reject proposals from shareholders for resolutions to go on the agenda at the AGM. The 'no action' regime is extremely bureaucratic and is administered by the Securities Exchange Commission (SEC). To adopt a similar regime in Australia would introduce a significant increase in regulatory costs for the government, which would be in direct opposition to the government's deregulatory objectives.

Under the laws in the United States, the company can disallow any proposed resolution to appoint an external board member or remove an existing board member. The company can also disallow proposals relating to the company' ordinary business operations and also disallow any proposal relating to a part of the business that accounts for less than five per cent of assets and revenue.

Even if a shareholder is able to surmount these obstacles, there are also detailed procedural provisions relating to the 'no action' regime — both for the shareholder (including having to lodge the proposal *120 days prior* to the meeting materials being sent out) and the company in question.

Governance Institute is of the view that the situation for shareholders in relation to their capacity to place resolutions on the agenda at an AGM is considerably more constrained in the United States than in Australia.

The attached letter from the coalition also clearly sets out the case against a square root rule, which has been proposed in the past.

Conclusion

Governance Institute supports the Corporations Legislation Amendment (Deregulatory and Other Measures) Bill 2014 which repeals the rule allowing 100 members to requisition general meetings of companies (the 100-member rule) as set out in s 249D of the Act.

Shareholders are not disempowered because the bill still allows for groups with five per cent of the votes that can be cast to requisition a general meeting — ensuring that there is a level of shareholder support before other shareholders are put to the cost of a general meeting.

Governance Institute also continues to strongly support the retention of the right of 100 members to raise issues of concern by placing a resolution on the agenda of the AGM and having statements relating to that resolution distributed to members at the cost of the company through the utilisation of ss 249N(1)(b) and 249P(1)(b).

Our support of the proposed repeal of the right of 100 members to call a general meeting utilising s 249D is based on the need to prevent mischief and the resultant considerable expense to which companies and their shareholders are subjected.

We would welcome the opportunity to meet and elaborate on these issues.

Yours sincerely

Tim Sheehy
Chief Executive