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Leaders in governance

27 September 2006

The Hon. Bob Debus, MP
Attorney General, Minister for the
Environment and Minister for the Arts
Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Mr Debus

Corporations Amendment Bill (No 1) 2006: '100-member rule' (s 249D)

The New South Wales State Council of Chartered Secretaries Australia (CSA) is concerned to know that NSW opposes the repeal of the rule in s 249D allowing 100 members to requisition general meetings of companies (the 100 member rule) and supports the introduction of a square root rule.

Square root rule

The New South Wales State Council of CSA remains firm in its belief that a square root rule is not feasible. We know that our view is supported by other organisations, such as Australian Shareholders' Association, Australian Institute of Company Directors, Investment and Financial Services Association of Australia, Australian Employee Ownership Association, FINSIA, Business Council of Australia and Australasian Investor Relations Association (the coalition for the repeal of the 100 member rule).

We note that such a provision does not exist in any other jurisdiction. Comparable jurisdictions employ a percentage test for shareholder-requisitioned general meetings:

- United Kingdom 10%
- USA 10%
- Canada 5%
- New Zealand 5%
- European jurisdictions between 5% and 20%.

A percentage test is simple and easy to understand. For example, there are difficulties attached to calculating a square-root rule for an investor based in another jurisdiction. Such a rule would disenfranchise shareholders, who could not look to the law in an any other jurisdiction for guidance as to their rights.

We would also like to point out that the utilisation of the square root rule will, in the majority of cases, have the unintended consequence of concentrating the power to call an extraordinary general meeting (EGM).

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Given that approximately 90 per cent of companies listed on the Australian stock exchange have fewer than 10,000 shareholders, the use of the square root rule means that the vast majority of companies will be subject to fewer than 100 members being able to call an EGM, perhaps as few as 22. The square root rule will therefore increase the likelihood of an EGM being called where there is little chance of carrying the resolutions.

While the New South Wales State Council of CSA supports a policy objective of ensuring that small groups of members can have their concerns addressed at general meetings (see our comments below on ss 249N(1)(b) and 249P(2)(b)), we do not believe that the square root rule will provide an outcome that is beneficial to shareholders generally.

Misunderstanding of the role of ss 249N(1)(b) and 249P(2)(b) in effecting shareholder rights

It is important not to overlook the fact that we, and all other parties who have advocated for this reform for many years, support the retention of ss 249N(1)(b) and 249P(2)(b) that preserve the rights of members to use a 100-member test to put a resolution on the agenda of the Annual General Meeting (AGM) and request the company to distribute a statement to all its members. The New South Wales State Council of CSA and the coalition for the repeal of the 100 member rule 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.

Indeed, we believe that there is considerable confusion as to what, exactly, the repeal of the 100-member rule in s 249D will alter, given that it is not proposed to alter the 100-member rule in ss 249N(1)(b) and 249P(2)(b).

For example, we refer to an issue of the online newsletter *UnionSafe* that says:

> *The government is looking to raise the threshold for shareholders being able to place items on the agenda of annual general meetings from the 100 signatures currently required to having 5% of the company's capital value. For a company such as Westpac that would mean having to own $1.7 billion worth of shares. Geoff Derrick from the Financial Sector Union said the changes were part of a broader move to silence shareholder activism.*[1]

Clearly, there is a misunderstanding in relation to which provision is being proposed for reform.

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

We understand that some parties have expressed concern that the repeal of the 100 member rule in s 249D is intended to suppress shareholder activism. For example, the minutes of the meeting of the Labor Council of NSW on 21 July 2005 state that:

> *Australian Manufacturing Workers' Union: - outlining to Unions NSW their opposition to the Federal Government's decision to amend the corporations' law and gut the capacity for shareholder activism. The Union said that the right of all shareholders, employees and other stakeholders to speak up at corporate AGM's, ask questions and demand accountability was fundamental to proper corporate governance principles and was a democratic right that should not be undermined. The Union said that defending proper corporate governance and the rights of all shareholders (including workers and proxy holders) was of particular importance to the Union... The Union said the active use of*

[1] 'Feds to Clamp Down on Shareholder Activists', *UnionSafe*, 27 July 2005, <http://unionsafe.labor.net.au/>

> *these rights promoted stakeholder rights, community rights, workers' rights and promoted a healthy corporate sector.*[2]

The New South Wales State Council of CSA is not opposed to shareholder activism, which it believes is an essential component of corporate governance. Nor are the other parties in the coalition who have been advocating for this reform. We support shareholders being able to put issues on the AGM agenda 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.

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 we support this. An article in *Green Left Weekly* notes that:

> *Shareholder resolutions on environmental and progressive social issues have never won a majority at a company AGM, and they are never likely to. Greenpeace and the AFL-CIO often claim 'victory' after gaining the votes of as few as 5% of shareholders. Domini Social Investments, which works with the ICCR, explains: 'Filers of social issue resolutions don't expect their resolution to receive a majority vote and be adopted by management. Rather, filers use these resolutions to get management's attention.*[3]

In the research report, *From the Picketline to the Boardroom: Union Shareholder Activism in Australia*, Professor Ian Ramsay and Kirsten Anderson note that:

> *Where unions have been successful in gaining significant support from institutional shareholders or from a group of shareholders representing a significant stake in a company, this may signal to the board that issues of concern to unions may also be of concern to the wider shareholder base*.[4]

However, the New South Wales State Council of CSA and the coalition for the repeal of the 100 member rule are opposed to the vexatious use of the 100 member rule in s 249D to call an EGM 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 an EGM that it is not expected that the resolutions put forward at the EGM will carry.

To put 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 mischievous.

> *The Union said a quick read of submissions to the Federal Government Inquiry by the NRMA, the ALP and the majority report indicated a preoccupation with financial cost and inconvenience to corporations rather than the importance of these rights for shareholders and stakeholders.*[5]

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[2] Labor Council of NSW, Minutes of Meeting 21 July 2005, <http://council.labor.net.au/minutes/>
[3] Sue Boland, 'Can 'Shareholder Activism' Change Society?' in *Green Left Weekly* (2000), <www.greenleft.org.au/back/2000/424/424p15.htm>
[4] Ian Ramsay and Kirsten Anderson, *From the Picketline to the Boardroom: Union Shareholder Activism in Australia*, Centre for Corporate Law and Securities Regulation and Centre for Employment and Labour Relations Law, The University of Melbourne 2005
[5] Labor Council of NSW, Minutes of Meeting 21 July 2005, <http://council.labor.net.au/minutes/>

We believe that such a reading of the proposed reform fails to apprehend that it is shareholders who bear the cost of the special meeting.

For example, the NRMA has been subject to a number of uses of the 100 member rule in s 249D to call an EGM. Since 1996, requisitions signed by 100 members (0.005 per cent of a two-million membership base) have resulted in five special general meetings. A report by legal firm Minter Ellison Lawyers found it cost a company the size of the NRMA $4.5 million to arrange each special meeting.[6]

We query how it can be anything other than vexatious to have 100 shareholders force a company, such as Telstra for example, to call a special meeting that has absolutely no chance of achieving anything other than costing shareholders $2 million or $3 million.

The potential for abuse

It has been suggested by some commentators that, as the 100 member rule has not been used recently, it no longer requires reform. The Parliamentary Joint Committee on Corporate and Financial Services 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. The New South Wales State Council of CSA firmly supports this view.

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. Thus, it is shareholder return that is being threatened when the threat to invoke s 249D (the 100 member rule) is made.

Conclusion

The New South Wales State Council of CSA supports 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).

However, our support of the repeal of the right of 100 members to call an EGM utilising s 249D is based on the need to prevent mischief. The five per cent rule would nevertheless continue to operate and this is entirely consistent with thresholds set in other jurisdictions.

We trust that these additional comments can assist to clarify why the repeal of the 100 member rule in s 249D has received widespread support from multiple industry parties that represent a range of interests from retail shareholders to large institutions as well as bipartisan support during the six-year consultation process on this issue.

Yours sincerely

Nick Geddes FCIS
Chairman, NSW State Council

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[6] Peter Weekes, ‘Give us a high five first’, *The Age*, 9 March, 2005