Governance Institute of Australia

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Mr John Price
Commissioner
Australian Securities and Investments Commission
Level 24, 120 Collins St
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By email: deregulation@asic.gov.au

Dear John

ASIC's Deregulatory Initiatives

Governance Institute of 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, company secretarial practice and compliance within their organisations, including public listed and public unlisted companies, private companies, public sector agencies and not-for-profit organisations, with their primary responsibility being the development and implementation of governance frameworks. Our Members frequently are those with the primary responsibility for dealing and communicating with regulators such as the Australian Securities and Investments Commission (ASIC).

Governance Institute of Australia welcomes the opportunity to comment on *Report 391: ASIC's Deregulatory Initiatives* (the report) and draws upon the experience of our Members in providing our response.

1 Forms

Governance Institute notes that ASIC supports and is involved in developing Standard Business Reporting (SBR) in relation to financial reporting. Simplifying business-to-government reporting processes by providing a standardised electronic reporting format offers the potential for businesses to improve the efficiency of their reporting to government. Likewise, the 'recorded once, reported to many' approach also offers government agencies a more consistent approach to collecting and sharing information.

As a general principle, we note that SBR should reduce the need for companies to populate ASIC forms with the same information. While we are on record as noting that we do have concerns about the extension of SBR to other forms of narrative reporting, such as sustainability reporting, there are clearly sets of data, such as the details of directors and officers, which could be entered once on an ASIC form and then populated across a number of different companies as relevant. Being able to 'record once, report on many forms' would ease the compliance burden significantly in this regard.

The adoption of interactive forms by ASIC as it transfers its legacy system to the new web-enabled database will clearly facilitate this. We also think that the introduction of interactive

forms would enable consolidation of forms on similar topics. Sections of the form could be completed as appropriate, rather than companies being required to complete different forms that require the same information. For example, we note that there are numerous ASIC forms dealing with changes to shares, including:

- Form 208 — Notification of statement of special rights carried by shares
- Form 211 — Notification of division or conversion of classes of shares
- Form 2205 — Notification of resolutions regarding shares
- Form 484 — Change to company details
- Form 2560 — Notification of reduction in share capital details.

Some of these forms are required to be lodged in relation to the same issue of shares, or a change in capital.

We are the view that ASIC should explore whether Form 484 could become an omnibus form with the capacity for the same information to populate different sections as relevant. For example, different sections of the form could 'pop up' as required. However, we note that it is vital that users not have to read multiple questions before realising that they only need to respond to a few of them. Any interactive form that fulfils multiple purposes would need to be user-friendly and tested with users. The aim must always be to ensure that the forms reduce the time spent on compliance.

To this end, Governance Institute also supports ASIC's intended review of Forms 603, 604 and 605 as outlined in the report.

2 Online disclosure

Governance Institute also supports ASIC's interest in utilising online disclosure, or electronic delivery of disclosure materials as outlined in the report.

We are on the record as recommending that Australia move to an opt-in system for receiving hard copy meetings materials. A company would be required to announce to the ASX (and then place on its website in a clearly defined section):

- when the AGM will be held (as is currently the case, prior to the expiration date of an individual's right to nominate an external director)
- when the annual report and meeting materials are available online and how to access them and vote online. Voting online (by either online proxy lodgement or our preferred method, online direct voting) would be the default option, with shareholders being able to request hard copy voting forms. Shareholders who have provided their email address to a company and provided consent for electronic communication could be notified of this (as is currently the case).

The United Kingdom moved to a joint opt-in framework for the combined release of the annual report and notice of meeting — we have the precedent in another jurisdiction that an opt-in system for receiving hard copy meetings materials works. With hindsight, when Australia moved to an opt-in legislative framework for receiving hard copies of the annual report, it was probably a missed opportunity that we did not also move to an opt-in for hard copy meetings materials simultaneously.

We recognise that these matters are dealt with in legislation, and that any amendments to the Corporations Act are a matter for the Australian Government. However, we are of the view that ASIC's support for such legislative amendment to provide for electronic communication to shareholders on matters where notification is required under the Corporations Act would be very helpful in having such amendments considered and progressed.

3 Simplifying wholly owned financial reporting relief

Governance Institute strongly supports ASIC's suggestion that there could be a reduction in the complexity of the relief provided by ASIC from the law requiring all companies to prepare, audit and lodge financial reports for companies if they are the wholly owned subsidiary of another company that lodges financial reports, provided the companies enter into deeds of cross-guarantee and meet certain other conditions. We support the suggestion that this could be achieved by incorporating the relief directly into Ch 2M of the Corporations Act and making changes to the insolvency provisions of the Act to remove the need for deeds of cross-guarantee.

4 Resignation, removal and replacement of auditors

Governance Institute strongly supports ASIC's intention, as set out in paragraph 74 and 75, to allow the auditor of a public company to resign at any time, unless there is some evidence (such as disagreements with management) to suggest that ASIC should not give consent to the resignation. Resignation would be subject to market disclosures being made about the details of both the resigning and incoming auditor, and the reason for the change.

We are on the record as seeking improvements to the mechanism for notifying the appointment or cessation of an auditor and have raised these matters with ASIC on a number of occasions. We note that ASIC intends to undertake public consultation on this matter, but we set out below our reasons for calling for changes to the mechanisms in place, as this may hold some bearing on the matters on which ASIC consults.

a) Consenting to resignations, removals and replacements: Form 315

The mechanism for notifying the appointment or cessation of an auditor does not currently operate efficiently and effectively.

For public companies, there is no requirement to advise ASIC of the name of a new auditor at the time of appointment. This information is advised to ASIC on Form 388, Copy of Financial Statements and Reports, which is lodged together with the annual report. However, public listed companies have relief whereby accounts lodged with Australian Securities Exchange (ASX) do not also need to be lodged with ASIC with Form 388. We note that this relief, while welcome, can create problems. For example, when an auditor seeks permission from ASIC to resign, ASIC has been known to refuse permission because it does not have that auditor noted on its records. This arises as ASIC does not insist that a listed public company lodge a Form 388 each year.

Governance Institute of Australia notes that the inefficiency of the process in relation to the absence of a form to notify ASIC of the appointment of an auditor can also create difficulties in the following situations:

- when incorporating a public company or converting from a private company to a public company, and
- when a small proprietary company becomes a large proprietary company.

Furthermore, directors of a public company must within one month of registration appoint an auditor who holds office until the company's first annual general meeting (AGM) (s 327A). Under s 327B, a public company must appoint an auditor at its first AGM. At that first AGM, it is the right of shareholders to appoint the auditor. It may be that the shareholders appoint a different auditor than was originally appointed by the directors. There is no provision on Form

315 to show that the auditor is not resigning but ceased to hold office at the first AGM. Thus there is no provision on the form to allow for the process as set out in the Corporations Act.

Governance Institute of Australia recommends that Form 315 could be a multi-faceted form, containing provision for:

- companies to notify the name of the auditor at the time of appointment (appointment of auditor) — currently, Form 315 provides for the cessation of the auditor only
- the cessation of the auditor at the first AGM, if that auditor is not reappointed by the shareholders — the name of the replacement auditor could also be advised
- the resignation of the auditor following the conversion of a public company to a proprietary company
- the resignation of the auditor following a large proprietary company becoming a small proprietary company.

Benefits of extending Form 315

We understand that the initial reaction to our recommendation that Form 315 be expanded is likely to be that we are adding to regulation, rather than providing ideas for deregulation. However, deregulation is about achieving efficiency in regulation and removing duplicative processes and procedures, and we believe that the expansion of Form 315 as set out above will achieve these outcomes, subject to our earlier comment that only relevant sections would need to be accessed and completed. Our reasons are set out below.

We note that the forms for registered schemes already provide for notification of both the appointment and cessation of the auditor (FS06 and FS08) and the logic behind this form would be expected to apply to public and large proprietary companies.

ASIC has advised this organisation that the original Form 315 had included questions relating to the appointment of auditor and change of name of auditor. At the time of the repeal of the annual return, as part of the reduction in regulation to which companies are subject, ASIC did not consider it appropriate to create a new form. The creation of a new form would have undermined the reduction in red tape that was being enacted.

We have discussed with ASIC how our Members can notify ASIC of the appointment of the auditor when no form exists for such notification. At present, some public listed companies that have taken advantage of the relief whereby accounts lodged with ASX are deemed to be lodged with ASIC attach a covering letter to Form 315 or send in a stand-alone letter notifying ASIC of the appointment of the auditor.

There are a number of problems associated with attaching a covering letter or sending a stand-alone letter:

- It is not commonly known that a covering letter attached to Form 315 or a stand-alone letter could be required to ensure that ASIC has a record of the appointment of the auditor as this is an informal process that has been arrived at by trial and error on the part of our Members.
- Large public listed companies are familiar with regulatory challenges and frequently have the resources to manage them, and thus may well arrive at the solution of attaching a covering letter or sending in a stand-alone letter after contact with ASIC. However, newly listed and start-up companies do not understand why a covering letter should be attached to a form or why a stand-alone letter that is not requested should be sent in, but wish the form to be available from ASIC so that their regulatory obligations and the process attached to them are clear.

We note that, at present, when a company that has not lodged a Form 388 or provided a covering letter attached to Form 315 or a stand-alone letter notifying ASIC of the appointment of an auditor it can face considerable time and effort in remedying the problems arising from the current situation. Indeed, the time and effort devoted to remedying the situation, which can run into many hours of extended correspondence and contact with ASIC by company secretaries or other officers, is considerably greater than the time and effort that would be involved in filling out a short form notifying ASIC of the appointment of an auditor.

Costs of current situation

Governance Institute of Australia Members who have had to grapple with the current situation point to the difficulty in quantifying the costs attached to remedying the current situation, as the hours spent on unravelling the problem caused by the absence of information held by ASIC on this front vary from company to company.

However, the costs involved relate to:

- management time
- efforts devoted to clarifying a situation whereby the company has fulfilled its compliance obligations, but there is no record of it having done so, including providing copies of documents to support that a company has fulfilled its compliance obligations, when no formal process exists for such confirmation
- the potential for delays in AGMs, where the auditor is being replaced, but ASIC will not grant permission for the auditor to resign given it has no record of the appointment. This is a cost borne directly by shareholders. We note that this last issue will be addressed by ASIC's proposal to allow an auditor to resign at any time.

The costs attached to the current situation extend to the relief granted to listed public companies whereby accounts lodged with ASX do not also need to be lodged with ASIC, as the relief is rendered null and void, given that our Members advise that it is preferable that their companies lodge Form 388 with ASIC to avoid the problem of ASIC being unaware of the appointment of an auditor.

Costs attached to having to comply by filling out a form

Governance Institute of Australia Members confirm that it would take them approximately ten minutes to fill out a short form notifying ASIC of the appointment of an auditor.

Penalties attached to current difficulties with Form 315

Our Members have found that when the shareholders do not reappoint the auditor originally appointed by the directors of a public company at the first AGM, ASIC has been known to penalise the company for not notifying ASIC of the auditor's resignation. We note that Members are unable to advise ASIC that the auditor has resigned in such circumstances, as it is not a resignation. It is the shareholders' right to appoint an auditor that is being exercised. Our Members therefore cannot advise ASIC of a resignation that did not occur.

We note that this difficulty would cease if Form 315 provided for notification of cessation of auditor at the first AGM, if shareholders appoint a different auditor.

b) Exceptional circumstances when consent may be granted

Governance Institute also recommends that the result of an audit tender not be excluded from ASIC's list of exceptional circumstances as set out in its Draft Regulatory Guide 26. This creates very practical difficulties for companies, as the timing of the tender process frequently does not accord with the timing of the AGM.

In reality, this results in companies being forced to either call a general meeting (at cost to shareholders) to remove the existing auditor and appoint the new auditor that has been successful in the tender process, or retain the existing auditor that has not been successful in the tender process until such time as the next AGM is held. In the latter case, this may result in the existing auditor knowing that in, say, April, a new auditor will be appointed at the AGM in, say, November, but the auditor will still have to complete the June audit. It is arguable whether this situation will result in the best audit outcome, despite the professionalism of registered auditors. It is simply not realistic to assume that companies will always be able to undertake the tender process just prior to the AGM, and be able to obtain ASIC consent prior to the AGM.

From a risk mitigation point of view, the running of a tender process in the lead-up to an AGM, which also coincides with the preparation of year-end accounts and the busiest time of the year in an auditor's work program, is not preferable, particularly where the outgoing auditor is required to be informed of the outcome of the tender prior to delivering their report. While auditors will no doubt insist that such a situation would not impact on their ability to continue to perform their services professionally and impartially, it would be far more preferable (and prudent) if companies could conduct external audit tenders well outside the timing for key audit deliverables and not be required to call a second general meeting (at cost to shareholders) in any one year to obtain member approval.

> Entities should plan their audit tendering processes to ensure that auditors know whether their appointment will be continuing at the time of completing the audit and that any resignation takes effect at the next AGM.

Companies need to fulfil their statutory obligations, and we request ASIC to consider the very real practical difficulties attached to an insistence that tendering not be considered an example of an early consent circumstance. In each instance, we understand that ASIC may decide not to grant consent, but we recommend that it be possible to seek consent in these circumstances.

Governance Institute of Australia recommends that the final Regulatory Guide 26 provide:
1. consent for the existing auditor to resign where that auditor has been unsuccessful in a tender process
2. in these tender cases, the directors be authorised to appoint the new auditor until the next AGM, at which time the shareholders will be requested to approve (or not) the appointment of the new auditor. (This is similar to the requirements for a public company on registration under s 327A.)

c) Form 342

We note that when an auditor wishes to resign, ASIC consent is required. Governance Institute of Australia supports this requirement, which is to ensure that the auditor is resigning for appropriate reasons and is not being dismissed or forced to resign. The policy objective, which we support, is to protect shareholders and ensure that the directors are not applying pressure on the auditor to resign.

Form 342 is used when seeking permission to resign as auditor.

However, we note that, due to the reasons we set out above in relation to the challenges arising from the lack of a form for notification of appointment of auditor, ASIC may not necessarily grant consent for the auditor to resign, even when it is an appropriate resignation, on the basis that ASIC did not approve the appointment.

The recommendations relating to Form 315 noted above would ameliorate this issue.

d) Notification of company of consent to resign

We note that ASIC has a statutory obligation (s 329(6)) to send dual notices of consent to resign to both the auditor and the company.

However, we are of the view that ASIC is inconsistent in meeting this obligation. While ASIC always notifies the auditor of its consent to resign, it frequently fails to also notify the company that consent has been provided.

Governance Institute of Australia recommends that ASIC institute internal procedures to ensure that it always notifies the company at the same time that it notifies the auditor of its consent to the auditor to resign.

e) Need to provide for different requirements when takeovers occur and the auditor is the same for both the acquiring and target companies

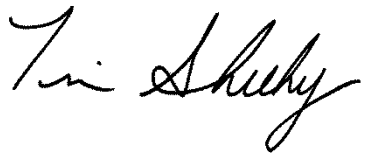
We note that, when a takeover occurs, the current default position is that the auditor of the company that begins to be controlled by another company must retire at the next AGM (s 327H(a)). The target company must then call for nominations and appoint an auditor at the next AGM. Where the auditor of the target company and the acquiring company is the same auditor, we cannot point to any practical or public benefit being achieved by requiring auditors to retire and target companies to reappoint the auditor where that auditor is the auditor of the acquiring company.

Governance Institute of Australia recommends that the default position should be that, unless the acquiring company gives notice to the auditor of the target company to step down, the target company should not be required to ask its auditor to retire and then reappoint them at the next AGM.

Conclusion

Governance Institute looks forward to seeing the outcome of the consultation on ASIC's deregulatory initiatives. We would welcome the opportunity to discuss any of our views in greater detail.

Yours sincerely



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