CHAPTER 12

DIRECTOR'S POWER TO CALL A MEETING

Whether a director of a listed company should have the power to call a meeting of members

12.1 Section 249CA of the Corporations Law provides that a director of a listed company may call a meeting of members despite anything in the company's constitution. The right of a director to call a meeting of the company's members applies to companies incorporated in Australia and included in an official list of the Australian Stock Exchange (ASX).

12.2 The submissions to the PJSC on this power were not uniform. The views of individual shareholders, companies and professional bodies were equally divergent.

Arguments in favour of a director having the power to call a meeting

This power existed in the past

12.3 The PJSC was advised that directors had been empowered in this way in the past and it was acceptable, particularly in relation to listed companies, that a single director should be able to create a forum for the consideration of certain matters.[1] It was pointed out that a director who exercised the power would be subject to the ordinary duties of directors. A director could not properly take the step of calling a meeting unless it was in the interests of the company that such action be taken:

> There is not, within companies, any established rule of "board solidarity", even though in most cases decisions are taken by consensus. The duties the law casts upon directors are cast upon them severally and individually. The ability for a particular director, of his or her own motion, to cause a matter within members' competence to be placed before them for decision might on occasion operate as an aid to prudent corporate governance and serve the interests with which the preceding section concerning whistleblowing is concerned.[2]

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1 Mr RI Barrett, Submission 5, p 9. Regulation 40(1) of Table A incorporated this norm from 1 July 1962 until its repeal. Before that, the rule derived from the English Table A of 1862 was that the convening of general meetings was a matter for the directors as a board. See also Mr Laurie Factor, Committee Hansard, 16 August 1999, p 129.

2 Mr RI Barrett, Submission 5, p 9. See also Mr Sandy Easterbrook, Committee Hansard, 17 August 1999, p 235.

A tool for raising issues

12.4 Several submissions supported the new power as a tool for an independent but minority director to raise relevant issues for review or decision in a shareholders' meeting.[3] It would also provide a director with leverage in dealing with the majority of directors who are not independent.[4] It was argued that in some circumstances a director might need to bring matters to the attention of shareholders for a vote:

> A director is responsible and liable to the members, and it may be that in some circumstances he cannot fulfil those responsibilities unless he brings certain matters to the attention of members and allows them to vote on them.[5]

Qualified support

12.5 The Australian Law Reform Commission (ALRC) noted that as the power to call meetings can be both beneficial and dangerous, the power should be qualified. The ALRC envisaged a situation where certain issues need to be brought to the attention of a general meeting but the board opposes the calling of such a meeting. In those circumstances, the ability of a single director to call a meeting will be beneficial. On the other hand, "costly and unnecessary general meetings might be called by a distrustful director as an adjunct of boardroom politics that ought properly to be resolved in that forum".[6]

12.6 The ALRC suggested that the power should be qualified to minimise the risk of its unwarranted use. The director should be required to give the board 28 days notice before calling a meeting and to specify in the notice the reason why such a meeting is considered necessary.[7]

12.7 Similarly, the Henry Walker Group Ltd supported the new power subject to controls on costs and self-interested directors.[8]

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3 Investment & Financial Services Association Ltd, Submission 34, p 9. See also Mr Sandy Easterbrook, Committee Hansard, 17 August 1999, p 235; Mr Ted Rofe, Committee Hansard, 18 August 1999, p 308 and the West Australia Joint Legislative Review Committee of the Australian Society of CPA, the Institute of Chartered Accountants and the Chartered Institute of Company Secretaries, Submission 18, p 5, which suggested that section 249CA should operate as a "whistleblower" section.

4 Investment & Financial Services Association Ltd, Submission 34, p 9.

5 Mr John Wilkin, Submission 21, p 9.

6 Australian Law Reform Commission, Submission 10, pp 5-6.

7 Australian Law Reform Commission, Submission 10, p 6.

8 Henry Walker Group Ltd, Submission 12, p 3.

Arguments against a director having the power to call a meeting

The power is unfettered

12.8 One important ground of objection to new section 249CA is that it gives a single director an unfettered power to call a meeting. The provision makes no statement about the bona fides of the director and takes no account of the costs that may be borne by the company. It does not rule out the possibility of a succession of meetings being called by a dissident director.[9] The PJSC was told that a dissident director could impose considerable expense on the company by calling a succession of meetings.[10] In addition, the calling of meetings to expose division on the board may have a negative effect on the company's market standing and share price.[11] The majority of submissions that opposed the power urged the introduction of safeguards to avoid unnecessary meetings and expense.[12]

Current arrangements are adequate

12.9 A number of submissions were of the view that the current powers for requisitioning a meeting are adequate.[13] Belmont Holdings Ltd opposed the new provision on the grounds that there is ample scope now for aggrieved directors to convene meetings without the unnecessary expense of a meeting.[14]

12.10 Mr JA Sutton described a company's constitution as "a contract between the members and their company in which the members delegate management of their interests to the board of directors". The board is legally required to manage the affairs of the company properly and to report to the members in general meeting. If members disagree, there exist "ample powers to seek correction".[15]

12.11 The Australian Institute of Company Directors (AICD) queried the effect of the power in practice, maintaining that a single dissident director would be outnumbered and that, in all likelihood, little would be achieved by

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9 Chartered Institute of Company Secretaries in Australia Ltd, Submission 1, p 1.

10 Ernst & Young, Submission 38, p 3.

11 Australian Institute of Company Directors, Submission 47, p 6.

12 See Chartered Institute of Company Secretaries in Australia Ltd, Victoria Branch, Submission 24, p 3; Belmont Holdings Ltd, Submission 20, p 3; KPMG, Submission 71, pp 4-5.

13 Boral Ltd, Submission 14, p 2.

14 Belmont Holdings Ltd, Submission 20, p 2. See also Mr Boris Ganke, Committee Hansard, 17 August 1999, p 247. It was estimated that the cost of convening a meeting for very large companies was in the order of $2 million. For smaller companies with 15,000 members the cost would be $30,000, or $2 per shareholder.

15 Mr JA Sutton, Submission 57, p 2.

calling a general meeting. The AICD noted that the main sanction of a dissatisfied director is to resign with an accompanying public statement.[16]

12.12 The Association of Mining and Exploration Companies Inc (AMEC) was of the view that a director's power to call a meeting should be subject to the threshold requirements in section 249D(1). According to AMEC, a requirement of this nature would prevent unnecessary meetings.[17] A similar view was expressed by Mr R Furlonger who stated that a director was in a similar position to a shareholder and should be subject to same requirements for convening a meeting of members.[18]

Power to call a meeting is ineffective

12.13 The AICD submitted that the absence in the director's power of equivalent provisions to sections such as 249D(2) and (5), and 249E(2) and (3), which provide procedures for calling a meeting, raised doubts as to how a director could call a meeting.[19]

Other alternatives

12.14 It was suggested to the PJSC that other alternatives might be more appropriate. The Accounting Association of Australia and New Zealand (AAANZ) called for a compromise. The AAANZ recognised that external directors have special responsibilities because they are not full time employees of the company. They represent all shareholders especially the less informed. A compromise was needed to ensure that unnecessary meetings are not called yet guarantee the ability of external directors to fulfil their duties:

> While there should be some protection to avoid the company's assets being wasted by the calling of unnecessary meetings of shareholders, nonetheless, a compromise might be needed to guarantee the ability of outside directors to properly fulfil their duties with respect to less well-informed shareholders.[20]

12.15 Another alternative was that the power should be exercised by not less than a specified percentage of all directors. This, it was submitted, would avoid a situation where a disgruntled director could put the company to expense and

16 Australian Institute of Company Directors, Submission 47, p 6.

17 Association of Mining and Exploration Companies Inc, Submission 45, p 3. See also Australian Listed Companies Association Inc, Submission 66, p 3.

18 Mr R Furlonger, Submission 4, p 6. See also Mr Boris Ganke, Committee Hansard, 17 August 1999, p 247.

19 Australian Institute of Company Directors, Submission 47, p6.

20 Accounting Association of Australia and New Zealand, Submission 16, p 2.

inconvenience.[21] Bristile Ltd suggested that a compromise would be for the power to be exercised by two directors or one-third of directors.[22] KPMG proposed that a director should be required to obtain the support of a majority of the board.[23]

12.16 The Accounting Bodies proposed that provisions similar to sections 249O and 249P should apply in respect of the distribution of a notice meeting called by a director:

> A company should only bear the cost of the distribution of the notice of a resolution if it is received on time, not more than 1,000 words long and not defamatory.[24]

Power to call a meeting should be optional

12.17 The Australian Stock Exchange (ASX) and the Law Institute of Victoria objected to the right of a director to call a meeting being mandated in the Corporations Law, preferring that it be optional under the company's constitution.[25] In support of this position, the ASX noted that the calling of meetings is a "significant and potentially costly action" and that companies should determine whether individual directors should be able to call meetings.

12.18 The Law Institute of Victoria submitted that the Law already provides safeguards for minority shareholders:

> Shareholders should have the ability to choose whether an individual director should have the right to call a meeting. A director who has particular concerns about corporate governance or other matters concerning the company is free to raise those concerns with the ASIC, if the other directors are unwilling to call a meeting of shareholders to consider the matter. In addition, there are various other safeguards for minority shareholders in the existing law.[26]

12.19 Ernst & Young opposed a director's power to call a meeting on the basis that the provision overrides anything in a listed company's constitution. It was proposed that members should be able to amend their constitution to remove this power. [27] Similarly Coles Myer Ltd stated that members of a listed

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21 Arnold Bloch Leibler, Submission 23, pp 9-10.

22 Bristile Ltd, Submission 26, p 2.

23 KPMG, Submission 71, p 4.

24 Joint Submision by the Australian Society of CPAs and The Institute of Chartered Accountants in Australia, Submission 73, p 6.

25 Australian Stock Exchange, Submission 44, p 11. See also Law Institute of Victoria, Submission 55, p 3.

26 Law Institute of Victoria, Submission 55, p 3.

27 Ernst & Young, Submission 38, p 3.

company should decide whether to empower an individual director to call a meeting of members.[28]

Conclusions

12.20 As several witnesses told the PJSC, a director's power to call a meeting can be exercised despite anything in the company's constitution. Strong arguments were made for retaining this power on the grounds that its public benefit outweighed the infrequent occasions when a director may abuse the power. It was also stated that although in reality the power "is never going to be used", it should remain in the Corporations Law as a tool or leverage for independent, minority directors in dealing with the board. Otherwise the majority will be in a position to implement a decision irrespective of the views of the independent directors. In response it was argued that current avenues for raising issues or concerns already exist that do not put shareholders to the additional expense of a meeting. The use of this power as leverage in board discussions was, as one witness told the PJSC "extortion because somebody could say, 'I will call a meeting and it will cost the company $1 million' and to avoid that he would get a golden handshake and retire".[29] Further, the cost and time involved in convening a meeting will distract the company from its business activities.

12.21 The PJSC believes that directors must act within the powers entrusted to them by shareholders and not outside these powers. By overriding a company's constitution, the Law permits a director do so without regard to bona fides and without any sanction. The PJSC was not persuaded that the Corporations Law should override the wishes of shareholders who will have to bear the costs of a general meeting called by a director. In order for the meeting to be properly convened adequate notice would need to be given to all members.[30] It was estimated that the cost of the notice of meeting was $2.00 per shareholder. The PJSC believes that if a director's view does not prevail at the board it is unlikely that it will prevail at a general meeting called by the director. In the view of the PJSC the use of the Corporations Law as leverage in board discussions is undesirable and may have the effect of dissuading directors from exercising their commercial judgment in decisions affecting the company. A director's power to call a meeting, therefore, should be optional under a listed company's constitution as recommended by the Law Institute of Victoria.

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28 Coles Myer Ltd, Submission 89, p 5.

29 Mr Boris Ganke, Committee Hansard, 17 August 1999, pp 247-48.

30 See *Wishart v Foster* (1961) 4 FLR 72 and *Winter v McAdam* (1957) 1 FLR 210. The Law does not prescribe the method of convening a meeting that is called by a director.

Recommendation

12.22 The PJSC recommends that section 249CA of the Corporations Law be repealed.