Labor Members Minority Report

Labor members called for an Inquiry by the committee into the Corporations Amendment Bill (No. 2) 2005 in order to allow proper consideration of the issue of shareholder participation as it relates to the amendments proposed in the Bill.

The stated objective of the Bill, to more effectively balance shareholder participation and the cost of that participation, is one that Labor strongly endorses in principle. The question Labor members sought to examine was whether the proposed changes met both concerns regarding potential abuse of existing avenues for shareholder participation, and the legitimate right of small shareholders to participate in company governance processes. After due consideration the view of Labor members is that a more effective balance of these needs can be achieved.

Labor values the right of all shareholders to participate fully in company governance processes and we make our recommendations on this basis.

Removal of the '100 member rule'

The impact on companies

The Committee heard evidence outlining reasonable concerns as to the operation of the 100 member rule and the impact on companies required to hold Extraordinary General Meetings (EGM's).

One negative consequence of holding EGM's is the significant time and cost burden for companies and their management. Examples provided to the committee indicate costs of up to and over $1million to hold such a general meeting and Labor members are cognisant of the seriousness of this.[1]

Given this level of expense, it is reasonable to expect that a resolution, for which an EGM is called, has the support of a significant number of the members of the company.

In a company with a large shareholding, it is clear that the views of 100 members may not fairly indicate the mood or preference of a majority of shareholders on any particular issue. As such, the threshold allowing 100 members to call an EGM to discuss and vote on a particular resolution has the potential to permit disproportionate influence to a small number of shareholders.

[1] Submission No. 2, ANZ, p. 2 & Submission No. 29, NRMA, p. 3

It is on this basis, that Labor members support the removal of the 100 member rule.

Notwithstanding this position, Labor members recognise the rights of small shareholders to access company governance processes. We also recognise that in companies with a large number of members, the threshold of 5% of voting rights necessary to call an EGM will preclude smaller shareholders from ever gaining the necessary numbers to call such a meeting. This would effectively close this avenue of shareholder participation for small shareholders acting together.

As a result, Labor members favour the inclusion of a cap to operate in conjunction with the 5% rule for the number of individual members required to call an EGM. The cap would come into effect when a threshold of 5% combined shareholding could not be reached by a significant number of small shareholders acting together. Labor proposes that this cap be 1,500 members.

A threshold of 1,500 members would better address the need to obtain a wide level of support for a resolution to justify the expense of calling a general meeting as it would indicate that the resolution on which the meeting is premised has some chance of a successful vote. The cap would also ameliorate the circumstances of small shareholders in larger listed companies where members can number in ten's or hundreds of thousands, and allow them to operate together if necessary, without the explicit support of a large individual shareholder.

Aligning Economic Interest

An underlying issue in evidence to the committee was that a shareholder should have a genuine economic interest in the company if they are to contemplate the calling of an extraordinary general meeting. This economic interest must exist for a shareholder to balance consideration of the cost associated with calling an EGM, and the likely success of the resolution on which the meeting is premised. Put simply there must be an alignment of the economic interests of shareholders who wish to call a general meeting with those of the company and its other shareholders.

In relation to small shareholders and the operation of a capped threshold, a greater alignment of shareholders interests can be achieved by requiring that all members wishing to call an EGM should hold, at a minimum, a marketable parcel of shares. This requirement would address concerns of that a single shareholder can split their shares with ninety nine other individuals for the purpose of calling an annual general meeting. Adding a requirement for a minimum parcel of shares would ensure that this practice would no longer be possible.

In order to effect this change, it is necessary to include a definition of a marketable parcel of shares in the Corporations Act. Labor proposes that a marketable parcel should equal 100 shares or more and that this definition be included in the Act.

The combination of a cap of 1,500 members against the 5% rule, and the requirement for each of the 1,500 members to hold a minimum marketable parcel of 100 shares,

will effectively align the interests of those seeking an EGM with other shareholders and the financial interests of the company.

These changes will more effectively balance the rights of shareholders to participate in company governance processes and consideration of the costs of utilising the EGM as such a mechanism.

Recommendation 1:

Labor endorses the removal of the 100 member rule.

Regarding operation of the 5% rule, Labor recommends a cap allowing 1500 members to support the calling of an extraordinary general meeting of the company.

Labor recommends that each of the 1,500 members individually hold at a minimum, a marketable parcel of 100 shares.

Managed Investment schemes

The Labor members note that Treasury did not formally consider the implications of the removal of the 100 member rule for Managed Investment Schemes, prior to release of the discussion draft.

While Labor members understand evidence presented to the Committee suggests that the issues facing managed investment schemes are the same as those for companies of varied shareholding, we suggest that Treasury evaluate the appropriateness of including Managed Investment Schemes in regard to the proposed changes.

Companies with one member, one vote arrangements (Mutuals)

Considering removal of the 100 member rule, the practical application of the 5% rule for mutual organisations drew specific consideration from Labor members.

Circumstances that are specific to one member one vote companies, such as mutuals, mean no large shareholders can join with others in order to reach the 5% threshold on calling an EGM. The effect is that 5% of members would be required to agree to the calling of such a meeting, not 5% of shareholders votes. As a result the 5% rule operating in isolation will present an extremely high threshold for members to reach in organisations with several hundred thousand members or more. For example, 5% of NRMA's members would equate to approximately 100,000 individuals. Such a threshold would be extremely onerous.

Based on this analysis, the position of the majority and evidence from Mutual Strategies, it is clear that some amelioration of the 5% rule is desirable for large

companies as the difficulty associated with gaining the support of so many members is extremely prohibitive.[2]

Balancing this evidence, and concerns regarding the effect of 5% on larger mutual companies, is the fact that as each member of a mutual has the same voting power, there must always be a majority of individual members in favour of the resolution, in order to pass a resolution at an annual general meeting. It is reasonable therefore to expect a significant number to show support for the resolution before the expense of a general meeting is incurred.

In combination these two considerations would demand a high hurdle for members of mutual companies, recognising the need for wide support before the calling of an EGM, while still providing an avenue for members to call such a meeting should extraordinary circumstances demand it.

Labor members considered the application of a 1% threshold for all mutuals, but found that this presented difficulties with regard to smaller mutual organisations. A 1% threshold would cause mutuals with fewer than 10,000 members to require less than 100 members in order to call an EGM, the very same number that the current amendment seeks to remove.

Labor members also saw that a 1% threshold would present a significantly onerous requirement for the members of larger mutuals. Mutuals with over 1 million members would require more than 10,000 individual supporters. For members of most mutuals this would present a near impossible hurdle.

To overcome these limitations and meet the identified circumstances of mutuals, Labor proposes that separate threshold arrangements for mutual companies be applied. This would take the form of a cap of 5,000 members to be applied against the 5% threshold requirement.

In effect, 5% of members would be required to call an EGM, up to a total of 5,000 members, regardless of the size of the mutual organisation. This would represent an increase in the number of members required to call an EGM by a multiple of fifty.

It should be noted that the proposed cap for mutuals is also higher than for one share one vote companies because there is no additional burden of a minimum economic interest in the form of a marketable parcel of shares.

Given this view, although agreeing with the majority position that some amelioration of the 5% threshold is required, Labor does not support the majority finding in favour of a 1% threshold for all mutuals.

2 Submission No. 15, Mutual Strategies, p. 3

Recommendation 2:

Labor endorses the removal of the 100 member rule for mutual organisations.

Regarding operation of the 5% rule for one member one vote companies, Labor recommends a cap allowing 5,000 members to support the calling of an extraordinary general meeting of the company.

Review the effectiveness of these changes

Given the significance of the changes for small shareholders proposed in the Corporations Amendment Bill, Labor members recommend a review of the operation of the amended provisions two years from the time they become law.

Shareholder participation is a critical issue in the guidance and governance of our companies. As such it will be necessary to review whether these provisions, which will impact the avenues of participation available to shareholders, have achieved the desired result.

Recommendation 3:

The Parliamentary Joint Committee on Corporations and Financial Services should review the impact of changes under the Corporations Amendment Bill (No.2) 2005, two years from the effective date of legislation introducing the changes.

Threshold for listing members' resolutions at general meetings

Recognising evidence to the committee, and comments made in the Majority report, Labor sees little gain in reducing the threshold allowing members statements to be brought to Annual General Meetings (AGM's) already scheduled. It was clear that although there is a need to improve the avenues of direct communication between shareholders and boards, there was no significant support, including from shareholder representatives, for a move to allow 20 members to list a resolution on the agenda of an AGM.

Labor members however recognise the underlying need to enhance participation opportunities for small shareholders. Accountability from directors and company management is the right of all shareholders, and special measures are warranted to ensure that small shareholders retain a reasonable level of access. As such, Labor proposes an amendment to ensure proposed resolutions are included in AGM’s.

Inclusion of member resolutions on the AGM agenda

As part of Labor's consultation process during the Inquiry, members became aware of circumstances that limit the access of 100 members to include a resolution on the agenda of an annual general meeting. These occurred when proposed member resolutions with 100 supporting signatures are returned to proposing members for modification shortly before the deadline for the distribution of documents for the general meeting.

This can occur when companies take issue with the contents or wording of a proposed resolution and direct the proposer to modify it. The time involved in this negotiation process can prevent agreement on the wording of the resolution before meeting documents are sent to members. The result is that the proposed resolution is not included in the meeting agenda, effectively cutting off this avenue of shareholder participation.

It is not reasonable that a company avoid putting bona fide items on the AGM agenda if 100 members sign in favour of the item being included. To address this risk, Labor proposes an amendment to the Corporations Law to give effect to the following situation.

> Where proposed resolutions with 100 supporting members are received before the AGM, as per the requirements of s.249 O of the Corporations Act, the proposed resolution must be included in the meeting agenda.
>
> Responsibility for negotiating changes to wording of the proposed resolution in advance of the distribution of the meeting notice rests with the company. Should the proposer not agree to the requested changes, the original proposal shall be included in the agenda.
>
> As per s.249 O (5), the company is not required to include the proposed resolution on the agenda or distribute related meeting notices where the proposed resolution includes defamatory statements or is longer than 1000 words.

The amendment would have the following effect and be an addition to s.249 O of the Corporations Act.

The company is responsible for negotiating changes to the member's resolution should change be deemed necessary. Failure to negotiate a change to the wording of the resolution should not preclude its inclusion in the notice of meeting.

Recommendation 4:

That the Corporations Act be amended so it is clear that companies may not delay the inclusion of a member's resolution on any grounds other than those described by s.249 O (5) (a) and (b) of the corporations law.

Distribution of member statements

The Labor members agree with the majority position and Recommendation Five in the Majority Report that members' statements with the support of 20 or more members be distributed to all members along with the notice of meeting.

Labor also endorses the position that members' statements with the support of more than 20 but fewer than 100 members should be limited to one page in length.

Further, Labor members support the view that there should be no provision to allow companies to withhold members' statements from distribution if they perceive them to be irrelevant or inappropriate. The current exceptions regarding defamation should however be retained.

As per Labor members' position in Recommendation 4 above, the onus for negotiating the wording of member's statements should reside with the company. A lack of consensus on the wording of the statement should not be a valid reason for a company withholding the statement from distribution if it is initially received by the company at a suitable date.

While members of the committee understand that there may be some cost impact from this provision, it is expected that other changes included in this Bill, which allow the dissemination of members' notices electronically, will assist companies to manage the costs associated with this avenue of shareholder participation.

Cherry Picking of Proxy Votes

Throughout the Inquiry process, there was widespread support for the proposed changes in the draft Corporations Amendment Bill regarding cherry picking of proxy votes. There were also indications from Chartered Secretaries Australia and the Securities Institute that changes to proxy voting in the area of the direct voting of proxies be considered in order to enhance shareholder participation.[3]

Labor supports the recommendations in the proposed Bill, but calls on the government to take these provisions further in future.

[3] Evidence to the Inquiry, Hansard p. CFS 24

The proposed change would ensure that if a nominated proxy holder votes on a poll, they must vote their proxies as directed. This outcome only goes part of the way to preventing 'cherry picking' of proxy votes.

Labor supports a practice where by directed proxy votes received by a company's share registrar are automatically allocated in the case that a poll is called. Proxy votes are already tallied as a matter of procedure, in case a poll is called. The difference here would be that, in the case of a poll being called, directed proxies would be allocated without the intervention or discretion of a nominated proxy.

Evidence from the Australian Shareholders Association submission to the Inquiry supports the view that this is procedurally a sensible position:

> 'In relation to the provision of relief to proxy holders who for some reason do not vote on a poll we would prefer that valid directed proxies were automatically included in the tally of voting.'[4]

This approach, if used whenever there was to be a poll called, would ensure that directed proxies are no longer at risk of being 'cherry picked'. Directed proxies would always be included in the voting, and the discretion of an individual proxy holder in respect of directed proxies would not come into play.

Labor recognises that the culture of AGM's is such that polls are not always called and it should still fall to the Chairperson of a meeting to call a poll. Voting by a show of hands could still be relied upon without the compulsion to call a poll. And undirected proxies could still be cast at the discretion of the holder when voting on a poll.

Further to this, Labor recommends that the government investigate direct voting mechanisms, such as allowing the use of internet and telephone direct voting methods. This would have the effect of allowing more people to participate in the show of hands vote.

Labor members support the comments and Recommendation 7 of the majority report, calling on the Treasurer to investigate direct voting and how its use might be encouraged.

Disclosure of Proxy Votes

Labor members agree with the majority position and therefore the amendment repealing the requirement to disclose proxies.

Labor recognises evidence from the Australian Shareholders Association (ASA) to the effect that shareholders attending an annual general meeting '…expect that all voting

[4] Submission No 4. Australian Shareholders Association, p. 4

should initially be on a show of hands so that the strength of votes by individual shareholders is evident.'[5]

Labor also recognises the right of the Chair to consider the situation at the general meeting and make a determination on when and whether proxy voting results should be disclosed. This is because Labor recognises the importance of the general meeting and the need for engaged discussion and argument between shareholders.

Disclosure of Information Filed Overseas

The issue of timely and easy access to information is a critical one for all shareholders, and especially for small shareholders.

While the prevalence of shareholders seeking information on their company's international operations and listings via the internet is increasing, many shareholders still rely on information that is presented to them in Australia via the Australian Stock Exchange.

It is recognised that ASX Listing Rule 3.1 requires the disclosure of information that is deemed to be material or price sensitive to Australian investors via the ASX, but that s.323DA of the Corporations Act also relates to information which is not deemed to be price sensitive. It is the disclosure of information that is not deemed to be material or price sensitive that should still be disclosed in Australia according to evidence received by the committee.

The ASA stated that it was important to simultaneously release information in Australia that is released overseas to allow shareholders to opportunity to monitor any coincidental price movements and to prevent an erosion of trust or perception that foreign shareholders may receive superior disclosure.[6]

The Australian Council of Super Investors identified the relatively low cost associated with complying with s.323DA, as it could simply involve the sending of a .pdf document to the ASX for inclusion with other company information.[7]

Labor is not opposed to the requirements for disclosing information supplied to overseas exchanges residing in the ASX listing rules, but it is clear from evidence provided to the committee that the ASX listing rules do not have the same requirements as s.323DA.

[5] Submission No. 4, ASA, p. 5

[6] Submission No. 4, ASA, p. 5

[7] Submission No. 9, Australian Council of Super Investors, p. 5

Given this evidence to the committee and Labor's preference for keeping small shareholders as well informed as possible, Labor opposes the repealing of s.323DA.

For Labor Members

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