Minority Report

Senator Andrew Murray, Australian Democrats

The Australian Democrats disagree with a number of the recommendations contained within the majority report. The scale of the proposed changes are largely unnecessary, have not been the subject of sufficiently detailed public discussion, and are likely to reduce the ability of shareholders, particularly smaller shareholders, to effectively participate in the governance of the companies of which they are part-owners.

Abolition of the '100 Member rule'

The threshold for requisitioning a special general meeting is determined by s249D Corporations Act 2001.

> *The directors of a company must call and arrange to hold a general meeting on the request of:*
>
> *(a) members with at least 5% of the votes that may be cast at the general meeting; or*
>
> *(b) at least 100 members who are entitled to vote at the general meeting.*

The Government is again trying to reform this provision by setting a minimum of a 5% economic interest before being able to requisition a special general meeting (SGM). While this percentage of capital method is common elsewhere – UK 10%, Canada and NZ 5%, in Europe between 5-20% - Australia's more advanced system should not be compromised by limiting shareholder democracy in this fashion.

The Australian Democrats do not share the majority report's support for a move to a simple 5% rule under s.249D. There is, we recognise, a case for modest change to reflect an appropriate reaction to the very few instances of reported abuse of the current provisions (North Limited and NRMA might provide examples of these). However we are not persuaded that the need for change is great, and we are not persuaded that the changes should be as significant as those planned.

The committee majority appears to have been persuaded by the evidence of the companies themselves that change is necessary. However the committee also received well-considered academic evidence which suggested that there is no pressing need for change. Professor Stephen Bottomley from the Centre for Commercial Law at the Australian National University put this view very clearly, based on sound research:

> Put simply, I see no reason for that amendment to be made. There is no evidence of widespread abuse of the right of 100 members to request a special general meeting. My submission refers to research that I undertook involving 217 companies drawn from a list of the top 500 public companies in Australia. That research collected information about extraordinary general meetings that were held between 1998 and 2002. The information I

> received was that there were only five special general meetings requisitioned by shareholders during that time. That includes meetings requisitioned by either the 100-members rule or the five per cent rule. My data was not able to differentiate between those two.
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> My concern is that the drive to repeal the 100-member rule is driven more by anecdote than by fact. To my knowledge, over the past six years there have been only four examples where the use of the 100-member rule has been considered to have caused some controversy. Those are examples that are probably well known to the committee. It seems to me that those few instances are driving the move to amend this provision.[1]

Mr Ted Rofe made a similar point, and also pointed out that simply requisitioning meetings in circumstances of "controversy" does not amount to abuse of the provisions. Indeed, any circumstances which lead to the use of s. 249D are likely to be controversial – the provisions are there precisely to accommodate the extraordinary. Mr Rofe's submission stated:

> Prior to its amendment in 1998, section 246 of the Corporations Law provided that – in the case of a company having a share capital – at least 100 members holding shares in the company on which there had been paid up an average sum, per member, of at least $200 and – in the case of a company not having a share capital – at least 100 members, could require the directors of the company, as soon as practicable, to convene a general meeting of the company to be held as soon as practicable but, in any case, not later than two months after the date of the deposit of the requisition.
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> In the period of some seven years during which section 246 was in force and the further period of nearly seven years since section 249D came into operation, there have been only about half a dozen cases in which attempts to utilise these provisions have proved controversial.
>
> This is hardly a significant figure.
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> The requisitions which have stimulated media controversy have tended to involve environmental, social and industrial relations matters. That such matters can be of genuine concern and economic relevance to shareholders is illustrated by the costs incurred by BHP in relation to Ok Tedi and by Orica Ltd (formerly ICI Australia) in relation to the remediation of its Rhodes and Botany sites and by the James Hardie asbestos inquiry.[2]

An appropriate principle might be to move the thresholds as far as is necessary to prevent blatant abuse, but no further. The current proposal, to have the 5% rule as the only threshold, is far more onerous than necessary. Yet the government, having failed to successfully implement this policy by regulation in 2000 (the regulations were disallowed) now seek to do so by legislative amendment.

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1 *Transcript of Evidence*, Professor Stephen Bottomley, 28 April 2005, p. 48.

2 Mr Ted Rofe, *Submission 24*, p. 3.

There is a good case for retaining two thresholds within s.249D. Companies in Australia vary so dramatically in size that trying to adopt one threshold to suit them all appears ridiculous. Even within the ASX 200 companies, there are massive variations. Telstra has over 6 billion shares held by nearly 1.7 million shareholders. Wattyl, on the other hand, has 83 million shares held by approximately 9,300 shareholders. A single threshold is unlikely to provide for successful shareholder participation in companies with such significant differences in size.

If change is necessary – and we are not persuaded that it is – then a far more sensible solution would be to adopt, as the second threshold, a square root rule with a floor and a ceiling. That is, the number of shareholders required to requisition a meeting should be the square root of the total number of shareholders – but should be no lower than 500 and no higher than 1500.

This proposal would lift the 100 member threshold by at least 500% without making it completely unattainable by smaller shareholders.

As an additional safeguard against abuse, we would support a return to a minimum shareholding for each requisitioner at the time of requisitioning. A minimum shareholding of 100 shares would seem appropriate, and would mean that the minimum total shareholding for requisitioning a meeting would be 50,000 shares (500 members times 100 shares each).

The proposal we have made could apply equally well to managed investment funds and mutuals.

Threshold for listing members resolutions at a general meeting

We are not persuaded by the need for the proposed change to s.249N, largely for the reasons expressed in the majority report. The Democrats therefore support recommendations 3 and 4 in the majority report.

Distribution of Members statements

Similarly, we are not persuaded by the need for the proposed change to s.249P. If our suggestion in relation to requisitioning general meetings is adopted, then these *quid pro quo* changes will not be necessary.

However, we support recommendation 6 in relation to appropriate protection from defamation actions for the Australian Stock Exchange.

Proxy votes

The provisions in the draft bill relating to proxy voting are conspicuous for what they do *not* say. The bill misses the opportunity to mandate appropriate voting behaviour by institutional shareholders, who should be required to disclose their voting histories to their members. The voting decisions of institutional investors can be critical not only to the outcomes for shareholders in the company, but also for members of the

superannuation fund or other institution making the investment. I remain committed to the view expressed in my CLERP 9 minority report, in which I stated:

> It is worth repeating paragraph 8.66 of the Committee's report which says:
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> *The disclosure of voting is one of the central features of the OECD Principles of Corporate Governance which state: The exercise of ownership rights by all shareholders, including institutional investors should be facilitated. Institutional investors acting in a fiduciary capacity should disclose their overall corporate governance and voting policies with respect to their investments, including the procedures that they have in place for deciding on the use of their voting rights. The voting record of such investors should also be disclosed to the market on an annual basis.*[3]
>
> The Democrats believe that the trustees and managers of superannuation funds and managed investment schemes have a fiduciary duty to act in the best interests of their members and beneficiaries. We believe that a trustee can only satisfy their fiduciary obligations by taking an active interest in material corporate governance activities of their equity investments.
>
> Material corporate governance activities would include voting on constitutional issues and decisions on the election and remuneration of directors.
>
> Voting on these three matters should be mandatory.
>
> In the absence of support for our view, the Democrats will support the broader amendments of the ALP to require fund managers, trustees of super funds and life companies to maintain and disclose voting policies and records.
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> We will amend the legislation to extend the requirement to vote on material corporate governance resolutions to fund managers. [4]

Cherry picking of proxy votes

We argue that the proposed amendment in relation to cherry picking still leaves the way open for abuse. Consider a situation where a proxyholder supports the "No" vote on a resolution. They find that they are holding, say, 2000 No votes and 10,000 Yes votes. They then decide not to exercise any of these votes. This action would be entirely consistent with the proposed legislation, yet would:

- Leave the "yes" vote a net 8000 votes short of its true position, and
- Frustrate the intentions of the owners of those "yes" proxies.

A far more effective way to deal with cherry-picking would be for the Corporations Act to require each proxy form to indicate whether the proxies are intended to be

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3 OECD Principles of Corporate Governance Draft Revised Text, January 2004, p. 7.

4 Australian Democrats, *CLERP (Audit Reform and Corporate Disclosure) Bill 2003*, Part 1, Australian Democrats Minority Report, pp. 221-222

mandatory (where the proxyholder must vote) or discretionary (where the proxyholder may vote). The Act could then require proxy-holders to exercise those proxies in accordance with the wishes of the shareholder issuing the proxy.

In addition, as noted above, we take the view that certain types of vote should be mandatory for institutional shareholders.

Disclosure of proxy votes

We do not support the proposal to repeal s.250J(1A). The Corporations Act should require all proxy votes to be declared, recorded, and disclosed to the general meeting. We agree that the timing of this disclosure can be a matter for the company and the chair to decide for themselves. However, we feel that the requirement for disclosure should remain within the legislation.

Disclosure of information filed overseas

We do not support the proposal to repeal s.323DA. This amendment appears to be unnecessary and will reduce the information available to shareholders without significantly reducing the costs to companies. After all, in order to meet their overseas reporting requirements, the companies have gathered the appropriate information, issued a report, and made it public. The marginal cost of then making it public in Australia is insignificant.

The views of the Commercial Law Association, Mr Ted Rofe, and the ACTU, which are detailed in paras 2.83 through 2.85 of the majority report are not given the weight which they deserve. There is simply no substantial reason not to require companies listed in Australia to make available to local shareholders the same information which is made available to overseas shareholders.

SENATOR ANDREW MURRAY

Appendix to Australian Democrats Minority Report

Shareholders in Some Public Companies

Company Name	Date of Annual Report	Number of shareholders	Square root	Number of shares	5% rule
Telstra	20 August 2004	1,682, 882	1,297	6,182,363,532	309,118,170
Qantas	26 August 2004	176,574	*420*	1,845,115,428	92,255,770
Commonwealth Bank	10 August 2004	714,492	845	1,264,006,062	63,200,300
National Australia Bank	12 November 2004	385,506	621	1,550,986,508	77,548,425
David Jones	13 September 2004	75,570	*275*	425,000,000	21,250.000
AMP	4 March 2005	965,292	982	1,860,152,060	93,007,600
AGL	16 August 2004	113,571	*337*	456,219,716	22,810,985
Coles Myer	17 September 2004	446,488	668	1,169,300,000	58,465,000
Santos	28 February 2005	79,423	*282*	585,390,738	29,269,535
Wattyl	18 August 2004	9,320	*97*	83,626,206	4,181,310
Coca Cola Amatil	9 March 2005	39,263	*198*	743,809,318	37,190,465
Orica	8 October 2004	44,725	*211*	270,057,893	13,502,895

NOTE: *Italics* indicates fall below the proposed 500 minima for the number of shareholders.