Parliamentary Joint Committee on Corporations and Financial Services

Inquiry into the Exposure Draft of the Corporations Amendment Bill (No 2) 2005

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DUTIES OF THE COMMITTEE

Section 243 of the *Australian Securities and Investments Commission Act 2001* sets out the duties of the committee as follows:

The Parliamentary Committee's duties are:

(a) to inquire into, and report to both Houses on:

(i) activities of ASIC or the Panel, or matters connected with such activities, to which, in the Parliamentary Committee's opinion, the Parliament's attention should be directed; or

(ii) the operation of the corporations legislation (other than the excluded provisions), or of any other law of the Commonwealth, of a State or Territory or of a foreign country that appears to the Parliamentary Committee to affect significantly the operation of the corporations legislation (other than the excluded provisions); and

(b) to examine each annual report that is prepared by a body established by this Act and of which a copy has been laid before a House, and to report to both Houses on matters that appear in, or arise out of, that annual report and to which, in the Parliamentary Committee's opinion, the Parliament's attention should be directed; and

(c) to inquire into any question in connection with its duties that is referred to it by a House, and to report to that House on that question.

TERMS OF REFERENCE

On 9 February 2005, the Parliamentary Joint Committee on Corporations and Financial Services resolved to inquire into the Exposure Draft of the Corporations Amendment Bill (No.2) 2005. The Exposure Draft Bill seeks to amend the *Corporations Act 2001*. It is intended to facilitate increased shareholder participation in corporate governance, while reducing the costs of such participation. Specifically, it proposes changes to the '100-member' rule for calling meetings, and changes to proxy voting.

The Committee will consider:

(a) the need for the proposed amendments;

(b) the impact of the proposed amendments on corporate governance;

(c) the impact on shareholder participation of the Bill, including proposed amendments to the '100-member' rule;

(d) the impact of the proposed amendments to rules for proxy voting;

(e) possible alternative approaches; and

(f) any related matter.

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CHAPTER ONE

The Inquiry

Background

1.1 An exposure draft of the Corporations Amendment Bill (No. 2) 2005 was released on the Treasury website on 7 February 2005, along with an exposure draft explanatory memorandum. Treasury called for written comments on the exposure draft by 1 April 2005.

1.2 The bill proposes a number of changes to corporate governance and shareholder participation arrangements for corporations governed by the *Corporations Act 2001*. A number of the proposed changes arise from previous reports of this Committee (and its predecessors), and from reports of the Corporations and Markets Advisory Committee (CAMAC).

1.3 In particular, the bill proposes to:

- Remove the "100 member rule" for requisitioning extraordinary general meetings;
- Reduce to 20 the threshold for listing a resolution at an annual general meeting;
- Reduce to 20 the threshold for requesting distribution of a member's statement;
- Prevent the "cherry-picking" of proxy votes;
- Remove legislative requirements relating to the disclosure of proxy votes; and
- Remove the requirement to disclose information disclosed in overseas markets.

Adoption of reference

1.4 At a private meeting on 16 February 2005, the Committee agreed to the following terms of reference for this inquiry.

The Committee will consider:

(a) the need for the proposed amendments;

(b) the impact of the proposed amendments on corporate governance;

(c) the impact on shareholder participation of the bill, including proposed amendments to the '100-member rule';

(d) the impact of the proposed amendments to rules for proxy voting;

(e) possible alternative approaches; and

(f) any related matter.

1.5 The Committee agreed to a closing date for submissions of 8 April 2005, in order to allow submitters to provide, to this Committee, modified versions of the submissions made to Treasury. A list of the submissions received appears at **Appendix 1**.

1.6 The Committee held one hearing on this reference, in Canberra, on 28 April 2005. Witnesses who appeared before the Committee at that hearing are listed at **Appendix 2**. Copies of the Hansard transcript are tabled for the information of the Senate and the House of Representatives. They are also available through the internet at www.aph.gov.au/hansard.

CHAPTER TWO

Issues

2.1 In evidence before the Committee, a number of issues were raised in relation to the proposed bill:

- the proposal to remove the "100 member rule" for calling general meetings;
- reduction to 20 of the threshold for listing resolutions for discussion at the annual general meeting;
- distribution of members statements;
- "cherry-picking" of proxy votes;
- alternative means of voting;
- the disclosure of proxy votes; and
- disclosure of information filed overseas.

2.2 This Chapter will consider each of these issues in turn.

Abolition of the "100 Member Rule"

2.3 Section 249D(1) of the *Corporations Act 2001* states:

> (1) 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.

2.4 Item 1 of Schedule 1 of the current bill proposes to replace that subsection with the following:

> (1) The directors of a company must call and arrange to hold a general meeting on the request of members with at least 5% of the votes that may be cast at the general meeting.

2.5 The effect of this amendment is to remove the "100 member rule" currently set out in s.249D(1)(b) while leaving the "5% rule" currently set out in s.249D(1)(a) intact.

2.6 Treasury's stated reasons for proposing this change are:

> The 100 member rule allows relatively small groups of members to requisition general meetings of large companies. This can expose large companies (and, indirectly, their members) to significant costs.
>
> A particular concern is that the rule allows for special interest groups to threaten the imposition of large and unnecessary costs on companies, for publicity purposes or to influence negotiations with the company, to the detriment of the vast majority of members. The 100 member rule has been criticised for giving disproportionate influence to minority shareholders, failing to recognise the substantial size differences between companies and for being out of step with comparative laws in other countries.[1]

2.7 In its submission, NRMA outlined the impact such "disproportionate influence" can have on its business:

> The NRMA's repeated experience over recent years has seen a situation where 0.005% of members are able to call a special meeting at the cost of approximately $4 million. This circumstance has occurred 7 times in the past 3 years. Clearly this continues to pose a significant distraction to both the Board and Management's operation of the business.
>
> These costs become even greater when the NRMA is forced to pursue legal proceedings with respect to the validity of proposed resolutions. This is clearly untenable.
>
> Of even greater concern is that none of the 10 or so resolutions voted on by the members were passed by the requisite majority. This demonstrates a shortcoming that provides an opportunity for a small number of disaffected members to call a meeting that does not have support of the wider membership.[2]

2.8 In previous reports, this Committee has called for the abolition of the 100 member rule, essentially for the reasons outlined above by Treasury. Recommendation 24 of the Committee's CLERP 9 Report was as follows:

> The Committee recommends that the 100 member rule for the requisitioning of a general meeting be removed from section 249D of the Corporations Act.[3]

2.9 Submissions and evidence before the Committee during this inquiry generally supported the removal of the 100 member rule. For instance, Chartered Secretaries Australia stated:

> We strongly support the repeal of the 100-member rule and the maintenance of the requirement that shareholders requesting a meeting should have at least five per cent (5%) of the votes that may be cast. CSA has made many

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1 *Exposure Draft Explanatory Memorandum*, p.5.

2 NRMA, *Submission 29*, p.1.

3 Parliamentary Joint Committee on Corporations and Financial Services (2004) CLERP (Audit Reform and Corporate Disclosure) Bill 2003, Part 1 – Enforcement, Executive Remuneration, Continuous Disclosure, Shareholder Participation and related matters, p. 179.

> submissions on this matter and has supported a range of different proposals designed to provide the necessary balance between allowing shareholders to participate in meetings of the company and the need to control the costs of organising shareholder meetings. This simple five per cent (5%) proposal is a welcome solution, that operates relative to the size of the company, without the complications of calculating tiered and mathematical solutions produced in the past.[4]

2.10 Support for this amendment did not just come from groups representing large companies. The Australian Shareholders Association, for instance, stated:

> Requiring five per cent of total voting shares to requisition a special general meeting is a reasonable balance of the rights of shareholders to have matters of general shareholder interest addressed with the importance of allowing directors to effectively run the company.
>
> In its forty-year history, the Australian Shareholders' Association has not used the powers under this section. It has only ventured to call for a special general meeting in one case, using the five per cent rule, which did not come to fruition as the director whose resignation was sought stepped down. Under this amendment the ASA would seek support of institutions or major investors in order to collect signatures representing five per cent of the register for issues deemed sufficiently urgent to require a special meeting to address them.[5]

2.11 However, support for the amendment was not universal. A number of submissions, while acknowledging that the current 100 member rule requires change, proposed reform rather than repeal. These proposals included:

- a "modified square root" proposal, whereby the number of members required to call a meeting would be the square root of the number of all votes which could be cast at the meeting, with the additional proviso that each individual shareholder calling for the meeting should hold $1000 worth of shares;[6]
- a sliding percentage requirement, where the required percentage increases as the size of the entity increases;[7] and
- retaining the 100 member rule but requiring that all requisitioning shareholders "must have held shares of a certain monetary value for at least 1 year prior to the meeting request";[8]

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4 Chartered Secretaries Australia, *Submission 10*, p. 1.

5 Australian Shareholders Association, *Submission 4*, p. 2.

6 Proposed by the Australian Council of Super Investors (submission 9)

7 Proposed by NSW Young Lawyers (submission 18)

8 Proposed by the Finance Sector Union of Australia (submission 19)

2.12 Further, a number of submissions opposed the amendment outright, supporting the subsection in its current form. The Australian Council of Trade Unions, for instance, stated:

> The ACTU acknowledges the legitimate concern of business to manage the costs (in terms of money and human resources) to companies in the calling and hosting of special or extraordinary general meetings of shareholders, and that these should not be arranged to address frivolous matters.
>
> Nonetheless it is our view that the 100-member threshold constitutes a significant hurdle, which gave companies sufficient protection against meetings being called on frivolous or vexatious grounds.[9]

2.13 Two submitters opposed the amendment on the basis that there is no history of the 100 member rule being abused:

> First, it is my submission that the proposed amendment is unnecessary. There is no evidence of widespread abuse of this right to request a general meeting in Australian companies. Indeed, the evidence suggests that section 249D(1) has been used only infrequently.[10]

2.14 The Committee remains of the view that the 100 member rule should be abolished. While there is little history of the rule being abused, its potential for abuse remains clear. In the Committee's view, it is not necessary for parliament to wait until some quota of abuses is observed, before reforming the provision. The Committee considers that sufficient other mechanisms exist for smaller shareholders to question company directors and influence company policy. Furthermore, the Committee is aware that any vexatious use of the 100 member rule will result in substantial costs to the company, and that these must be reflected in poorer investment returns for shareholders.

2.15 The Committee notes the proposals for reforming the rule rather than repealing it. However, the Committee considers that the 5% rule alone is sufficient to ensure that, in the extraordinary circumstances which would justify an extraordinary meeting, shareholders could requisition a meeting. This would probably (for practical purposes) require the recruitment of at least one institutional shareholder – and this in itself provides a safeguard against frivolous use of s. 249D.

2.16 Accordingly, the Committee supports item 1 of schedule 1 of the proposed bill.

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9 Australian Council of Trade Unions, *Submission 14*, p. 2. Mr James McConville (submission 25) expressed a similar view.

10 Prof. Bottomley, *Submission 20*, p. 1. Similar views were expressed by Mr. Ted Rofe (submission 24).

The 100 member rule and mutuals

2.17 A number of submitters and witnesses drew the Committee's attention to the impact which the abolition of the hundred member rule would have on mutuals. In mutuals, each shareholder has an identical shareholding. Unlike other listed companies, mutuals do not have large private or institutional investors holding a substantial proportion of the shares (and therefore votes). Consequently, for a large mutual, meeting the 5% threshold would be virtually impossible:

> To contact 5% of members to call a meeting in a large mutual is a virtual impossibility without a large public advertising campaign or direct mail-out by the requisitioners, using a copy of the members' register obtained under s.173 of the *Corporations Act*. Such a campaign may itself be destabilizing for a financial institution, even before the meeting itself is held.[11]

2.18 This view accords with a view previously expressed (but not substantially discussed) by this Committee.[12] Macquarie Bank submitted that, as a consequence, Mutuals should either retain the hundred member rule, or retain the hundred member rule and add a financial bond to prevent vexatious use of the provision.[13]

2.19 Witnesses from Treasury acknowledged that the position of mutuals had not received specific consideration while the proposed bill was being drafted. However, Treasury argued that making an exception for mutuals would be problematic:

> One of the problems we encountered when first looking at that was that this problem with the 100-member rule being abused is not just limited to mutuals; potentially it can affect a lot of other large corporates. Also, there is no definition of mutual in the act. A lot of people use the term, but it may be problematic to invent a definition just for this purpose. Another issue is that the policy justification that we are using to support the removal of the rule does not just cover mutuals. The rule would still be out of step with comparable overseas jurisdictions for corporates. We thought that by just trying to look for a solution for mutuals it would be imperfect.[14]

2.20 The Committee is not convinced by Treasury's evidence. If the bill in its current form were passed, it would clearly have the unintended consequence of essentially preventing members of mutuals from calling an extraordinary general meeting. While an amendment to change the meeting requisition requirements for mutuals may require additional drafting, and the insertion of a new definition into the Act, these difficulties do not seem insurmountable. It may, for instance, be possible to apply the new provision to "a company where all shareholders hold an equal number of shares" rather than defining mutuals *per se*.

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11 Mutual Strategies, *Submission 15* , p. 15.

12 Parliamentary Joint Committee on Corporations and Securities (1999) *Report on Matters Arising from the Company Law Review Act 1998*, p. 164.

13 Macquarie Bank, *Submission 13,* p. 13.

14 Mr Nigro, *Transcript of Evidence*, 28 April 2005, p. 72.

2.21 The Committee agrees with submissions that the 5% threshold is too high for larger mutuals, and would effectively prevent shareholders from requesitioning a meeting. However, the Committee considers that, particularly for larger mutuals, the 100 member threshold is too low. For that reason, the Committee supports the bill's abolition of the hundred member threshold for mutuals.

2.22 The Committee considers that the best approach for mutuals is to strike a middle path between the 5% and 100 member thresholds. A threshold of 1% would be a substantial reduction from 5%, yet would prevent extremely small numbers of members from calling extraordinary meetings for vexatious reasons.

Recommendation 1

2.23 The Committee recommends that the bill be amended to insert a section which provides that, for mutuals, the threshold for calling an general meeting should be 1% of the total number of votes able to be cast at the general meeting;

The 100 Member Rule and Managed Investment Funds

2.24 Chapter 5C of the Corporations Act outlines provisions for Managed Investment Funds. Under Chapter 5C, the members of such funds have a range of rights (such as the removal of the scheme's responsible entity – s.601FM or the winding up of the scheme – s.601NB) which may be exercised at a members' meeting.

2.25 A member's meeting may be called by members in accordance with section 252B of the Corporations Act, which sets out the same tests as currently exist for companies in s.249D: meetings can either be called by members with 5% of the votes to be cast; or by 100 members.

2.26 While the proposed bill would remove the 100 member rule for companies, it would not do so for managed investment funds. This omission was noted by representatives from the Investment and Financial Services Association:

> The draft legislation does not touch at all the provisions in relation to managed investment schemes, either for calling a meeting or putting resolutions on the agenda of a meeting.[15]
>
> When I raised the matter with Treasury officials, when I initially read the bill, I simply assumed that the provisions would extend across both companies and managed investments. It was only when I looked at the details of the bill that I realised they did not. When I raised it with Treasury they indicated to me that most of the focus in the past years, in terms of problems with these provisions, had come from companies, hence their focus on companies.[16]

15 Mr. O'Reilly, *Transcript of Evidence*, 28 April 2005, p. 4.

16 Mr O'Reilly, *Transcript of Evidence*, 28 April 2005, p. 5.

2.27 Blake Dawson Waldron Lawyers supported the view that the amendment to s.249D should be accompanied by an identical amendment to s.252B:

> … any changes to company meeting provisions in the Corporations Act should flow through to the "mirror image" provisions for meetings of managed investment schemes. Without flow through, there will be arbitrary differences between the provisions which will tend to cause confusion among the investing public. This will be particularly confusing for members of the many stapled entities listed on the Australian Stock Exchange whose securities comprise both a share in a company and a unit in a managed investment scheme.[17]

2.28 The Committee supports this view. While Treasury's focus on companies is understandable, it remains deirable for the provisions relating to companies, and to managed investment funds, to remain consistent.

Recommendation 2

2.29 The Committee recommends that the bill be amended to remove the 100 member rule for managed investment funds.

Threshold for listing members resolutions at a general meeting

2.30 Section 249N(1) of the *Corporations Act 2001* states:

> (1) The following members may give a company notice of a resolution that they propose to move at a general meeting:
>
> (a) members with at least 5% of the votes that may be cast on the resolution; or
>
> (b) at least 100 members who are entitled to vote as a general meeting.

2.31 Item 3 of Schedule 1 of the proposed bill makes a simple numerical change to s.249N(1)(b), substituting "20" for "100".

2.32 Treasury's reasons for proposing this change are:

> This measure will make it significantly easier for shareholders to add resolutions to the agenda of the AGM as the support of only 20 shareholders is needed. This will enhance shareholders' ability to participate in Annual General Meetings and question their company's board and management without imposing significant costs on the company as no new meeting would need to be called and held.[18]

17 Blake Dawson Waldron Lawyers, *Submission 21*, pp 7-8.

18 *Exposure Draft Explanatory Memorandum*, p.5.

2.33 As was noted by some witnesses in oral evidence, it does not appear that any groups actually called or campaigned for this amendment.[19] Further, there does not appear to be significant reason for the new threshold to be 20.[20] It appears that this amendment was developed within Treasury as a form of regulatory compensation to shareholders for the loss of the 100 member rule, discussed above.

2.34 The Committee supports Treasury's intentions in this case. It is reassuring to see Treasury attempting to counterbalance necessary reforms with measures to increase the participation of shareholders. Unfortunately, the proposed amendment may have a perverse effect, by allowing a tiny minority of shareholders to flood the annual general meeting with resolutions. If a substantial quantity of these "campaign" resolutions is received, this may in fact eliminate the opportunity for other shareholders to place their resolutions on the agenda and have them debated and decided.

2.35 In its submission, Telstra stated:

> There is a real risk that if small interest groups use amended section 249N to put numerous additional resolutions before the company's annual general meeting that mainstream shareholders will choose not to attend annual general meetings and the meetings will become dominated by fringe issues.[21]

2.36 It was also suggested that a threshold as low as 20 could easily be subverted by a single shareholder splitting their interest:

> … we believe 20 shareholders is an extremely low number to get a shareholder proposal up onto the notice paper. Given the ability of any holder to share-split now, in essence this proposal could allow one holder to split his or her holding—or its holding, in the case of a corporate entity—into 20 different parcels and therefore satisfy this proposal. If that were the case, one holder would be able to legally split—as they are—their holdings into 20 different parcels and therefore satisfy this 20-member test. It just seems ridiculous, really, for essentially one person or one holder to be able to split their holding into 20 different parcels to satisfy the test. Also, there is no limitation or minimum threshold on the size of holding that the 20 holders have or on the duration of their holdings et cetera. There are those sorts of issues as well.[22]

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19 See Mr Sheehy, *Transcript of Evidence*, 28 April 2005, p. 11.

20 See Mr Sheehy, *Transcript of Evidence*, 28 April 2005, p. 20, and Mr Rawstron, *Transcript of Evidence*, 28 April 2005, p. 72.

21 Telstra Corporation, *Submission 1*, p. 2.

22 Mr Matheson, *Transcript of Evidence*, 28 April 2005, p. 34.

2.37 While opposition to this proposal was widespread, it was not unanimous. A number of submitters supported the proposal, arguing that it would enhance shareholder participation at the annual general meeting.[23]

2.38 One submitter, the Business Council of Australia, argued that the current 100 member threshold is insufficient:

> To overcome the potential for a small parcel of shares to be assigned across 100 individuals to satisfy the threshold, the BCA also believes the Act should be amended to require the 100 shareholders to each hold a minimum quantity of shares, such as a marketable parcel.[24]

2.39 While the Committee does not support the BCA's argument for the threshold to be tightened, neither does the Committee support lowering the threshold to 20. Twenty members, in proportion to the number of shareholders with an interest in most public companies, represents a negligible amount. The danger raised by submitters, of annual general meetings being hijacked to the detriment of the company and of mainstream shareholders, is genuine and should be avoided.

Recommendation 3

2.40 The Committee recommends that item 3 of schedule 1 of the bill should be omitted.

2.41 The Committee noted the proposal made by the National Institute of Accountants, that the proposed 20 member threshold should have a twelve month sunset clause.[25] While the Committee does not support that specific proposal, the Committee agrees that, in the event that the threshold under s. 249N(1)(b) is reduced, a review will be necessary. This Committee is the obvious body to conduct such a review.

Recommendation 4

2.42 The Committee recommends that, in the event that recommendation 2 is not enacted, the Parliamentary Joint Committee on Corporations and Financial Services should conduct an inquiry into the operation of s.249N after the proposed amendment has been in operation for one year.

Distribution of Members' Statements

2.43 Section 249P of the *Corporations Act 2001* states:

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23 ASFA (submission 7), the Australian Council of Super Investors (submission 9), the ACTU (submission 14), the Financial Sector Union of Australia (submission 19), and the Commercial Law Association (submission 26) supported the 20 member proposal.

24 Business Council of Australia, *Submission 16*, p. 6.

25 National Institute of Accountants, *Submission 22*, p. 1.

> (1) Members may request a company to give to all its members a statement provided by the members making the request …
>
> (2) The request must be made by:
>
> (a) members with at least 5% of the votes of the votes that may be cast on the resolution; or
>
> (b) at least 100 members who are entitled to vote at the meeting.

2.44 Item 5 of the proposed bill would reduce the threshold in section 249P(2)(b) from 100 to 20.

2.45 The reason for this change was similar to that outlined above for s.249N. The explanatory memorandum states:

> This reduction will encourage members to utilise this provision to alert other members to issues, and gain support for resolutions that may have been proposed under section 249N.[26]

2.46 A number of witnesses and submitters opposed this measure, for two broad reasons:

- the additional cost of distributing Members' statements; and
- potential for statements to include defamatory material.

2.47 The Securities Institute of Australia, for example, stated:

> While the SIA acknowledges that the proposal aims to bring issues to the attention of the company and shareholders, and in particular to provide unsophisticated shareholders with a better understanding of the potential complexities surrounding the resolution or matter, we believe this change may be subject to abuse by a very small minority of shareholders with vested interests. We are concerned that the proposal may result in the dissemination of frivolous, vexatious or defamatory statements.[27]

2.48 The Insurance Australia Group stated:

> We do not agree that the proposed change does not create significant cost for shareholders. The cost of adding even a single 1000-word statement to an AGM pack of materials is significant for large companies such as IAG.[28]

2.49 The Committee is unconvinced by the cost-related arguments against the proposed amendment. Shareholders should be able to exercise some rights of ownership. Members statements stand in a different position to AGM resolutions or the requisitioning of an extraordinary AGM, because they need not be justified by a

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26 *Exposure Draft Explanatory Memorandum*, p. 8.

27 Securities Institute of Australia, *Submission 5*, p. 2.

28 Insurance Australia Group, *Submission 11*, p. 2.

level of voting support at the subsequent meeting. Companies should be able to tolerate, accommodate, and even encourage voices of dissent among their owners. It should be noted that if the Committee's recommendation 2 is accepted, the number of members statements relating to resolutions is unlikely to be any higher than at present.

2.50 However, the Committee is prepared to consider some accommodation of the concerns of industry, to contain the company's exposure to additional costs, without silencing voices of dissent. Recommendation 5 is intended to have this effect.

Recommendation 5

2.51 The Committee recommends that the proposed bill be amended to provide that members statements proposed by 20 or more, but less than 100, shareholders should be:

- **no more than one page in length; and**
- **received by the company by a suitable date, in order to enable distribution with the package of AGM materials.**

2.52 Several submitters proposed that, if s.249P is amended to reduce the threshold to 20, the Company should be entitled to refuse to distribute members statements which were irrelevant or inappropriate:

> If the "20 member rule" were to be adopted, then these carveouts should be expanded to address issues of irrelevance and inappropriateness, including any members' resolution or statement which seeks to fetter the proper discretion of a board. Given that the management of a company is vested in its board of directors, we believe that there should be express carveouts for these matters.[29]

2.53 The Committee does not support this proposal for two reasons. First, such a carve-out would lead to a great deal of uncertainty as to how "irrelevant" or "inappropriate" should be defined. The use of such concepts would almost inevitably lead to conflict, and probably legal action, between companies and shareholders whose members' statements had been refused publication. Second, the Committee considers that s.249P is an accountability measure, designed to make company directors accountable to the owners of the company. To then give those directors an effective veto over the publication of members' statements would seriously compromise the effectiveness of the section, as the veto could be used to quash resolutions critical of the board.

2.54 The question of defamation, however, raises a further concern. Company directors are already entitled to refuse to distribute a members statement if it is defamatory (s.249P(9)(a)). The proposed amendment to s.249P should therefore pose no direct difficulty for companies. However, the proposal may have implications for the Australian Stock Exchange (ASX). In its submission, the ASX stated:

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29 Macquarie Bank, *Submission 12*, p. 5.

> ASX has concerns that the potential increase in the number of members' statements may result in increased exposure of ASX to the risk of actions for defamation because:
>
> • Listed companies are required to release communications with shareholders to the market (Listing Rule 3.17);
>
> • ASX will 'publish' members' statements over its company announcements platform;
>
> • Members' statements are outside the usual ambit of continuous disclosure. They are not drafted by the company, will not necessarily be 'material' in terms of the Listing Rule 3.1 or s674(2) of the Corporations Act and are more likely to contain statements which could expose ASX to the risk of allegations of defamation than those drafted by the company.
>
> • The operation of s1100B of the Corporations Act in providing qualified privilege to ASX is uncertain. In particular, it is not clear that the protection would extend to members' statements released under Listing Rule 3.17. It may be arguable for example that such information is not "necessary to ensure that the market operates in a fair, orderly and transparent way".[30]

2.55 The Committee considers that this issue relates more to s.1100B than to s.249P, and should not be an impediment to the proposed changes. The Australian Stock Exchange, when circulating material which has been published by companies in accordance with s.249P, should receive the full protection of s.1100B. Alternatively, the ASX, when republishing material which has been published by companies in accordance with s.249P, should be regarded as undertaking innocent dissemination - similar to the position of a newsagent who, by distributing newspapers containing defamatory material, "republishes" the defamatory material without attracting liability in tort.[31]

Recommendation 6

2.56 The Committee recommends that the Treasurer review the protection provided to the Australian Stock Exchange under s.1100B of the *Corporations Act 2001*.

"Cherry-Picking" of Proxy Votes

2.57 Section 250A of the Corporations Act 2001 addresses the proxy voting process at company meetings. Currently, the Chair is required to exercise any proxies they have on a poll (though not a show of hands), and to vote the proxies according to

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30 Australian Stock Exchange, *Submission 28*, p. 3.

31 The classic English statement of this principle is *Emmens v Pottle* (1885) 16 QBD 354. For a more modern, Australian use of the principle, see *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574. *Thompson vs Australian Capital Television* is particularly relevant as it relates to electronic republication (in this case by a television broadcast).

the instructions they have received. However, other proxyholders are not under that same obligation.

2.58 This has given rise to concerns about the 'cherry-picking' of proxy votes: the practice of withholding some or all proxy votes where they do not reflect the position of the proxyholder, whilst casting those that do. In a previous report, this Committee recommended that:

> …the law be amended to ensure that the voting intentions of shareholders through their proxyholder are carried out according to their instruction.[32]

2.59 The proposed bill addresses this problem in Item 7 of Schedule 1, which extends the Chair's obligation to vote proxies according to instruction to all proxyholders, where they vote. It states:

> (d) if the proxy is not the chair – the proxy need not vote on a poll, but if the proxy votes on the poll in any capacity, the proxy must vote on the poll in the exercise of the proxy appointment and must vote in the way specified in the proxy appointment.

2.60 The evidence received by the Committee recognised the problem of cherry-picking of proxies. The Australian Shareholders' Association reflected the general feeling when they stated:

> The awarding of a proxy is a responsibility that should be taken seriously and cherry-picking of proxy votes is unacceptable.[33]

2.61 Consequently, the proposed amendment was supported insofar as it addresses the problem. There was some feeling, however, that it offers only a partial solution as it does not oblige the proxy holder to vote but only states that proxies must be voted as per instruction *where voted*. Several organisations wanted the amendment to go further and make voting the proxies obligatory.[34] The Explanatory Memorandum accompanying the Amendment Bill notes that a blanket obligation to vote a proxy and to vote it as intended, as opposed to the obligation to vote a proxy as intended where it is voted, was considered too onerous. Notably, there may be circumstances where an individual is unaware of their status as proxyholder, and other mitigating circumstances which prevent the proxyholder voting in a poll. As the proposed amendment includes penalties for cherry-picking, it imperative that the proxyholder should not be penalised where they were unable to vote. Consequently, the Committee supports this amendment.

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32 Parliamentary Joint Committee on Corporations and Financial Services (June 2004) *CLERP (Audit Reform and Corporate Disclosure) Bill 2003 Part 1 – Enforcement, Executive Remunerationn, Continuous Disclosure and related matters*, p.166.

33 Australian Shareholders' Association Ltd, *Submission 4,* p.4.

34 For instance Submission 4, Australian Shareholders' Association Ltd, p.4; Submission 10, Chartered Secretaries of Australia, p.2; Submission 18, NSW Young Lawyers, p.6-7; Submission 21, Blake Dawson Waldron, p.8

Alternative means of voting at general meetings

2.62 Consideration of proxy voting led the Committee to consider means by which shareholders not attending meetings might be able to vote, other than by nominating a proxy.

2.63 Direct voting could take a number of forms, with votes being cast by post or fax, phone, or electronically. Direct voting would remove the uncertainty associated with the appointment and instruction of proxies. Consequently, problems such as the cherry-picking could be substantially lessened by a greater use of direct voting. And a clear audit trail is established by direct voting, which increases the transparency and confidence in the process.

2.64 There was broad support for a greater use of direct voting, though some reservations were noted. In advocating a greater emphasis on direct voting, the Australasian Investor Relations Association (AIRA) outlined the following benefits: it avoids the problems associated with proxy voting; it is simpler, more efficient and more transparent; it encourages the participation of those who cannot attend meetings to a greater degree than the existing proxy process; and it ensure that results of resolutions better reflect the shareholdings of investors.[35]

2.65 Given the significant increase in the use of communications technology in all areas of commerce, not least share trading, its slow adoption in the voting process is conspicuous. Yet the technology clearly exists to allow its far greater use, evidenced by the experiences in the countries such as the UK and USA. Mr Munchenberg, representing the Business Council of Australia (BCA), predicted an "inevitable trend in that sort of direction"[36] despite a slow start in Australia.

2.66 Considerable attention has been devoted to the issue of electronic voting.[37] In his 2004 review of impediments to share voting in the UK, Paul Myners concluded that:

> Electronic voting remains the key to a more efficient voting system, and all parties – issuers, institutional investors and the intermediaries – need to make conscious efforts to introduce electronic voting capabilities.[38]

2.67 In a subsequent report, he has reported a significant increase in electronic voting capabilities, with the Institutional Shareholders' Committee (ISC) encouraging

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35 Australasian Investor Relations Association, *Submission 3,* p.3.

36 Mr Munchenburg, *Transcript of Evidence*, 28 April 2005, p.24

37 Thus far it seems that electronic voting has largely implied electronic *proxy* voting. There has evidently been very limited implementation of direct electronic voting. See Richard Alcock, Andrew Daly & Caspar Conde (2005), *Electronic Proxy Voting in Australia,* Allens Arthur Robinson, Sydney.

38 Paul Myners (2004) *Review of the Impediments to Voting UK Shares,* Report to the Shareholder Voting Working Group, www.fsa.gov.uk

their members to facilitate it and CREST, the UK Central Securities Depository which accounts for some 85% of UK-issued share capital, reported significant growth in the use of its electronic proxy voting facilities.[39]

2.68 Whilst the benefits of direct or electronic proxy voting are acknowledged, there were concerns expressed about the possible disenfranchisement of shareholders without access to electronic communication.[40] However, processes need not be limited to on-line voting and the technology already exists to allow phone voting as well, for instance: many of the bodies offering on-line proxy voting already also offer phone voting.

2.69 Concerns have also been raised about the implications of greater moves to direct voting on the conduct of company meetings. In order to ensure that direct votes are properly counted, the Investment and Financial Services Association (IFSA) suggest that resolutions be decided by polls rather than by a show of hands, which effectively disenfranchises those shareholders not present. They suggest that the show of hands be confined to votes on the conduct of the meeting rather than substantive matters.[41] However, there was concern that this would limit the value of the meeting as a forum where matters were raised and questions answered. Mr Wilson, representing the Australian Shareholders' Association (ASA), emphasised that many would want to wait until hearing the debate at the meeting before determining how to vote, or to appoint a proxy holder to do this on their behalf and emphasised the efficiency of voting via a show of hands at meetings.[42] It should be noted, though, that direct voting is not proposed as a replacement for the proxy process or for the AGM but as an additional means to facilitate shareholder engagement.[43]

2.70 Interest in direct voting is clearly growing. Even relatively sceptical organisations acknowledged that it "could be a good thing – it needs further investigation".[44]

Recommendation 7

2.71 The Committee recommends that the Treasurer investigate direct voting, how its greater use might be encouraged, and the full implications of its widespread use.

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39 Paul Myners (March 2005) *Review of the Impediments to Voting UK Share: Progress – One Year On*, www.fsa.org.uk, p.3; CREST (January 2005) *Electronic Proxy Voting Update* www.crestco.co.uk

40 Mr Munchenburg, *Transcript of Evidence*, 28 April 2005, p.24

41 IFSA, *Submission 23*, p.3. Deciding resolutions by poll rather than a show of hands was one of the recommendations of the Myners Review in the UK: Paul Myners (March 2005) *Review of the Impediments to Voting UK Share: Progress – One Year On*, www.fsa.org.uk, p.8.

42 Mr Wilson, *Transcript of Evidence* 28 April 2005, p.40

43 Mr Munchenburg, *Transcript of Evidence* 28 April 2005, p.33

44 Mr Wilson, *Transcript of Evidence* 28 April 2005, p.40

Disclosure of proxy votes

2.72 Item 9 of Schedule 1 of the Exposure Draft repeals section 250J(1A) of the Corporations Act 2001 which requires that, before a vote is taken, the Chair must inform the meeting of the number of proxy votes received and how they are to be cast. The Explanatory Memorandum explains that this is because the inherent uncertainty surrounding proxy voting means that accuracy of disclosure is dubious and can, at best, only be indicative.[45]

2.73 The issue of the timing of disclosure of proxies is evidently one around which there is little agreement. Even in supporting the amendment, the BCA acknowledged that, within their membership:

> there is a considerable division of opinion on when proxy votes should be revealed.[46]

2.74 Disclosing proxy votes before discussions on a resolution, according to some, stymies debate at the meeting. Whilst this debate may, ultimately, not directly affect the outcome of the vote, it provides a valuable opportunity to ask pertinent questions, express opinions, and give matters of a concern a hearing.[47] Removing this debate would give shareholders the impression that their views were not valuable or worthy of discussion.

2.75 The alternative view is that, by not disclosing the proxy tallies before debate, the chair is giving the false expectation that the debate can somehow affect a decision that is, in effect, already decided.[48]

2.76 But, regardless of the perspective adopted on the timing of disclosure, and the acknowledgement of the importance of disclosure at some stage, there was support for the amendment repealing the requirement. Given the degree of disagreement, the BCA argued that this was not something that should be mandated by legislation, but should be left to shareholders to decide, along with other matters of procedure at meetings.[49]

2.77 The Committee agrees that the exact timing of disclosure should not be dictated by legislation and so support the amendment. This should not, however, be seen as diminishing the importance of disclosure: full and timely disclosure of voting remains central to good corporate governance. It was suggested by the BCA that disclosure of proxies might be conducted after discussion but before a poll, thus encouraging debate but allowing a vote in full knowledge of the proxies already cast.

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45 *Exposure Draft Explanatory Memorandum*, p.13

46 BCA, *Submission 16,* p.9

47 BCA, *Submission 16,* p.9

48 Mr Keeves, *Transcript of Evidence* 28 April 2005, p.64

49 Mr Munchenburg, *Transcript of Evidence* 28 April 2005, p.26

2.78 The Committee agrees that this might be a sensible compromise between the positions outlined. However, this should be something for companies and their shareholders to decide upon.

Disclosure of information filed overseas

2.79 Section 323DA of the *Corporations Act 2001* states:

> (1) A company that discloses information to, or as required by:
>
> > (a) the Securities and Exchange Commission of the United States of America; or
> > (b) the New York Stock Exchange; or
> > (c) a financial market in a foreign country if that financial market is prescribed by regulations made for the purposes of this paragraph;
>
> must disclose that information in English to each relevant market operator, if the company is listed on the next business day after doing so.

2.80 In its report entitled *Report on Matters Arising from the Company Law Review Act 1998* this Committee recommended that s.323DA (of the then Corporations Law) should be deleted. The report stated:

> The PJSC concluded that the provision was superfluous and included a number of potentially undesirable consequences. The Listing Rules of the ASX already require the disclosure of any information which would have a material effect on the price or value of company securities. Any additional information disclosed to foreign exchanges would not be price sensitive and would not be material to the Australian market. Therefore there seems little reason for the provision.[50]

2.81 Item 12 of schedule 1 of the proposed bill adopts the Committee's previous recommendations. However, a number of submitters and witnesses opposed the repeal of s.323DA. The Commercial Law Association stated:

> the removal of this provision would be a step backwards in the Australian disclosure regime and would be a step **consciously and deliberately** moving out of alignment with leading international markets and the trends in these markets. Such a step would be in sharp contrast to recent corporate law amendments that have been aimed at placing Australian market players in a significantly more competitive position, and aligning the Australian market with global capital markets.[51]

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50 Parliamentary Joint Committee on Corporations and Securities (1999) *Report on Matters Arising from the Company Law Review Act 1998*, p. 29.

51 Commercial Law Association of Australia, *Submission 26,* p. 2, emphasis in original.

2.82 Mr Ted Rofe argued that "Investors in companies listed on the ASX should not be forced to rely on third parties to be fully informed in relation to the companies in which they invest."[52]

2.83 The ACTU stated:

> It is our view that many shareholders do not have access to information that is disclosed to foreign securities exchanges. As it is not a significant burden upon corporations to disclose information in Australia that is required of them by foreign regulators, the ACTU submits that on balance Section 323DA should be retained.[53]

2.84 The Committee remains of the view that s. 323DA should be repealed. Any requirement for the disclosure in Australia of information which is required to be disclosed to overseas markets, should be found in the ASX listing rules, not in the Corporations Act. The Committee notes that the repeal of section 323DA need not mean that Australian investors lose access to information disclosed overseas. With the prevalence of the internet as a business tool, information filed overseas is readily available to Australian investors. Furthermore, it should be remembered that the ASX listing rules and the Corporations Act only provide minimum requirements for disclosure. There is nothing to prevent companies voluntarily disclosing such information to their shareholders.

2.85 Consequently, the Committee supports item 12 of schedule 1 of the proposed bill.

Senator Grant Chapman

Chairman

52 Rofe, *Submission 24,* p. 10.

53 ACTU, *Submission 14,* p. 3.

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

Ms ANNA BURKE MP
DEPUTY CHAIR

SENATOR KATE LUNDY

SENATOR PENNY WONG

MR CHRIS BOWEN

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.
>
> 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.
>
> 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.
>
> 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:
>
> *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.
>
> 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.

APPENDIX 1

SUBMISSIONS RECEIVED

1. Telstra
2. Australia and New Zealand Banking Group Limited
3. Australasian Investor Relations Association
4. Australian Shareholders' Association
5. Securities Institute of Australia
6. Law Council of Australia
7. AFSA – The Voice of Super
8. Australian Automobile Association
9. Australian Council of Super Investors
10. Chartered Secretaries Australia Ltd
11. Insurance Australia Group
12. CONFIDENTIAL
13. Macquarie Bank
14. Australian Council of Trade Unions
15. Mutual Strategies Pty Limited
16. Business Council of Australia
17. Australian Institute of Company Directors
18. NSW Young Lawyers
19. Finance Sector Union of Australia
20. Professor Stephen Bottomley
21. Blake Dawson Waldron

22. National Institute of Accountants

23. Investment and Financial Services Association Ltd

24. Mr Ted Rofe

25. The Corporate Research Group

26. Commercial law Association of Australia Limited

27. Credit Union Services (Aust) Limited

28 Australian Stock Exchange

29. National Roads & Motorists Association Limited

APPENDIX 2

PUBLIC HEARING AND WITNESSES

THURSDAY 28 APRIL 2005 – CANBERRA

BOTTOMLEY, Professor Stephen, Director, Centre for Commercial Law, Australian National University

Keeves, Mr John Storrie, Chairman, Corporations Committee, Business Law Section, Law Council of Australia

MATHESON, Mr Ian, Chief Executive Officer, Australasian Investor Relations Association

MUNCHENBERG, Mr Steven, General Manager, Government and Regulatory Affairs, Business Council of Australia

NIGRO, Mr Lenny, Policy Analyst, Corporations and Financial Services Division, Department of the Treasury

O'REILLY, Mr David John, Senior Policy Manager, Investment and Financial Services Association Ltd

RAWSTRON, Mr Michael, General Manager, Corporations and Financial Services Division, Department of the Treasury

SHEEHY, Mr Timothy Brian, Chief Executive, Chartered Secretaries Australia

SIBREE, Mr Mark William, Executive Director, Mutual Strategies Pty Ltd

SPATHIS, Mr Phillip Arthur, Executive Officer, Australian Council of Superannuation Investors Inc.

TATE, Ms Diane Elizabeth, Senior Manager, Policy and Government Relations, Securities Institute of Australia

WILSON, Mr Stuart Henderson, Chief Executive Officer, Australian Shareholders Association Ltd