
# Business Council of Australia

Submission to the Parliamentary Joint Committee on Corporations and Financial Services

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

April 2005

# Foreword

The Business Council of Australia is an association of Chief Executives of leading Australian corporations. It was established in 1983 to provide a forum for Australian business leaders to contribute directly to public policy debates to build a better and more prosperous Australian society.

The key role of the Business Council is to formulate and promote the views of Australian business. The Business Council is committed to achieving the changes required to improve Australia's competitiveness and to establish a strong and growing economy as the basis for a prosperous and fair society that meets the aspirations of the whole Australian community.

The Business Council has a particular responsibility to apply Australia's business experience and understanding to successfully resolving the challenges now facing Australia. In a global environment, Australia's future depends on achieving world class performance and competitiveness. On the basis of sound research and analysis, the Business Council seeks to play a key role with government, interest groups and the broader community to achieve performance and world class competitiveness.

With this in mind, the Business Council of Australia makes the following submission.

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# 1. Introduction

The Corporations Amendment Bill (No 2) 2005 addresses a number of issues with shareholder rights that have been apparent for some time. In particular, there has been widespread acceptance that the ability of just 100 shareholders to requisition an extra-ordinary general meeting (**EGM**) sets the threshold too low. Similarly, the BCA has previously expressed concern with 'cherry picking' by proxy holders.

The BCA believes that the critical issue for consideration by the Committee is whether the amendments proposed in the Bill strike the right balance between the benefits conferred on shareholders and the cost incurred by the companies. Such an analysis requires the Committee to examine the full range of opportunities for communication and engagement between shareholders and companies and not just those opportunities that arise from the statutory rights of shareholders at company general meetings.

## 1.1 Shareholder Engagement

Most Australians are shareholders in major corporations, either directly, through investment funds or through their superannuation. Their shareholdings have contributed significantly to the increasing wealth of many Australians, who therefore have a keen interest in the performance and prospects of their companies. These shareholders should, and do, have the right to be informed about the performance and prospects of their companies, to question the company Board and management and to raise issues of concern to the shareholders. These rights are entrenched in both statute and common law.

An important element of the engagement between companies and their shareholders is the annual general meeting (**AGM**). The AGM of a company is the major event each year at which the company's owners and managers have the opportunity to come together and examine the affairs of the company. It is an opportunity for the company Board and managers, particularly the Chairman and the Chief Executive, to advise shareholders on the company's performance and prospects. It is also the opportunity for the shareholders to question their Board and company management, to consider the accounts and to vote on the election of Directors and any other business of the company. As such, the AGM provides an important accountability mechanism. Furthermore, the AGM is not only a legal obligation for companies, but a contractual one with shareholders, through company constitutions.

The role of the AGM as a source of information for shareholders and as an opportunity for shareholders to question the performance and prospects of their companies, however, has diminished significantly in recent years. In large part, this is due to the need for shareholders to access information about a company more frequently that an annual meeting, the different information needs of retail and institutional shareholders (both groups making up the 'shareholders' of a company) and technological advances. Retail shareholders, for example, mostly get information about their companies from newspapers, so the media's daily scrutiny of companies has largely replaced the annual scrutiny of the AGM.

What this means is that some of the shareholder rights being considered under the Corporations Amendment Bill (No 2) 2005 are not as fundamental as they once were. This is not to say that these rights should be removed and the BCA supports the right of shareholders to question company Boards and management. What we are seeing, however, is that as these rights become less important for most shareholders, they are increasingly being used by special interest groups to push their particular campaigns.

A more detailed examination of these trends and their implications for engagement between shareholders and companies can be found in the BCA publication, *Company & Shareholder Dialogue – Fresh Approaches to Communications between Companies and their*

*Shareholders*[1]. This document also discusses a range of proposals for improving AGMs and other communications between companies and their shareholders and increasing the opportunities for shareholders to engage with their companies. The BCA would be happy to make copies of this document available to the Committee.

1 Business Council of Australia, *Company & Shareholder Dialogue – Fresh Approaches to Communications between Companies and their Shareholder*s, 2004, available from www.bca.com.au or in hard copy from the BCA.

# 2. Proposed Amendments

The Corporations Amendment Bill (No 2) 2005 proposes a number of amendments to the *Corporations Act 2001*, summarised in the Explanatory Memorandum to the Bill as:

- removing the 100 member rule from section 249D of the Corporations Act;
- reducing the threshold allowing members' resolutions to be brought to AGMs already scheduled (section 249N);
- reducing the threshold for distribution of members' statements by the company along with the notice of meetings (section 249P);
- facilitating the electronic circulation of members' resolutions and members' statements (sections 249O and 249P);
- ensuring the voting intentions of members are carried out by appointed proxies by preventing the 'cherry-picking' of proxy votes (subsections 250A(4) & (5));
- amending the requirements relating to the disclosure of proxy votes (subsection 250J(1A)); and
- removing the requirement for companies to disclose information reported to overseas exchanges (section 323DA).

The BCA supports the majority of these amendments but does not support the proposals to reduce the threshold allowing members' resolutions to be brought to AGMs and for distribution of members' statements, from 100 to 20 shareholders (sections 249N and 249P).

## 2.1 Removing the 100 member rule (section 249D)

The BCA strongly supports the removal of the right of 100 shareholders to require a company to convene a extra-ordinary general meeting (the '100 shareholder rule'). The BCA also notes that the flaws in the current threshold have been widely recognised[2] and amendment of this provision is overdue.

The right of the shareholders of a company to call a general meeting and to place resolutions on the agenda of that meeting or the AGM, is not in itself controversial. The ability of just 100 shareholders to exercise these rights, however, has been contentious. In particular, many companies are concerned that, with rising shareholder activism, they will be required to call expensive general meetings, other than the AGM, to deal with single issues of concern to only a very small minority of shareholders. In theory, under the current law it is possible for 100 shareholders, each holding just one share, to force a company to hold a general meeting.

2 For example, this issue was reviewed by the Parliamentary Joint Statutory Committee on Corporations and Securities in 1999. The Committee concluded "*that the present provision for 100 members to requisition a meeting of the company is inappropriate and open to abuse*" (para 15.16). Labor Senators and members concluded that there was a "*need for change to restore an appropriate balance between promoting company efficiency and maintaining corporate governance concerns of minority shareholders*" (Labor Members and Senators Minority Report, p 175). Senator Murray for the Democrats noted that "[t]*hresholds need to be sensible but not unreasonable. We believe that there may be merit in revising upward the threshold of 100 members, especially for large mutual organisations*" (Australian Democrat Minority Report, p 184).

While s 249D has been invoked a number of times, what may be less obvious is the use of s 249D as a threat, used by groups against companies as a negotiation tactic.

The current threshold can represent a miniscule portion of the ownership of a company. The top 50 listed companies in Australia, which account for 75%[3] of the Australian market by capitalisation, typically have between 100,000 and 1,000,000 shareholders[4]. A group of 100 shareholders therefore represents between 0.1% and 0.01% of all shareholders in the company. Corporations, however, by law do not operate on a 'one-shareholder one-vote' basis, therefore 100 shareholders may represent significantly less than 0.1% and 0.01% of the votes. For example, Insurance Australia Group has issued 1,682,721,213 shares[5]. Assuming 100 shareholders with the minimum marketable parcel[6] of shares (126 shares) request the company hold a general meeting, those shareholders will represent 0.000007% of the votes. A general resolution requires 50% of votes to pass and a special resolution 75%. As would be expected, experience shows that when 100 shareholders requisition a general meeting, their proposals are soundly defeated by the majority of shareholders. It is therefore highly questionable whether the expenditure of time and money in organising and conducting the meeting has been to the benefit of the vast majority of shareholders.

### 2.1.1 Use of Section 249D.

Section 249D has been used a number of times by groups that have forced companies to organise expensive meetings with little hope of the resolutions promoted by those groups being passed at the meetings (see below). Examples of the use of s 249D are given below[7].

In 1999, 122 shareholders in North Ltd called an EGM to amend the company's constitution. The group of shareholders were concerned about North Ltd's involvement in the Jabiluka uranium mine. Following litigation, it was agreed the EGM would be held on the same day as the AGM. North Ltd estimated that the EGM would otherwise have cost the company $186,000. The resolution to amend the constitution received 6% of the votes in favour.

Also in 1999, 166 shareholders in Wesfarmers called a general meeting to consider resolutions on the company's involvement in the forestry industry. At the meeting, 98% of the votes were cast against the resolutions. Wesfarmers put the cost of the meeting at approximately $80,000.

In 2002, 237 shareholders in NRMA Insurance called a general meeting to consider an amendment to the company's constitution to prohibit the payment of retirement benefits to Directors without shareholder approval. The resolution gained 30% support. NRMA Insurance estimated that holding a general meeting separate to its AGM would cost around $1.4 million.

### 2.1.2 International Comparison

The proposal in the Bill to allow 5 per cent of shareholders to trigger an EGM is broadly consistent with the threshold applied in other countries. As the Explanatory memorandum notes, a 5 per cent threshold is used in Canada and New Zealand, a 10 per cent threshold in the United Kingdom and between 5 and 20 per cent in the rest of Europe. The BCA sees no reason why Australia should have a threshold set below 5 per cent.

3 As at 30 June 2002. ASX, http://www.asx.com.au/statistics/l3/IndexDescription_MS3.shtm
4 Based on a sample of 2003 company annual reports.
5 Insurance Australia Group, *2003 Annual Report*. Share figures given for 31 August 2003.
6 ASX Market Rules set a minimum marketable parcel of shares as having a value of $500.
7 Tapley, M., *Parliamentary Research Note 18 2001-02*, accessed at http://www.aph.gov.au/library/pubs/rn/2001-02/02rn18.htm

## 2.2 Reducing the Resolution Threshold (section 249N)

The BCA does not support the proposal to reduce the threshold of shareholders needed to place a resolution on the AGM agenda from 100 to 20. The BCA believes there are already other ways for concerned shareholders to express their views and notes that larger corporations are actively looking to improve their communications with shareholders through alternative approaches.

### 2.2.1 Adverse Impacts of Lowering the Threshold

The BCA understands that this reduction has been proposed to balance the removal of the 100 shareholder rule for requisitioning general meetings. Contrary to claims in the Explanatory Memorandum that such an amendment would "*enhance shareholders' ability to participate in Annual General Meetings and question their company's board and management*"[8], the BCA believes that the proposed amendment will have the opposite effect and will result in most retail shareholders attending AGMs being excluded from the discussion and prevented from asking questions.

Reducing the threshold from 100 to 20 shareholders will make it significantly easier for special interest groups to have a series of resolutions placed on the agenda of the AGM. Each resolution needs to be addressed by the company and the opportunity provided for questions and discussion on the resolutions. Experience has shown already that special interest groups will be organised to ask a long series of questions on their issue. Significantly increasing the number of such resolutions by lowering the threshold, will result in a significant increase in the length of AGMs and in AGMs that are dominated by special interest groups to the exclusion of ordinary retail shareholders. It is already the case that ordinary retail shareholders are discouraged from asking questions, and often leave AGMs in large numbers before they are finished, where the AGM is dominated by questioning from special interest groups.

Section 249N is typically used by conservation groups and unions to have resolutions placed on the AGM agenda relating to their environmental or workplace relations campaigns. Lowering the threshold will see special interest groups increasingly using what is intended as a shareholder right to pursue their broader campaigns and as a negotiating gambit with companies.

It is not an onerous requirement on these groups to get their resolution endorsed by 100 shareholders, particularly when it is considered that, to be passed, a general resolution requires 50% of votes and a special resolution 75%. If a group of shareholders is proposing a resolution with the intention of having that resolution passed, they will need to gain widespread support from across the shareholders in the company. With such support, achieving the 100 shareholder threshold is not a significant hurdle. If, however, the resolution is being put forward with no expectation that it will succeed, then the question should be asked whether this is an appropriate use of shareholders rights. Clearly where resolutions are put forward without an expectation of the resolution being successfully carried, the proponents of the resolution must be seeking some other advantage, such as publicity, from putting the resolution forward. The BCA does not believe that this is what section 249N is intended to achieve.

Another advantage that makes the current law attractive to special interest groups is the requirement that the company distribute the members' statement on their resolution to all company shareholders, at the expense of the company. While this may be appropriate where a significant group of shareholders has a concern with the company's performance and prospects, it provides special interest groups with a free vehicle for a mass mail out of their literature (this is discussed further in the following section of this submission).

8 Explanatory Memorandum, Corporations Amendment Bill (No.2 ) 2005, p 7.

The above concerns will be exacerbated by the Bills' proposal to reduce the threshold from 100 to 20 shareholders. Such a change is likely to see a significant increase in the number of 'minority interest' issues being placed on the agenda of AGMs, reducing the opportunity for ordinary retail shareholders to ask questions and participate in discussion at the AGM. The BCA believes that the proposal to reduce the threshold to 20 is therefore a regressive move in terms of the interests of the majority of participants in the AGM.

### 2.2.2 Alternative Approaches

The BCA believes that the proposed amendment to s 249N is unnecessary to increase the ability of shareholders to question the Board and management of the company. The Corporations Act already gives a very wide ranging right to any shareholder to ask a question at the AGM[9]. The vast majority of companies will allow all reasonable time for questions from the floor of the AGM, while trying to manage the meeting to avoid excessive repetition in questioning or long discursive commentary by questioners.

In addition, there is a growing practice among larger companies, and particularly those with large retail shareholder bases, to encourage shareholders to identify in advance issues they wish to have discussed at the AGM. Typically, shareholders will be invited to identify those issues when they receive their notice of meeting and annual report. The most frequently raised issues are then collated and the Chairmen addresses these at the AGM. The list of key issues to be covered at the AGM can also be provided to each shareholder on registration at the AGM or projected onto screens in the auditorium. Other issues and questions raised are responded to by the company directly to the shareholder.

Companies that have recently adopted this practice include the ANZ Banking Group, BHP Billiton, Caltex, Commonwealth Bank of Australia, National Australia Bank, Origin Energy, Qantas, St George Bank, Telstra and Westpac Banking Corporation.

The BCA has also encouraged its members to consider taking the issues most commonly raised by shareholders and adding these formally to the AGM agenda as separate items for discussion[10]. The AGM agenda would then broadly consist of two parts – the first covering the formal business of the meeting (acceptance of accounts, election of Directors, etc.), the second covering specific issues raised by shareholders. The order in which those issues are dealt with would be dictated by the number of shareholders raising the issue (that is, the issue raised most frequently by shareholders would be dealt with first).

Formally adding shareholder concerns to the agenda has a number of advantages. The first is that it gives shareholders some direct say in the matters that are to be discussed at the AGM and to have these formally recognised on the agenda. Unlike the 100 or 20 shareholder threshold, it also ensures that those items being discussed at the AGM are the items of greatest interest to the majority of retail shareholders.

In summary, the BCA believes that the current threshold for placing a resolution on the agenda of the AGM should be retained. 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.

9 s 250S, *Corporations Act 2001*.

10 Business Council of Australia, *Company & Shareholder Dialogue – Fresh Approaches to Communications between Companies and their Shareholders*, pp 19 – 21.

## 2.3 Reducing the Members' Statements Threshold (section 249P)

The BCA does not support the proposal to reduce the threshold of shareholders needed to require a company to distribute a members' statement from 100 to 20.

The stated intention of this amendment is to "*assist unsophisticated shareholders to understand the complexity of some resolutions and any surrounding issues*"[11]. The BCA believes that reducing the threshold will significantly increase the amount of material sent to shareholders, with little control over the quality, accuracy or truthfulness of that material, with the result that many shareholders will be left less well informed, rather than more.

As noted above, s 249P provides special interest groups with a free vehicle for a mass mail out of their literature to the shareholders of a company, at the company's expense. For companies such as AMP, Telstra or Insurance Australia Group, this mailing list includes around 1 million shareholders. A company's share register is therefore a very attractive vehicle for campaign mail outs – and you don't have to pay.

A major concern for companies is that they are required to distribute the material of special interest groups when there is very little legislative control over whether the information being distributed to shareholders is factual or correct. The Corporations Act requires that the information cannot be defamatory and must relate to any matter that may be properly considered at a general meeting[12]. These controls do not protect a company from having to distribute material from special interest groups that is factually incorrect, unsubstantiated assertion or malicious.

The proposed amendment will greatly exacerbate the problems already being experienced by companies under the current provision. In effect, this provision is equivalent to requiring incumbent Parliamentarians to use their electoral allowances to mail out to their electorates the policy positions and claims of other candidates contesting the election.

As with s 249N, the BCA believes that the current threshold should be retained, but the Act should be amended to require the 100 shareholders to each hold a minimum quantity of shares, such as a marketable parcel.

## 2.4 Facilitating Electronic Communication (subsections 249O and 249P)

The BCA supports the increased used of electronic communications between companies and shareholders and therefore supports the proposed amendment.

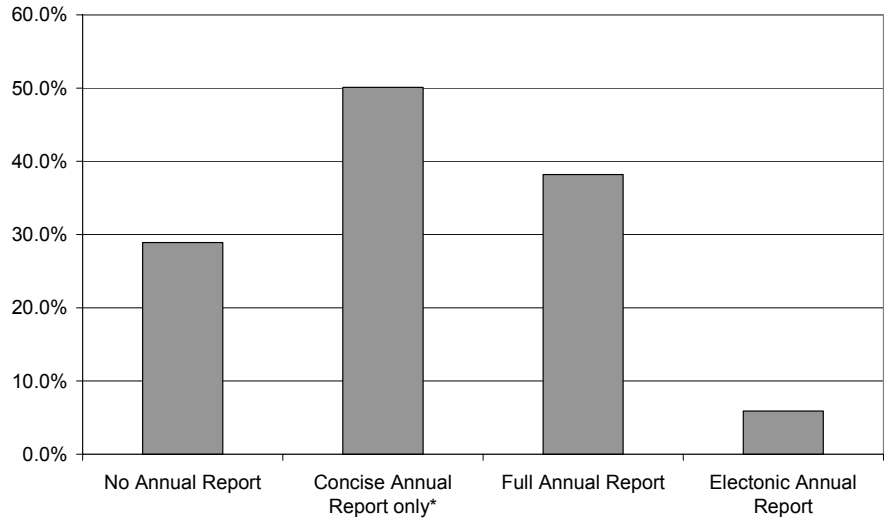
The use of electronic media potentially enables more timely and comprehensive communication between the company and its shareholders, and reduces the 'information gap' between retail and institutional shareholders. Companies can facilitate shareholder participation by electronically distributing notices of meetings and annual reports and providing for the electronic authentication and submission of proxy forms.

While the potential for improved communication through electronic media, including email, websites and webcasting, is significant, there are major barriers to their increased use. A significant issue is whether shareholders have the ability or desire to receive information from their companies electronically. While over 70% of Australians now have access to the Internet[13], for example, usage is least common among people over 55[14]. This group is also

11 Explanatory Memorandum, Corporations Amendment Bill (No.2 ) 2005, p 8.
12 S 249P.
13 Nielsen//Netratings Global Internet Trends Q4 2002, http://www.nielsen-netratings.com/pr/pr_030220.pdf
14 Australian Bureau of Statistics, *2001 Census of Population and Housing*.

the age group with the highest percentage of direct share ownership[15]. When offered a choice of format for annual reports, for example, the vast majority of shareholders in large corporations opt for printed reports, even though nearly 80% of large companies offer electronic reports (see Figure 1).

**Figure 1: Preferences of Shareholders in Receiving Annual Reports**




*: percentage electing to receive concise annual report where offered (approximately 60% of large corporations offer a concise annual report – total percentage will therefore not sum to 100%).

*Source: Chartered Secretaries Australia,* Benchmarking Company Secretariat Functions in Australia*, April 2004.*

The BCA believes that increased use of electronic media needs to be actively encouraged, while recognising the very real limitations that these media have at present.

## 2.5 Preventing Proxy 'Cherry-Picking' (subsections 250A(4) and (5))

The BCA has previously expressed concern with 'cherry picking' by proxy holders[16].

Under the current law, where a shareholder directs how a proxy votes, the proxy must vote in accordance with the shareholder's direction, provided the proxy exercises that shareholder's votes[17]. The proxy may not vote against the shareholder's direction, but nor is the proxy obliged to exercise the vote. It is therefore open to the proxy to not act upon some of the proxy votes they hold (in effect, to 'cherry-pick'). An exception to this is the Chairman, who must vote on a poll in accordance with the directions of the shareholder[18].

This is clearly an area where improvements in shareholder participation can be made to ensure that the voting intentions of shareholders are carried out by their appointed proxy, regardless of who has been appointed as proxy. The BCA therefore supports the proposed amendments in the Bill.

15 *ASX 2003 Australian Share Ownership Study*, February 2004.
16 Business Council of Australia, *Company & Shareholder Dialogue – Fresh Approaches to Communications between Companies and their Shareholders*, p 36.
17 s 250A(4).
18 s 250A(4)(c).

## 2.6 Disclosure of Proxy Votes (subsection 250J(1A))

The BCA supports the repeal of subsection 250J(1A).

There is a considerable division of opinion among shareholders and among companies on when proxy votes should be revealed. On the one hand, it can be argued that the results of proxy votes should be revealed before the discussion on a resolution and before any show of hands from the meeting. Proponents of this view argue that to not do so risks misleading the meeting, if those attending the meeting believe they have a significant opportunity to influence the final outcome, yet the outcome has already been determined by proxy votes.

On the other hand, it can be argued that the results of proxy votes should only be revealed following the discussion and any show of hands. Resolutions may be passed on a show of hands or may be put to a poll, in which case the results of proxy votes can be revealed on the calling of the poll. Proponents of this view argue that revealing the results of the proxy votes in advance presents the resolution as a *fait accompli* and stifles any discussion or debate from the floor of the meeting. Allowing discussion first may not influencing the final outcome of the vote but it allows retail shareholders in particular to express their views.

The Business Council of Australia's *Code of Conduct* for AGMs[19] suggests that:

> "*Following the conclusion of debate on a resolution, and before the resolution is put to the meeting, the Chairman will disclose the way in which proxy votes have been cast on the resolution and the way in which the Chairman will cast those undirected proxies given to the Chairman*".

An alternative approach is to put the question to shareholders at the AGM and allow them to determine when the results of proxy votes should be revealed.

## 2.7 Disclosure of Information Filed Overseas (section 323DA)

The BCA agrees with this amendment, especially as any information filed overseas which is material will need to be disclosed to the Australian Stock Exchange anyway.

## 2.8 Design Act etc. (section 279(5)

The BCA does not have a view on these proposed amendments, which are procedural.

19 Business Council of Australia, *General Meetings Code of Conduct*, September 2003, available at www.bca.com.au

# 3. Conclusion

The BCA supports efforts to improve shareholder engagement with companies. The BCA has taken the initiative in this area, last year publishing *Company & Shareholder Dialogue – Fresh Approaches to Communications between Companies and their Shareholders* to encourage companies to improve communications between shareholders and companies.

The BCA therefore supports those elements of the Corporations Amendment Bill (No 2) 2005 that it believes will increase shareholder engagement. The BCA opposes a number of the proposed amendments, however, because it believes that these amendments, while well intentioned, will in practice reduce the opportunities for ordinary retail shareholders to question the Board and management of companies and to understand the issues the company faces. The BCA also believes that these amendments are unnecessary, as alternative avenues exist for shareholders to raise their issues with their companies.

The BCA would welcome the opportunity to discuss the issues raised in this submission with the Committee.

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