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8 April 2005

The Secretary
Parliamentary Joint Committee on Corporations and Financial Services
Department of the Senate
Parliament House
Canberra ACT 2600

By email: corporations.joint@aph.gov.au

Dear Mr Marinac

**Submission on draft Corporations Amendment Bill (No. 2) 2005**

This submission relates to Item 1 of Schedule 1 to the draft Bill. That Item proposes to amend subsection 249D(1) by removing the capacity of at least 100 members who are entitled to vote at a general meeting to request that the directors of the company call a general meeting.

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.

A survey of 217 Australian public companies in the top 500 Business Review Weekly list found that in the four years between July 1998 and July 2002 there were only five extraordinary general meetings requisitioned by shareholders (relying on either the 5% of votes rule in paragraph 249D(1)(a) or the 100 members rule in paragraph 249D(1)(b)). A copy of this study (in PDF format) accompanies this submission. In the last six years there have been, at best, four companies in which the use by shareholders of the right to requisition a meeting under paragraph 249D(1)(b) has received critical public attention: in North Ltd (June 1999); Wesfarmers Ltd (July 1999), Gunns Ltd (February 2003), and NRMA Ltd (2001 to 2004).

Of the latter case it can be said that notwithstanding the financial size of the NRMA it is in many respects a unique company. In the absence of evidence of more widespread problems, it would be surprising to see reforms to the *Corporations Act 2001* being made in response the problems experienced by this particular company. I do not believe that the experiences in the other three companies provide that additional evidence.

Secondly, despite claims that the 100 members rule is too easily satisfied, the fact is that the impact of the 100 members rule varies depending on the number of shareholders in the company. For example, in a company with 1000 shareholders, the 5% rule in s 249 is more easily satisfied than the 100 members rule. That is, it is as feasible that such a company can be disrupted by the self-interest of a single shareholder who owns a 5% parcel of shares.

Thirdly, it is argued by some that Australian corporate law is out of step with other countries, and that a single rule – the 5% rule – would bring us more into line with international standards. Corporate governance is indeed a matter of international concern. But the practices,

structures, and assumptions which, together, comprise a system of corporate governance vary significantly from one country to another. There should be no automatic assumption that legal developments in one jurisdiction should apply in another.

Fourthly, it might be argued that it is the infrequency of use, combined with isolated instances of alleged misuse, that supplies a reason to remove the 100 member rule. I would disagree with this argument. The fact that, despite its infrequent use, the rule nevertheless attracts the attention of company directors and managers suggests that it can have a positive effect in prompting managerial behaviour that is responsive to, without being a hostage to, shareholders' interests. Repealing this rule would remove an important component in what might be described as a system of corporate self-regulation.

That system can be thought of as an escalating set of mechanisms for dealing with shareholder concerns. The first mechanism is communication between the board and shareholders to see if concerns can be addressed informally. The final mechanism is the use of legal action, involving (where appropriate) actions for oppression, or derivative suits. In between these extremes are other possible responses, ranging from shareholders asking questions at an AGM, the right of shareholders to move a resolution at a general meeting, to the right to requisition a special general meeting. Ideally most concerns can be dealt with through steps such as informal consultation or questions at the AGM. The advantage of having a variety of possible responses, some more serious than others, is that it allows appropriate responses to particular issues in particular companies at particular times.

Yours sincerely

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