

CORPORATIONS AMENDMENT BILL (No. 2) 2006

REGULATION IMPACT STATEMENT

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AMENDMENTS TO SECTIONS 249D AND 252B – THE 100 MEMBER RULE

BACKGROUND

Sections 249D of the *Corporations Act 2001* (the Corporations Act) commenced on 1 July 1998, introduced by the *Company Law Review Act 1998*. Section 249D currently requires the directors of a company to call and arrange a general meeting at the request of:

- Members with at least 5% of the votes that may be cast at a general meeting (paragraph 249D (1)(a)); or
- At least 100 members who are entitled to vote at a general meeting (paragraph 249D(1)(b)).

Section 252B mirrors the requirement for managed investment schemes.

The right of members to requisition a general meeting of shareholders independently of an annual general meeting has been a feature of the Australian corporations legislation since the 1960s. The legislative history of the provision is extensive and is provided at [Attachment A](#).

Originally, company members could only convene an extraordinary general meeting (EGM) if they held not less than one-tenth of the paid up capital carrying voting rights¹. It was not until 1981 that members could invoke an alternative test to requisition an EGM. The *Companies Act 1981* reduced the 10% threshold to 5% and provided that an EGM could also be requisitioned by at least 200 members.

The rules relating to the calling of an extraordinary general meeting seek to balance two competing policy considerations – facilitating member participation in corporate governance on the one hand, and minimising costs to business on the other. The thresholds for calling the meetings have changed over time as the commercial environment has evolved and the relative importance of these two factors has been reassessed.

¹ Section 137, *Uniform Companies Act 1961* – or in the case of a company with no share capital, members who carried one-tenth of the voting rights.

PROBLEM IDENTIFICATION

Note - Herein, discussion of ‘public companies’ and their ‘members’ includes managed investment schemes and their members unless otherwise differentiated. This is because the reasoning throughout this Regulation Impact Statement is equally applicable to both entities and the provisions governing them respectively.

The 100 member rule allows relatively small groups of members to requisition general meetings of large companies. While this provides members with an enhanced opportunity to participate in corporate governance, it can expose large companies (and, indirectly, their members) to significant costs.

The costs of holding a general meeting are varied and there are few economies of scale – generally, the larger the membership base of a company, the higher the cost of holding a general meeting. These costs include the hiring of venues large enough to accommodate expected attendants, production costs and technical services, contracting of auditors and share registry services, printing and substantial postage costs for notices of meetings and other statutory documents.

Other costs that are less quantifiable include management time spent planning the meeting and considering resolutions. These costs would be higher for general meetings requisitioned by members, where additional professional advisory costs are incurred to determine the company’s responsibility in relation to resolutions proposed by members.

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, without regard to the interests 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.

Many stakeholders, including the Australian Institute of Company Directors, the Business Council of Australia, Rio Tinto Limited and NRMA Limited have submitted concerns about this provision. The 100 member rule has previously been used by special interest groups to raise awareness of their cause at the expense of companies and their members as a whole.

The requisition in 1999 of a general meeting of North Limited by members holding less than one per cent of shares is often quoted in support of such concerns. The meeting was called to discuss environmental issues which, while important, were not necessarily central to the interests of the company or its members. The cost of the meeting was estimated to be at least \$300,000. General meetings of Wesfarmers and Rio Tinto were also requisitioned in 1999.

The NRMA, a company limited by guarantee with over 2.2 million members, has had general meetings requisitioned (costing the company an estimated \$5 million each) by small special interest groups gaining 100 members’ support on at least 2 prior occasions.

The power to requisition a general meeting is one of many statutory and other mechanisms available to members to communicate issues to the company and other members. In particular, there are provisions in the Corporations Act which allow the members to propose resolutions for the agenda of meetings already scheduled (section 249N) and require the distribution of members’ statements to accompany resolutions (section 249P). The chair of an AGM must also allow members reasonable opportunity to ask questions or make comments on the company’s management (section 250S).

Sections 249N and 249P employ the same threshold test (the 100 member rule or five per cent of votes) as the current section 249D. However these mechanisms impose less costs upon a company than calling a general meeting. For minority or special interest groups wishing to raise awareness of their cause, there is little incentive to pursue alternative avenues less costly to the company as the threshold test is the same.

Threshold tests for calling a general meeting in comparative jurisdictions are based on a percentage of total voting rights, such as five per cent in Canada and New Zealand, 10 per cent in United States and United Kingdom, and between five and 20 per cent in other European jurisdictions.

REGULATORY OBJECTIVES

To:

- allow adequate opportunities for members to exercise their rights through general meetings;
- properly balance the interests of groups of minority members of public companies with the interests of a majority of members regarding the requisition of company meetings; and
- prevent the law becoming a hindrance to the efficient and cost effective operation of public companies.

IDENTIFICATION OF ALTERNATIVES

Option 1: No change.

Under this option, the current thresholds would remain in place. This means that the threshold to requisition a company meeting would remain as 5% of votes that may be cast at the general meeting (paragraph 249D (1)(a) or 100 members (paragraph 249D (1)(b))).

Option 2: Remove the 100 member rule leaving a minimum threshold of 5% of votes that may be cast.

This option would remove the 100 member rule, meaning that the only threshold for members wishing to requisition a public company meeting would be 5% of votes that may be cast at the meeting.

Option 3: Replace the 100 member rule with a square root test with a cap and floor.

Under this option, the 100 member threshold test would be replaced with a number representing the square root of the total number of members for each company. As irregularities could occur with very small or large membership bases, a cap of 500 and a floor of 100 could be applied.

Option 4: Remove the 100 member rule, cap the 5% threshold and require requisitioning members to have a minimum economic interest.

This option is the same as Option Two with a 500 member cap applied. In addition, each of the 500 members would be required to hold a minimum marketable parcel of, say, 100 shares.

IMPACT ANALYSIS

Impact Group Identification

Groups that will be affected by the proposed amendments include:

- public companies;
- managed investment schemes;
- directors and officers of public companies; and
- members of public companies.

Public companies and managed investment schemes

Whilst section 249D applies to all companies in Australia, proprietary companies are only permitted to have a maximum of 50 non-employee shareholders.² Consequently, the 100 member rule has no application to proprietary companies.

There are approximately 19,000 registered public companies and 4,000 registered managed investment schemes in Australia.

² Section 45A, *Corporations Act 2001*.

Public companies vary markedly in size from small unlisted companies to large listed enterprises such as BHP Billiton Limited and Telstra Limited.

Managed investment schemes are required by the Corporations Act³ to be operated by a licensed responsible entity. This responsible entity must be a public company that holds an Australian financial services licence. There are approximately 884 licensed responsible entities.

Directors and officers of public companies

The Corporations Act⁴ requires that a public company have at least three directors, of whom at least two ordinarily reside in Australia.

An ‘officer’ of a corporation includes a director and a secretary. An ‘officer’ is also defined by a person’s functional relationship with the company, such as a person who participates in the making of decisions that affect the whole or a substantial part of the business of the corporation.⁵

Members of public companies⁶

In 2004, 55 percent of the Australian adult population or approximately eight million people owned shares either directly or indirectly. This consisted of:

- 23 per cent or 3.4 million who only own shares directly (ie shares listed in their names – such that they are voting ‘members’);
- 11 per cent or 1.6 million who only hold shares indirectly (ie through a managed fund or self managed superannuation fund – such that it is the fund that is the voting ‘member’ of the company); and
- 21 per cent or 3.1 million who have both types of investments.

In total, 44 per cent of the population or 6.4 million people were direct share owners in 2004. The average portfolio value, as reported by respondents to the ASX Share Ownership Study, was \$41,400 in 2004.

Therefore, the impact group (total number of members of public companies) would include:

- 6.4 million people that own shares directly;
- a large number of institutions (such as superannuation funds and managed investment schemes) holding shares for the benefit of fund unit holders;
- a large (unquantifiable) number of public and proprietary companies owning shares for the indirect benefit of their owners; and

³ Sections 601FA and 601FB.

⁴ Section 201A

⁵ For the complete definition of ‘officer’, see section 9 of the *Corporations Act 2001*.

⁶ Figures sourced from the Australian Stock Exchange 2005 publication: *Australia’s Share Owners: An ASX study of investors in 2004*

- customers of mutual-type organisations such as credit unions and the National Roads and Motorists Association (NRMA) who are members of particular public companies limited by guarantee by virtue of their patronage (generally entitled to one share carrying one vote).

ASSESSMENT OF COSTS AND BENEFITS

An assessment of the costs and benefits of Options 1, 2, 3 and 4 above is outlined below.

Option 1: No specific action

The **benefits** from retaining the status quo are:

- the current rule is simple and clearly understood; and
- Minority groups of members retain a mechanism to force the company as a whole (including its management and members) to consider an issue at a general meeting. This may facilitate shareholder participation in company decision making, an important element of good corporate governance.

The **costs** are that

- the law would fail to recognise size differences between public companies;
- narrow interests may be catered to at the expense of the interests of other members and the company as a whole;
- companies will continue to be exposed to actual or threatened general meeting costs in relation to resolutions that have no realistic prospect of success;
- the risk of undue distraction to management caused by frivolous or vexatious use of the 100 member rule would remain present; and
- the law would remain out of step with comparable overseas jurisdictions, which base the requirement to requisition a company meeting on a proportion of voting rights.

Option 2: Remove the 100 member rule leaving a minimum threshold of 5% of votes that may be cast.

The **benefits** of this proposal are:

- there is less potential for abuse or vexatious use, which protects public companies and their members from incurring the costs of holding general meetings except where there is sufficient support from a company's members;
- it is readily applicable to any public company, easily calculated and takes account of size differences between companies;
- the higher threshold, relative to other forms of shareholder participation such as proposing a resolution at a scheduled annual general meeting under section 249N, reflects the greater cost of holding an extraordinary general meeting;

- it would be in line with threshold tests in comparable overseas jurisdictions whilst still being at the lower end of the spectrum; and
- it would not introduce any new or complex tests into the legislation.

The **costs** of this proposal are:

- Outside the context of an annual general meeting, it may be harder for shareholders to raise legitimate issues of concern, particularly for large companies with dispersed membership.

Option 3: Make the minimum threshold for calling a company meeting the square root of the number of members of the company subject to a minimum of one hundred members and a maximum of five hundred.

The **benefits** of this are:

- it goes some way to recognising size differences between public companies, with proportionately fewer members required to requisition a general meeting as the membership base of the company grows;
- whereas the application of the “square root” rule alone may lead to a very high threshold in the case of large companies, the 500 member cap would keep the threshold at a level more easily obtainable for minority shareholders; and
- similarly, whereas the application of the “square root” rule alone may lead to a unreasonably low threshold in the case of companies with very small membership bases, the 100 member floor keeps the test workable;

The **costs** of this proposal are:

- the effect of the cap and floor is that only a proportion of public companies (with membership bases of between 10,000 and 250,000) are actually subject to the sliding scale which is the main benefit of the square root test;
- with a cap of 500 members, there is still the risk that companies with larger membership bases (over 250,000) might be subjected to the costs of holding an extraordinary general meeting in relation to resolutions that have no realistic prospect of success;
- the threshold test would remain out of step with comparable overseas jurisdictions; and
- the square root test is more complex than other options.

Option 4: Remove the 100 member rule, cap the five per cent threshold at 500 members, and require requisitioning members to have a minimum economic interest.

The **benefits** of this proposal are:

- The requirement that members hold a minimum specified parcel of shares will provide some protection against vexatious use of the provision where a special interest group holds no real economic interest in a public company; and
- the 500 member cap would keep the threshold at a level more easily obtainable for minority shareholders in the case of larger companies with wide membership bases.

The **costs** are:

- with a cap of 500 members, there is still the risk that companies with larger membership bases (over 250,000) might be subjected to the costs of holding general meeting in relation to resolutions that have no realistic prospect of success;
- in this way, the problems associated with the 100 member rule are shifted to a '500 member rule' (albeit with the extra protection offered by the minimum economic interest requirement);
- if the economic interest test is to be based on the number of shares rather than value, it would fail to appreciate the differences in value between companies' shares;
- as the concepts of 'par value' and 'authorised share capital' were removed from the Corporations Act, it would be necessary to refer to the market price of the shares to determine the value of a person's economic interest. A test based on market value would be complex and involve a difficult and potentially expensive valuation exercise; and
- a test based on market value would not easily apply to companies that do not have all their shares quoted, 'mutual' structured companies or companies with non-standard capital and voting shares.

CONSULTATION

Early inquiries by the Companies and Securities Advisory Committee (CASAC) and the Parliamentary Joint Statutory Committee on Corporations and Securities (PJSC)

In its October 1999 report on matters arising from the Company Law Review Act 1998 the PJSC recommended that the sole test to requisition a special meeting of a company be 5% of the issued share capital of the company held collectively by requisitioning members.

In its June 2000 report *Shareholder Participation in the Modern Listed Public Company*, CASAC recommended that only members holding at least 5% of votes that may be cast at a meeting should be able to exercise the requisition power.

Various companies and organisations including the Australian Institute of Company Directors (AICD), the Business Council of Australia, Rio Tinto Limited and NRMA Limited, supported the removal of the 100 member rule.

Regulation altering the 100 member rule

A regulation making power was inserted in the Corporations Act by Schedule 6 of the *Corporate Law Economic Reform Program Act 1999*. This permitted an alteration of the 100 member rule by regulation and commenced on 1 January 2000.

A regulation replacing the 100 member rule with the five per cent of voting members threshold was gazetted on 19 April 2000. The Senate disallowed the *Corporations Amendment Regulations 2000 (No. 4)* on 28 June 2000.

Square root rule proposal

The Government, in its response to the PJSC's 1999 Report, proposed replacing the 100 member test with a square root rule. On 18 December 2000, the former Minister for Financial Services and Regulation announced a second proposal to replace the 100 member rule with a square root test by regulation.

After early criticism of the effect of the square root test in relation to either very large or small companies, an additional cap and floor were suggested, in consultation with the Chartered Secretaries of Australia (CSA).

This proposal was ultimately abandoned in 2001, on the basis that the square root rule with a cap and floor was overly complex. In addition, doubts were cast on whether a square root rule could be prescribed under the regulations, as the regulations may only alter the 100 member rule to prescribe a 'different number of members'. A legislative solution was considered preferable.

Exposure Draft Corporations Amendment Bill (No. 2) 2002

A draft Bill was released for public consultation in December 2002 which proposed (inter alia) the repeal of the 100 member rule, and retention of the 5% of voting members limb of section 249D.

The 2002 Exposure Draft received many submissions from a wide range of stakeholders including representative bodies from the business, investor, accounting, legal, government and banking sectors as well as submission from various special interest organisations. Views regarding the removal of the 100 member rule remained divided, particularly around whether the right to call an EGM delivered member participation benefits commensurate to the cost of calling an EGM.

Alternatives such as sliding scale type tests (similar to the square root proposal), minimum economic interest tests and additional proper purpose requirements were proposed in submissions, although there were no clear preferences.

Exposure Draft Corporations Amendment Bill (No. 2) 2005

The contents of the 2002 draft Bill were modified and it was republished for public consultation in February 2005. The 2005 Exposure Draft retained the amendment to remove the 100 member rule and sought to better balance the impact of the removal of the 100 member rule, by improving shareholder access to other mechanisms for participation.

In particular, the package included amendments to lower significantly the threshold for members placing resolutions on the agenda of meetings already scheduled (section 249N), and for the distribution of members' statements by the company along with notices of meetings (section 249P).

This consultation process indicated a significant shift in stakeholder views about the proposal to remove the 100 member rule, with a significant consensus emerging in support. Importantly, this included shareholder representatives such as the Australian Shareholders Association, and investment groups such as the Investment and Financial Services Association Ltd (IFSA) and the Association of Superannuation Funds of Australia Ltd (ASFA).

A variety of alternative tests were put forth in submissions. These proposals, and the recommendations of the Parliamentary Joint Committee on Corporations and Financial Services (discussed below) formed the basis of Options Three and Four of this Impact Statement.

Submissions

A total of 37 submissions were received from a variety of stakeholders, including industry representative bodies, large and small business, banks, mutual organisations, lawyers, accountants, large investor groups and other interest groups. Submissions generally supported removal of the rule allowing 100 members to requisition an extraordinary general meeting of a company (approximately 80 per cent).

Key arguments in support of the amendment were:

- 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.
- 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. This disrupts management and gives rise to a number of logistical issues.
- The 100 member rule fails to recognise the substantial size differences between companies.
- A 5% threshold is equal to or lower than the thresholds in other comparable jurisdictions.
- Removing the 100 member rule and retaining the 5% threshold does not suffer the complications associated with proposals for a tiered threshold or economic interest test.
- A 5% threshold strikes a reasonable balance of protecting member rights whilst ensuring business efficiency.

- If shareholders who wish to requisition a meeting cannot obtain 5% of the voting rights in support, it is unlikely that any resolution put to the meeting would have a realistic chance of success.

Key arguments against the amendment were:

- There is insufficient evidence of abuse to justify repeal.
- A 5% threshold places an unnecessarily high burden on shareholders seeking urgent resolution of a matter.
- A 5% threshold does not readily apply to organisations structured as a mutual, because there is no dominant shareholder.

A number of submissions made the comment that the 100 member rule should also be removed with respect to managed investment schemes as well as companies (section 252B).

Parliamentary Joint Committee Inquiry into the *Exposure Draft Corporations Amendment Bill (No. 2) 2005*

The Parliamentary Joint Committee on Corporations and Financial Services (PJC) also conducted an inquiry into the 2005 Exposure Draft, tabling its report on 16 June 2005.

The Committee supported removal of the 100 member rule, but suggested a threshold test be retained for mutual companies. The PJC recommended that the threshold for requisitioning an EGM of a mutual company should be set to one per cent rather than five per cent of the votes that may be cast (Recommendation One).

The minority PJC report recommended a cap on the five per cent threshold of 1,500 members, with an additional requirement that each of those 1,500 members hold a minimum marketable parcel of 100 shares (Recommendation One of the Minority Report).

EVALUATION AND RECOMMENDATION

Option 2 is the recommended option. The abolition of the 100 member rule will improve the balance between encouraging shareholder participation and avoiding unnecessary costs for companies. The proposal has strong support from stakeholders including shareholder representatives.

A 5% strikes a reasonable balance of protecting member rights whilst ensuring business efficiency. If shareholders who wish to requisition a meeting cannot obtain 5% of the voting rights in support, it is unlikely that the resolution put to the meeting would have a realistic chance of success.

Removing the 100 member rule and retaining the 5% threshold does not give rise to the complexity that may be associated with proposals for a tiered threshold or economic interest test. Option 2 is the most simple and cost-efficient approach to use, from the perspective of both companies and the requisitioning members.

By retaining a simple 5% threshold, Australia's laws are aligned with (although still at the lower end of the spectrum of) comparable laws overseas, which base the requirement to requisition a company meeting on a proportion of voting rights, not just a flat number of members.

The retention of other mechanisms, such as the 100 member threshold for proposing resolutions at general meetings already scheduled, illustrates the availability of other avenues for small minority

shareholder participation that are less likely to lead to the imposition of large costs for the companies and other members.

IMPLEMENTATION AND REVIEW

On 8 December 2005, the Parliamentary Secretary to the Treasurer, the Hon Chris Pearce MP, announced that the Government will proceed with legislative reforms to improve rules for shareholder meetings. The announcement followed an extensive consultation period.

These changes will be made by amendment to the Corporations Act and are to be contained in the Corporations Amendment Bill (No 2) 2006. The amendment will come into force upon the Royal Assent.

The Government will monitor and review the amendments after three years with a view to assessing their impact on shareholder participation.

DEVELOPMENTAL HISTORY OF THE PROVISIONS DEALING WITH THE REQUISITION OF GENERAL MEETINGS UNDER THE CORPORATIONS ACT

Summary

- *Uniform Companies Acts 1961*
Threshold: 10% of paid up capital (or 10% of voting rights if no share capital).
- *Companies Act 1981*
Threshold: 5% of paid up capital (or 5% of voting rights if no share capital)
OR
at least 200 members.
- *Corporations Act 1989*
Threshold: 5% of total voting rights
OR
at least 200 members if no share capital, or 100 members who have \$200 paid up if there is share capital.
- *Company Law Review Act 1998 (Section 249D)*
Threshold: 5% of total voting rights
OR
100 members, for a meeting to be called at the company's expense.
- *Corporate Law Economic Reform Act 1998*
Added a regulation making power to permit adjustment of the 100 member rule in section 249D.
- Regulation 2G.2.01 2000
Replaced the 100 member number test with a 5% test. Regulation was disallowed.

Uniform Companies Acts 1961

In an attempt to achieve uniform company law in Australia the Uniform Companies Acts of 1961 were adopted in Victoria, New South Wales and Queensland. Section 137 of the Victorian *Companies Act 1961* mirrored former section 115 of the Victorian *Companies Act 1958*.

Under section 137 company members could requisition directors to convene an extraordinary general meeting if they held not less than one-tenth of the paid up capital carrying voting rights at general meetings or, in the case of a company not having share capital, members who carried one-tenth of the voting rights.

Companies Act 1981

It was not until 1981 that members could invoke an alternative test to requisition a meeting. Section 137 of the *Companies Act 1961* was replaced by section 241 of the *Companies Act 1981*. The new section 241 of the *Companies Act 1981* reduced the 10% threshold to 5%, and provided that a general meeting could also be requisitioned by at least 200 members.

Corporations Act 1989

Section 241 of the *Companies Act 1981* was in turn replaced by section 246 of the *Corporations Act 1989*. Section 246 retained the 5% threshold test but introduced a new rule stating that a meeting could be requisitioned by at least 100 members who have each paid up an average of \$200 on their shares.

Under section 246(1) members could requisition directors to convene a meeting:

- (a) If the company has shares, at least 100 members who have each paid up an average of \$200 on their shares; or
- (b) If the company did not have shares, at least 200 members; and
- (c) in every case members with at least 5% of the total voting rights.

At this stage the law referred to the par value of a company's share. For example if a BHP share had a par value of \$1, then a member would need to hold 200 shares to have the required \$200 monetary value to sign the requisition. This requirement limited the power to requisition meetings to members with what was considered to be a minimum economic interest in the company.

Law Reform - Second Corporate Law Simplification Bill 1996

In December 1994, as part of the Corporations Law Simplification Program, the Simplification Task Force released a discussion paper entitled *Company meetings: Proposal for simplification*. The paper outlined proposed amendments to the provisions of the Corporations Law relating to company meetings.

Simplification Task Force Proposals

The task force considered that the first two thresholds in section 246(1) did not necessarily fix a meaningful proportion of the company's members. It was considered that for widely held companies a relatively small number of members may take advantage of the provisions. The monetary threshold in the first test had been eroded over time through inflation and could be manipulated through nominee shareholdings.

The Simplification Task Force proposed that only the 5% test remain, and that the first two thresholds in section 246(1) be repealed.

Exposure Draft 1995

An exposure draft of the Second Corporate Law Simplification Bill was released in June 1995. The exposure draft repealed the rule allowing 100 members who had paid up an average of \$200 on their shares because it was not consistent with the abolition of par value shares and it was considered too difficult to find a substitute rule to replace the monetary threshold of \$200.

Instead, the new section 249D provided that 200 members or members holding 5% of the votes would be able to request directors to requisition a general meeting.

Consultative Group/ Simplification Task Force

The specific numerical threshold of 200 members was retained at the request of the Simplification Consultative Group and, in particular, the representatives of institutional investors.

The institutional investors were concerned that if the 5% rule were the only threshold, then a measure could only be initiated with the support of the institutional investors. This could bring some considerable pressure to bear on institutional shareholders in some circumstances to call a meeting.

Draft Second Corporate Law Simplification Bill 1996

In July 1996 the Government released a redrafted version of the Second Corporate Law Simplification Bill, taking into account issues raised in the submissions it received and subsequent consultation. As a result the Bill proposed to increase the opportunity for members to requisition meetings by reducing the number of members from 200 to 100 and retaining the 5% threshold on members holding at least 5% of the votes.

Parliamentary Joint Committee on Companies and Securities

In June 1996 the Government referred the draft Second Corporate Law Simplification Bill to the Parliamentary Joint Committee on Corporations and Securities (the Committee). The Committee received 26 written submissions on the draft Bill and held hearings on 13 September and 2 October 1996 in Canberra and Sydney respectively.

Submissions

On 18 November 1996 the Committee tabled its report in the Senate. The Committee received submissions expressing concerns about proposed section 249F which included comments indirectly relating to proposed section 249D.

Under the proposed section 249F, members with at least 5% of the votes that may be cast at a general meeting could call, and arrange for holding, a general meeting of the company at their own expense. A company would no longer be able to displace this right by adopting a contrary provision in its constitution.

The Chartered Institute of Chartered Secretaries (CICS) expressed concern that these provisions gave power directly to the minority members to convene meetings and did away with the filtering process carried out by company directors. As a consequence, the company could have to deal with meetings being called for improper purposes and incur unnecessary expenses trying to set aside the meeting in court.

Similarly, the Australian Institute of Company Directors (AICD) felt that members' rights under section 249D should be qualified and the common law position be spelled out clearly in the legislation that members' meetings generally must be called for proper purposes (i.e. the objects of the proposed meeting must be appropriate for a members' meeting).

Recommendations

The Committee recommended that the Bill should make it clear that the power of members to requisition or convene a general meeting should not be exercised frivolously, and should be exercised only where the purpose of the meeting is a valid purpose of the meeting.

In response the Task Force agreed to amend the Bill to clarify that members meetings could only be called for a proper purpose.

Government Response to the Committee's Report

In June 1997 the Government released its response to the Committee's recommendations. The Government agreed with the Committee's recommendation and proposed to include in the Bill a provision stating the general common law position that meetings must be called for a proper purpose. The provision was meant to limit the power of members to call a general meeting under section 249F or to requisition directors to call a general meeting under section 249D.

Company Law Review Bill 1997

In late 1996, the Corporations Law Simplifications Program was advanced as part of the Corporate Law Economic Reform Program and was renamed the Company Law Review Bill 1997.

Section 249D of the Company Law Review Bill retained the 5% test but reduced the number of 200 shareholders to 100.

The change from 200 members to 100 was consistent with comments made by the Australian Shareholders Association (ASA) in their submission dated 26 October 1995. The ASA submitted that the threshold of 200 signatures was too high, and that 100 shareholders was an appropriate threshold.

In addition, the Bill introduced a new safeguard against shareholders using their power under section 249D frivolously. The Bill offered protection by including the proper purpose test under section 249Q.

Section 249Q provides that a meeting of a company's members must be held for a proper purpose. This provision gave statutory backing to the general common law position that meetings must be called for a proper purpose (ie that the matters to be put to the members are those which under the company's constitution a general meeting is competent to consider). The provision does not call for an examination of the intentions or the bona fides of the requisitionists.

Parliamentary Joint Committee on Companies and Securities

On 3 March 1998 the Company Law Reform Bill 1998 was referred to the Parliamentary Joint Committee on Corporations and Securities.

The NRMA commented on the proposed reduction of the threshold number from 200 to 100 members under section 249D. The NRMA indicated that the current threshold of 200 was an unrepresentative figure (about 0.01% of its total membership) and that the lower threshold was even less representative. It stated: "the ease with which 0.01% of the NRMA's membership can have a Special General Meeting called needs to be viewed in the context of costs to the company and, thus to the membership as a whole, both direct and indirect, in actually holding the meeting." It estimated the cost of convening a general meeting at that time as around \$1 million.

While acknowledging the importance of procedures to enable general meetings to be called, the NRMA stated that, in the case of a large mutual, the law should encourage members to have their grievances dealt with at the annual general meeting so that the calling of a Special General Meeting is a last resort. It recommended raising the threshold for companies with 1 million members to 1% of the membership of the company.

In response the majority report noted that the revised Bill now included a proper purpose test under s 249Q. The Committee agreed with the comment made in a submission from Corrs Chambers Westgarth stating that the proper purpose test under section 249Q will reinforce the limited nature of the requisitioning power under section 249D.

The Minority Report noted the Committee's comments but went further to suggest that the operation of the proper purpose test may need further review after the new law had time to be assessed. The Minority Report also considered that it is vital that the minority shareholders retain the ability to call meetings but that it is equally vital that such shareholders are effectively dissuaded from using this power frivolously or vexatiously.

Company Law Review Act 1998

The Company Law Review Bill 1997 was introduced into Parliament on 3 December 1997 and passed on 25 June 1998 with no amendments to the proposed section 249D. The *Company Law Review Act 1998* commenced on 1 July 1998.

Section 249D of the *Company Law Review Act 1998* retained the 5% threshold and the 200 member test was reduced to 100 members. This is the threshold test contained in the Corporations Act today. A proper purpose test was included (section 249Q).

Corporate Law Economic Reform Bill 1998

Since the Company Law Review Act came into effect on 1 July 1998, the Australian Institute of Company Directors and the NRMA have continued to request amendment of section 249D.

In response to the representations made by the NRMA to the Parliamentary Joint Committee on Corporations and Securities (outlined above) the Government introduced a regulation making power into the *Corporate Law Economic Reform Program Act 1999*.

Subsection 249D(1A) permits by regulation an alteration of the 5% or 100 member rule, by allowing a different threshold to be prescribed for particular cases where that would be appropriate, while retaining the existing threshold as a general rule.

Regulation 2G.2.01

On 19 April 2000, regulation 2G.2.01 was introduced. It applied until 28 June 2000 when the Senate disallowed the regulation. During its period of operation, reg 2G.2.01 applied only to public companies and specified that, for the purposes of section 249D(1)(b), directors of a public company must call and arrange to hold a general meeting on the request of at least 5% of the total number of members of the company rather than 100 members who are entitled to vote at a general meeting. The result was that, while the regulation operated, the 100 member threshold did not apply to public companies but continued to apply to proprietary companies.

GENERAL MEETINGS OF COMPANIES.

The board of directors and the general meeting of members are both organs of the company with their respective powers determined by the replaceable rules, the company's constitution and the Corporations Act. The relationship between the general meeting and the board of directors is analogous to the division of powers between the Federal and State legislatures under a Federal constitution. The general meeting has specific powers but the residual powers vest with the directors.

The powers of management are usually vested in the directors such that they and they alone can exercise these powers. The members in a general meeting cannot override management decisions made by the directors and involve themselves in the management of their company. However, if the members disapprove of the actions of the board, they can alter the replaceable rules or constitution to deprive the directors of some of their powers or they can exercise the power given to them by the articles to vote in directors of whose policies they approve.

The practice whereby companies confer a wide power of management on the board of directors results in the separation of management and ownership. Ownership vests in the members. In the case of large, public companies it is essential that management vests in the board of directors. Where there are a large number of shareholders, it would quickly become unworkable if the general meeting had the power to manage the company. The day to day operations of such companies cannot be effectively run by shareholder referendum. In the case of small proprietary companies there is no such difficulty as directors and shareholders of such companies are often the same people and in practice there is no separation of management and ownership.

The successful implementation of corporate governance principles enables a corporation to balance the need for managerial risk-taking and entrepreneurial abilities with the need for ensuring that the actions of management correspond with the interests of shareholders and other interests in the community. The will of the members is expressed at their meetings. The calling and conducting of meetings is part of the internal regulation of companies. The provisions of the Corporations Act regarding meetings are primarily aimed at ensuring that the will of the members is reflected in the running of the company and that they have certain opportunities to acquire information regarding the affairs of the company.

Another object of members' remedies, such as the right to requisition a meeting, is to protect members (principally minority members) from abuse at the hands of the controllers of the company, whether they be the directors with management control or majority members of the company through their voting power. The potential for abuse arises because the board of directors is in control of the management of the company and the majority members are in control of the general meeting of the company. Minority members are vulnerable to the actions of both groups of controllers whenever the interests of the controllers and the minority members diverge.

SITUATIONS REQUIRING A GENERAL MEETING

Examples of situations requiring a general meeting of members include:

- Electing or removing directors;
- Altering the constitution;
- Appointing or removing auditors;
- When the board of directors is unable to act for any reason – for example if the board is in deadlock and cannot reach a decision;
- When the general meeting has the power to ratify breaches of duty by the directors as long as its ratification does not constitute fraud on, or oppression of minority members; and
- When directors are in breach of their duties and refuse to initiate an action on the company's behalf against themselves.