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The Parliament of the Commonwealth of Australia

**DIFFERENTIAL VOTING SHARES  
AND THE AUSTRALIAN STOCK EXCHANGE**

**PARLIAMENTARY JOINT COMMITTEE ON  
CORPORATIONS AND SECURITIES**

**NOVEMBER 1993**

The Parliament of the Commonwealth of Australia

**DIFFERENTIAL VOTING SHARES  
AND THE AUSTRALIAN STOCK EXCHANGE**

PARLIAMENTARY JOINT COMMITTEE ON  
CORPORATIONS AND SECURITIES

NOVEMBER 1993

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The Senate  
Parliament House  
CANBERRA ACT 2600

## DUTIES OF THE COMMITTEE

Section 243 of the Australian Securities Act 1989 reads as follows:

The Parliamentary Committee's duties are:

- (a) to inquire into, and report to both Houses on:
  - (i) activities of the Commission 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 any national scheme law, 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 a national scheme law;
- (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.

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# DIFFERENTIAL VOTING SHARES AND THE ASX

## INTRODUCTION

- 1 The Australian Stock Exchange (ASX) issued a discussion paper on Wednesday 10 November 1993 entitled **Differential Voting Rights**. The paper addresses in some detail approaches currently taken by overseas exchanges and the prevailing policy of the ASX on attachment of differential voting rights to shares in publicly listed companies.
- 2 The paper addresses two types of differential voting shares which have developed in recent years - super voting shares and targeted shares. Both types of shares have a common feature in so far as they provide for an alteration to the voting value of ordinary shares so as to negate a one-vote-one share arrangement.
- 3 The paper invites interested parties to respond to a set of questions and to expand on the answers if desired. The ASX has requested that answers and comments be submitted to it no later than Monday 29 November.
- 4 Given the cycle of parliamentary sittings and the pressure of other business the Committee will not have time to carry out a detailed analysis of the issues involved. It is concerned however at
  - \* the limited time provided for consideration of such complex issues;
  - \* whether the ASX has the capacity to make a detached and objective assessment of the problem, and
  - \* some of the possible outcomes of the proposals currently before the ASX.

- 5 The discussion paper states in its introduction that, in raising the matter, it is cognisant that -
- \* there has to date been little public debate on the topic in Australia; and
  - \* while there has been a great deal of debate overseas on the topic, there is still no consensus among scholars or other commentators regarding the desirability of ordinary shares that carry differential voting rights<sup>1</sup>
- 6 The Committee agrees with these views and notes that they are at variance with the position taken by the Chairman of the ASX who is reported to have said that "*The market is already well aware of the issues involved*"<sup>2</sup>
- 7 The Committee believes the time allowed for comment on issues of such complexity is unreasonably short. Furthermore, it believes that such apparently consciously truncated consideration of such complex questions damages the credibility and impartiality of the ASX by creating the impression that it is simply going through the motions of a perfunctory consultative process to arrive at a pre-determined outcome.
- 8 While not suggesting that this is the objective of the ASX, the Committee is encouraged in this view by the unsolicited verbal and written comments it has received from business people and other interested parties.
- 9 The Committee believes that the discussion paper addresses issues of long-term importance both to the system of shareholder protection and to the perception of strong corporate oversight which has developed in Australia in recent years.

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<sup>1</sup> 'Differential Voting Rights', ASX Discussion Paper, November 1993, para 5.

<sup>2</sup> *Australian Financial Review*, 15 November, 1993, p. 22



- 10 Among serious questions raised by the Paper and of central importance to the efficiency and accountability of companies to their shareholders are the following :
- \* the possibility of entrenchment of control by current major shareholders;
  - \* the possibility of one group of shareholders in a company being able to increase its proportion of voting control without formal takeover or acquisition of equity;
  - \* the possibility that such acquisition of control may be in breach of the takeover code (*Ch 6 of the Corporations Law*);
  - \* the possibility that ordinary shareholders will lose rights and that the value of their shareholdings might diminish.
- 11 The Committee believes that any proposed departure from the time-honoured principle of one share one value must be subject to the most thorough analysis, scrutiny and debate, involving consideration of the experiences of overseas exchanges and the full range of implications for Australian shareholders.
- 12 While the discussion paper provides examples of how overseas exchanges (including New York, London and Toronto) have approached the differential share issue, the analysis is neither complete nor comprehensive. There is, however, despite these shortcomings, ample evidence even in the Paper to support the conclusion that the question has been a vexed and divisive one wherever it has been discussed and that it has proved universally difficult to arrive at a satisfactory set of rules.
- 13 By contrast with the long and sometimes bitter debate in the US, Canada and elsewhere the debate in Australia is in its infancy. The discussion paper is a valuable starting point for what the Committee believes should be a much longer and more informed debate involving not only members of the ASX but also the many other interested parties including

large and small shareholders, academics, corporate lawyers, representative organisations such as the Australian Investment Managers Group, the Securities Institute of Australia, the Attorney General and interested parliamentary committees from both state and federal jurisdictions.

- 14 For this reason the Committee strongly opposes the reported suggestion that a decision might be made by the ASX in December 1993.

#### Recommendation (i)

The Committee recommends that the ASX allow until the end of February 1994 for submission of views and comment on the complex issues raised in its discussion paper 'Differential Voting Rights'.

- 15 As the Committee has noted, the issue of the discussion paper is against a background of a submission to the ASX by News Corporation Limited that the ASX waive its current listing rule 3K to allow News to put to its shareholders a proposal for the creation of super-voting shares. The Committee requested a copy of the original News proposal from the ASX, but was informed that the proposal was confidential. The Committee is therefore unable to comment upon the proposal which, in any event, appears to have undergone a number of changes, following the initial negative reaction from significant parts of the securities industry. (The Committee notes that News' latest proposal has been provided to it by the ASX.)
- 16 While under section 774 of the Corporations Law, amendments to the ASX listing rules may be disallowed by the Attorney General, it is an irony and of some concern to the Committee that a waiver of these rules is not subject to such disallowance.
- 17 The Committee does not, in common with a number of others, consider that a case-by-case approach to the question of company alterations to their shareholding structures is appropriate. Any proposal for such a change should entail

consideration by the ASC and the Attorney General as provided for in Section 774.

- 18 The Committee approached the ASX concerning this matter. In a letter to the Chairman dated, dated 19 November, 1993, the Director of Operations of the ASX advised the Committee that " *the ASX is not, and has not been contemplating using its waiver power for the purpose of any relief to ... Newscorp from listing rule 3K(2) ...*" a copy of the letter is appended.
- 19 While the Committee welcomes this response from the ASX it notes that the waiver option has not been ruled out but the ASX has advised the Committee "*... that, in the event if found it necessary to use its waiver power, it would advise the Australian Securities Commission, your Parliamentary Committee and the Attorney-General in advance of exercising that waiver power, so that those parties could consider their position*"; a clear indication that waiver remains an option.
- 20 Further, the Committee considers the whole question of differential shares, whether implemented by waiver or amendment of current listing rules should be the subject of careful consideration by the ASC and the Attorney General, as well as by the commercial community and other interested parties including this Committee.

#### **Recommendation (ii)**

The Committee recommends that any change in ASX requirements which would permit alteration to the current one-share-one vote rule should be implemented by means of amendment to the ASX listing rules. The Committee strongly opposes the introduction of such changes by waiver on a case-by-case basis.

- 21 Section 774 of the Corporations Law requires the ASX to lodge notice of any amendment to the listing rules with the ASC within 21 days of such amendment (subsection 774 (3)). The Attorney General can, within 28 days of receipt of the notice by the ASC, disallow the whole or part of any amendment. The possibility consequently exists that a

proposal made in December to alter the listing rules would need to be considered and responded to by the ASC and the Attorney General by early in 1994.

- 22 The Committee considers that any proposed change to the listing rules involving such an important matter as differential voting rights is a matter which requires a period of exposure to allow proper comment. To do otherwise would run the risk of allowing a fundamental change to the current structure of shareholding to be made in an unacceptably short time frame and without full and proper consideration.
- 23 The Committee notes that the letter from the Director of Operations of the ASX, in referring to the Attorney General's 28 day period for disallowance indicates that *"it would be open to the Attorney General to take longer than the 28 days to decide the issue, if he so determined, by either disallowing the change as an interim measure or by asking the ASX to withdraw the change until such time as he has had the opportunity to consider the matter further"*.
- 24 Notwithstanding this, the Committee believes that, in the longer term, consideration should be given to involving both the Attorney General and government in matters involving such fundamental and far-reaching change.
- 25 The Committee takes this view because it believes the ASX might be placed under considerable pressure and possible conflict of interest in resolving such issues. This may influence its capacity to be detached and objective.
- 26 In the current situation, the fear of the loss of brokers commissions from trading in Newscorp shares (said to be in the order of \$60m) resulting from a possible decision by Newscorp to move overseas, faces the ASX with a difficult conflict of interest.

27 The Committee therefore recommends

**Recommendation (iii)**

**That both the ASC and the Attorney-General prepare a response to the ASX discussion paper 'Differential Voting Rights' and publish those responses.**

**Recommendation (iv)**

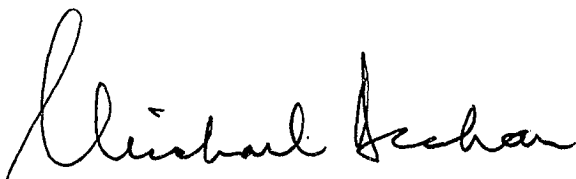
**That the Attorney-General examine the longer term implications of decisions on such fundamental issues as differential noting rights for shares being made by bodies which may be subject to undue pressure and/or face possible conflicts of interest.**

28 The underlying concern of the Committee is that the ASX retain its reputation as an institution which has established and maintains the highest international standards; that it provide a market which is fair, open and applies uniformly high standards.

29 The Committee is concerned that the proposed changes, if supported by the ASX, together with the haste in making such a decision would significantly undermine its integrity and have a profound long term effect on the standing of Australia's capital market.

## 30 SUMMARY OF RECOMMENDATIONS

- (i) The Committee recommends that the ASX allow until the end of February 1994 for submission of views and comment on the complex issues raised in its discussion paper 'Differential Voting Rights'.
- (ii) The Committee recommends that any change in ASX requirements which would permit alteration to the current one-share-one vote rule should be implemented by means of amendment to the ASX listing rules. The Committee strongly opposes the introduction of such changes by waiver on a case-by-case basis.
- (iii) That both the ASC and the Attorney-General prepare a response to the ASX discussion paper 'Differential Voting Rights' and publish those responses.
- (iv) That the Attorney-General examine the longer term implications of decisions on such fundamental issues as differential noting rights for shares being made by bodies which may be subject to undue pressure and/or face possible conflicts of interest.



MICHAEL BEAHAN  
CHAIRMAN

November, 1993



## AUSTRALIAN STOCK EXCHANGE

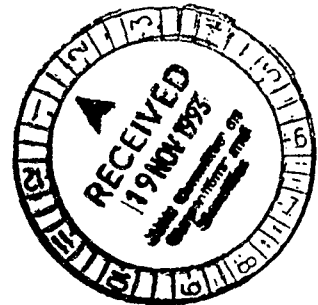
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Senator Michael E Beahan  
Chairman  
Joint Statutory Committee on Corporations and Securities  
The Senate  
Parliament House  
CANBERRA ACT 2600



Dear Senator

### SUPER-VOTING SHARES

I refer to our telephone discussion this morning and confirm that Australian Stock Exchange Limited (ASX) is not, and has not been, contemplating using its waiver power for the purpose of granting any relief to News Corporation Limited (NewsCorp) from Listing Rule 3K(2) to enable NewsCorp to put to its shareholders for approval a proposal to introduce super-voting shares.

This morning I confirmed to you that in the event that ASX was to permit the shareholders in NewsCorp to decide the issue on whether NewsCorp should be able to issue super-voting shares, it would do so by way of a change to Listing Rule 3K(2). Such a change to the rule would require notification to the Australian Securities Commission under section 774 of the Corporations Law. The Commission is, in turn, required to send a copy of the notice to the Attorney-General, who may within 28 days disallow the rule. In the event that he disallows it, the one share, one vote rule would remain in force. It would be open to the Attorney-General to take longer than 28 days to decide the issue, if he so determined, by either disallowing the change as an interim measure or by asking ASX to withdraw the change until such time as he has had the opportunity to consider the matter further.

I have also advised you that ASX has undertaken that, in the event it found it necessary to use its waiver power, it would advise the Australian Securities Commission, your Parliamentary Committee and the Attorney-General in advance of exercising that waiver power, so that those parties could consider their position.