CHAPTER 15

REQUISITIONING A GENERAL MEETING

15.1 The *Company Law Review Act 1998* among other things inserted the following provisions in the Corporations Law:

> **Calling of general meeting by directors when requested by member**s
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> **249D (1) [Members request]** The directors of a company must call and arrange to hold a general meeting on the request of:
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> (a) members with at least 5% of the votes that may be cast at the general meeting; or
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> (b) at least 100 members who are entitled to vote at the general meeting.
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> **249D (2) [Form of request]** The request must:
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> (a) be in writing; and
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> (b) state any resolution to be proposed at the meeting; and
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> (c) be signed by the members making the request; and
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> (d) be given to the company.
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> **249D (3) [Separate copies may be used for signing]** Separate copies of the document setting out the request may be used for signing by members if the wording of the request is identical in each copy.
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> **249D (4) [Percentage of votes to be determined]** The percentage of votes that members have is to be worked out as at the midnight before the request is given to the company.
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> **249D (5) [Time limits for calling and holding of meeting]** The directors must call the meeting within 21 days after the request is given to the company. The meeting is to be held not later than 2 months after the request is given to the company.
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> …
>
> **Purpose**
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> **249Q** A meeting of a company's members must be held for a proper purpose.

15.2 Item 4 of **Schedule 6 – Miscellaneous amendments of the Corporations Law** of the Corporate Law Economic Reform Program Bill 1998 provides as follows:

4 After subsection 249D (1)

Insert:

(1A) The regulations may prescribe a different number of members for the purpose of the application of paragraph (1)(b) to:

(a) a particular company; or

(b) a particular class of company.

Without limiting this, the regulations may specify the number as a percentage of the total number of members of the company.

15.3 On 2 August 1999 the Minister for Financial Services and Regulation, the Hon Joe Hockey MP, referred the operation of sections 249D and 249Q and Item 4 in Schedule 6 to the PJSC for inquiry. The Minister also noted that the Companies and Securities Advisory Committee (CASAC) was currently considering the issues raised by s.249D in a discussion paper entitled "Shareholder participation in the modern listed public company". The CASAC subsequently presented the discussion paper in September 1999.

Submissions

15.4 The PJSC received 21 submissions which addressed this topic, of which 7 were broadly in favour of the present test or threshold in s.249D, while 14 were generally opposed to the threshold as being too low.

Arguments against the present threshold

Problems with the provisions

15.5 A majority of the submissions advised that there were deficiencies in the operation of s.249D. Rio Tinto Limited submitted that it was important to impose limitations on the way in which a few individuals, perhaps with only one share each, or small single interest groups, can use the provision for other than proper purposes. There needs to be a balance between legitimate shareholders' rights and the potential abuse of those rights at what could be a substantial cost to the company. The threshold of 100 members is totally inadequate because of large share registers and the ease with which the Internet may be used to obtain this small number. The Law Council of Australia submitted that the threshold was too low and was open to abuse. The policy concern is that where requisitioning shareholders with a nominal economic interest may have purchased shares solely to request the meeting and to further a particular cause, it is not in the company's interest to be required to call the meeting. It is in fact a waste of shareholder funds and executive time. This is different to the situation where minority shareholders with a real economic interest in the company raise legitimate concerns. The Investment and Financial Services Association Ltd (IFSA)

submitted that too frequent meetings will inconvenience and distract management from its core task of conducting company business, with adverse consequences for shareholder and customer confidence. At present there is not an appropriate balance. The present threshold may be requisitioned at considerable cost to the company by people with a very small economic interest in the company, or within a short time before or after the annual general meeting. Coles Myer Ltd submitted that the threshold was too low for large companies. It is a simple task to recruit 100 shareholders. The costs of the provision outweigh the benefits. North Limited submitted that a special meeting was extremely disruptive for the company. It not only imposes a considerable cost but also is a major distraction for directors and management over a considerable period of time. Special meetings destroy rather than create economic value.

15.6 Blake Dawson Waldron, on behalf of the Australian Stock Exchange Limited, the Australian Institute of Company Directors, the Business Council of Australia and the Chartered Institute of Company Secretaries in Australia Ltd (CICS), submitted that s.249D(1)(b) is open to serious abuse by disgruntled minorities, single issue groups and others motivated by concerns other than the interests of the company. Urgent amendment of the provision was necessary. There is now a virtually unrestricted right for small numbers of shareholders with a tiny economic interest in the company to requisition meetings. The provision is already proving to benefit principally those who seek to damage a company. The CICS separately submitted that the issue was of critical importance for all major corporates in Australia. A meeting could be requisitioned at high cost within a short time of the annual general meeting by shareholders with a small holding, with no consideration for the rights of other shareholders. The Internet means that it is easier to get 100 requisitioning numbers. A number of submissions made similar points.

15.7 A number of submissions advised that the Corporations Law provided other safeguards apart from s.249D for the rights of small and single issue shareholders to place their views before the company in general meeting.

Meetings must be held for a proper purpose

15.8 A number of submissions advised that the requirement in s.249Q that meetings must be held for a proper purpose was not an effective safeguard for perceived abuse of s.249D. Blake Dawson Waldron submitted that s.249Q required only that the matters to be put to members should be within the competence of a general meeting of the company to consider. Section 249Q is not sufficient to prevent ongoing harassment. North Limited submitted that s.249Q should include a provision that it is not a proper purpose if the meeting is not requisitioned in good faith. Evidence of a lack of good faith could include repeated presentation of issues rejected by earlier meetings. Also, Canadian safeguards could be adopted under which a company need not hold a meeting if it is requisitioned for a range of political or social purposes. The IFSA submitted that s.249Q is of limited use in preventing a small number of shareholders from requisitioning a meeting which is not in the interests of the company as a whole. A proper purpose is anything which a company could do in a

general meeting. Also directors may be reluctant to rely on the proper purpose test given possible litigation and publicity. McCullough Robertson submitted that there were a number of technical legal problems with the concept of proper purpose. The Law Council of Australia submitted that the purpose of s.249Q was to prevent the requisitions power from being used for invalid, specious or frivolous purposes. Unfortunately it is not clear that this objective has been achieved.

Mutual companies

15.9 The President of NRMA Limited, Mr Nicholas Whitlam, submitted that s.249D has particular difficulties for mutual companies. The question was the threshold and striking a balance between the legitimate rights of members to call for special meetings on the one hand and the abuse of the process for frivolous reasons on the other. The NRMA has 1.8 million members and its sister mutual company NRMA Insurance Limited has 1.4 million members. There are no shareholding blocks, with each member having one vote equally valued. It was easy to obtain 100 signatures and the costs of a special meeting could be up to $1 million. Costs could be reduced to half this, however, if special meetings can be held adjacent to an annual general meeting. The NRMA would prefer a threshold of 1%, which should apply only to mutual companies. The NRMA is very pleased with the regulation making power in the Bill.

Suggested remedies

15.10 Submissions which suggested a remedy to the perceived problem concentrated on economic rather than numerical thresholds. These included a requirement to hold a marketable parcel of shares, or shares to a certain value for each individual requisitioning member, or for a total shareholding of a minimum percentage of voting rights. There was less support for a purely numerical threshold.

15.11 Other suggested courses included a requirement for ASIC to approve the requisitioned meeting, provision for individual companies to exclude the operation of s.249D, provision for requisitioning members to negotiate with the company before the meeting was held and limits on the matters which a meeting could address. Several submissions referred to the Canadian safeguards, which are in addition to a 5% voting rights threshold.

Arguments in favour of the provision

15.12 A number of submissions advised that s.249D was beneficial for shareholder rights and corporate democracy. Mr Peter Graham QC submitted that in two cases of which he had personal knowledge the provision had been useful in dealing with a belligerent and uncompromising management. In both cases the mere mention of the provision without its actual use was enough for a positive outcome. Even in another case where the provision was in fact invoked the costs incurred by the company were preferable to the emasculation of s.249D rights. The Australian Society of Certified Practising Accountants and the Institute of Chartered Accountants in Australia submitted that there were no problems with either the provision or with the proposed regulation making power to amend the threshold. The Association of Superannuation

Funds of Australia Limited submitted that there were no clear instances of the failure of the legislation so no changes were necessary.

15.13 The Boral Green Shareholders submitted that the provision allows dissenting groups to put a point of view. Obtaining 100 members is not easy and represents a real contrary point of view. Any change should make it easier not harder to requisition a meeting. The North Ethical Shareholders submitted that the present threshold is considerable. It is hard to recruit 100 members and there are legal fees and the risk of legal challenge. There is adequate legal protection for companies against harassment. Nevertheless, the possibility of abuse exists and it may be reasonable to require the 100 members each to own 50 shares. However, if the numerical test was 5% then this would virtually destroy shareholder rights. The BHP Shareholders for Social Responsibility and the Amcor Green Shareholders submitted that the provision was important for shareholder democracy and good corporate governance. The hurdle of 100 members is extremely high; it is exceedingly difficult to bring together that number of shareholders. Any change should be to less than 100 members, but it would be acceptable to provide that each must hold a marketable parcel of shares.

15.14 In relation to mutual companies, Mr Peter Carroll, an NRMA member, submitted that Mr Whitlam (see paragraph 15.9) exaggerated the difficulties and overlooked the implications of good governance for large mutual companies. The provision did not have a history of frequent or frivolous use. Also the NRMA had routine mailouts to members at least seven times a year, for the company magazine and the annual general meeting, so costs would be relatively trivial.

CASAC discussion paper

15.15 As mentioned earlier, CASAC presented "Shareholder participation in the modern listed public company" in September 1999. The CASAC view was that the present 100 shareholders test is not soundly based on principle. The shareholder numerical threshold or any variation of it is unsatisfactory. The test for requisitioning a meeting should be a proportion of the issued share capital of the company. CASAC has not yet reached a decision on what that proportion should be, but noted that a 5% threshold would be compatible with overseas practice.

Conclusions

15.16 The PJSC concludes that the present provision for 100 members to requisition a meeting of the company is inappropriate and open to abuse. The current position is that 100 members who together may hold only a tiny economic interest in a company and be only a minuscule proportion of the company's numbers, may require the company to hold a special meeting, with the resulting costs to be met by the company itself. In addition, the company is disadvantaged by its directors and managers being diverted from their core functions.

15.17 The PJSC further concludes that s.249Q, which provides that a meeting must be held for a proper purpose, is not a safeguard against abuse of the requisition power. It appears that a proper purpose is any matter which is within the competence of the

company in general meeting. It would be easy, therefore, to draft a requisition in those terms. Also, if directors declined to convene a meeting for lack of proper purpose they would invite litigation.

15.18 The sole test for requisition of a special meeting should be an issued share capital threshold which must be met collectively by the requisitioning members. The PJSC endorses the CASAC finding that the numerical shareholder test or any variation of it is unsatisfactory. The reason for this is that such tests would not overcome the basic difficulty that a group of members with an insignificant economic stake in the company may put the company and the other shareholders to the expense and inconvenience of a meeting.

15.19 There are further specific difficulties with the various submissions which attempt to ameliorate the effect of the numerical shareholder threshold. These include administrative complexity and uncertainty and the likelihood of litigation. In the case of making the present numerical test a replaceable rule the PJSC endorses the CASAC finding that requisition of a meeting is a significant matter of corporate governance, for which a uniform rule is appropriate.

15.20 The test of a minimum proportion of issued share capital to be met collectively by requisitioning members is preferable not only as a matter of principle but also for administration reasons. The issued share capital test is simpler to administer and more transparent in effect. The PJSC also endorses the comment by CASAC that if requisitioning members cannot cross, say, a 5% shareholding threshold, then there must be serious doubts that their resolution would succeed.

15.21 The PJSC concludes that a 5% issued share capital test would be reasonable, given CASAC advice that this would be compatible with overseas practice.

15.22 Large mutual companies such as the NRMA are in a special position and may need different provisions.

Recommendation

15.23 The PJSC recommends that the Corporations Law be amended to provide that the sole test to requisition a special meeting of a company is 5% of the issued share capital to be met collectively by the requisitioning members.