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Shareholder Activism under the Corporations Act

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SUMMARY

Shareholder activism may be directed to achieving corporate governance outcomes or improving shareholders' returns or, in a wider form, to achieving ecological, social and political outcomes. This paper identifies a number of steps which may be taken by activist shareholders to advance these interests. The paper first considers shareholders' ability to requisition extraordinary general meetings and raise matters at annual general meetings. The paper then considers more radical means available to shareholders to advance strategic objectives, including "vote no" campaigns and resolutions to remove individual directors. The paper then considers the most radical strategy, for which there is (as yet) no Australian precedent, namely the use of the statutory derivative action to assert that directors breached their corporate law duties by failing to give sufficient weight to particular interests, for example, labour relations or the environment.

THE CONTEXT OF SHAREHOLDER ACTIVISM

A narrower form of shareholder activism is directed to achieving corporate governance outcomes or improving shareholders' returns. A wider form of shareholder activism is designed to achieve ecological, social and political outcomes.[1]

Shareholder activism takes place in the context of reasonably wide support for "corporate social responsibility",[2] and a reasonably wide consensus that, although directors owe their duties to the corporation, it is legitimate for directors to have

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1 G Watts, "Shareholder Democracy – Mob Rule or a Shining Path", paper delivered at 2001 Business Law Section Corporate Law Workshop, p 1; P Darvas, "Section 249D and the 'Activist' Shareholder: Court Jester or Conscience of the Corporation?" (2002) 20 C&SLJ 390.

2 The Joint Parliamentary Committee inquiry into corporate social responsibility defined this concept as "a company or organisation considering, managing and balancing the economic, social and environmental impacts of its activities".

regard to a range of interests including the interests of the community, the environment, employees, customers and suppliers in exercising those duties.[3] [4] This reconciliation of corporate and wider interests works well where a particular initiative which would advance environmental, employee or community objectives can also be said to serve corporate interests. However, this reconciliation will fail if such an objective cannot be reconciled to shareholders' interests even in the middle or long term.[5] Even where directors do have regard to the wider interests of the community, the environment and employees in making corporate decisions, there is ample scope for differences between the view which directors form as to where the corporate interests lie and the preferred outcome of, for example, an environmental activist group or trade union. A corporation's commitment to corporate and social responsibility is therefore unlikely to remove all occasions for dispute as to whether the corporation is properly taking account of particular interests and for associated shareholder activism.

The activities of shareholder activist groups may impose significant costs on corporations. The calling of an extraordinary general meeting requisitioned by an

[3] This formulation of directors' duties is wider than the "shareholder primacy model", which would hold that the corporation's purpose is to maximise its owners' wealth and directors' role is to achieve that objective. It is narrower than the widest view of "corporate social responsibility", which holds that a corporation should give as much weight to interests of employees, consumers and the environment as to its shareholders. This formulation broadly corresponds to the "corporate benefit" approach identified in the Corporations and Markets Advisory Committee's Discussion Paper, November 2005, which relies on the benefit which a corporation may gain from adopting corporate social responsibility practices. CAMAC distinguishes this approach from an "ethics based" approach which suggests a wider ethical obligation for a corporation to take corporate and social responsibility into account. CAMAC's Discussion Paper acknowledges that the duties of directors under s 180 (care and diligence) and s 181 (good faith) of the *Corporations Act* do not expressly oblige or allow directors to take the interests of stakeholders (other than shareholders) into account in considering the company's best interests, but notes that courts have allowed directors to take non-shareholders' interests into account where it is commercially justifiable to do so. The Joint Parliamentary Committee, in its recent report in respect of corporate social responsibility, also expresses the view that the *Corporations Act* permits directors to have regard to the interests of stakeholders other than shareholders in exercising these duties.

[4] By way of comparison, the *Company Law Reform Bill* (UK) introduced in November 2005 requires directors to act in the way they consider, in good faith, would be most likely to promote the company's success for the benefit of its shareholders as a whole; and requires directors, in fulfilling this duty, to have regard so far as reasonably practicable to the likely consequences of any decision in the long term; the interests of the company's employees; the need to foster the company's business relationships with suppliers, customers and others; the impact of the company's operations on the community and the environment; the desirability of the company maintaining a reputation for high standards of business conduct; and the need to act fairly as between the company's members. The Joint Parliamentary Committee inquiry into corporate social responsibility did not support the UK approach, noting that it would introduce uncertainty into the scope of directors' duties and provided no guidance as to how directors must act in order to comply with the relevant requirements.

[5] See A A Dhir, "Realigning the Corporate Building Blocks: Shareholder Proposals as a vehicle for achieving corporate social and human rights accountability" (2006) 43 Am Bus LJ 365 at 369-374.

activist group can be very costly, and even the placing of a resolution to the agenda for an annual general meeting can involve a marginal increase in the costs of that meeting. The passage of a resolution that prioritises the particular objective of an activist group may involve a wealth transfer from existing shareholders to those who support that objective.[6] The risk is particularly significant in relation to shareholder activism by trade unions, where the goals of the union advancing the interests of its members may well be contrary to the interests of shareholders.[7]

GENERAL MEETINGS

Shareholders Requisition Company to Call Extraordinary General Meeting

There are several examples of interest groups seeking to require extraordinary general meetings to be called to allow resolutions concerning particular matters to be considered:

- In 1999, shareholders associated with the Australian Wilderness Society requisitioned an extraordinary general meeting of Wesfarmers Limited to consider a series of resolutions directed to preventing a subsidiary of that company from proceeding with logging in Western Australian forests.
- Also in 1999, 121 shareholders requisitioned an extraordinary meeting of North Limited to consider resolutions requiring the preparation of a report as to the long term implications of the development of the Jabiluka Mine for the company. When amended resolutions were put before North's annual general meeting in October 1999, they received 6 percent of shareholders' votes.[8]
- In 2001, a group of shareholders in NRMA Insurance Group Limited requisitioned an extraordinary general meeting to consider a constitutional amendment to prohibit payment of retirement allowances to directors without shareholder approval.[9]
- In March 2004, members of the Australian Manufacturing Workers Union requisitioned an extraordinary general meeting of the National Roads & Motorists Association (NRMA) and put forward resolutions amending the constitution to include provisions as to the terms on which patrol officers would be employed.[10]

6 I Anabtowi, "Some skepticism about increasing shareholder power" (2006) 53 UCLA L Rev 561.

7 S Schwab and R Thomas, "Realigning Corporate Governance: Shareholder Activism by Labor Unions" (1998) Michigan LR 1018 at 1074-1075.

8 Watts, op cit n 1, p 4; K Anderson and I Ramsay, "From the picket line to the board room: Union shareholder activism in Australia" (2006) 24 C&SLJ 284.

9 *NRMA Insurance Group Ltd v Spragg* (2001) 161 FLR 243; 38 ACSR 174; [2001] NSWSC 381.

10 *NRMA v Parkin* (2004) 49 ACSR 386; [2004] NSWSC 296 at [56], appeal dismissed (2004) 49 ACSR 485; [2004] NSWCA 153.

Directors must call a general meeting at the request of members who hold at least 5 percent of the votes that may be cast at that general meeting or, alternatively, at least 100 members who are entitled to vote at that general meeting.[11] Such a request must be in writing, state any resolution to be proposed at the meeting and be signed by the members making the request; and may be either a single document containing the request and the necessary number of signatures, or a series of signed documents containing the same request and the required number of signatures in total.[12] Minority shareholders must exercise the power to requisition a general meeting in good faith and for the purpose for which it is conferred, but a requisitionist is not required to act in the interests of the company as a whole and can requisition a meeting in its own interests.[13] If a valid requisition is received under s 249D, a meeting must be called within 21 days after that requisition is received by the directors, and must be held not later than two months after that request is received.[14] A meeting convened under s 249D must be held at a reasonable time and place.[15]

The 100 member threshold for shareholders to call such a meeting (100 member rule) has been repeatedly criticised by business groups and law reform bodies, and the courts have also recognised the costs arising from the operation of the 100 member rule and noted the need for legislative reform.[16] The Parliamentary Joint Committee on Corporations and Securities (PJC) recommended removal of the 100 member rule in October 1999. The Companies and Securities Advisory Committee also recommended that the 100 member rule be abolished for listed public companies in its final report, *Shareholder Participation in the Modern Publicly Listed Company*, July 2000, and recommended that shareholders should have to satisfy a significant threshold test before an extraordinary general meeting was called.

The Government then announced an intention to remove the 100 member rule in December 2002 and released draft amending legislation for comment at that time. A regulation was then introduced in April 2003 providing that, for public companies, directors would only be required to call a meeting if required to do so by at least 5 percent of members, but that regulation was disallowed by the Senate on 28 June 2003. The PJC again recommended the removal of the 100 member

[11] *Corporations Act*, s 249D. This section has a long history, originating with the *Companies Act 1938* (Vic). The provision allowing shareholders holding a specified number of shares to require directors to requisition such a meeting was introduced in the *Uniform Companies Act* from 1 March 1972. Section 252B, which is similar to s 249D, allows members of a managed investment scheme with 5% of the votes that can be passed on a resolution or 100 members who are entitled to vote on the resolution to requisition a meeting of members of the scheme.

[12] *Re Carlton Football Club Ltd; Gratton v Carlton Football Ltd* (2004) 51 ACSR 29; [2004] VSC 379 (shareholders requisitioned a meeting to consider a resolution of no confidence in the Club's directors and a resolution that directors not sign an agreement to play AFL games on certain playing fields).

[13] *Humes Ltd v Unity APA Ltd* [1987] VR 474; (1987) 11 ACLR 641; 5 ACLC 15.

[14] *Corporations Act*, s 249D(5).

[15] *Corporations Act*, s 249R.

[16] *NRMA v Snodgrass* (2002) 42 ACSR 371 at 376; *NRMA v Scandrett* (2002) 171 FLR 232; 43 ACSR 401 at 411-412; 21 ACLC 176; [2002] NSWSC 1123.

rule in its report into the CLERP 9 Bill in June 2004. The Government next released an Exposure Draft of a further bill seeking to remove the 100 member rule in February 2005. The PJC again supported the removal of that rule in its inquiry into the Exposure Draft; noted that the rule was open to abuse and that "any vexatious use of the 100 member rule will result in substantial cost to the company, and that those must be reflected in poorer investment returns for shareholders"; and went on to observe that:

> "The 5% rule alone is sufficient to ensure that, in the extraordinary circumstances which would justify an extraordinary meeting, shareholders could requisition a meeting. This would probably (for practical purposes) require the recruitment of at least one institutional shareholder – and this in itself provides a safeguard against frivolous use of s 249D."[17]

However, the amendment of the 100 member rule required the approval of the States under the 2001 agreement under which the States referred their corporations powers to the Commonwealth. In late July 2006, the State Attorneys-General withheld approval to the amending legislation to remove the 100 member rule.

When a Meeting need not be called under Section 249D

There are several circumstances in which directors may decline to convene a meeting which is requisitioned under s 249D.

First, directors may refuse to call a meeting if its purpose is to consider matters which are within directors' exclusive powers or functions, and the resolution is not framed as an amendment to the company's constitution. The starting point for determining whether a requisition is invalid because it intrudes on directors' powers and functions is the powers conferred on directors under the company's constitution. A common form provides:

> "The business of the Company is to be managed by the Directors, who may exercise all such powers of the Company as are not, by the Corporations Act or by this constitution, required to be exercised by the Company in general meeting."

In *Alexander Ward & Co v Samyang Co*[18] Lord Kilbrandon observed that an article in similar terms meant that "the directors, and no one else, are responsible for the management of the company, except in the matters specifically allotted to the company in general meeting". By way of example, in *NRMA v Parker*,[19] the defendant sought to requisition the holding of a general meeting to pass a resolution directing the Council of the NRMA to, inter alia, instruct the returning officer to adopt a postal ballot system. McLelland J held that, in general, a power vested exclusively in the directors under the constitution of a company cannot be effectively exercised by a resolution of members in general meeting, nor can the

[17] Report of the Parliamentary Joint Committee on Corporations and Financial Services, [2.14]-[2.15]; Anderson and Ramsay, op cit n 8, p 284.
[18] [1975] 1 WLR 673 at 683.
[19] (1986) 6 NSWLR 517; 11 ACLR 1; 4 ACLC 609.

exercise of such a power by the directors be controlled or interfered with by a resolution of members in general meeting.[20]

However, requisitionists can readily avoid the objection that the relevant matter is outside the powers of the general meeting by drafting the resolution as one to alter the company's constitution to require directors to take particular matters into account, and that is now well understood by shareholder activist groups. For example, in *NRMA Ltd v Snodgrass*,[21] a number of NRMA members sought to requisition an extraordinary general meeting of NRMA to consider a resolution to amend NRMA's constitution to require directors who were elected to NRMA's Board in 1999 and subsequent elections to publish full details of their election campaign funding, and to disqualify any director who did not comply with that requirement from serving the director. That requestion was valid since it was directed to amending NRMA's constitution, which was within shareholders' powers in general meeting. Similarly, a requisition for an extraordinary general meeting to amend NRMA's constitution to include terms preserving the current working conditions of patrolmen was valid, since it was within shareholders' power to amend the constitution.[22]

Second, directors may refuse to call a general meeting if its purpose is to consider matters which could not be lawfully effected by the company in general meeting.[23]

Third, directors may refuse to call a general meeting if the requisition is for an extraneous purpose so as to constitute an abuse, for example, to harass the company and its directors.[24] However, it is sufficient to establish a proper purpose for such a requisition that the requisitionist genuinely seeks to have the requisition passed, and self-interest on the part of a requisitionist does not establish an improper purpose.[25] For example, a requisition for an extraordinary general

[20] See also *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cunninghame* [1906] 2 Ch 34; *John Shaw & Sons (Salford) Ltd v Shaw* [1935] 2 KB 113 at 134; *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 at 837; *Poliwka v Haven Holdings* (1983) 8 ACSR 747 at 787; *Queensland Press Ltd v Academy Investments (No 3) Pty Ltd* [1988] 2 Qd R 575; (1987) 11 ACLR 419; 5 ACLC 175 (shareholders' requisition for an extraordinary general meeting to consider proposal for the disposal of the company's shares in another company was invalid, since the power to dispose of those shares was vested in directors).

[21] (2001) 37 ACSR 382; 19 ACLC 769, affirmed (2001) 39 ACSR 260, 19 ACLC 1675.

[22] *NRMA v Parkin* (2004) 49 ACSR 386; [2004] NSWSC 296 at [56], appeal dismissed (2004) 49 ACSR 485; [2004] NSWCA 153.

[23] See, eg, *Windsor v The National Mutual Life Association of Australasia* (1992) 7 ACSR 210; 10 ACLC 509 (shareholders' requisition of a general meeting to rescind a change of status from a company limited by guarantee to a company limited by shares and guarantees was invalid, because the *Corporations Act* did not permit that change of status to be reversed).

[24] *Humes Ltd v Unity APA Ltd* [1987] VR 474; (1987) 11 ACLR 641; 5 ACLC 15; *Australian Innovation Ltd v Petrovsky* (1996) 21 ACSR 218; 14 ACLC 1257 (director requisitioned meeting to replace other directors).

[25] *NRMA v Scandrett* (2002) 171 FLR 232; 43 ACSR 401 at 411-412; 21 ACLC 176; [2002] NSWSC 1123; *NRMA v Parkin* (2004) 49 ACSR 386; [2004] NSWSC 296 at [56], appeal dismissed (2004) 49 ACSR 485; [2004] NSWCA 153 at [56].

meeting to amend NRMA's constitution to entrench patrolmens' working conditions was held to be valid although it was prompted, at least in part, by union members' wish to improve their bargaining position in enterprise bargaining negotiations.[26] Section 249Q of the *Corporations Act*, which provides that a meeting must be held for a proper purpose, does not alter this position.[27]

If parts of a requisition for a general meeting under s 249D are valid and parts are not, directors must convene the meeting in respect of the valid parts of that requisition, as long as those valid resolutions can be separated from the invalid resolutions.[28] The court may extend the time within which directors must convene a meeting under this section, if it is fair and just to the parties concerned.[29] The court may also make an order cancelling a meeting which was requisitioned under this section, with the requisitionists' consent, if the conduct of that meeting would be oppressive to shareholders as a whole.[30] Perhaps regrettably, there is little prospect that this power would permit the cancellation of such a meeting without the requisitionists' consent.

Consequences of Directors Failure to Convene a Meeting under Section 249D

If directors fail to convene a meeting as required by s 249D within 21 days of a request being given to the company, shareholders holding more than 50 percent of the votes of the requisitioning shareholders may call and arrange to hold the meeting themselves at the company's expense.[31] The company may recover that expense from the directors, unless they can establish that they have taken all reasonable steps to comply with s 249D. If directors fail to convene an extraordinary general meeting and shareholders exercise their power to convene that meeting under s 249E, they act as a "quasi officials" of the company in convening that meeting and must exercise the power to do so in the best interests of the company as a whole.[32] It may be that, under s 1324 of the *Corporations Act*, the court also has power to order that a company or its directors call a meeting if directors fail to do so.[33]

[26] *NRMA v Parkin* ibid at [58].

[27] *NRMA v Snodgrass* (2002) 42 ACSR 371.

[28] *Totally and Permanently Incapacitated Veterans' Association of NSW Ltd v Jadd* (1998) 146 FLR 16; 28 ACSR 549.

[29] *Corporations Act*, s 1322; *NRMA Insurance Ltd v Carroll* (1999) 32 ACSR 655; [1999] NSWSC 1022 at [16]; *NRMA Insurance Group Ltd v Spragg* (2001) 161 FLR 243; 38 ACSR 174; [2001] NSWSC 381; *NRMA v Scandrett* (2002) 171 FLR 232; 43 ACSR 401, 21 ACLC 176; [2002] NSWSC 1123 at [61]; *NRMA v Scandrett* [2002] NSWSC 1038; *NRMA v Parkin* (2004) 49 ACSR 386; [2004] NSWSC 296, appeal dismissed (2004) 49 ACSR 485; [2004] NSWCA 153.

[30] *Corporations Act*, s 233; *Turnbull v NRMA* (2004) 50 ACSR 44, [2004] NSWSC 557.

[31] *Corporations Act*, s 249E.

[32] *Adams & Ors v Adhesives Pty Ltd* (1932) 32 SR (NSW) 398 at 401-402; *Humes Ltd v Unity APA Ltd* [1987] VR 474; (1987) 11 ACLR 641 at 646; 5 ACLC 15; Watts, op cit n 1 at 14.

[33] The court left open this possibility in *Premier Gold NL v Ocean Resources NL* (1994) 14 ACSR 695 (shareholder requisition to convene a general meeting to pass resolutions

Shareholders may themselves call an Extraordinary General Meeting

Shareholders holding 5 percent of the votes that may be cast at a general meeting may themselves call and arrange to hold an extraordinary general meeting themselves, as an alternative to requiring the company to do so under s 249D.[34] The statutory entitlement to call a meeting under s 249F "recognises the importance of the right of a relatively small minority to be heard, to ventilate their concerns and to play an active role in the company's affairs".[35] If members call a meeting under this section, directors may be under an obligation to ensure that members are provided with full and correct information necessary to enable them to form a judgment as to the matters to be considered at the meeting.[36]

A meeting under s 249F is called in the same way, so far as practicable, as the company's general meeting would be called.[37] A proxy form for such a meeting must be returned to the company, not the convening shareholder so as to comply with Corporations Act, and proxy forms which were returned to the convening shareholder would be invalid.[38] Members' right to call a general meeting under s 249F cannot be displaced or modified by a company's constitution, but a meeting called under that section can be postponed by directors if the constitution permits and the directors are acting in good faith and for the benefit of members in doing so.[39] In *Central Exchange Ltd v Rivkin Financial Services Ltd*,[40] the court observed that:

> "the circumstances in which it will be proper for the Board to postpone or change the place for a meeting called pursuant to s 249F, or to cancel such a

to remove existing directors). On the other hand, in *Re Carlton Football Ltd* (2004) 51 ACSR 29; [2004] VSC 379, Warren J observed that it is unlikely that the court would make an order under s 249G (which allows the court to order that a meeting of company's members be called if it is impracticable to call the meeting in any other way, on the application of a director or any member entitled to vote at the meeting) or under s 1324 (which allows the grant of an injunction) if directors failed to call a meeting in response to a requisition under s 249D, since *Corporations Act*, s 249E allowed the requisitionists to call and arrange the meeting in that situation.

34 *Corporations Act*, s 249F. This section was introduced by the *Company Law Review Act 1998*. The predecessors to this section only conferred a right on 5% of members to call the meetings so far as the company's constitution did not make any other provision.

35 *Bisan Ltd v Cellante* (2000) 43 ACSR 322; [2002] VSC 430 at [10] (shareholders called general meeting under s 249F to consider resolution to remove existing directors).

36 *Central Exchange Ltd v Rivkin Financial Services Ltd* (2004) 213 ALR 771; 51 ACSR 441; [2004] FCA 1546 at [76] (shareholder called general meeting to consider resolution to remove existing directors and elect new directors).

37 *Corporations Act*, s 249F(2).

38 *Corporations Act*, s 250B(1); *Bisan v Cellante* (2000) 43 ACSR 322; [2002] VSC 430.

39 *Pinnacle VRB Ltd v Ronay Investments Pty Ltd* (2000) 35 ACSR 240; 18 ACLC 733; [2000] VSC 330 (shareholders called meeting under s 249F to remove and elect new directors).

40 (2004) 213 ALR 771; 51 ACSR 441; [2004] FCA 1546. This decision is reviewed in N Pathak and H Lauritsen, "A shareholder's right to call general meetings – a sharp sword for the disgruntled shareholder or just a blunt instrument" (2005) 23 C&SLJ 283.

> meeting, will be limited and such powers must, of necessity, be exercised extremely sparingly so as not to frustrate the right conferred by s 249F. If the directors change the place, as well as the timing, they must have justification for doing so. The directors cannot arbitrarily postpone or change the place for the meeting."

In that case, the court upheld directors' decision to postpone a meeting called for 3 November 2004 to replace the company's directors to the date of the company's annual general meeting on 30 November 2004, and to change the location of that meeting so that it would be held at the same place as the annual general meeting.

It is unlikely that s 249F will be used by shareholder activist groups generally, given the relatively high percentage of shares required to exercise this power, and the fact that a shareholder who calls a meeting under that section must pay the expenses of calling and holding that meeting. This section is more commonly used in contests for corporate control.

Placing Resolution on Agenda for General Meeting

Members with at least 5 percent of the votes that may be cast on a resolution, or at least 100 members who are entitled to vote at a general meeting, may give notice of a resolution which they propose to move at a general meeting.[41] A notice under s 249N must be in writing, set out the wording of the proposed resolution and be signed by the members proposing to move the resolution.[42] If the company is given notice of a resolution under this section, the resolution must be considered at the next general meeting that occurs more than two months after that notice is given.[43] The company must give members notice of that resolution at the same time, or as soon as practicable afterwards, and in the same way as it gives notice of the meeting.[44] The company is responsible for the cost of giving notice of the resolution to members, if it receives the notice in time to send it to members with the notice of meeting.[45] If the company does not receive that notice in sufficient time to send it out with the notice of meeting, then the members who gave notice of that resolution are jointly and individually liable for the expenses reasonably incurred by the company in giving notice of the resolution to members.[46]

[41] *Corporations Act*, s 249N. The 2005 Exposure Draft of the *Corporations Amendment Bill (No 2)* contained a provision reducing the threshold of number members to require a resolution to be brought before an already scheduled general meeting under s 249N from 100 to 20, which was removed from the *Corporations Amendment Bill (No 2) 2006*. As noted above, the State Attorneys-General have presently not agreed to that Bill going forward.

[42] *Corporations Act*, s 249N(2).

[43] *Corporations Act*, s 249O(1).

[44] *Corporations Act*, s 249O(2).

[45] *Corporations Act*, s 249O(3).

[46] *Corporations Act*, s 249O(4).

The company is not required to give notice of the resolution to members if it is more than 1000 words long or defamatory.[47] A resolution cannot be put if it is so vague that it cannot be implemented.[48] Directors can also refuse to place a resolution under s 249N on the agenda of a general meeting if its object could not be lawfully achieved, for example if it intruded on matters exclusively vested in the directors.[49] Again, this limit can be avoided by drafting the resolution as one to alter the company's constitution to require directors to take that object into account or to remove a director who opposes the policies which shareholder activists seek to promote.[50]

The United States experience indicates that the ability to place a resolution on the agenda of a general meeting under s 249N is likely to be sufficient to achieve the goals of shareholder activist groups, even if the ability to requisition an extraordinary general meeting under s 249D is ultimately narrowed by the removal of the 100 member rule. By way of example, a number of activist groups submitted shareholder proposals encouraging United States companies to adopt comprehensive codes of environmental, social and political ethics following the Exxon Valdez oil spill in 1989. Shareholder resolutions were put before Unocol's 2001 annual general meeting, opposing Unocol's involvement in a joint venture with the government of Myanmar (Burma) in the construction of a gas pipeline, and seeking to require the introduction of a code of conduct for workplace rights

[47] *Corporations Act*, s 249O(5). The company is also not required to give notice of the resolution if it was not received in time and members who are liable for the cost of sending out the notice out under s 249O(4) have not given the company a sum reasonably sufficient to meet those expenses.

[48] *Totally & Permanently Incapacitated Veterans Association of NSW Ltd v Gadd* (1998) 146 FLR 161; 28 ACSR 549 at 551; BC 9804347.

[49] *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cunninghame* [1906] 2 Ch 34; *Gramophone & Typewriter Ltd v Stanley* [1908] 2 KB 89 at 105; *John Shaw & Sons (Salford) Ltd v Shaw* [1935] 2 KB 113 at 134; *NRMA v Parker* (1986) 6 NSWLR 517; 11 ACLR 1; 4 ACLC 609; *Stanham v The National Trust of Australia* (1989) 7 ACLC 628; 15 ACLR 87; *Queensland Press Ltd v Academy Investments (No 3) Pty Ltd* [1988] 2 Qd R 575; (1987) 11 ACLR 419; 5 ACLC 175; *NRMA Ltd v Bradley* (2002) 42 ACSR 616, [2002] NSWSC 788.

[50] A common feature in US resolutions is linking board or executive remuneration to the company achieving the specified objective: see generally, J W Eisenhofer and M J Barry, *Shareholder Activism Handbook*, (Aspen Publishers, 2005). Section 14(a) of the *Securities Exchange Act 1934* authorises the Securities Exchange Commission to regulate the proxy solicitation process, which has been done by regulation under r 14a-8. That rule allows shareholders in public corporations to have proposals included with any management proposal in the proxy materials provided to shareholders for the annual general meeting, at the corporation's expense, unless either the shareholder has not complied with specified procedural requirements or the proposal falls within a number of specified bases for exclusion. The position in the United States differs from that in Australia in that a majority vote for a resolution at a general meeting does not make the proposal binding on the company, unless the corporation's by-laws specifically provide for that result. Even if a resolution is passed at a general meeting, the board of the United States company may reject that proposal if it considers that it is not in the company's best interest to implement it. The power is not available to an Australian board, if a resolution is framed as an amendment to the company's constitution.

based on International Labour Organisation conventions and the establishment of a board committee to formulate proposals to link executive compensation with the company's ethical and social performance.[51] Shareholder resolutions addressing climate change at GE's 2003 general meeting were supported by 22.6 percent of votes cast, at American Electric Power's 2003 general meeting were supported by 26.9 percent of votes; at Eastman Chemical's 2003 general meeting were supported by 24.9 percent of votes; and at Exxon Mobil's 2003 general meeting were supported by 22 percent of the votes.[52] On a number of occasions, shareholder resolutions have not been pressed in the US following the company's agreement to take particular steps sought by activist groups. For example, in 2005, resolutions relating to global warming were withdrawn from the general meetings of Chevron Texaco and several other oil companies after they agreed to disclose their financial exposure from climate change and to develop strategies to reduce carbon dioxide omissions and promote renewable energy.

There are also several Australian examples of the use of the power arising under s 249N of the *Corporations Act*. For example:

- In May 2001, resolutions were submitted to shareholder meetings of Rio Tinto in the United Kingdom and Australia as part of a campaign by the Construction Forestry Mining Energy Union. The first resolution called for disclosure in Rio Tinto's annual report of matters relevant to the independence of its non-executive directors and for an independent director to be appointed as Deputy Chairman and achieved 20.3 percent of the vote. The second resolution called for the adoption of a workplace code labour practice consistent with the International Labour Organisation's declaration on fundamental rights to work and received 7.3 percent of the vote.[53]
- In 2002, a group of members of NRMA sought to place resolutions before NRMA's general meeting requiring the company to release and discharge a media organisation and certain journalists from undertakings to the court in proceedings brought by NRMA and cause those proceedings to be discontinued or dismissed.[54]

[51] Watts, op cit n 1, p 3.

[52] J R Healy and J M Tapick, "Climate Change: It's not just a policy issue for Corporate Counsel – It's a Legal Problem" (2004) 29 Colum J Envil Law 89 at 106; C A Williams and J M Conley, "An Emerging Third Way? The Erosion of the Anglo American Shareholder Value Constructs" (2005) 38 Cornell Intn'l LJ 493 at 529.

[53] Anderson and Ramsay, op cit n 8, pp 284-289.

[54] *NRMA v Bradley* (2002) 42 ACSR 616, [2002] NSWSC 788. This resolution was held to be invalid as contrary to the constitutional powers vested in the company's directors. A second resolution required NRMA to decline to pay the legal costs of a former director in legal proceedings, and was held to be invalid because it was contrary to a constitutional provision providing an indemnity to directors. A third resolution dealt with reducing the number of directors and altering the rules in the constitution as to payments to directors, and was held to be invalid so far as it sought to reduce the number of directors, because it did not comply with s 203D of the *Corporations Act*, but valid so far as it would amend the constitution in relation to payment to directors.

- In 2003, shareholders relied on s 249N to require a resolution to be put at Boral's annual general meeting concerning workplace health and safety and executive remuneration. The first resolution was framed as a resolution to amend Boral's constitution to require the Board to review Boral's health and safety management system, avoiding the limitation which would otherwise have prevented intrusion on management's responsibilities.[55]
- Members associated with the Financial Services Union relied on s 249N to put forward a resolution at the Commonwealth Bank's annual general meeting in 2004, to amend the Bank's constitution to require the Board to appoint an independent auditor to conduct a review of the impact of each major change program implemented or undertaken in each year, and require that auditor to consult with the Financial Services Union in conducting that review.[56]
- In 2004, shareholders affiliated with the Australian Workers Union also relied on s 249N to put forward a number of resolutions at the annual general meeting of Bluescope Steel, relating to corporate governance issues and executive remuneration.[57]

Shareholders may vote for resolutions of this kind in order to achieve ecological, social or political outcomes either because they consider passage of those resolutions is favourable to the economic returns on their shares, or because they are committed to the wider ecological, social or political objectives.[58] The attraction for shareholder activists of placing matters on the agenda for a company's annual general meeting may be increased by the fact that industry guidelines recommend that fund managers vote on all material issues at any meetings where they have the voting authority and responsibility to do so,[59] and it is arguable that responsible entities of managed investment schemes and their officers have a statutory duty to exercise their votes on such issues.[60] An activist group which places a matter on a company's resolution can therefore place pressure on institutional shareholders to address that issue in voting their shares. A resolution placed by shareholder activists on the agenda for the general meeting need not receive a majority of votes in order to achieve the activists' objective, since the United States experience is that companies often make concessions to activists once a resolution achieves significant shareholder support.[61]

[55] Anderson and Ramsay, op cit n 8, pp 289-292.
[56] Anderson and Ramsay, op cit n 8, pp 294-297.
[57] Anderson and Ramsay, op cit n 8, pp 297-299.
[58] Williams and Conley, op cit n 52, p 528.
[59] IFAS Guideline Note No 2.00, *Corporate Governance: A Guide for Investment Managers and Corporations*, July 1999.
[60] *Corporations Act*, s 601FC(1)(b) (duty of responsible entity), s 601FD(1)(b) (duty of officers of responsible entity).
[61] Watts, op cit n 1, p 6.

Providing Shareholder's Statement to General Meeting

Members with at least 5 percent of the votes that may be cast on a resolution, or at least 100 members who are entitled to vote at a meeting, may also require the company to give a statement provided by those members about a resolution that is proposed to be moved at the general meeting or any other matter that may properly be considered at the general meeting, to shareholders generally.[62] A company is responsible for the cost of distributing that statement if it is received in time to be distributed with the notice of meeting, but need not distribute that statement if it is defamatory or more than 100 words in length.[63] For example, in 2004, members associated with the Financial Services Union relied on s 249P to require a statement to be distributed to shareholders of the Commonwealth Bank, in support of the proposed amendment to the Bank's constitution noted above.[64]

Collateral Attack on Adequacy of Information Provided to Shareholders

A resolution considered at a general meeting could also provide the basis for shareholder activists to advance a collateral attack on the adequacy of the information provided to shareholders in relation to that meeting. A company's directors have a duty to disclose relevant information in relation to any proposal to be considered at a general meeting. That obligation requires directors to make "full disclosure of all the facts within their knowledge which are material to enable the shareholders … to determine upon their action"[65] and to "provide such material information as will fully and fairly inform shareholders of what is to be considered at the meeting and for which their proxy may be sought", which is "to be such as will enable shareholders to judge for themselves whether to attend the meeting and vote for or against the proposal or whether to leave the matter to be determined by the majority attending and voting at the meeting".[66]

It would be open to shareholder activists to attack the adequacy of the information provided by directors to a general meeting, concerning a resolution placed on its agenda, under the misleading and deceptive conduct provisions.[67]

[62] *Corporations Act*, s 249P. The 2005 Exposure Draft of the Corporations Amendment Bill (No 2) contained a provision reducing the threshold to require distribution of members' statements by the company together with a notice of meeting under s 249P, which was removed from the *Corporations Amendment Bill (No 2) 2006*. As noted above, the State Attorneys-General have presently not agreed to that Bill going forward.

[63] *Corporations Act*, s 249P(9).

[64] Anderson and Ramsay, op cit n 8, pp 294-297.

[65] *Bulfins v Bebarfalds Ltd* (1938) 38 SR (NSW) 423 at 440; *Central Exchange Ltd v Rivkin Financial Services*, (2004) 213 ALR 771; 51 ACSR 441; [2004] FCA 1546 at [75].

[66] *Fraser v NRMA Holdings Ltd* (1995) 127 ALR 543 at 554; 15 ACSR 590; 13 ACLC 132.

[67] *Trade Practices Act*, s 52, *Fair Trading Act*, s 41, *Corporations Act*, s 1041H, ASIC Act, s 12DA, cf *Fraser v NRMA Holdings Ltd* (1995) 127 ALR 543 at 554; 15 ACSR 590; 13 ACLC 132; *Cleary v Australian Co-Operative Foods (No 2)* (1999) 32 ACSR 701; [1999] NSWSC 991; *Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd* (2005) 55 ACSR 583; [2005] FCA 1426.

There is precedent for such an attack in United States case law, where two shareholders sought to have International Paper's shareholders adopt a resolution concerning corporate accountability for environmental issues, and the United Paperworks International Union then successfully attacked the information provided by the company to shareholders in relation to that resolution for its failure to disclose adverse aspects of the company's environmental record.[68] Similarly, United States activists relied on Californian legislation prohibiting misleading and deceptive conduct in bringing proceedings against Nike Inc and individual officers alleging that it had made false statements or omitted material facts in responding to media allegations about labour conditions in factories in which its products were manufactured.[69]

Questions at Annual General Meeting

The least intrusive form of shareholder activism is for shareholders to exercise their right to raise questions at the annual general meeting in order to highlight particular issues. The chair of an annual general meeting must allow a reasonable opportunity for members to ask questions about or make comments on the company's management.[70]

"Just vote no" Campaigns and Removal of Directors

Shareholders in United States companies have also adopted the strategy known as the "just vote no" campaign, in which shareholders vote against the re-election of existing directors in order to express concern as to the company's performance.[71] For example, 42 percent of votes cast at the annual general meeting of Walt Disney Company in 2004 were voted against the re-election of Disney's then Chairman and Chief Executive Officer, Michael Eisner, and Disney subsequently replaced Eisner as Company Chairman and he resigned as Chief Executive Officer several months later.[72]

A more aggressive version of the "just vote no" campaign involves the requisition of an extraordinary general meeting, or placing a resolution on the agenda of an annual general meeting, to remove a director or directors of the company. Attempts to remove directors have occurred from time to time in contests for corporate control,[73] but are less common in larger listed companies.

[68] *United Paperworks International Union v International Paper Co* (1985) F 2d 1190 (2d Cir 1993).

[69] *Kasky v Nike Inc* 45 P 3d 243; D Monsma and J Buckley, "Non-Financial Corporate Performance: The Material Edges of Social and Environmental Disclosure" (2004) U Balt J Envtl L 151 at 196-198.

[70] *Corporations Act*, s 250S.

[71] J A Grundfest, "Just Vote No: A Minimalist Strategy for Dealing with Barbarians Inside the Gates" (1993) 45 Stan L Rev 857.

[72] J B Stewart, *Disney War: The Battle for the Magic Kingdom* (Simon & Schuster, 2005).

[73] *Paringa Mining & Exploration Co plc v North Flinders Mines Ltd* (1988) 52 SASR 22; 14 ACSR 587 (requisition by controlling shareholder for general meeting to remove

However, in 1994, institutional investors holding about 18 percent of shares in Goodman Fielder requisitioned an extraordinary general meeting to remove certain members of the board, although that meeting did not proceed after agreement was reached between the company and those shareholders. In 1995, institutions holding about 15 percent of shares in Coles Myer attempted to remove a number of directors from the Coles Myer board, although that matter was again resolved by a compromise by which the board was reconstituted.[74] The most recent attempt to remove directors, initiated by the directors themselves rather than by shareholders, arose in respect of National Australia Bank Limited in 2004, and was resolved by agreement reached between the relevant directors which allowed the extraordinary general meeting to be cancelled.

Notwithstanding anything in its constitution or any agreement between a director and the company or any of its shareholders, a public company may remove a director by ordinary resolution.[75] Notice of the resolution must be given to the shareholders at least two months before the meeting is to be held.[76] However, if the company itself calls a meeting after the notice of intention is given, the meeting may pass the resolution to remove the director even though it is held less than two months after the notice of intention is given. There is no requirement that the removal of directors should be effected by separate resolutions, rather than by a resolution providing for the removal of a number of directors.[77]

directors and appoint new directors); *Premier Gold NL v Ocean Resources NL* (1994) 14 ACSR 695; *Bisan Ltd v Cellante* (2000) 43 ACSR 322; [2002] VSC 430; *Tang v Bondgreen Pty Ltd* (2003) 47 ACSR 400; [2003] NSWSC 824 (requisition for general meeting to consider resolution removing two directors and appointing new directors); *Central Exchange Ltd v Rivkin Financial Services Ltd* (2004) 213 ALR 771; 51 ACSR 441; [2004] FCA 1546.

74 J Hill, "Changes in the Role of the Shareholder" N R Grantham and C Rickett (eds), *Corporate Personality in the 20th Century* (1998), pp 202-207.

75 *Corporations Act*, s 203D(1). Section 203D does not invalidate any other procedure which may be available for the removal of directors, in addition to that provided under the section: *Link Agricultural Pty Ltd v Shanahan* [1999] 1 VR 466; (1998) 28 ACSR 498; 16 ACLC 1642; [1998] VSCA 3; *Dick v Comvergent Communications* (2000) 34 ACSR 86; 18 ACLC 442; *Allied Mining and Processing Ltd v Boldbow Pty Ltd* (2002) 26 WAR 355; 169 FLR 369; [2002] WASC 195. For example, the company's constitution may dispense with the requirement for two months notice for a resolution for the removal of a director. A resolution to remove directors may not extend to a person who might in future be appointed as a director to fill a casual vacancy, since it would not be possible for that future director to put his or her case to members as to why he or she should not be removed under s 203D(3)-(5): *NRMA v Scandrett* (2002) 171 FLR 232, 43 ACSR 401, 21 ACLC 176, [2002] NSWSC 1123 (shareholders requisitioned an extraordinary general meeting to pass resolutions to remove a group of directors, and also remove directors appointed to fill casual vacancies within a specified future period, and the court held the second resolution could not be validly passed).

76 *Corporations Act*, s 203D(2).

77 *Taylor v McNamara* [1974] 1 NSWLR 164; (1974) CLC 40-111; *Claremont Petroleum NL v Indosuez Nominees Pty Ltd* [1987] 1 Qd R 1; (1986) 10 ACLR 520; *NRMA v Scandrett* (2002) 171 FLR 232, 43 ACSR 401, 21 ACLC 176, [2002] NSWSC 1123.

A director who is subject to a notice of a resolution under s 203D must be given a copy of that notice by the company as soon as possible after it is received.[78] That director is entitled to put his or her case to members by giving the company a written statement for circulation to members, and speaking at the meeting, whether or not he or she is a member of the company.[79] The company must circulate the director's written statement to members, unless it is more than 1000 words long or defamatory,[80] by sending a copy of that written statement to everyone to whom notice of the meeting is sent, if there is time to do so, or otherwise having the statement distributed to members attending the meeting and read out at the meeting before the resolution is voted on.[81]

A "just vote no" campaign or a resolution for removal of directors gives rise to particular difficulties for the company's board, as to the extent to which corporate resources may be used in responding to that attempt. As a general matter, directors may properly inform members of their views and may use company resources in order to do so.[82] However, directors are generally not entitled to use the company's resources to actively advance the election of particular candidates at the expense of others.[83] If shareholder activists target a particular director, this may constrain the use of the company's investor relations staff and proxy solicitation, other than for the limited purpose of providing balanced disclosure as to the relevant issues. There may also be an exception to this principle if the election of a particular director would harm the business or reputation of the company, or contravene a statutory provision causing the company to lose a valuable asset and it appears that the company is entitled to inform shareholders of the consequences of the election of that director in that situation.[84] Directors' conduct may exceed their authority, even though the individual directors act in good faith and for a proper purpose, if they expend an unreasonable amount of the company's moneys in relation to a contested election for directors, or act in a manner which is excessive or unfair in the circumstances.[85]

Institutional investors may face difficulty in combining to support a particular agenda, including the removal of a director or directors, because their doing so may give rise to an association under the *Corporations Act*.[86] Requirements for

[78] *Corporations Act*, s 203D(3).

[79] *Corporations Act*, s 203D(4).

[80] In *NRMA v Snodgrass* (2002) 20 ACLC 1664, Campbell J held that the word "defamatory" is to be given its common law meaning in s 203D without any consideration of the availability of defences. If the relevant statement is defamatory, without reference to defences, the company is relieved of any obligation to distribute it.

[81] *Corporations Act*, s 203D(5)-(6).

[82] *Peel v London & North Western Railway Company* [1907] 1 Ch 5 at 21.

[83] *Advance Bank Australia Ltd v FAI Insurances Ltd* (1987) 9 NSWLR 464; 12 ACLR 118; 5 ACLC 725.

[84] *Advance Bank Australia Ltd v FAI Insurances Ltd* (1987) 9 NSWLR 464 per Mahoney JA at 493; 12 ACLR 118 at 143-4; 5 ACLC 725.

[85] *Advance Bank of Australia v FAI Insurances* (1987) 9 NSWLR 464; 12 ACLR 118; 5 ACLC 725.

[86] This difficulty would arise if the relevant institutions were held to be acting "in concert" with each other for the purposes of *Corporations Act*, s 12(2)(c); or, in the case of the

notification of substantial shareholdings under Pt 6C.1 of the *Corporations Act* may be triggered if the relevant institutions are treated as associates, and s 606 of the *Corporations Act* could then prohibit the relevant institutions from acquiring any more shares in the particular company. This difficulty is partly resolved by ASIC Class Order 00/455, which provides that an agreement of two or more institutions to act collectively in respect of voting at a general meeting will not trigger Pt 6C.1 or s 606 of the *Corporations Act*, if specified conditions are satisfied. In order to obtain the benefit of the Class Order, the relevant institutions are required to announce that they have made a voting agreement in relation to a particular company's general meeting; the names of the institutions that are parties to the agreement; a description of the matter to be voted on; a summary of "the objectives of the action" and how the institutions propose to vote; and the relevant interests in voting shares and voting power held by each institution and by the institutions collectively.[87]

DIRECTORS' DUTIES

Duty of Care and Diligence and the Business Judgment Rule

We now turn to the most radical strategy available to shareholder activists, for which there is (as yet) no Australian precedent, the use of the statutory derivative action to assert that directors breached their duties at general law or under the *Corporations Act* by acting or failing to act in a particular way (for example, opening a particular mine or failing to adopt sufficient environmental remediation strategies) or failing to give sufficient weight to a particular interest (for example, employees' interests or environmental interests). We will deal first with the scope of directors duties and whether the business judgment rule is sufficient to protect directors against such an attack. We will then turn to two practical matters which would arise in such an attack, namely the circumstances in which activist shareholders could require the company to make information available which might support such an attack and the procedural requirements for a statutory derivative action.

Any action seeking to rely on directors' duties is likely to be founded on an allegation that, in failing to take particular actions or failing to give sufficient weight to a particular interest, directors have failed to comply with the duty of care and diligence at general law or under the *Corporations Act*. At general law, directors must "take reasonable steps to place themselves in a position to guide and monitor the management of the company".[88] Section 180(1) provides that a director or officer is required to exercise his or her powers and discharge his or her

removal of a director, if they have formed an "understanding … for the purpose of controlling or influencing the composition of the board" under *Corporations Act*, s 12(2)(b).

87 See also ASIC Policy Statement 128, "Collective Action by Institutional Investors"; C Ali, G Stapledon and M Gold, *Corporate Governance and Investment Fiduciaries*, (2003) [3.22].

88 *Daniels v Anderson* (1995) 16 ACSR 607 at 664, 13 ACLC 614 at 662.

duties with the degree of care and diligence which a reasonable person would exercise if he or she:

- was a director or officer of a corporation in the corporation's circumstances; and
- occupied the office within that corporation held by the director or officer, and had the same responsibilities within the corporation as the director or officer.[89]

It could be argued that a failure to take steps to ensure that a company complied with legislative standards as to labour conditions and environmental protection involves a contravention of the statutory duty under s 180.[90] However, absent a failure of that character, the first difficulty facing a shareholder activist in bringing a claim for breach of the duty of care and diligence under s 180 is that it should be difficult to establish that directors' decisions in balancing competing interests involve any lack of care or diligence, at least if relevant factors have been taken into account.

A further difficulty facing such a claim is the business judgment rule. Australian courts have traditionally expressed a reluctance to interfere with directors' judgments on questions of business management.[91] That approach now has statutory basis in s 180(2) of the *Corporations Act*, which provides that a director or other officer of a corporation who makes a business judgment[92] will be taken to meet the requirements of the duty of care and diligence in s 180(1), and their equivalent duties at common law and in equity, in respect of that judgment in certain circumstances. In order to obtain the benefit of the business judgment rule, a director or other officer must make the judgment in good faith for a proper purpose; must not have a material personal interest in the subject matter of the judgment; must inform himself or herself about the subject matter of the judgment to the extent he or she reasonably believes to be appropriate; and must rationally believe that the judgment is in the best interests of the corporation. A director's or

[89] *ASC v Gallagher* (1993) 11 WAR 105, 10 ACSR 43; *Permanent Building Society v Wheeler* (1994) 11 WAR 187; 14 ACSR 109; 12 ACLC 674; *Daniels v Anderson* (1995) 16 ACSR 607; *Re HIH Insurance Ltd (in prov liq) and HIH Casualty and General Insurance Ltd (in prov liq): ASIC v Adler & Ors* (2002) 168 FLR 253; 41 ACSR 72; [2002] NSWSC 171 (Santow J), (2003) 46 ACSR 504, [2003] NSWCA 131 (Court of Appeal); *ASIC v Vines* (2003) 182 FLR 405; 48 ACSR 322; 22 ACLC 37; [2003] NSWSC 1116; *ASIC v Vines* (2006) 55 ACSR 617; [2005] NSWSC 738; *Gold Ribbon (Accountants) Pty Ltd v Sheers* (2005) 23 ACLC 1288; [2005] QSC 198.

[90] *Cashflow Finance Pty Ltd (in liq) v Westpac Banking Corp* [1999] NSWSC 671; *Re HIH Insurance Ltd (in prov liq) and HIH Casualty and General Insurance Ltd (in prov liq): ASIC v Adler & Ors* (2002) 168 FLR 253; 41 ACSR 72; [2002] NSWSC 171at [327] (Santow J) (2003) 46 ACSR 504; [2003] NSWCA 131 (Court of Appeal); S Bielefeld, S Higginson, J Jackson and A Ricketts, "Directors' Duties to the Company and Minority Shareholder Environmental Activism" (2005) 23 C&SLJ 28 at 37.

[91] *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL* (1968) 121 CLR 483 at 492; *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 at 832; *Residues Treatment & Trading Co Ltd v Southern Resources Ltd* (1989) 7 ACLC 1130.

[92] The term "business judgment" is defined in s 180(3) as any decision to take or not take action in respect of a matter relevant to the business operations of the corporation.

officer's belief that the judgment is in the best interests of the corporation is taken to be a rational one, unless the belief is one which no reasonable person in his or her position would hold.[93] The business judgment rule should be available in relation to a business decision involving the balancing of competing interests.

Shareholders' Right to Information

If, notwithstanding these difficulties, shareholder activists contemplate proceedings alleging a breach of directors' duties, then a logical first step would be to gather the information which might support the allegation that, for example, directors had failed to give sufficient priority to a particular issue.

At general law, a shareholder was only entitled to inspect documents of a company if it could be shown that his or her inspection of the documents was necessary with reference to a particular dispute or question in which the shareholder was interested, and inspection would be limited to inspection of those documents which were relevant to that dispute or question.[94] Section 247A of the *Corporations Act* allows the court, on a shareholder's application, to make an order authorising an applicant to inspect a company's books, or authorising another person to inspect those books on the applicant's behalf. The court may only make such an order if it is satisfied that the applicant is acting in good faith and that the inspection is to be made for a proper purpose.[95] This section may also be of limited use to a shareholder seeking to challenge directors' decisions in relation to social or environmental policies, since the case law recognises that it is not intended to affect the basic rule of company law that a shareholder ought not ordinarily to have recourse to the courts to challenge a managerial decision made by or with the approval of a company's directors.[96]

This section also permits a person who is granted leave to bring derivative proceedings under s 237 of the *Corporations Act* or applies for or is eligible to apply for leave under that section, to apply to the court for an order authorising that person to inspect books of the company or authorising another person to

[93] *Corporations Act*, s 180(2). The Consultation Paper released by Treasury in relation to the Corporate and Financial Services Regulation Review, April 2006, raised the possibility of an extension to the business judgment rule to allow protection against liability to directors who act in good faith, within the scope of the corporation's business, reasonably and incidentally to the corporation's business and for its benefit, in respect of other duties under the *Corporations Act* such as the duties of good faith (*Corporations Act*, s 181), use of position (*Corporations Act*, s 182), use of information (*Corporations Act*, s 183), insolvent trading (*Corporations Act*, s 588G) and the duty to keep books and records and declarations relating to financial statements (*Corporations Act*, Ch 2M).

[94] *Edman v Ross* (1922) 22 SR (NSW) 351.

[95] *Barrack Mines Ltd v Grants Patch Mining Ltd* (1987) 12 ACLR 357; 6 ACLC 97; *Quinlan v Vital Technology Australia Ltd* (1987) 5 ACLC 389 per Pidgeon J at 393; *Ito v Shinko (Australia) Pty Ltd* [2004] QSC 268.

[96] *Re Augold NL* [1987] 2 Qd R 297 at 308-309, 370-371; (1986) 11 ACLR 362; *Humes Ltd v Unity APA Ltd* [1987] VR 474 at 478-479; (1987) 11 ACLR 641; 5 ACLC 15; *Barrack Mines Ltd v Grants Patch Mining Ltd* [1988] 1 Qd R 606 at 613; 12 ACLR 630.

inspect books of the company on that person's behalf.[97] The court is able to make such an order only if it is satisfied that the applicant is acting in good faith, and that the inspection of those books is to be made for a purpose connected with the application for leave under s 237, or with bringing or intervening in proceedings pursuant to leave granted under that section.[98]

Statutory Derivative Action

The statutory derivative action allows an individual shareholder to bring an action on behalf of a company, for a breach of duty by a director or officer, where the company is unwilling or unable to do so. A person has standing to bring a derivative action if he or she is a member, former member or a person entitled to be registered as a member of the company or a related body corporate, or an officer or former officer of a company, and he or she obtains leave from the court under s 237.[99] Section 237 sets out the circumstances in which the court may grant leave for a statutory derivative action to be brought, or authorise the applicant to intervene in proceedings for the purpose of taking responsibility for those proceedings, or for a particular step in those proceedings. The court is required to grant that leave if it is satisfied that:

- it is probable that the company will not itself bring the proceedings, or properly take responsibility for the proceedings, or for a particular step in them;
- the applicant is acting in good faith;
- it is in the best interests of the company that the applicant be granted leave;
- there is a serious question to be tried; and
- either the applicant gave written notice to the company of the intention to apply for leave and of the reasons for applying at least 14 days before making the application, or it is appropriate to grant leave although that provision is not satisfied.

The second requirement for the grant of leave is that the applicant is acting in good faith. In *Swansson v RA Pratt Properties Pty Ltd*,[100] Palmer J observed that a person may be acting in good faith in seeking to bring derivative proceedings, even if he or she does not have a financial interest in the company or an involvement in its present management. His Honour observed the factors relevant to the good faith requirement included the applicant's honest belief that a good cause of action existed and had reasonable prospects of success (although that belief would be tested against whether a reasonable person in the circumstances would hold that belief) and whether the applicant was seeking to bring the action for a collateral purpose.[101]

[97] *Corporations Act*, s 247A(3)-(4).
[98] *Corporations Act*, s 247A(5).
[99] *Corporations Act*, s 236(1).
[100] (2002) 42 ACSR 313 at 320-321, 20 ACLC 1594, [2002] NSWSC 583.
[101] See also *Charlton v Barber* (2003) 47 ACSR 31 at 43; *Carpenter v Pioneer Park Pty Ltd (in liq)* (2004) 51 ACSR 299; [2004] NSWSC 1077 at [28]-[29]; *Goozee v Graphic World Group Holdings Pty Ltd* (2002) 42 ACSR 534; [2002] NSWSC 640.

The third requirement for the grant of leave is that it is in the company's best interests that the applicant be granted that leave. In *Swansson v RA Pratt Properties Pty Ltd*,[102] the court observed that the "best interest of the company" test required more than a prima facie indication that the proceedings may be or are likely to be in the interests of the company, and that the court must be satisfied that the proposed action actually is, on the balance of probabilities, in the company's best interest. The court observed that the onus was on the applicant to provide evidence of, inter alia, the company's character and its business, so the effects of conduct of the litigation can be appreciated; and whether the redress sought by the applicant is available by means which do not require the company to be brought into litigation against its will.[103] It is likely to be very difficult for an activist shareholder to satisfy this requirement, given the difficulty in establishing that directors' conduct in not acting in a particular way involved a breach of duty, and the likely application of the business judgment rule to defeat such a claim.

A person whose interests have been, are or would be affected by an action in breach of the *Corporations Act* may also seek an injunction to restrain that action, or damages in lieu of the grant of an injunction.[104] However, an applicant would first need to establish a contravention of the *Corporations Act* in order to obtain an injunction under this section, and the business judgment rule ought to make it difficult to establish that contravention where a business decision involves balancing competing interests, for the reasons noted above.

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[102] (2002) 42 ACSR 313 at 320-321, 20 ACLC 1594, [2002] NSWSC 583.

[103] See also *RTP Holdings Pty Ltd & Anor v Roberts & Ors* [2000] SASC 386 (granting leave); *Metyor Inc v Queensland Electronic Switching Pty Ltd* (2002) ACSR 398; 20 ACLC 1517; [2002] QCA 269 (granting leave); K Porter, "Commencement of Derivative Proceedings" (2002) *Australian Corporation Practice Bulletin* [28].

[104] *Corporations Act*, s 1324; *Mesenberg v Cord Industrial Recruiters Pty Ltd* (1996) 39 NSWLR 128; 130 FLR 180; 19 ACSR 483 at 490-491; 14 ACLC 519 (Young J); and contrast *Airpeak Pty Ltd v Jetstream Aircraft Ltd* (1997) 73 FCR 161; 144 ALR 448; 23 ACSR 715; 15 ACLC 715.