

Australian Trade Unions as Shareholder Activists: The Rocky Path Towards Corporate Democracy

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Abstract

This article examines the use of the '100 shareholder rule' by trade unions to address the common concerns of workers and shareholders such as the work safety performance of corporations. The shareholder action by the Transport Workers' Union at the 2003 Boral Annual General Meeting is used as an illustrative example of union shareholder activism. In light of the withdrawal of consultation with trade unions by way of labour law mechanisms, particularly the individualisation and union exclusion that has marked Australian workplace relations in recent years, shareholder activism is an important avenue for trade unions to pursue their concerns. Consequently, this article argues for maintaining the '100 shareholder rule' (part of which is under threat by federal government proposals) particularly so that it can continue to be used by worker shareholder groups. Two theories of the corporation — the director-centred stakeholder theory and the democratic theory — are considered as theoretical devices to justify union shareholder activism. It is argued that whilst both theories may have some merit in this context, the democratic theory provides the best foundation for union shareholder activism.

1. Introduction

Australian trade unions have begun to participate as shareholders in general meetings of publicly listed companies. The legal mechanism that has enabled this union shareholder activism is the statutory right of 100 or more shareholders entitled to vote to propose resolutions at a company meeting.¹ This right forms one of two rights that constitute what is known as the '100 shareholder rule'.² The causes, justifications and reactions to trade union involvement in corporate governance by way of the '100 shareholder rule' are the foci of this article.³ The

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1 Section 249N(1) of the *Corporations Act 2001* (Cth) (hereafter the *Corporations Act*).

2 The second part of the '100 shareholder rule' is the statutory right of 100 or more shareholders to requisition a company meeting: s249D(1) of the *Corporations Act*. See discussion below in Part 5 of this article.

3 The author's research in this field was prompted by his involvement in union shareholder activism at the Boral AGM in 2003. At a late stage in my research, my attention was drawn to extensive research by Kirsten Anderson and Ian Ramsay in this field. For their illuminating views, see Kirsten Anderson & Ian Ramsay, *From the Picketline to the Boardroom: Union Shareholder Activism in Australia: Research Report* (2005).

Transport Workers' Union of New South Wales' (hereafter the TWU) involvement in the Boral annual general meeting (hereafter AGM) in October 2003 will be used as an illustrative case study of union shareholder activism. The article posits that there are clearly identifiable regulatory factors that may have precipitated the rise of union shareholder activism. It is also argued that union shareholder activism is justified both on efficacy and democratic grounds. In light of these justifications the merit in manoeuvres to stifle union shareholder activism in Australia is doubtful.

Part 2 of this article discusses the TWU action at Boral that focussed on workplace safety as a corporate governance issue. Part 3 suggests some of the causes or reasons behind the rise of union shareholder activism as a means to promote worker representation in corporate governance. This will involve examining developments in the Australian regulatory, industrial and corporate arrangements that have prompted trade unions to become active shareholders. In the area of workplace relations these developments include the emergence of hostile employer strategies made possible by regressions in Australian labour law. In the area of corporate governance these developments include the adherence to a shareholder 'value' model of the corporation that justifies the exclusion of workers in corporate decision making. It is argued that these and other aspects of the regulatory, industrial corporate environment in which Australian trade unions operate have precipitated trade union experimentation with shareholder activism. Australian trade unions are faced with increasingly limited avenues for promoting worker concerns from outside the corporation under labour laws *and* limits to the obligation (and inclination) of corporations to consider worker concerns internally under corporate law. In that context, Australian trade unions have invoked the '100 shareholder rule' as an innovative measure to pursue workers' 'voice' within corporations.

Part 4 of this article aims to justify union shareholder activism by showing how it might effectively make managers more accountable to shareholders and employees. Organised worker activity in the corporate arena can operate to successfully align shareholder and employee interests and translate them into concrete accountability outcomes through pressures brought to bear by shareholder proposals. Additionally, the democratic theory of the corporation serves to justify union shareholder activism. In capitalist economies, corporations have extensive influence in the public arena and over the private lives of individuals. Accordingly, any regime of corporate governance must justify large-scale corporate bureaucracy in a similar fashion to the way that systems of civil governance must justify the existence of large-scale public bureaucracy. As Gerald Frug suggested in a seminal article,⁴ the responsibilities imposed by corporate laws must be more than mere chimeras; accountability mechanisms on the statute books must be actually operative — that is *put into effect* — to have more than merely an ideological role.⁵ Trade union shareholder activism triggering the '100 shareholder rule' is one such example where a self-motivated party actually puts into operation accountability mechanisms under corporate laws. Such operation of substantive shareholder rights under the '100 shareholder rule' should be

4 Gerald Frug, 'The Ideology of Bureaucracy in American Law' (1984) 97 *Harv LR* 1277.

intrinsically valued if corporate law is to make a genuine contribution to the ideal of corporate democracy.

Finally, in Part 5, this article will examine some of the counter-initiatives that corporations and the federal government have pursued to restrict the operation of the '100 shareholder rule' and limit future union shareholder activism. Reactions by corporate managers to union shareholder activism are best viewed as ploys to avert further attempts by shareholders to bring those managers to account. It will be argued that because trade union shareholder activism promotes corporate democracy, moves to restrict it are ill-conceived.

2. *The '100 Shareholder Rule' and the TWU Action at Boral*

The TWU action at the Boral AGM in October 2003 in Sydney was one of the major involvements of an Australian trade union in a public corporation general meeting to date. It raises a host of issues regarding direct participation by minority shareholder interests. The extent of minority shareholder participation in publicly listed companies is largely dependent on the rights of shareholders to put a resolution at a company meeting or requisition a company meeting. In particular, for activist shareholders, such as trade union members, the crucial issue is the question of the threshold shareholders must fulfill to validly put a resolution or call a company meeting.⁶ Currently, this threshold requirement is formulated in a unique fashion under Australian legislative provisions that indicates the initial requirement for participation at general company meetings may be relatively easy to fulfil by minority shareholder groups. Under the *Corporations Act* a group of 100 members or more have rights with respect to putting resolutions at general meetings or calling a general meeting. The TWU action involved participating in a pre-planned AGM (that is, participation in a meeting that would have occurred whether or not certain shareholder resolutions were proposed) rather than a meeting requisitioned by shareholders to raise specific concerns (although in theory the TWU could have requisitioned a meeting).⁷ Consequently, the aspect of the 100 shareholder rule invoked by the TWU is found in s249N(1) of the *Corporations Act*. That section provides to the effect that 100 members or more, who are entitled to vote at a general meeting, may put a resolution at a general meeting.

In 2002 a shareholder group called the 'Boral Ethical Shareholders' was formed. By mid 2003 the shareholder group had approximately 140 members. Boral is a public corporation listed on the Australian Stock Exchange. Therefore, members of the Boral Ethical Shareholders purchased shares directly on the share

5 This application of Frug's argument relies on the importance that Pound placed on the 'law in action' after formulating his famous distinction between 'the law in the books' and 'the law in action': Roscoe Pound, 'Law in Books and Law in Action' (1910) 44 *Am LR* 12. One of Pound's major purposes in making this distinction was to illustrate that the effectiveness of law could be measured by calculating the gap between the written law and the enforcement of or compliance with the law. See discussion of Pound in Roman Tomasic, 'Towards a Theory of Legislation: Some Conceptual Obstacles' (1985) 6 *Statute LR* 84 at 96.

6 See Simon Milne & Nicola Wakefield Evans, 'Shareholder Requisitions: The 5%/100 Member Provision' (2003) 31 *ABLR* 285; Paula Darvas, 'Section 249D and the "Activist" Shareholder: Court Jester or Conscience of the Corporation?' (2002) 20 *C&SLJ* 390 at 390.

7 See s249D(1) of the *Corporations Act*.

market in the usual fashion as any member of the public is entitled to do. However, the Boral Ethical Shareholders were an unusual group of shareholders in the sense that they mainly consisted of individuals who were members or ex-members of the TWU. Consequently, the Boral Ethical Shareholders had the organisational assistance of the TWU.⁸ Most or all of the members of the shareholder group had either recently been engaged, or were engaged by Boral in its transport operations. These individuals held common concerns about the management of Boral. In particular they were concerned about the occupational health and safety performance of the corporation.

By forming a shareholder group of at least 100 shareholders, the Boral Ethical Shareholders and the TWU were able to trigger the '100 shareholder rule'. This union shareholder activism took the form of putting a number of resolutions at the Boral AGM in October 2003. The main resolutions that the Boral Ethical Shareholders put concerned occupational health and safety at Boral. This strategy was chosen due to genuine safety concerns raised by TWU members. For some time prior to the 2003 AGM, TWU members had raised concerns about safety at various Boral concrete sites.⁹ In 2002, Boral increased its profit by 51 per cent to \$192 million.¹⁰ At the same time the corporation's performance enhancement programs delivered \$112 million in operational improvement and cost savings.¹¹ In 2005, Boral's profit was \$377 million and the performance enhancement program delivered \$106 million dollars in operational costs savings.¹² Thus workers raised queries that Boral, a corporation which prides itself in delivering 'shareholder value' and having a 'market driven focus',¹³ was cutting costs to the detriment of work safety. Specifically, there was a concern that the cost cutting may have been adversely affecting the level of investment in capital improvements and maintenance at Boral concrete sites.¹⁴

TWU officials authorised to conduct safety inspections under the *Occupational Health and Safety Act 2000* (NSW) (hereafter the *OHS Act*) carried out a safety audit of Boral concrete sites. This audit indicated that Boral may not have been addressing safety issues in a timely manner, and that safety concerns raised by workers simply failed to get addressed at all. It also indicated that while formal structures for safety consultation with workers existed, they may not have been functioning properly and may not have been playing a significant role in resolving safety issues at Boral concrete sites.¹⁵ Following the TWU safety audit, a number

8 In particular an employee who played a key role was Shannon O'Keefe. The author was also employed by the TWU at the time.

9 Boral's primary business is in building and construction materials.

10 Boral Limited, *Annual Review 2002*: <http://www.boral.com.au/Annual_Reports/reports/Annual_Report_2002/full_annual_report.pdf?AUD=InvestorInformation&Nodes=&site=CI> at 3 (15 May 2006).

11 *Id* at 8.

12 Boral Limited, *Annual Review 2005*: <http://www.boral.com.au/Images/common/pdfs/2005_Annual_Review.pdf?AUD=InvestorInformation&Nodes=&site=CI> at 1, 11 (15 May 2006).

13 Boral Limited, *Annual Review 2003*: <http://www.boral.com.au/Annual_Reports/reports/Annual_Report_2003/4811BORAR%20Full%20A.pdf?AUD=InvestorInformation&Nodes=&site=CI> at 17 (15 May 2006).

14 Transport Workers Union of NSW, *Safety Policy and Practice at Boral Limited* (2003) at 2.

15 *Id* at 3.

of safety correction notices were issued by the TWU to address work safety issues at Boral sites. Under the *OHS Act* these correction notices serve as formal notification to an employer of the hazards identified. Following this, reinspections were carried out that appeared to indicate that little or nothing had been done to eliminate or control the risks identified at the majority of sites. The findings of the work safety audit and the lack of adequate response to it by Boral, suggested that there may have been a disconnect between Boral's safety policy and practice. Boral had developed corporate policies that proclaimed a commitment to safety,¹⁶ but on occasions these had failed to be properly implemented at the workplace level. The TWU and its members were well positioned to document these failures. The union argued that whilst Boral had reported substantial improvements in the rate of lost time due to injuries,¹⁷ these kinds of indicators were ultimately unsatisfactory representations of the work safety performance of Boral for a variety of reasons. These reasons included the fact that Boral safety disclosure appeared to be not externally verified; there was no board health, safety and environment committee (unlike other listed companies such as BHP, CSR, Qantas and Rio Tinto that had committees dealing with safety); and shareholders did not have the benefit of adequate independent auditing of safety practices to ensure transparency and implementation of policies.¹⁸

A. Work Safety as a Corporate Governance Issue

By raising these concerns the TWU began to translate occupational health and safety into a corporate governance issue. The union had undertaken inspections under the *OHS Act* and put significant resources into attempting to gain improvements at Boral concrete sites under work safety laws. This process under work safety laws, based as they are on the Robens philosophy that emphasises the shared interests of employers and employees,¹⁹ had failed to deliver satisfactory outcomes for the TWU in this instance.²⁰ Accordingly, the union turned to another strategy that envisaged shareholders and workers having a common interest in improving workplace safety. Tony Sheldon, the Secretary of the TWU stated:

We believe that improving workplace health and safety is an area where workers and investors have a common interest. Industrial and investment interests can be aligned by improving the identification and management of workplace health and safety risks.²¹

Prior to these views being expressed by the TWU leadership, a BT Financial Group report commissioned by three institutional shareholders had presented work

16 See Boral Limited, *Annual Review 2002*, above n10 where it is stated at 5–6 that the 'Corporation is committed to providing safe and healthy working conditions for all people involved in our business'.

17 Ibid.

18 TWU, above n14.

19 See Committee on Safety and Health at Work, *Safety and Health at Work: Report of the Committee 1970–72*, Cmnd 5034 (1972).

20 For a view that work safety involves contradictory rather than mutual employer/employee interests, see Harry Glasbeek, 'Occupational Health and Safety Law: Criminal Law as a Political Tool' (1998) 11 *AJLL* 95.

21 TWU, above n14 at 1.

safety as a corporate governance issue.²² The report stated that the proper management of work safety risks was essential to the creation of long-term and sustainable shareholder value.²³ If a corporation does not manage work safety well, this will lead to costs associated with the enforcement of work safety laws and costs associated with loss of corporate credibility, image or reputation.²⁴ The report recommended that the disclosure of safety performance of companies should be comprehensive and include, in addition to negative indicators such as injury incidence rates, positive performance indicators such as what a corporation is doing to effectively identify, assess and control work safety risks.²⁵

B. The TWU and Boral Ethical Shareholder Proposals

Having identified work safety as a governance issue, the TWU and the Boral Ethical Shareholders then formulated a number of shareholder resolutions aimed at improving the transparency, accountability and effectiveness of Boral's safety policies. The first resolution proposed by the Boral Ethical Shareholders at the 2003 AGM ('Resolution 9') was aimed at establishing structures to confirm that Boral was properly implementing its safety policies. It included inserting (by special resolution) a new article into Boral's corporate constitution. This new article would establish a board committee responsible for safety, health and the environment. The new article would also provide for the appointment of an independent safety auditor. It also provided that the reporting on safety in Boral annual reports must conform to more stringent requirements as set out in the Labour Practice and Decent Work guidelines in the Global Reporting Initiative.²⁶ The group then put four resolutions designed to shift the decision-making power regarding how to reward Boral's management team from the Board to a shareholder ratification process. The second resolution proposed by the group ('Resolution 10') provided for an amendment of the corporate constitution (by special resolution) so that the corporation in general meeting (instead of the board of directors) would determine remuneration of directors. The third resolution ('Resolution 11') attempted to abolish an existing option plan for senior Boral executives. The fourth resolution ('Resolution 12') provided for an alternative mechanism for long-term incentives for senior executives by putting an ordinary resolution to shareholders at a general meeting. Similarly, the fifth proposal ('Resolution 13') provided for a short-term incentive plan for executives to be approved by shareholders by way of an ordinary resolution at a general meeting. Finally, the shareholder group attempted to tie executive performance to safety

22 BT Financial Group, *Workplace Health and Safety Governance* (April 2003). The Report was commissioned by the Public Sector Superannuation Scheme, the Commonwealth Superannuation Scheme and the Catholic Superannuation Fund.

23 *Id.* at 1.

24 *Id.* at 2. The recent public debacle concerning the mismanagement by James Hardie of worker's claims for compensation for asbestosis contracted whilst working for James Hardie graphically illustrates the impact that work safety issues can have on corporate reputation.

25 TWU, above n14.

26 Global Reporting Initiative, *Sustainability Reporting Guidelines 2002: Part C: Report Content, 5 Performance Indicators — Social Performance Indicators: Labour Practices and Decent Work, guidelines LA5, LA6, LA7, LA8, LA14, LA15*: <http://www.globalreporting.org/guidelines/2002/gri_2002_guidelines.pdf> (15 May 2006)

performance. The sixth proposal ('Resolution 14') provided for the amendment of Boral's senior executive remuneration policy to link 30 per cent of the short-term incentives to the achievement of safety targets set by the proposed Safety, Health and Environment Board committee.²⁷ Table 1 below summarises the proposals put by the Boral Ethical Shareholders/TWU and the percentage of votes cast in favour of each resolution.²⁸

Boral Ethical Shareholder/TWU Shareholder Proposal	Percentage of votes cast in favour of resolution (%)
Resolution 9: establishment of a board safety committee	17.3
Resolution 10: shareholders to determine directors remuneration	4.07
Resolution 11: abolition of executive options	6.4
Resolution 12: long-term executive incentives to be determined by resolution put to shareholders	9.09
Resolution 13: short-term incentives	4.9
Resolution 14: safety targets for senior executives	14.83

As Table 1 sets out, none of the shareholder resolutions received a majority of votes polled. However, Part 4 of this article below demonstrates that union resolutions that fail to obtain majority support can still lead companies to implement changes that benefit workers and shareholders.

3. Causes of Union Shareholder Activism

A. The Marginalisation of Employee 'Voice' Within and from Outside the Corporation

In addition to the TWU action at the 2003 Boral AGM, similar actions by shareholder groups organised by trade unions have been undertaken at other AGMs. At Rio Tinto's AGM in 2000, the Construction Forestry Mining and Energy Union (CFMEU) put a resolution calling on the corporation to appoint an independent deputy chairman and independent non-executive directors. The

27 The Boral Notice of Meeting 2003 sets out the AGM Resolutions in full: Boral Limited, Notice of Meeting 2003: <http://www.boral.com.au/Images/common/pdfs/2003_nom.pdf?AUD=InvestorInformation&Nodes=IC,IR,IN&site=CI?AUD=InvestorInformation&Nodes=&site=CI> at 2 (15 May 2006).

28 Michael Scobie, Boral Company Secretary, Letter to the Australian Stock Exchange reporting on the Outcome of Business and Declaration of Polls at 2003 Boral AGM (21 October 2003): <http://www.boral.com.au/Images/common/pdfs/Results_2003_AGM_Polls.pdf?AUD=InvestorInformation&Nodes=&site=CI>. The results of all six of these resolutions were decided by a poll rather than a show of hands (15 May 2006).

CFMEU also put a resolution urging Rio Tinto to adopt International Labour Conventions on workers' rights, including rights to collective bargaining.²⁹ At the Commonwealth Bank of Australia's AGM in November 2004, the Finance Sector Union of Australia put a resolution that an independent expert be engaged by the bank to assess the impact of changes at the bank that were estimated to lead to significant job losses.³⁰ In October 2004, the Australian Workers' Union put resolutions regarding executive remuneration and the job tenure of directors at the AGM of Bluescope Steel.³¹

Why has union shareholder activism emerged in the last few years as a significant feature of Australian corporate governance? The motivations for organised labour actively engaging in corporations as shareholders can be best understood by examining regressions in labour law in Australia, and the non-recognition of employees under corporate laws. In recent years there has been a scholarly emphasis on advocating for the recognition of employee 'voice' within the Australian firm.³² Perhaps one of the triggers of this scholarly pre-occupation is that corporate law in Australia has never substantively included employee voice in corporate governance; from within the Australian corporation the voice of employees as *employees* remains muted and marginal. Additionally, changes in Australian employment law in recent decades have seen managerial prerogative increasingly provided for at the expense of employee and trade union protections. These changes have diminished the ability of employees and trade unions to advocate their concerns from a position outside the corporation. The way that major aspects of Australian labour and corporate law operate to exclude trade unions and their members from corporate decision making is a key reason for the emergence of organised worker involvement in corporations, not as employees, but as *shareholders*.

(i) *Regressions in Australian Labour Laws*

For most of the latter half of the 20th century, Australia had comparatively strong employment protection laws and trade unions had extensive rights and protections. Trade unions were not merely agents for their members. Rather, they were recognised as parties principal in the resolution of industrial disputes and could instigate the resolution of disputes before the federal industrial tribunal.³³ Registered trade unions thus became the 'exclusive spokespersons' before industrial tribunals for Australia's working class.³⁴ Via compulsory industrial

29 John McCarthy, 'Union Dons New Garb to Move into Boardroom' *Courier Mail* (22 May 2000) at 15.

30 Blair Speedy, 'Boards to Face Tough Questions' *The Australian* (1 November 2004) at 32; Geoffrey Newman, 'CBA Chief Faces Protest Vote' *The Australian* (6 November 2004) at 36; 'Commonwealth Bank of Australia — 2004 Annual General Meeting — Chairman's Address' *Regulatory News Service* (7 November 2004).

31 Geoffrey Newman, 'Union Wades in at Steel AGM' *The Australian* (20 October 2004) at 25; 'BlueScope *Workers Online*' (15 October 2004).

32 See, for example the references regarding works councils, below n63.

33 Amanda Coulthard, 'The Decollectivisation of Australian Industrial Relations: Trade Union Exclusion Under the *Workplace Relations Act 1996* (Cth)' in Stephen Deery & Richard Mitchell (eds), *Employment Relations: Individualisation and Union Exclusion — An International Study* (1999) at 49.

conciliation and arbitration, protective standards were set and collective governance structures were supported. This system operated to limit management's ability to promote shareholder value at the expense of labour.³⁵ One pivotal device that provided this hand brake on employers was the comprehensive industrial award structure that detailed employees' market wage rates and work conditions on an industry basis. Industrial awards were formulated and enforced by specialist industrial tribunals through centralised arbitration. Through these industrial awards industrial tribunals set wages and conditions for all employees, whether or not those employees were union members and whether or not those employees desired their work to be governed in this fashion. Employers had to deal with trade unions because unions could seek an arbitrated settlement that would bind employers.³⁶ This process of arbitration provided an indirect form of participation by employees via their elected trade union leaders.³⁷ Additionally, this system of cooperative centralised industrial arbitration, successfully discouraged employers from utilising an array of available common law sanctions against workers and unions involved in strike action.³⁸ However, in the 1980s, employers began to take an increasingly aggressive stance towards strikes by bringing proceedings against unions and their members for alleged commission of industrial torts.³⁹ The decision in *Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots*,⁴⁰ which required the union and several of its officers to pay \$6.48 million in damages, confirmed how effective this strategy could be for employers.

In the early 1990s, protection of collective worker interests in labour law began to be eroded. In 1993, the Keating Labor government introduced enterprise bargaining into Australian industrial relations. Collective bargaining between trade unions and employers is recognised in many countries as a successful form of employee participation. However, it is of a different legal nature than industry-wide arbitrated settlements. In particular, the introduction of enterprise bargaining in Australia meant that trade unions were not parties principal when engaging in voluntary bargaining, which posed significant problems for trade union recognition.⁴¹ In the mid 1990s, with the election of a neo-conservative federal government, the entrenched position of unions and the idea of collectivism in the

34 Ron McCallum, 'Trade Union Recognition and Australia's Neo-Liberal Voluntary Bargaining Laws' (2002) 57 *Relations Industrielles* 225 at 231.

35 Richard Mitchell, Anthony O'Donnell & Ian Ramsay, *Shareholder Value and Employee Interests: Intersections Between Corporate Governance, Corporate Law and Labour Law: Research Report* (2005) at 31–33.

36 McCallum, above n34 at 227, 231.

37 Ron McCallum, 'Justice at Work: Industrial Citizenship and the Corporatization of Australian Labour Law' (2006) 48 *Journal of Industrial Relations* 1.

38 Keith Ewing, 'The Right to Strike in Australia' (1989) 2 *AJLL* 18 at 18; Breen Creighton, 'Enforcement in the Federal Industrial Relations System: An Australian Paradox' (1991) 4 *AJLL* 197 at 224.

39 The litigation leading to the decision in *Dollar Sweets Pty Ltd v Federated Confectioners Association and Others* [1986] VR 383 heralded the return of a more aggressive legal stance by employers in respect of strikes.

40 [1991] 1 VR 637.

41 McCallum, above n34 at 235; see also Coulthard, above n33.

Australian industrial relations system began to be dismantled. Changes made by the Howard government to industrial statutes reduced the influence of industrial awards; introduced new forms of non-union agreements including a statutory form of individual workplace agreement designed to individualise labour relations,⁴² and tightened restrictions on industrial action.⁴³ In addition, it became apparent that under the *Workplace Relations Act* 1996 (Cth) (hereafter the *WR Act*) no legal mechanism existed to force employers to recognise a trade union, even if the vast majority of those employed were members of the relevant union and desired the union to represent them in collective bargaining.⁴⁴

These statutory changes had a number of significant effects. These effects included communicating powerful disincentives to trade unions considering engaging in strike action, the rapid de-unionisation of the Australian workforce; reductions in employee participation in industrial affairs; and a boost to employer flexibility. This renewed employer flexibility has allowed corporations to focus on delivering shareholder value by reducing wages, intensifying work and introducing lower cost forms of work engagement with less interference from organised labour.⁴⁵

Recently the Howard government unleashed its second wave of industrial relations reforms. The majority of the provisions of the *Workplace Relations Amendment (Work Choices) Act* 2005 (Cth) (hereafter *Work Choices*)⁴⁶ commenced on 27 March 2006. *Work Choices* breaks the tradition of evolutionary reform in industrial relations by instigating the most radical and far-reaching change to Australia's system of industrial relations since the enactment of the *Conciliation and Arbitration Act* 1904 (Cth). Paradoxically, the changes wrought by *Work Choices* are not achieved by 'deregulation' — that is the withdrawal of regulation — but through unnecessarily prescriptive, voluminous and complex re-regulation.⁴⁷ This is not the place to attempt to discuss the full complexity of the reforms. However, some of the reforms to structural and collective aspects of labour law ought to be mentioned to give some indication of the enormity of the changes. *Work Choices* sets out to paralyse the state industrial relations systems and abolish the award-making role of the Australian Industrial Relations Commission (hereafter the AIRC). The Australian Council of Trade Unions will no longer bring test cases to the AIRC for determination and no new federal

42 See the analysis of Australian Workplace Agreements in Andrew Stewart, 'The Legal Framework for Individual Employment Agreements in Australia' in Deery & Mitchell above n33 at 36–37.

43 Warren Friend, 'The Right to Strike' (1998) 23 *Alt LJ* 95 at 95.

44 The decision in *BHP Iron Ore Pty Ltd v AWU* (2000) 102 FCR 97 indicated that the freedom of association provisions would not protect the right of a trade union to collectively bargain. See McCallum, above n34 at 238, 241.

45 Mitchell, O'Donnell & Ramsay, above n35 at 37.

46 *Work Choices* substantially amended the *WR Act*. For an excellent summary of the changes made by *Work Choices*, see Andrew Stewart & Elizabeth Priest, 'The Work Choices Legislation: An Overview' supplement to Breen Creighton & Andrew Stewart, *Labour Law* (4th ed, 2005) available at: <<http://www.federationpress.com.au/pdf/WorkChoicesLegislation300306.pdf>> (15 May 2006).

47 Andrew Stewart, 'A Simple Plan for Reform? The Problem of Complexity in Workplace Regulation' (2005) 31 *Australian Bulletin of Labour* 210.

awards will be made, because the AIRC has lost its powers to resolve industrial disputes by arbitration. Instead a new body, the Australian Fair Pay Commission, will have a broad discretion to fix a federal minimum wage and is under no obligation to hold any hearings at all for this purpose.⁴⁸ It will be easier for employers to eradicate existing award conditions by using Australian Workplace Agreements and non-union collective agreements. *Work Choices* also abolishes the 'no disadvantage' test, which was arguably the most important safeguard in the previous bargaining system under the *WR Act*. Instead a new standard is assessed against five minima, some of which will prove to be illusory safeguards. In addition, the Workplace Relations Regulations 2006 (Cth) which commenced on 27 March 2006, provides that a broad-variety matters are prohibited from inclusion in agreements. This prohibited content includes many collective matters such as trade union training leave and bargaining agents' fees, and also includes terms providing remedies for unfair dismissal. Seeking to include prohibited content in an agreement may attract heavy fines. This will ward off innovations in agreement making by trade unions to replace favourable protective standards so that in time, many of the protective federal award standards will be abolished or become irrelevant.⁴⁹ Finally, *Work Choices* even more heavily proscribes trade union industrial action.⁵⁰

The overall effect of *Work Choices* is to engineer 'a fundamental shift in power from labour to capital'.⁵¹ Furthermore, the corporatisation of labour law under *Work Choices* reinforces the notion that employees are a mere appendage to the productive processes of the corporation.⁵² These effects resulting from the anti-union emphasis of *Work Choices* clearly indicate at the very least that traditional industrial strategies based on labour law and relations are becoming less effective for unions. Indeed following the enactment of *Work Choices*, serious queries must be raised about whether labour law has outlived its utility for trade unions altogether.⁵³ In a more hostile employment relations environment and from a more marginal perspective in industrial relations generally, Australian trade unions have

48 Joellen Riley & Troy Sarina, 'Industrial Legislation in 2005' (2006) 48 *Journal of Industrial Relations* (forthcoming).

49 John Howe, Richard Mitchell, Jill Murray, Anthony O'Donnell & Glenn Patmore, 'The Coalition's Proposed Industrial Relations Changes: An Interim Assessment' (2005) 31 *Australian Bulletin of Labour* 189 at 196.

50 See Part VC of the *WR Act* as amended by *Work Choices*, in particular s439 (indicating pattern bargaining is unprotected) and ss473–479 (regarding secret ballot requirements). Additionally, employers will no longer need to seek a certificate from the federal commission before commencing certain actions in tort because *Work Choices* repeals s166A of the *WR Act*.

51 Howe et al, above n50 at 206. On changes in the balance of power between labour and capital see Michael Quinlan, 'Contextual Factors Shaping the Purpose of Labour Law: A Comparative, Historical Perspective' in *Labour Law, Equity and Efficiency: Structuring and Regulating the Labour Market for the 21st Century* (2005) at 11.

52 Ron McCallum, 'The Australian Constitution and the Shaping of Our Federal and State Labour Laws' (2005) 10 *Deakin LR* 460.

53 At the time of writing this article, speculation was rife regarding how extensive the 'shadow' industrial relations system built around collective common law deeds would become. Additionally, might a trade union operate more successfully as an unincorporated association rather than a registered body to represent workers under labour laws? I am thankful to Ron McCallum for bringing this point to my attention.

been forced to reconsider and broaden the mechanisms they deploy to achieve their goals. One innovative mechanism that unions have triggered to make corporations accountable to workers and that avoids the limitations of the labour law framework is shareholder activism.

(ii) *The Exclusion of Employee Interests in Corporate Governance*

Work Choices eliminates some union strategies, particularly those focussed on binding industrial awards, and tightens restrictions on many other traditional union strategies. What a legislative schema such as *Work Choices* cannot do is to change the reality that employees make vital contributions to the value of corporations. In this context, arguments that employees are as much members of the firm as shareholders are of heightened relevance. Employees make considerable firm-specific investments in the enterprise through their years of service. Workers contribute human capital to corporations in the form of time, energy, physical strength, talent and skill. Perhaps more importantly, employees contribute financial capital in the form of deferred cash payments (in exchange for leave and redundancy entitlements) to the corporation.⁵⁴ This human capital perspective indicates that employees are an equally important stakeholder in corporations as shareholders. Indeed, because employees have less ability to exit from an enterprise, they may have a greater stake than shareholders in the future of that enterprise.⁵⁵ Despite the long-term stakes that employees have in corporations, corporate law remains preoccupied with the rights of shareholders.⁵⁶ In contrast, employees as ‘non-shareholder stakeholders’ are treated as outsiders to the firm.⁵⁷ There are no mainstream legislative provisions for the protection of employees as *employees* (rather than as *creditors*) under Australian corporate laws.⁵⁸ Australian directors do not ordinarily owe statutory duties to employees. Under Australian corporations law, employees’ interests are mainly only taken into account in exceptional circumstances, such as in failed companies where employees have certain rights to their entitlements as a species of creditor.⁵⁹ Nevertheless, even then the position of employees in the situation of a corporate collapse remains vulnerable.⁶⁰ It has been suggested that the reason behind this vulnerability is that employees continue to be effectively excluded from participatory mechanisms within the corporation.⁶¹ It would not be too much of an exaggeration to say that

54 Joellen Riley, ‘Lessons from Ansett: Locating the Employees’ Voice in Corporate Enterprise’ (2002) 27 *Alt LJ* 112 at 113.

55 See discussion of C Summers’ views in Jennifer Hill, ‘At the Frontiers of Labour Law and Corporate Law: Enterprise Bargaining, Corporations and Employees’ (1995) 23 *Fed LR* 204 at 215–216.

56 Mitchell, O’Donnell & Ramsay above n35 at 17.

57 Jennifer Hill, ‘Corporate Governance and the Role of the Employee’ in Paul Gollan & Glenn Patmore (eds), *Partnership at Work: The Challenge of Employee Democracy: Labor Essays 2003* (2003).

58 Andrew Clarke, ‘The Relative Position of Employees in the Corporate Governance Context: An International Comparison’ (2004) 32 *ABLR* 111 at 115.

59 *Id* at 35; Mitchell, O’Donnell & Ramsay, above n35 at 18.

60 See Riley, above n54 at 113 where she discusses the example of Ansett’s collapse. Despite the introduction of the General Employee Entitlements Redundancy Scheme, some Ansett workers did not receive any entitlements and others only received part of their entitlements.

61 Hill, above n57.

the fixation of corporate governance on the relationship between corporate officers and shareholders, in contrast to broader stakeholder approaches to corporate law, has necessarily seen employee interests in the corporation side-lined.⁶²

Furthermore, unlike some European jurisdictions that have established worker participation via works councils and the principles of co-determination, there has been a failure to establish such employee rights in Australia. Scholarly proposals to consider the introduction of European style works councils as an additional tier of worker representation in Australia have not materialised into any significant concrete steps to institute this aspect of worker democracy.⁶³ In Australia there have historically been alternative means to works councils for the promotion of industrial democracy. The tradition of compulsory conciliation and arbitration, the institutional entrenchment and political influence of trade unions and the adversarial aspects of capital-labour relations in Australia, have shaped a different political trajectory to one that might have seen a substantial political effort to institute works councils. This has fed the lack of engagement with employees through corporate law mechanisms and has meant that more direct forms of workplace democracy remain under-developed in Australia.

Contemporary developments in corporate (re)structuring and labour market arrangements have presented additional problems for the achievement of workplace democracy. The vertical disintegration of the firm⁶⁴ (also referred to as the tendency towards the virtual firm)⁶⁵ whereby large enterprises contract out or outsource work, has directly or indirectly contributed to the vast increase in the number of precarious work arrangements such as labour hire, 'independent' contracting and outwork. Such developments minimise the prospects of establishing effective participatory mechanisms for workers (particularly certain marginalised workers). The problem for worker involvement in corporate governance is this: even if *employees* are included within the category of firm stakeholders, a vast number of peripheral workers who are not considered core workers or 'employees' of the key larger enterprises would continue to be denied participatory rights in those enterprises.

62 For a contemporary articulation of a broad stakeholder approach, see Margaret Blair & Lynn Stout, 'A Team Production Theory of Corporate Law' (1999) 85 *Virginia LR* 247. For a seminal broad stakeholder piece see E Merrick Dodd, 'For Whom Are Corporate Managers Trustees?' (1932) 45 *Harv LR* 1145.

63 This is despite this scholarship providing specific guidance on how state and Commonwealth parliaments might be able to establish works councils: Ron McCallum & Glenn Patmore, 'Works Councils and Labour Law' in Paul Gollan, Ray Markey & Iain Ross (eds), *Works Councils in Australia: Future Prospects and Possibilities* (2002). On the prospects of establishing works councils in Australia more generally see Ron McCallum, 'Crafting a New Collective Labour Law for Australia' (1997) 39 *Journal of Industrial Relations* 405; Ron McCallum, 'Collective Labour Law, Citizenship and the Future' (1998) 22 *MULR* 42; see also the essays in Gollan & Patmore, above n57; Anthony Forsyth, 'Works Councils in Germany: Are They 'Transplantable' to Australia?' in Gollan, Markey & Ross; Glenn Patmore, 'Industrial Democracy for Australia: Towards a New Form of Employee Representation in the Workplace' (2001) 53 *Arena Magazine* 45.

64 Hugh Collins, 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws' (1990) 10 *Oxford J of Legal Studies* 353 at 356.

65 Lynn LoPucki, 'Virtual Judgment Proofing: A Rejoinder' (1998) 107 *Yale LJ* 1413 at 1433–1434.

The pre-eminence of shareholders in corporate governance, the attenuation of indirect employee participation through labour law mechanisms, the failure to promote industrial democracy through works councils and the creation of contingent workforces peripheral to the firm are some of the main factors that facilitate the exclusion of employee interests from corporate law. The regulatory framework, which is myopic in its focus on shareholder constituencies, sits awkwardly with the critical contribution employees make to corporations and the trade union strength in certain key industries which has capitalised on the pivotal role played by employees. The mismatch between the de facto importance of employees and the de jure exclusion of employee interests under much of mainstream Australian corporate and labour law inevitably sees issues raised by employees emerge by other means and/or in other forums. This should come as no surprise to those persons familiar with the pluralist viewpoint on workplace relations. Historically, workplace relations in capitalist societies have been hotly contested.⁶⁶ It remains a controversial and contentious field of social relations today.⁶⁷ Accordingly, any workplace governance system must provide appropriate mechanisms for the venting of industrial issues. If these dispute resolution mechanisms are not provided, and workplace issues go unresolved, they are inevitably manifested in other ways. Traditionally employee interests have been protected and (indirect) employee representation achieved in Australia by way of mechanisms beyond the boundaries of the firm, such as industrial conciliation and arbitration. However, as argued above, in recent decades these industrial strategies are no longer available or are less successful in protecting workers as unions and their members become increasingly marginalised in a hostile employment law and workplace bargaining environment. Consequently, trade unionists have had to expand their repertoire of legal strategies. Trade unionists have not only focussed more on their as yet unchanged powers under state work safety laws, but have also become more savvy with respect to corporate governance strategies. The strategy of promoting employee interests by way of the '100 shareholder rule' has arisen in a context where labour laws have offered inadequate protection to employees and the bulk of corporate laws operate to exclude employee 'voice'.

4. *Justifications of Union Shareholder Activism*

A. *Effectiveness and Democracy as Justifications for Union Shareholder Activism*

Given regulatory exclusions of employee interests, small windows of opportunity for collective worker action, such as the ability of trade unions to put shareholder resolutions, are of heightened significance. Nevertheless, even this type of worker activism has been opposed by corporate leaders. For example, in the course of debate at the 2003 Boral AGM, the response of some of the Boral executives to TWU participation was that a group that was not *bona fide* was harassing them.⁶⁸

66 All but the most dogmatic unitarist industrial relations scholars (who might suggest that workplaces are harmonious and integrated spaces where employers and employees share the same organisational goals) would agree that workplace relations are contentious. See Stephen Deery et al, *Industrial Relations: A Contemporary Analysis* (2nd ed, 2001) at 7–8.

67 Creighton & Stewart, above n46 at 1.

The implication was that groups such as trade unions should not be allowed to put shareholder resolutions or participate in company meetings.⁶⁹ However, arguments that suggest that shareholder activism by trade unions is illegitimate are largely misconceived. Obviously corporate officers are going to be dismissive of, and openly hostile to, union shareholder activism because it directly disrupts and challenges the way corporate officers conduct decision making at company meetings. Nevertheless, it does not necessarily follow from this hostile managerial attitude towards union involvement that shareholders will hold similar views. What management criticisms of union shareholder activism overlook, or deliberately conceal, is that the activation of the '100 shareholder rule' by trade unions actually aligns shareholder interests with employee interests through attempts to make managers more accountable. Thus the first major justification of union shareholder activism examined in this section is that such activism is *effective* in monitoring managers and, in some instances, creating shareholder value. The second major justification is examined through the lens of the democratic theory of the corporation. This justification focuses on union shareholder activism as a manifestation of the healthy workings of democratic participation in the corporate sphere. This second justification is independent of arguments about the promotion of shareholder value because it relies on an alternative *democratic* justification of minority shareholder participation in corporate governance. This second justification is important because corporate managers must be brought to account by democratic legal means in order to justify large-scale corporate power.

(i) *Effective Monitoring of Managers by Unions — Lessons from the USA*

Labour activism in the corporate sphere has been a feature of corporate governance for a number of decades in the United States of America. The commentary analysing this aspect of US corporate governance has identified a number of aspects of union shareholder activism that suggest that it is effective in making managers accountable to shareholders and workers.⁷⁰ In this section, some of the relevant lessons derived from the US commentary are discussed in relation to union shareholder activism in Australia.

(a) Union Shareholder Activism can assist in Overcoming the Problem of Collective Action

Part of the problem of unchecked managerial power that has long been identified by commentators is that widely dispersed shareholdings and diversified share

68 My personal notes of the 2003 Boral AGM debate.

69 This kind of perspective is well rehearsed in the United States where complaints have been made that shareholder activism is undertaken by 'gadflies and religious or political groups unable to achieve their ends through legitimate political mechanisms': Alan Palmiter, 'The Shareholder Proposal Rule: A Failed Experiment in Merit Regulation' (1994) 45 *Alabama LR* 879 at 901.

70 This section draws on the literature from the USA on labour shareholder activism. In particular, see Stewart Schwab & Randall Thomas, 'Realigning Corporate Governance: Shareholder Activism by Labor Unions' (1998) 96 *Mich LR* 1018; Marleen O'Connor, 'Organised Labor as Shareholder Activist: Building Coalitions to Promote Worker Capitalism' (1997) 31 *University of Richmond LR* 1345; Marleen O'Connor, 'Labor's Role in the American Corporate Governance Structure' (2000) 22 *Comparative Labor Law & Policy J* 97.

portfolios are a recipe for shareholder passivity. Berle and Means' groundbreaking, partly empirical study of American capitalism published in 1932 explained the causes of this shareholder passivity.⁷¹ They postulated that there was a chasm between a self-perpetuating and strategically positioned management at the apex of the corporate structure that controlled public corporations, and a body of dispersed and largely disenfranchised shareholders whose 'ownership' of the corporation did not entail any influence on corporate decision making. Managers, the new 'princes of industry', rather than shareholders, now controlled corporations.⁷² A concomitant of the separation of ownership and control is that shareholders do not have the practical ability or political will as a group to monitor the performance of managers.⁷³ This is known as the problem of collective action. It is a problem because, in situations where shareholders fail to engage in monitoring of management, a director's allegiance may shift from the shareholder constituency to fellow directors and management. This in turn provides a fertile environment for passive board cultures such as the blind faith in leadership which occurred at HIH before its collapse.⁷⁴

In contrast to the conventional view of the 'disenfranchised' shareholder, employees make firm-specific investments and consequently develop long-term attachments to corporations.⁷⁵ These factors indicate employees will have greater incentive than ordinary shareholders to monitor companies to ensure their long-term survival and profitability.⁷⁶ Moreover, the normative influences that lead to passivity in other shareholders are sometimes less evident in trade union culture.⁷⁷ Many union members are exposed to the social conditioning of worker activism.

71 Adolf Berle & Gardiner Means, *The Modern Corporation and Private Property* (1933).

72 Id at 69. See also William Bratton, 'The New Economic Theory of the Firm: Critical Perspectives from History' (1989) 41 *Stan LR* at 1497; John Kenneth Galbraith, *The New Industrial State* (2nd ed, 1971) at 73. The *Corporations Act* assumes the separation of ownership and control in one of the key replaceable rules. Section 198A states that companies are managed by or under the direction of directors. Arguably managers are strategically positioned to dominate the day to day affairs of the corporation and, through the proxy process, critical decisions of the general meeting such as who is elected as a director: Sandra Berns & Paula Baron, *Company Law and Governance: An Australian Perspective* (1998) at 241. In Australia in recent years there has been a significant rise of the number of small shareholders. Fifty five per cent of all adult Australians are either directly or indirectly shareholders. Forty four per cent of adult Australians or 6.4 million people directly own shares: see Australian Stock Exchange, *Australia's Share Owners: An ASX Study of Share Investors in 2004*: <http://www.asx.com.au/about/pdf/2004_share_ownership_booklet.pdf> (7 December 2005). The increase in small shareholders' direct involvement in the sharemarket is partly due to the demutualisation of large Australian mutual societies such as National Mutual, Colonial Mutual, AMP and NRMA, and to the privatisation of government organisations such as Telstra, Qantas and state electricity commissions. Small shareholders are also increasingly indirectly involved in the sharemarket through mutual funds including superannuation funds. See Michael Duffy, 'Shareholder Democracy or Shareholder Plutocracy? Corporate Governance and the Plight of Small Shareholders' (2002) 25 *UNSWLJ* 434 at 436. This rise in the number of small shareholders is consistent with findings that there has been a 'decline in individual shareholding as a percentage of the market': Mitchell, O'Donnell & Ramsay above n35 at 27.

73 Stephen Bainbridge, 'The Politics of Corporate Governance' (1995) 18 *Harvard Journal of Law and Public Policy* 671.

74 Stephen Conroy, 'Labor's Approach to Corporate Governance: Empowering the Shareholder' (2003) 15 *The Sydney Articles* at 29.

Indeed unions can generate the political will and organisational capacities to overcome the collective action problems associated with formulating a coalition of active shareholders.⁷⁸ Thus the '100 shareholder rule' can facilitate union monitoring of management where the general shareholdership does not have any incentive to do so. The '100 shareholder rule' would be impotent if there were not groups such as union activists to put it into practice. If there is a large difference between strong shareholder rights on the statute books and a lack of exercise of those rights, then corporate law can largely play a role in legitimising management without actually making management substantively accountable to shareholder constituencies. It is clear from the reaction from certain corporate managers that some corporate managers do not want shareholders to actually bring managers to account in the way that union activists have done. The positive aspect of these kind of objections from corporate leaders is that they usually indicate that union involvement challenges top-down management by enhancing shareholder capacities to effect change at general meetings. Therefore union shareholder activism fills an important gap in the monitoring process created by problems of collective shareholder apathy.

(b) Aligning Worker and Shareholder Interests

The view that union resolutions will *diverge* from the interests of other shareholders becomes less persuasive as unions become more sophisticated in their participation as shareholders. In fact, the contrary position is becoming more likely as unions intentionally *align* their own interests with that of other shareholders by carefully researching the viability of mooted proposals. Unions in so doing transform their approach from a purely adversarial collective bargaining one to a strategic, co-operative corporate governance approach.⁷⁹ For example, the TWU proposals regarding the work safety performance of Boral were partly a reaction to increased interest by institutional investors in this kind of company performance indicator.⁸⁰ The union's investment in the research into Boral's safety performance was worthwhile because the resolutions regarding the safety performance of Boral received a much higher proportion of shareholder votes than the TWU resolutions regarding shareholder approval of certain matters relating to executive remuneration. These poll results were counter-intuitive in the sense that

75 See O'Connor, 'Labor's Role in the American Corporate Governance Structure' above n70 at 100.

76 Schwab & Thomas, above n70 at 1037.

77 See Michael Whincop, 'The Role of the Shareholder in Corporate Governance: A Theoretical Approach' (2001) 25 *MULR* 418 at 459.

78 In Australia, a number of key trade unions have been able to sustain their activism under a hostile federal government through charismatic leadership and by combining the organising model of worker activism with more traditional legal and political strategies. On the organising model of worker activism, see Michael Crosby, *Power at Work: Rebuilding the Australian Union Movement* (2005). Crosby argues that although overall union membership in Australia has declined, parts of the union movement are stronger than before because they consist of organised union activists not just (sometimes passive) union members.

79 Schwab & Thomas, above n70, 1090.

80 Boral Limited, *Sustainability Report 2005*: <http://www.boral.com.au/Images/common/pdfs/2005_sust_Report.pdf?AUD=&Nodes=&site=CI> at 16 (15 May 2006).

Boral shareholders were more interested in non-traditional shareholder concerns — that is the safety performance of the corporation — than more conventional corporate governance concerns regarding executive remuneration.⁸¹

In 2004 and 2005, Boral improved its public reporting of its occupational health and safety performance. Not only has Boral disclosed the achievement of negative occupational health and safety targets but it also provided information on an external assessment of safety management at Boral.⁸² This is a welcome improvement in reporting that was probably triggered by union and shareholder pressure and ought to boost Boral's corporate reputation.⁸³ Where a union proposal is intentionally aligned with shareholder interests and this leads a corporation to make positive reforms, the market reputation of the corporation may be boosted. This in turn may induce a favourable stock market reaction. This suggests that union resolutions can operate to improve worker conditions *and* maximise long-term profits for all shareholders.⁸⁴

(c) The Competitive Advantage of Unions

Unions through their members and through the inspection powers of their officials have access to information about corporate operations to which other shareholders do not have access to. Union members can often relay detailed messages to their union about the effectiveness of corporate policies 'on the ground' and so provide a critical bridge between written corporate policy and the actual implementation of that policy. This gives unions special monitoring abilities that 'create value for other shareholders.'⁸⁵ These expert monitoring abilities are part of what Professor Ian Ramsay calls the 'competitive advantage of unions'. Unions might be regarded as a kind of independent, expert stakeholder on workplace issues at a given corporation, creating additional validity to shareholder activism by unions. The monitoring of work safety at Boral by the TWU is indicative of the expertise that worker groups can bring to corporate governance forums. The TWU, using its powers of inspection under work safety legislation, in conjunction with information provided by its members who worked on a daily basis at Boral sites, was able to compile detailed information on the corporation's performance in implementing work safety policies. No other organisation had the same incentives or resources to compile information about this aspect of Boral's performance.

(d) Resolutions that Do Not Get Passed Can Still Change Corporate Practices

A criticism levelled at union shareholder activism is that the resolutions put by trade unions will almost certainly not obtain a majority of shareholder's votes.

81 On counter-intuitive voting by shareholders (whereby shareholders choose to not expand their powers vis-à-vis directors) see Lynn Stout 'The Shareholder as Ulysses: Some Empirical Evidence on Why Investors in Public Corporations Tolerate Board Governance' (2003) 152 *U of Penn LR* 667.

82 See *Boral Sustainability Report 2005*, above n80 at 16.

83 In June 2005 Boral was awarded a safety reporting award at the Australasian Annual Reporting Awards: id at 13.

84 See Scwhab and Thomas, above n70 at 1090.

85 Id at 1037.

Aside from the fact that there have been successful union proposals in the US,⁸⁶ there is good enough reason to reject this criticism on the basis that unsuccessful resolutions can prompt executives to change corporate policy and practices.⁸⁷ The resolutions put by the TWU at the Boral AGM led to publicity about the corporation's work safety performance. One of the effects of this publicity is that Boral has acted to safeguard its reputation by improving its work safety policies and public persona. In other instances of union activism, the mere act of putting up a resolution may lead the corporation involved to negotiate with the union so that the resolution is withdrawn on the basis that the corporation will change its practices.⁸⁸ Moreover, union shareholder activism can raise the public profile of the union, increase the union's leverage with a particular corporation and change workplace dynamics by demonstrating to management that workers can and will pro-actively pursue a role in corporate governance.⁸⁹

(e) Markets Constrain Union Shareholder Activism

Market constraints are perhaps the most significant and the most legitimate means of defining the appropriate boundaries of union shareholder activism. If a trade union acts to further the interests of its members at the expense of other shareholders' interests, markets will adequately constrain such opportunistic initiatives. Crucially, the need to persuade other shareholders to vote for resolutions proposed by unions would eliminate those proposals that deviate too far from the goals of the majority of shareholders.⁹⁰ In Australian company meetings shareholders are aware of who puts a resolution and so will be able to assess any union resolution with the knowledge that a union has proposed it.⁹¹ If, for example, shareholders foresee that union resolutions are motivated by collateral tactical concerns such as concurrent collective bargaining negotiations, shareholders can discipline such resolutions by simply voting against them.⁹²

Surprisingly a US empirical study of union proposals found shareholders were not particularly suspicious of union proposals.⁹³ The study found that union proposals receive as much or more support than do similar proposals by other

86 Id at 1028. A resolution is discussed that was put by the Teamsters at a meeting of Fleming Companies Inc. on 30 April 1997 to have shareholder approval of any poison pills. The resolution received 60.5 per cent of the votes.

87 O'Connor, 'Organised Labor as Shareholder Activist', above n70 at 1362.

88 O'Connor, 'Labor's Role in the American Corporate Governance Structure' above n70 at 114.

89 See O'Connor, 'Organised Labor as Shareholder Activist', above n70 at 1383.

90 Schwab & Thomas, above n70 at 1024.

91 In the case of Boral, the trade union resolutions were disclosed in the corporation notice of the 2003 AGM as resolutions put by a trade union group: Boral, *Notice of Meeting 2003*, above n27 at 3.

92 O'Connor, 'Organised Labor as Shareholder Activist', above n70 at 1383; Schwab & Thomas, above n70 at 1023. See also Whincop's argument that the best way to deal with frivolous proposals at AGM's is to have them '... voted down rather than for them not to be put at all': Whincop, above n77 at 457. In the case of Boral, the directors notified shareholders prior to the 2003 AGM that 'there are ongoing industrial and legal disputes between Boral subsidiary companies and the TWU...': Boral, *Notice of Meeting 2003*, above n27 at 9.

93 Randall Thomas & Kenneth Martin, 'Should Labor Be Allowed to Make Shareholder Proposals?' (1993) 73 *Washington LR* 41.

shareholder groups. This held true even where the union proposal was put when there was a concurrent dispute or negotiation with management.⁹⁴ At the Boral 2003 AGM, the only shareholder-initiated (rather than management-initiated) proposal other than those put by the TWU was a resolution regarding the performance of Boral in implementing responsible environmental practices. This resolution received a much lower vote than the TWU proposals regarding work safety.⁹⁵ Furthermore, a number of union resolutions in Australia have received a significant number of votes polled.⁹⁶ This indicates that concern about opportunistic conduct by trade unions in putting shareholder resolutions is overstated.

(f) Existing Corporate Laws Constrain What Proposals Can be Made

The pre-eminent position that directors have in the management of a corporation is recognised and validated in various provisions of the *Corporations Act*. In particular, the replaceable rule in s198A states that a corporation is managed 'by or under the direction of the directors'. The dominant role of directors in management has led to significant legal constraints on the rights of shareholders at general meetings. One important limitation to members' rights to propose a resolution at a general meeting arose out of McLelland J's judgment in *NRMA v Parker*.⁹⁷ In that case, McLelland J indicated the right of shareholders to put a resolution could not be exercised if the subject was a matter of management exclusively vested in directors.⁹⁸ Accordingly, the type of resolutions that trade union shareholder groups are able to put at pre-planned AGMs are constrained by existing legal criterion regarding the allowable content of the shareholder resolution.

(ii) *Democratic Theory as a Justification of Union Shareholder Activism*

(a) Accommodating Union Shareholder Activism into a Theory of the Corporation

A theory of the corporation provides a normative vision of the corporate form by identifying the interests of stakeholders that can be translated into legitimate objectives of the corporation.⁹⁹ Such a theory can also assist in identifying the most appropriate participatory mechanisms through which stakeholder interests

94 Id at 41, 46.

95 Resolution 8 put by the Boral Green Shareholders received 6.02 per cent of the votes cast in the poll. See Scobie, above n28 at 3.

96 At the Bluescope Steel AGM in October 2004, resolutions put by the Australian Workers' Union received between 8 per cent and 12 per cent of shareholder votes: 'Bluescope AGM gets Workers' Message' *Workers Online* (21 October 2004). At the Rio Tinto AGM in July 2000, a resolution put by the CFMEU received more than 20 per cent of shareholder votes: Jan McCallum, 'Rio Tinto Shapes Up' *Business Review Weekly* (29 September 2000) at 32.

97 (1986) 6 NSWLR 517.

98 Id at 521. For comment see Harold Ford, Robert Austin & Ian Ramsay, *Ford's Principles of Corporations Law* (12th ed, 2005) at 219.

99 I have benefited from discussions with Joellen Riley about the purposes served by a theory of the corporation.

can be accommodated. Union shareholder activism, although justified from a number of normative perspectives, fits best into the framework of a democratic theory of the corporation.

A debate on the theory of the corporation continues to rage about the purpose(s) of the corporation despite the fact that some commentators have treated that debate as being definitively concluded.¹⁰⁰ In particular, in the aftermath of collapses of corporations such as HIH, OneTel, Ansett and others in Australia, and Enron in the USA, the idea that the corporation exists exclusively to maximise shareholder value remains controversial. In this context queries have not only been raised as to whether the shareholder primacy model has faltered because directors have used the corporation as a vehicle to promote their own interests above the interests of shareholders;¹⁰¹ there continue to be stakeholder visions of the corporation that diverge from shareholder-centred models. These stakeholder visions that emphasise the inclusion of non-shareholder stakes in the corporation continue to have resonance in the context of the uncertainties and insecurities of the corporate world, particularly corporate collapses which affect many parties beyond shareholders. However, this does not necessarily lead to the conclusion that because union shareholder activism is carried out by non-shareholder stakeholders that broad stakeholder theories alone best justify union shareholder activism.

Consider the contemporary version of the stakeholder vision proposed by Professor Lynn Stout. Stout emphasises the altruistic behaviour of directors. She argues that directors primarily respond to internal pressures such as ‘a director’s sense of honour; her feelings of responsibility; her sense of obligation to the firm and its shareholders’ rather than to actual external pressures from shareholders and law enforcement agencies.¹⁰² Thus, provided that we select directors who fit altruistic profiling,¹⁰³ shareholder participation not only seldom occurs but is unnecessary when it does occur because directors will already act in shareholders’ interests. Directors have the power to define shareholders’ interests with little or no consultation with constituents.¹⁰⁴ However, it is questionable whether it is possible for directors to know, let alone act upon, shareholders’ interests without actual shareholder participation.

Stout characterises directors as the mediating hierarchs of the firm that protect shareholders from other shareholders.¹⁰⁵ According to this mediating model of the firm, directors’ powers are (rightly) strengthened with shareholder consent. The

100 Hansmann and Kraakman assert that ‘[t]here is no longer any serious competitor...’ to the shareholder primacy model: Henry Hansmann & Reinier Kraakman, ‘The End of History for Corporate Law’ (2001) 89 *Georgetown L J* 439 at 439.

101 Conroy, above n74 at 28.

102 Lynn Stout, ‘On the Proper Motives of Corporate Directors (Or, Why You Don’t Want to Invite Homo Economicus to Join Your Board)’ (2003) 28 *Delaware Journal of Corporate Law* 1 at 8–9.

103 *Id* at 21.

104 See Stephen Bottomley, ‘From Contractualism to Constitutionalism: A Framework for Corporate Governance’ (1997) 19 *Syd LR* 277 at 303 where he discusses the assumption of ‘the dominion of the elected over the electors’.

105 Stout, above n81 at 668.

heightened powers of directors then enable them to protect workers' firm-specific investments.¹⁰⁶ The strength of this approach is that it implies that managers should safeguard worker interests. However, it involves some questionable assumptions about the way that directors will respond to worker interests. It is just as likely that managers will use their strengthened power to sacrifice worker investments to increase short-term shareholder value.¹⁰⁷ Stout's director-centred account of the firm might lead to the conclusion that workers' interests in the firm need not be safeguarded by mandatory laws, because those interests are already adequately protected by directors' paternalistic conduct. Contrary to Stout's view, even if there is an overlap between the interests of stakeholders and managers, management cannot be relied on to use its power to protect stakeholders. If management is insulated from shareholders by reductions in shareholder power, it is far more likely to use this insulation to pursue its own interests.¹⁰⁸ As Mitchell, O'Donnell and Ramsay state: 'whereas corporate law might be characterised as pro-managerialist, it would be an overstatement to say this necessarily entails positive support for labour or other non-shareholder groups'.¹⁰⁹ In effect, in the absence of mandatory laws safeguarding non-shareholder interests in the corporation, the director-centred perspective may at best remain a marginal influence on the actual conduct of corporate managers; at worst it will operate as an additional ideological justification for the hegemonic position of directors and corporations in contemporary capitalist societies.¹¹⁰

(b) The Democratic Concept of the Firm

In light of the shortcomings of some contemporary stakeholder theories, the democratic concept of the firm offers a useful additional or alternative theory to the director-centred, broad stakeholder vision of the corporation. Theories of corporate democracy are potentially compatible with both the idea that the disconnect between management and shareholders should be addressed by empowering shareholders,¹¹¹ and the idea that non-shareholder stakeholders' interests, such as the interests of workers, should be included by way of mandatory laws in corporate governance processes.¹¹² However, existing versions of the

106 Id at 687.

107 O'Connor, 'Labor's Role in the American Corporate Governance Structure', above n70 at 104.

108 Lucian Bebchuk, 'The Case for Increasing Shareholder Power' (2005) 118 *Harv LR* 833 at 841–842.

109 Mitchell, O'Donnell & Ramsey, above note 35 at 17.

110 See Harry Glasbeek, 'The Corporate Social Responsibility Movement — The Latest in Maginot Lines to Save Capitalism' (1988) 11 *Dalhousie Law Journal* 363; Therese Wilson, 'The Pursuit of Profit at All Costs: Corporate Law as a Barrier to Corporate Social Responsibility' (2005) 30 *Alt LJ*.

111 Conroy, above n74 at 28–29.

112 See, for example Janice Bellace, 'The Role of the Law in Supporting Cooperative Employee Representation Systems' (1994) 15 *Comparative Labor Law and Policy Journal* 441; Marleen O'Connor, 'The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation' (1993) 78 *Cornell LR* 899; Marleen O'Connor, 'Corporate Malaise — Stakeholder Stautes: Cause or Cure?' (1991) 21 *Stetson LR* 3; Kenneth Wedderburn, 'The Legal Development of Corporate Responsibility' in Klaus Hopt and Gunther Teubner (eds), *Corporate Governance and Directors' Liabilities: Legal, Economic and Sociological Analyses on Corporate Social Responsibility* (1984).

democratic theory of the firm focus less upon which stakeholders should participate in corporate governance and more so on what participatory mechanisms should be included in corporate governance. Moreover, for present purposes, union shareholder activism does not necessarily require a non-shareholder stakeholder justification, precisely because union members are operating as shareholders (rather than as workers) when they utilise the '100 shareholder rule' to participate in corporate democracy. Therefore, it is unnecessary here to examine how the democratic vision of the firm might justify the inclusion of non-shareholder participants in corporate governance processes. Instead, this section will clarify the general strengths of the democratic vision of the firm and suggest how that vision justifies shareholder activism by unions or any shareholder group. Democratic concepts and mechanisms not only justify shareholder activism but through such activism, democratic processes legitimate corporate power.

A democratic concept of the firm draws upon the democratic ideas that are applied to the relationship between citizen and state.¹¹³ This allows an analogy to be made between the constituent parts of a state and the constituent parts of a corporation. The accountability mechanisms of democratic civic governance (governance of the state) can then be used to inform corporate governance (governance of corporations).¹¹⁴ The board of directors might be likened to the legislature because corporation members elect it. Executive directors can be likened to the executive of governmental ministers because both operate as appointed leaders. Management of the corporation, which has to account to the board of directors, is similar to the public service, which has to account to Parliament through Ministers.¹¹⁵ Finally, shareholders — as members of a corporation — have a right to vote akin to the right to vote of the general electorate.¹¹⁶

The analogy between the state and the corporation is substantiated by recent empirical research that punctures classical liberal understandings of the body politic.¹¹⁷ Many decades ago the legal realist movement in the mid-20th century had attempted to discredit classical liberalism. Roscoe Pound, a leading legal realist, stated:

We are properly dissatisfied with the picture of the self-sufficient individual in an economically self-sufficient neighbourhood and freely competing with his [sic] neighbours in an economic order based on free competitive competition We know very well that this is not a true picture of the society of today.¹¹⁸

113 See Mary Stokes, 'Corporation Law and Legal Theory' in William Twining (ed), *Legal Theory and Common Law* (1986) at 180. One of the seminal works on the democratic or political model of the firm is Earl Latham, 'The Body Politic of the Corporation' in E Mason (ed), *The Corporation in Modern Society* (1960).

114 Julian Blanchard, 'Corporate Accountability and Information: Lessons from Democracy' (1997) 7 *Australian Journal of Corporate Law* at 326.

115 Duffy, above n72 at 438.

116 Bottomley, above n104 at 296.

117 See Sarah Anderson & John Kavanagh, *The Top 200: The Rise of Global Corporate Power* (2000): <http://www/ips-dc.org/downloads/Top_200/pdf> (18 October 2005). This report found that of the 100 largest economies in the world, 51 are corporations.

The principal feature of market economies that leads to the decay of the classical liberal vision is the concentration of power in trading and financial corporations. In what Roberto Unger describes as ‘post-liberal societies’, ‘institutions that rival the state in power’ emerge.¹¹⁹ Thus contrary to classical liberalism — because business entities approximate the size and influence of governments — the state is not the only concentration of power that threatens individual autonomy.¹²⁰ Corporations also increasingly have an influence on individual life.¹²¹ The manner in which corporations are able to influence the shape of the contemporary body politic is akin to the way the state can act to constitute aspects of society. Thus, it cannot be presumed that a sphere of individual autonomy precedes state intervention into the economy because it makes little sense to talk of an unconstituted market order.¹²² In the globalised era, the expansion of corporate intervention into private life has been fuelled by financial deregulation, trade liberalisation, privatisation of government services and demutualisation of mutual societies.¹²³ These politico-economic developments that have transformed the contemporary body politic indicate that today the democratic vision of the business enterprise, based as it is on a state analogy, is more pertinent than ever.

A democratic concept of the firm has important implications for the role of shareholders, most relevantly in terms of their participatory rights. In this regard the voting analogy is the key to accountability in corporate governance. The legitimacy of the board and management in these ‘mini-democracies’ is that they have been elected by the shareholders (in the same way that the legislature’s position of power is justified by general elections). The fundamental power of shareholders to vote directors out of office should be a springboard that allows shareholders to conduct a wide variety of ongoing forms of monitoring ancillary to, or beyond, the election of the board.¹²⁴ This is because persons whose interests

118 Roscoe Pound, *Social Control Through Law* (1968) at 15.

119 Roberto Unger, *Law in Modern Society: Toward a Criticism of Social Theory* (1976) at 201.

120 See Berle & Means, above n71 at 313. The idea that corporations pose a threat to the state can be traced back to Thomas Hobbes’s Leviathan who stated that corporations were ‘lesser Common-wealths in the bowels of a greater, like worms in the entrayles of a natural man’: cited in Daniel Greenwood, in ‘The Semi-Sovereign Corporation’ *Legal Studies Research Article Series* University of Utah (2005), Research Article No. 05–04 at 2. The High Court made some moves towards recognising the power of corporations in *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 500, where Mason CJ and Toohey J stated ‘the resources which companies possess and the advantages which they tend to enjoy, ... are much greater than those possessed and enjoyed by natural persons’. For comment see Jennifer Hill, ‘Corporate Rights and Accountability: The Privilege against Self-Incrimination and the Implications of *Environment Protection Authority v Caltex Refining Co Pty Ltd*’ (1995) 7 *CBLJ* 127.

121 Greenwood, states that ‘our health, our ability to pay our mortgages, and our credit cards, our pensions, all depend on our corporate affiliation. Conversely, violations of our human rights are at least as likely from the corporations we work for as from our states. Corporations can dismiss us without hearing; ... corporations can search our desks without explanation or warning, or read our mail, or even prevent us from using our computers’: above n121 at 16.

122 Clifford Shearing, ‘A Constitutive Conception of Regulation’ in Peter Grabosky and John Braithwaite (eds), *Business Regulation and Australia’s Future* (1993).

123 Duffy, above n72 at 434–435.

124 John Pound, ‘The Rise of the Political Model of Corporate Governance and Corporate Control’ (1993) 68 *NYULR* 1003 at 1029.

are affected by decisions of large public or private institutions should be involved in the decision-making process to counter the tendency of such institutions to become bureaucracies managed in a top-down fashion.¹²⁵ The '100 shareholder rule' is one mechanism that can operate to counter undemocratic tendencies within corporations. It is central to the application of the democratic model of the firm in Australia because it allows meaningful participation by shareholders in corporate governance through an ongoing process of monitoring of corporate officers.

The application of democratic theory to companies is persuasive because it 'resonates with deeply held public notions about how large entities should be governed'.¹²⁶ The familiarity that people have with the representative government version of democracy provides added force to the democratic explanation of the corporation. Whilst the democratic conception of the corporation has not ascended as the dominant theory in corporate law and governance, there are signs that judicial pronouncements are beginning to be influenced by the comparison made between the corporation and representative democracy. For example, Justice Palmer has invoked the analogy of civic governance:

Just as in the body politic, so also in the body corporate, factions contend for power.... In the body politic the will of the majority is permitted to decide the contest as often as elections may lawfully be held. In the case of a public corporation, the will of the majority is permitted to decide the contest as often as members can muster sufficient numbers to invoke the right to requisition a meeting under s249D(1) for the purpose of a resolution under s203D(1).¹²⁷

There are limits to how far the analogy of civic governance can be applied as a description of existing governance structures in the corporate sphere. For example, a prominent feature of civic governance that has no parallel in corporate governance is that members of a corporation do not have equal voting power. Voting rights in a corporation are attached in equal proportion to the monetary value of an investment rather than to each shareholder.¹²⁸ This practical reality, however, does not preclude a normative argument that shareholders should have equal voting power in the same fashion as citizens of a democratic state.¹²⁹ Whilst recognising that there are practical differences between a state and a corporation, a corporation can still be seen as a species of political organisation or a different kind of body politic to the state (but a body politic nevertheless).¹³⁰ The civic governance metaphor has descriptive power because corporations have a requisite

125 See discussion of the theories envisioning the shareholder as participant in a political entity in Jennifer Hill, 'Visions and Revisions of the Shareholder' (2000) 48 *American Journal of Comparative Law* 39 at 52–53.

126 Pound, above n124 at 1035.

127 *NRMA v Scandrett* (2002) 43 ACSR 401 at 409 (Palmer J).

128 Duffy, above n73 at 438; Greenwood, above n121 at 14.

129 See Senator Andrew Murray's proposal, put forward during debate over the Company Law Review Bill 1997 (Cth), to establish at newly listed companies a dual board structure with the members of one body, the corporate governance board, being elected on the basis that each member of the corporation is entitled to one vote: Andrew Murray, Commonwealth, Senate, *Parliamentary Debates (Hansard)*, 24 June 1998 at 3919–3922. See also Andrew Fraser, *Reinventing Aristocracy: The Constitutional Reformation of Corporate Governance* (1998).

130 Bottomley, above n104 at 292–293.

democratic structure and internal system of governance which is common to all bodies politic.¹³¹ Furthermore, given the inadequate development of shareholder democracy under Australian corporate law, the democratic theory is useful as a prescriptive tool for promoting democratic developments in corporate governance.¹³²

(iii) *Shareholder Participation Must be Open to all Types of Shareholders*

The democratic vision of the firm and the ideal of corporate democracy justify mechanisms such as the ‘100 shareholder rule’ that facilitate shareholder participation by all kinds of shareholders. The fundamental basis of shareholder participation under *Corporations Act* is that any group of 100 ‘mums and dads’ should be able to activate participation rights. The criticism most often levelled at trade union groups is that unions may seek to pursue the interests of their members at the expense of the corporation and other shareholders.¹³³ But any group of 100 shareholders (and for that matter company management) will have motivations that may diverge from the interests of the shareholders as a whole. Green groups will emphasise environmental measures at the expense of short-term profits; small shareholder groups may be sticklers for rules safeguarding minority shareholder rights more than the majority of passive shareholders. In a similar way trade union groups will emphasise workers’ rights more than other shareholder groups. The democratic perspective underwrites all of these shareholder perspectives because it concentrates on the intrinsic value of shareholder participation.¹³⁴ To imply that trade unions should not be allowed to put shareholder resolutions amounts to an

131 Hill, above n125 at 51–57.

132 The potential for democratic theory to underpin progressive corporate law reform is signified by the business lobby’s attempts to discredit moves to expand shareholder democracy. See discussion of the limits of shareholder democracy in Business Council of Australia, Australian Institute of Company Directors and Chartered Secretaries Australia, *Company + Shareholder Dialogue: Fresh Approaches to Communication Between Companies and their Shareholders: Discussion Paper* (2004).

133 See Schwab & Thomas, above n70 at 1023.

134 The shareholder primacy perspective which concentrates on the accountability of managers to shareholders is also consistent with democratic theory because it can accommodate shareholder interests other than the promotion of wealth. This highlights the distinction between the shareholder value perspective and the shareholder primacy perspective. The shareholder value perspective holds that the exclusive mandate of managers is to increase the value of company shares. Berle concludes that ‘all powers granted ... to the management of a corporation ... are ... exercisable only for the rateable benefit of all the shareholders as their interest appears’: Adolf Berle, ‘Corporate Powers as Powers in Trust’ (1930–1931) 44 *Harv LR* 1049 at 1049. See also Friedman who believes that managers must conduct themselves in accordance with the desires of the owners of business ‘... which generally will be to make as much money as possible ...’: Milton Friedman, ‘The Social Responsibility of Business is to Increase its Profits’ *New York Times Magazine* (13 September 1970) at 32. These perspectives conflate maximising shareholder values with shareholder interests in general. Maximising shareholder value is not necessarily the only corollary of a shareholder primacy perspective. The shareholder primacy perspective merely makes the broader claim that managers must act exclusively in the interests of shareholders. In other words, although the shareholder value perspective is a more economic and at times dogmatic derivation of the shareholder primacy perspective, the difference between the two visions of the corporation is not only one of degree; it is also a difference of substance because the shareholder primacy perspective allows for shareholders to have goals other than the maximisation of the monetary value of their shares.

attack on the '100 shareholder rule' itself. Although it is a frustrating law to contend with for managers 'just wanting to get on with the job', certain minimum democratic mechanisms such as the 100 shareholders rule are crucial to a corporation's legitimacy.

Another criticism often levelled at union shareholder activism is that it is a very costly exercise to put resolutions that do not have a chance of receiving a majority of shareholder votes. In the first place, it is relatively inexpensive to allow shareholders to propose resolutions at a pre-planned company meeting such as an AGM. Moreover, this kind of criticism shows a poor appreciation of the application of democratic principles in the corporate sphere. It is the *practice* of democracy or the carrying out of democratic due process that serves a legitimisation function in the corporate sphere, in a similar fashion to the political sphere.

5. Reactions to Union Shareholder Activism

A. Moves to Stifle Union Shareholder Activism

Unfortunately some corporations and the Howard federal government have apparently failed to recognise the value that union shareholder activism can bring to corporate governance. Consequently, there have been a number of reactions from these actors designed to quell the rise of union shareholder activism in Australia.

(i) Boral's deployment of s136(3)

In response to the shareholder proposals put by the Boral Ethical Shareholders, Boral took measures to eliminate aspects of minority shareholder activism in the future. Boral management put a resolution at the 2003 AGM ('Resolution 3') that the shareholders approve the adoption of a new corporate constitution. One of the main differences between the new Boral constitution and the pre-existing Boral corporate constitution was that, under the new constitution, any special resolution seeking to modify or repeal a constitutional provision did 'not have any effect' unless it was approved by the board or unless it was proposed by shareholders with at least 5 per cent of the shareholding.¹³⁵ This resolution relied on s136(3) of the *Corporations Act* which in effect provides that a corporation's constitution may state that a special resolution does not have any effect unless a further requirement is complied with. Resolution 3 was passed by at least 93 per cent of the votes polled. Whilst it does not theoretically eliminate the right of a small group of Boral shareholders to put a special resolution to change the corporate constitution, it effectively renders that right an empty vessel; even if members approve of a special resolution to change the Boral constitution put by 100 members with less than 5 per cent of the shareholding, it would also, according to the provisions of the Boral constitution, have to be approved by the Board to have any effect. In other words, 100 shareholders can *put* a resolution to change the Boral constitution but it will have no *effect* if it does not meet special requirements. This was an attempt, (that appears to have gone unchallenged) to insulate Boral from future

¹³⁵ Boral, *Notice of Meeting 2003*, above n27 at 5.

shareholder activism aimed at changing the Boral constitution. Even though it is unlikely that a minority shareholder resolution will achieve a majority vote, this manoeuvre by Boral completely undermines the whole purpose of running a shareholder campaign to change the Boral constitution.

Bryan Frith argues that s136(3) was not designed to be used ‘to severely limit the scope of another *Corporations Act* provision’ (in this case the ‘100 shareholder rule’); rather s136(3) was probably aimed at making it difficult ‘to remove entrenching provisions in constitutions’ of ‘co-operatives, rather than listed companies’.¹³⁶ Boral’s deployment of s136(3) is an attack on the participatory rights of shareholders.¹³⁷ If law-makers do not address this restriction on shareholder democracy, it will set a dangerous precedent for other corporate managers to follow where they may wish to stifle shareholder activism by unions or for that matter activism by any small group of minority shareholders.

(ii) *Proposals to Abolish the Right to Requisition a Meeting*

In addition to the right of 100 shareholders to put a resolution at a general meeting, a group of 100 shareholders has the ability to requisition a general meeting.¹³⁸ This right has rarely been exercised by shareholders (aside from rare cases such as that of NRMA) indicating that shareholders, including trade union groups, have not abused the right to requisition meetings but rather have chosen to exercise restraint in exercising the right.¹³⁹ Despite this apparent restraint, the Howard government moved to eliminate this right of 100 shareholders by introducing legislative provisions that allowed the government to pass a regulation whereby a different number of members would be needed to call a meeting for a specified class of corporation.¹⁴⁰ Then the government introduced a regulation that provided that company meetings must be requisitioned by at least 5 per cent of the members. However this regulation was disallowed when the Australian Labor Party and the Democrats combined forces in the Senate.¹⁴¹ In 2005, the Howard government has renewed its efforts to reform the right to requisition a meeting. An exposure draft bill has been released (versions of which date back to 2002) proposing to abolish the ability of 100 shareholders to requisition a meeting.¹⁴² The release of the draft bill followed persistent lobbying from business groups such as Chartered Secretaries Australia, who strongly opposed the shareholder right to requisition a

136 Bryan Frith, ‘Right to Clip Board Powers’ *The Australian* (2 December 2003) at 20.

137 Interestingly, at the Boral AGM the shareholder’s association, rather than the TWU, was the most vocal critic of Boral’s resolution to change its constitution. Their position was that Boral was being hypocritical in allowing shareholder to decide, but by putting a resolution that limits shareholder rights. See my personal notes from the 2003 Boral AGM.

138 Subsection 249D(1)(b) of the *Corporations Act*.

139 Between 1998 and 2002, only five special general meetings had been requisitioned by shareholders with at least five per cent of the shareholding or by 100 shareholders: Stephen Bottomley, ‘Submission to the Parliamentary Joint Committee on Corporations and Financial Services: Inquiry into the Exposure Draft of the Corporations Amendment Bill (No 2) 2005’: cited in Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into the Exposure Draft of the Corporations Amendment Bill (No 2) 2005* (2005) at 6.

140 See discussion in Milne & Wakefield Evans, above n6 at 287, of s249D(1A), introduced by the *Corporate Law Economic Reform Program Act 1999* (Cth).

141 Duffy, above n72 at 441.

meeting.¹⁴³ Rather than recognising that it is important to maintain advanced aspects of shareholders' participation rights in Australia, the Howard government has chosen instead to use its legislative powers to limit shareholder rights. The rationale for the repeal of this aspect of the '100 shareholder rule' is that '[t]he rule allows for special interest groups to threaten the imposition of large and unnecessary costs on companies, for publicity purposes or to influence negotiation with the corporation ...'.¹⁴⁴ Clearly the amendments are aimed at potential (rather than actual) activation of the right to requisition general meetings by shareholder groups such as those organised by trade unions.¹⁴⁵ The abolition of the right of 100 shareholders to requisition a meeting has been supported by the majority report of a Senate Committee Inquiry.¹⁴⁶

In the governmental discussions on the proposal to abolish the right to requisition meetings there is little appreciation of the pre-existing common law limitations on the exercise of the right. The right to requisition a meeting is qualified in a number of ways by existing case law. First, directors may refuse to requisition a meeting where the meeting would not be held for a proper purpose.¹⁴⁷ Secondly, where a requisition relates to a matter solely within the authority of directors, the directors may refuse to call the meeting.¹⁴⁸ Thirdly, in a case where a requisition was declared invalid, it has been indicated that a meeting cannot be requisitioned to harass directors.¹⁴⁹

What such proposals to abolish shareholder rights by legislative amendments trivialise is the manner in which shareholder participation in corporate governance can act as a check on management power. This was one of the reasons for expanding participatory corporate governance mechanisms by the amendment of federal legislative provisions.¹⁵⁰ During the course of debate over amendments proposed in the *Company Law Review Bill 1997* (Cth), Senator Stephen Conroy cited the following quote from the *Australian Financial Review* which is instructive on this point:

142 Corporations Amendment Bill (No 2) 2005 (Cth) Exposure Draft, Section 1. Previously the Chief Executive Officer of NRMA described a number of shareholder initiated requisitions of general meetings as 'frivolous actions by a handful of people': quoted in Milne & Wakefield Evans, above n6 at 286. Also, members of the judiciary have been unsettled by the implications of s249D. Justice Windeyer for example, in relation to s249D, has commented: 'It seems to me extraordinary that ... a general meeting can be summoned by requisition of 100 members ...': *NRMA v Snodgrass; NRMA v Dupree* (2002) 42 ACSR 371 at 376.

143 See letter dated March 2003 to Treasury from Tim Sheehy, then the Chief Executive of Chartered Secretaries Australia, stating that the Chartered Secretaries supported the removal of the right of 100 shareholders under s249D(1) and indicating it supported alternative higher thresholds: <http://wwwcsaust.com/Content/NavigationMenu/NewsAdvocacy/Submissions/CorpAmendBill_response21.3.03.pdf> (15 May 2006).

144 Explanatory Memorandum the Corporations Amendment Bill (No 2) 2005 (Cth) Exposure Draft at 5.

145 See *ibid.*

146 Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into the Exposure Draft of the Corporations Amendment Bill (No 2) 2005*.

147 See s249Q of the *Corporations Act*. For comment and relevant cases, see Paul Redmond, *Companies and Securities Law: Commentaries and Materials* (4th ed, 2005) at 353.

148 Milne & Wakefield Evans, above n6 at 288; Ford, Austin & Ramsay, above n97 at 270–271.

149 See *Australian Innovation Ltd v Petrovsky* (1996) 21 ACSR 218, cited in Ford, Austin & Ramsay, n98 at 270.

[I]n reality the corporate market-place will not work efficiently until the shareholder class becomes better organised to discipline the clubby world of Australian boardrooms. Unfortunately, the boards too often act to disempower shareholders.¹⁵¹

The concept of directors' accountability to shareholders was also raised in parliamentary debate surrounding the Australian Government's temporarily successful move to abolish the 100-shareholder threshold for requisitioning meetings of public companies. In that debate Senator Robert Brown described the move as 'anti-democratic' and that it indicated to small shareholders that they were irrelevant in corporate governance.¹⁵²

In Australia, the right to requisition a meeting under the '100 shareholder rule' is a principal mechanism by which the principles of shareholder democracy can be put into practice. By abolishing this rule the ability of Australian shareholders to substantively exercise their democratic rights within corporations will be significantly reduced. Accordingly, abolishing this crucial part of the '100 shareholder rule' will significantly diminish the overall value of shareholder democracy in Australia.

(iii) *Litigation Aimed at Stifling Union Shareholder Activism*

Following the Finance Sector Union putting a resolution at the Commonwealth Bank's AGM in November 2004 calling for an independent assessment of the Bank's restructuring policy, the bank commenced a federal court action against the union. The bank has alleged that the shareholder activism by 150 to 200 bank staff was unprotected industrial action. The bank has also alleged the action was a form of illegal coercion in breach of the coercion provisions of the *WR Act*¹⁵³ that was designed to pressure the bank into making an enterprise agreement with the union.¹⁵⁴ If the bank is successful in this litigation the union could be liable for large fines. Professor Ian Ramsay is quoted as saying that a decision in favour of the bank will have a 'chilling effect' overall on union shareholder activism.¹⁵⁵ It is, however, difficult to see how a court could adequately justify a conclusion that the union shareholder activism in contention amounts to a genuine case of illegal coercion. Coercion implies that the bank was given no option but to concede to the union demands. 150 workers could not put any significant economic pressure on the bank.¹⁵⁶ Moreover, it would be difficult to characterise the action as having the

150 Similar justifications regarding the notion that directors and officers ought to be accountable to shareholders were the driving force behind the introduction of the shareholder proposal rule in the United States. See Christine Ayotte, 'Reevaluating the Shareholder Proposal Rule in the Wake of *Cracker Barrel* and the Era of Institutional Investors' (1999) 48 *Catholic University LR* 511 at 512.

151 'Corporate Oligarchy' *Australian Financial Review* (1 April 1998) at 12, cited by Stephen Conroy, Commonwealth, Senate, *Parliamentary Debates (Hansard)*, 24 June 1998 at 3896.

152 Cited in Milne & Wakefield Evans, above n6 at 290.

153 See former s170NC of the *WR Act* (the newly numbered provision in the *WR Act* as amended by Work Choices is s400).

154 'FSU Unlawful in AGM Activity: CBA' *CCH News Headlines Email Reports* (3 August 2005).

155 Stephen Long, 'Change of plan for union members are making their presence felt at AGMs: New Tactic for Unions' Australian Broadcasting Corporation Transcripts (10 July 2005).

156 CCH, above n154.

purpose of coercion given that the workers were pursuing shareholder issues that received a significant proportion of votes from the bank's shareholding.¹⁵⁷ If the court finds that the bank has successfully established it was coerced by the union, then this would be an attack on the ability of workers to exercise their rights as shareholders of a corporation.¹⁵⁸

6. Conclusion

Recently the rights of trade unions and their members under Australian labour laws have been severely eroded. Unions and their members are becoming increasingly marginalised in a hostile workplace bargaining environment in which union bargaining strategies are becoming increasingly impotent. This makes the denial of corporate governance rights for Australian workers all the more problematic. In recent years there has not been any significant improvement in the role employees play in corporate governance. There has not been any significant increase in openness to the idea of corporate social responsibility towards a broad variety of stakeholders including employees.¹⁵⁹ Nor have there been any significant steps taken to achieve in practice team production theories that emphasise the importance of human capital.¹⁶⁰ Consequently, rather than acquiesce to this state of affairs, trade unions have ingeniously used the '100 shareholder rule' to extend the site of labour political activism directly into the corporate governance arena. This development is significant because trade unions have begun to pursue workers' interests within the confines of the shareholder primacy paradigm of corporate governance.¹⁶¹ In this way they have broken free of the limitations of a regressive labour law schema and the lack of other participatory corporate governance mechanisms. There is a very real need for this kind of collective labour interest to be voiced in a corporate governance context where both shareholder and management interests are collectivised.¹⁶² Indeed, it is a matter of practical necessity that unions continue to explore the potential of participation as shareholders in general meetings as a much needed addition to the dwindling supply of trade union methods of influencing corporate strategy.

Union shareholder activism in Australia has involved a strategic effort to align employee and shareholder interests. However, even where trade union shareholder activism is driven by collateral collective bargaining concerns it should not be disallowed. The best way to deal with these concerns is to let the shareholder electorate decide. Furthermore, union shareholder activism is an intrinsically legitimate part of corporate governance if viewed from a democratic perspective. The democratic theory of the corporation resurrects shareholder participation — by any type of shareholder — as one of the predominant corporate governance processes. Without the ability of a small group of shareholders to participate in corporate governance, the power of those controlling large trading and financial

157 There were 48 million votes, or 11 per cent of the votes, in favour of the union resolution: Long, above n155.

158 Ibid.

159 Dodd, above n62; references, above n63.

160 See Lynn Stout, 'Power to PeopleSoft' *Wall Street Journal* (15 July 2003) at 132.

161 See O'Connor, 'Organised Labor as Shareholder Activist', above n70 at 1347.

162 Hill, above n125 at 63.

corporations would rightly be called into question. In the context of shareholder passivity, the actions of self-motivated corporate activists (such as unions) in making directors and officers accountable takes on increased importance. The existence of democratic corporate governance rules on the statute books cannot alone justify large-scale corporate power. Democratic corporate laws can only serve legitimating functions when actually put in to practice. Union shareholder activism precisely fulfils this vital function: it promotes the practice of corporate democracy. The absence of such shareholder activism would place a democratic justification of the large-scale corporation in jeopardy.

Despite the legitimate use by trade unions of existing corporate laws to call managers to account, corporations and the federal government have moved to repress union activism under the '100 shareholder rule' just as the government and companies have acted to block union activism in the industrial relations arena. These initiatives to repress union shareholder activism shift corporate governance away from genuine corporate democracy, and towards Frug's dystopia where corporate law operates as a hollow ideological subterfuge that masks undemocratic, large-scale bureaucracy. Accordingly, initiatives to stifle union shareholder activism should be discouraged.

Clearly, one preferable way of dispensing with complaints from directors and other corporate officers that union shareholder activism is mainly pursued when unions are frustrated in collective bargaining campaigns, would be to make labour laws adequately include trade unions in workplace governance structures. This process could be initiated by making it mandatory for employers to recognise unions in collective bargaining and instituting a positive right to strike. Additionally, it is also desirable that over time complementary corporate laws can be crafted that recognise employee interests. Such laws might foster management/trade union co-operation on strategic corporate concerns. The democratic theory of the corporation assists to move debate over appropriate corporate governance structures forward. It not only neatly captures the rationales for current mechanisms of shareholder participation but could also be used to justify the creation of new legal rules that would empower shareholders and workers within corporate governance. The ultimate goal for a just society is to recast large profit-making enterprises as mini-democracies.