# Union Shareholder Activism at Boral: The Rocky Path Towards Corporate Democracy

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[**Abstract:** *This paper 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 AGM 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.*]

## I. INTRODUCTION

Australian trade unions members have begun to participate as shareholders in general meetings of publicly listed companies. This aspect of trade union involvement in corporate governance, and its causes, justifications and reactions to it, is the focus of this paper. [1] The specific legal analysis undertaken is about the operation of the law relating to the ability of a small group of labour shareholders to requisition company meetings and propose shareholder resolutions at general meetings including annual general meetings. The provisions in the *Corporations Act 2001* (Cth) regarding this are known as the '100 shareholder rule'.

The first purpose of this paper is to explain 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 some of the developments in the Australian regulatory, industrial and corporate arrangements that have prompted trade union moves to become active shareholders. Increasingly hostile employer strategies made

[1] The author's research in to this field was prompted by the author's involvement in union shareholder activism at the Boral Annual General Meeting in 2003 which is discussed in this paper. An earlier oral and written version of this paper was presented for the purposes of assessment for the Master of Laws programme in 2004 at the University of Sydney in Professor Lynn Stout's subject 'Law and Economics in Contemporary Corporate Law'. At a late stage in this research my attention was drawn to extensive research by Kirsten Anderson and Professor Ian Ramsay in this field. For their illuminating views see Kirsten Anderson and Ian Ramsay 'From the Picketline to the Boardroom: Union Shareholder Activism in Australia' Research Report, Centre for Corporate Law and Securities Regulation and Centre for Employment and Labor Relations Law, The University of Melbourne, 2005.

possible by regressions in Australian labour law and the adherence to a shareholder 'value' model of the corporation that justifies the exclusion of workers in corporate decision making, have necessitated such a union response. Faced with the limits of voicing 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, Australian trade unions are increasingly invoking the innovative measure of shareholder activism to pursue workers' voice within corporations.

Secondly, this paper aims to justify union shareholder activism by showing how it might effectively contribute to making 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. The Transport Workers' Union of New South Wales' ("**TWU**") involvement in the Boral annual general meeting in October 2003 will be assessed as a case study of union shareholder activism. 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 in which systems of civil governance must justify the existence of large scale public bureaucracy.[2] Corporate law must be more than a mere chimera; accountability mechanisms on the statute books must be actually operative, that is *put into effect* to truly have a legitimating role.[3] Trade union shareholder activism triggering the 100 shareholder rule is one such example where corporate law accountability mechanisms are actually made operational. The operation of substantive shareholder rights such as the '100 shareholder rule' are of intrinsic value if corporate law is to make any genuine contribution to the ideal of corporate democracy.

Finally this paper 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.

## II. THE 100 SHAREHOLDER RULE AND THE TWU ACTION AT BORAL

The TWU action at the Boral Annual General Meeting in October 2003 in Sydney is one of the major involvements of an Australian trade union in a public company general meeting to date and raises a host of issues regarding direct participation by

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[2] Gerald Frug, 'The Ideology of Bureaucracy in American Law' (1984) 97 *Harvard Law Review* 1277-1388.

[3] This 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'. Pound's major purpose in making this distinction was primarily so 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) *Statute Law Review* 84-104, 96.

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 workers who are members of unions, the crucial issue is the question of the threshold shareholders must fulfill to validly put a resolution or call a company meeting.[4] 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 easy to fulfil by minority groups wanting to undertake shareholder activism. Under the *Corporations Act 2001* (Cth) ("**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 annual general meeting (that is, participation in a meeting that would have occurred whether or not certain shareholder concerns were proposed) rather than a meeting requisitioned by shareholders to raise specific concerns (although in theory the TWU could have requisitioned a meeting).[5] Consequently the aspect of the 100 shareholder rule invoked by the TWU is found in section 249N of the Corporations Act. That section provides that members with at least 5 per cent of the votes that may be cast at a general meeting *or* at least 100 members who are entitled to vote at a general meeting, may put a resolution at a general meeting. Provided that the draft resolution fulfils certain requirements[6] the company must, at its own cost, give notice of, and distribute the resolution to all members.[7]

In September 2002 a shareholder group called the "Boral Ethical Shareholders" was formed.[8] By mid 2003 the shareholder group had approximately 140 members. Boral is a public company listed on the Australian Stock Exchange. Consequently members of the Boral Ethical Shareholders purchased shares directly on the share 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 because they mainly consisted of individuals who were members or ex-members of the TWU, who had either recently been engaged, or were engaged by Boral in its transport operations. These individuals held common concerns about the management of Boral, and in particular the occupational health and safety performance of the company. Moreover, the Boral Ethical Shareholders had the organisational assistance of the TWU.[9]

The main resolutions that the Boral Ethical Shareholders put at the 2003 annual general meeting 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 Annual General Meeting, TWU members had raised concerns about

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[4] See Simon Milne and Nicola Wakefield Evans, 'Shareholder Requisitions – The 5%/100 Member Provision' (2003) 31 *Australian Business Law Review* 285-291; Paula Darvas 'Section 249D and the 'Activist' Shareholder: Court Jester or Conscience of the Corporation?' (2002) 20 *Companies and Securities Law Journal* 390-408, 390.

[5] Members with at least 5 per cent of the votes *or* at least 100 members who are entitled to vote at a general meeting can cause the directors to requisition a general meeting; section 249D(1) of the *Corporations Act.*

[6] Section 249O of the *Corporations Act*.

[7] Section 249O and 249P of the *Corporations Act.*

[8] *Safety Policy and Practice at Boral Limited* Transport Workers Union (NSW), Sydney, 2003.

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

safety at various Boral concrete sites. Boral's primary business is in building and construction materials. As at 30 June 2005, Boral employed a total of 15,179 people in Australia, the USA and Asia. In addition Boral engaged some 5,000 contractors. 10,000 of those employees are located in Australia.[10] Approximately 65% of Boral's workforce fits in to the blue collar category. By far the largest aspect of its male-dominated workforce (approximately 45%) is engaged in plant and transport operations.[11] Transport workers are engaged in concrete & cement, quarries, asphalt, general transport and brick and tile aspects of Boral's business. In 2002 Boral increased its profit by 51% to $192 million.[12] At the same time the company's Performance Enhancement Programs delivered $112 million in operational improvement and cost savings.[13] This profit trajectory continued in 2003 with profit up by 47% to 283 million.[14] In 2005 Boral profit was 377 million and the Performance Enhancement Programs delivered $106 million dollars in operational costs savings during 2005.[15] Thus the queries raised were that Boral, a company which prides itself in delivering "shareholder value" and having a "market driven focus",[16] was implementing an ongoing cost cutting program that was adversely affecting the level of investment in capital improvements and maintenance at Boral concrete sites.

A safety audit of Boral concrete sites conducted by TWU officials authorised to conduct safety inspections under the *Occupational Health and Safety Act* 2000 (NSW) ("**the OHS Act**") indicated that Boral was not addressing safety issues in a timely manner or safety concerns raised by workers simply failed to get addressed at all. It also found that while formal structures for OHS consultation existed they were not functional and did not play a significant role in resolving safety issues at Boral concrete sites.[17] This raised the issue of whether the ongoing cost cutting by Boral operated as a disincentive to invest in safety improvements and maintenance. [18] Following the TWU safety audit, a number of safety correction notices were issued by the TWU to address OHS issues at Boral sites. Under the OHS Act these correction notices serve as formal notification to an employer of the hazards identified. The inspections were carried out in June 2003 and subsequently the notices issued. Two weeks later reinspections were carried out and it was found that little or nothing had been done to eliminate or control the risks identified at the majority of sites. The union then wrote to Boral regarding the risks identified in the occupational health and safety inspections of Boral. When the union did not receive an adequate reply from Boral it referred the OHS audit results to Workcover.[19] The findings of the OHS audit and the lack of adequate response to it by Boral, suggested that there could be a disconnect between Boral's safety policy and practice. Boral had developed corporate policies that pronounced a commitment to safety but often these had failed to be

[10] Boral *Sustainability Report 2005*, 5-7.
[11] Ibid, 7.
[12] Boral *Annual Report 2002*, 3
[13] Ibid, 8.
[14] Boral *Annual Report 2003*, 12.
[15] Boral *Annual Report 2005*, 1, 11.
[16] Boral *Annual Report 2003*, 17.
[17] TWU above note 8, 3.
[18] TWU, above note 8, 2.
[19] Ibid, 4.

properly implemented at the workplace level.[20] The TWU and its members were well positioned to document this disconnect. Whilst the 2002 Boral Annual Report indicated substantial improvements in the rate of lost time injuries,[21] the union argued that these indicators were encouraging but ultimately inadequate representations of the occupational health and safety performance of Boral for a variety of reasons. These included Boral safety disclosure was 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 a committee dealing with safety) and shareholders needed independent auditing of occupational health and safety practices to ensure transparency and implementation of policies.

## 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 relevant inspections under the OHS Act and put significant resources into attempting to gain improvements at Boral concrete sites under occupational health and safety laws. This process under safety laws, based as they are on the Robens philosophy[22] that emphasizes the shared interests of employers and employees, had failed to deliver satisfactory outcomes for the TWU in this instance.[23] Accordingly, the union turned to an alternative or additional strategy that envisaged shareholders and workers having a common interest in improving workplace health and safety. Tony Sheldon, the secretary of the TWU stated:

> Boral has told us that they are comfortable with their commitment to safety performance and that there is a strong culture of safety within the company. Our research suggests that there could be a disconnect between Boral's stated safety policy and its implementation and that an externally audited safety system that conforms to the Australian standard is needed to rectify this. 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.[24]

Prior to these views being expressed by the TWU leadership, a BT Financial Group report commissioned by three institutional shareholders had presented workplace safety as a corporate governance issue.[25] The report stated that the proper management of workplace safety risks was essential to the creation of long term and sustainable shareholder value.[26] If a company does not manage workplace safety well this will lead to costs associated with the enforcement of occupational health and safety laws and costs associated with loss of corporate credibility, image or

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[20] See Boral *Annual Report* 2002 where it is stated the "Company is committed to providing safe and healthy working conditions for all people involved in our business". Ibid, 5-6.
[21] Boral *Annual Report* 2002.
[22] See Committee on Safety and Health at Work (Chaired by Lord Robens) *Safety and Health at Work*, London, 1972.
[23] 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 *Australian Journal of Labour Law* 95-119.
[24] TWU, above note 8, 1.
[25] *Workplace Health and Safety Governance*, BT Finance Group, April 2003. The Report was commissioned by the Public Sector Superannuation Scheme, the Commonwealth Superannuation Scheme and the Catholic Superannuation Fund.
[26] Ibid, 1. **Use James Hardie Example of public woes**

reputation.[27] **[ OHS cases against Boral]** 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 company is doing to effectively identify, assess and control work safety risks.[28]

### 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.[29] The first resolution proposed by the Boral Ethical Shareholders at the 2003 Annual General Meeting (**"Resolution 9**") was aimed at establishing structures to confirm that Boral was properly implementing its safety policies. It involved inserting a new article into Boral's corporate constitution (by special resolution) that would establish a board committee responsible for safety, health and the environment, appoint an independent safety auditor and measures that required more stringent reporting on safety in Boral annual reports. The group then put five resolutions designed to shift the decision of how to reward Boral's management team by linking incentives to safety targets and allowing the shareholders to determine the remuneration of directors. The second resolution proposed by the group ("**Resolution 10**") provided for an amendment of the corporate constitution (by special resolution) so that the company 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. The sixth proposal ("**Resolution 14**") provided for the amendment of Boral's senior executive remuneration policy to link 30% of the short term incentives to the achievement of safety targets set by the proposed Safety, Health and Environment Board committee. None of these proposals received a majority of votes polled. But as the analysis in Part IV of this paper below demonstrates, even proposals that do not formally succeed can still lead to positive outcomes for workers and shareholders.

## III. 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 annual general meeting, similar actions by shareholder groups organised by trade unions have been undertaken at other company general meetings. At Rio Tinto's annual general meeting in 2000 the Construction Forestry Mining and Energy Union put a resolution calling on the company to appoint an independent deputy chairman and independent non-executive

[27] Ibid. 2.
[28] Ibid, 4, 8.
[29] TWU, above note 8, 14.

directors. The CFMEU also put a resolution urging Rio Tinto to adopt International Labour Conventions on workers' rights including rights to collective bargaining.[30] At the Commonwealth Bank of Australia's annual general meeting in November 2004, in light of significant projected job losses at the bank, 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.[31] In October 2004 the Australian Workers' Union put resolutions regarding executive remuneration and the job tenure of directors at the Annual General Meeting of Bluescope Steel.[32]

Why have these actions come about? 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 firm.[33] Perhaps one of the triggers of this scholarly pre-occupation, is that corporate law in Australia has never substantively emphasised the inclusion of employee voice in corporate governance; from within the Australian corporation the voice of employees as *employees* remains muted and marginal. Additionally, regressions in Australian employment law in recent decades, whereby recognition of management of perspectives has been at the expense of employee and trade union protections have diminished the ability of employees and trade unions to advocate their concerns from a position outside the corporation. This marginalisation of workers in Australian public and corporate life 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.[34] 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.[35] Registered trade unions thus became the "exclusive spokespersons" before industrial tribunals for Australia's

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[30] John McCarthy 'Union Dons New Garb to Move into the Boardroom' *Courier Mail* 22 May 2000, 15.

[31] Blair Speedy 'Board to Face Tough Questions' *The Australian*, 1 November 2004, 32; Geoffrey Newman 'CBA Chief Faces Protest Vote' *The Australian* 6 November 2004, 36; 'Commonwealth Bank of Australia – 2004 Annual General Meeting – Chairman's Address' *Regulatory News Service* 7 November 2004.

[32] Geoffrey Newman, 'Union Wades in at steel AGM' *The Australian* 20 October 2004, p25;.'BlueScope AGM gets workers' message' *Workers Online*, 21 October 2004

[33] See references at note 88 below.

[34] Richard Mitchell, Anthony O'Donnell and Ian Ramsay *Shareholder Value and Employee Interests: Intersections Between Corporate Governance, Corporate Law and Labour Law*, Research Report, Centre for Corporate Law and Securities Regulation and Centre for Employment and Labour Relations Law, University of Melbourne, June 2005, 33.

[35] Amanda Coulthard 'The Decollectivisation of Australian Industrial Relations: Trade Union Exclusion Under the *Workplace Relations* Act 1996 (Cth)' in Stephen Deery and Richard Mitchell (eds) *Employment Relations: Individualisation and Union Exclusion – An International* Study (Federation Press, Sydney, 1999) 48-68, 49.

working class.[36] Via compulsory industrial 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.[37] The 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.[38] Industrial awards were formulated and enforced by specialist industrial tribunals through centralised arbitration. Through these industrial awards industrial tribunals set wage and conditions for all employees whether or not those employees were union members or whether 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.[39] Additionally, this system of cooperative centralised industrial arbitration, for the most of the 20th century successfully discouraged employers from utilising an array of available common law sanctions against workers and unions involved in strike action.[40] However, beginning 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. The litigation leading to the decision in *Dollar Sweets Pty Ltd v Federated Confectioners Association and Others*[41] heralded the return of a more aggressive legal stance by employers in respect of strikes. Shortly after, the decision in *Ansett Transport Industries (Operations) Pty Ltd v Australian Air Pilots*[42] which required the union and several of its officers to pay 6.48 million dollars in damages confirmed how effective this strategy was for employers.

In the early 1990s protection of worker interests by way of collectivity in labour law began to be eroded. In 1993 the Keating Labour government introduced enterprise bargaining into Australian industrial relations. Enterprise bargaining was of a different legal nature than industry-wide arbitrated settlements. In particular, it meant that trade unions were not parties principal when engaging in voluntary bargaining which posed significant problems for trade union recognition.[43] Some commentators in the early 1990s saw these developments as the beginning of the Americanisation of Australian labour law.[44] Subsequent developments suggest that this prognosis was incisive. In the mid 1990s, with the election of a neo-conservative federal government that had an employer-centred industrial relations agenda, the entrenched position of unions and the idea of collectivism in the Australian industrial relations system began

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[36] Ron McCallum, 'Trade Union Recognition and Australia's Neo-Liberal Voluntary Bargaining Laws' (2002) 57 *Relations Industrielles* 225-249, 231.

[37] However, even under this protective system employers retained the authority to determine methods of production, the appropriate size and skills of the workforce employed. Thus trade unions, whilst being able to insist on the procedural obligations of employers in relation to job loss, were effectively excluded from involvement in key management decisions: Mitchell, O'Donnell and Ramsay, above note 34, 31-33.

[38] McCallum, above note 36, 227.

[39] McCallum, above note 36, 231.

[40] Keith Ewing, 'The Right to Strike in Australia' (1989) 2 *Australian Journal of Labour Law* 18-39, 18; Breen Creighton, 'Enforcement in the Federal Industrial Relations System: An Australian Paradox' (1991) 4 *Australian Journal of Labour Law* 197-225, 224.

[41] [1986] VR 383.

[42] [1991] 1 VR 637

[43] McCallum, above note 36, 235.

[44] Laura Bennett 'The American Model of Labour Law in Australia' (1992) 5 *Australian Journal of Labour Law* 135-157

to be dismantled. The provisions *Workplace Relations Act 1996*(Cth) ("*WR Act*") effectively reduced the role of unions to one of agents for the employee upon the employee's request.[45] Industrial awards began to have reduced influence because the focus of labour laws became achieving international competitiveness, productivity and flexibility through enterprise bargaining.[46] Significantly, the 1996 changes introduced a statutory individual agreement (the AWA) designed to individualise labour relations.[47] A new form of non-union collective agreement also became another way in which unions could be excluded from employment relations. However, AWAs and certified agreements still had to pass a "no disadvantage test" which measured agreements globally against a legal or award standard.[48]

One of the most significant aspects of the de-collectivisation of the determination of terms and conditions of employment was the downfall of trade union recognition. Union exclusion in the bargaining process was achieved by new legal concepts such as 'freedom of association' which had the effect of replacing the notion that labour laws should maintain union industrial strength with the right to not belong to a union.[49] Freedom of association laws operated to prevent trade unions from seeking preference for trade union members by way of clauses in industrial award or collective agreements.[50] Moreover, it became apparent that under the WR Act no legal mechanism existed to force employers to recognize 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.[51]

To add to the attack on the trade union's hitherto central role in industrial relations, the *WR Act* tightened restrictions on industrial action by trade unions. Industrial action during the negotiations for a new enterprise bargaining agreement was still theoretically possible. However, despite this apparent legal immunity, it was a negative and ambivalent immunity, hedged about with qualifications that provided no certainty to the industrial parties as to the legal status of any particular industrial action.[52] A pivotal High Court decision further limited the scope of potential strike action, requiring such action to pertain to a narrow concept of the employment relationship.[53] These laws were powerful disincentives to unions considering engaging in any strike action to pursue their industrial goals. Not only did such restrictions on strike action make "co-ordinated national or industry campaigns difficult to organise"[54] but every strike could potentially lead to lengthy and costly

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[45] Coulthard, above note 35, 51.
[46] Former subsections 3(a) and 3(b) of *Workplace Relations Act 1996* (Cth); Mitchell, O'Donnell and Ramsay, above note 34, 34.
[47] See Andrew Stewart, 'The Legal Framework for Individual Employment Agreements in Australia' Stephen Deery and Richard Mitchell (eds) *Employment Relations: Individualisation and Union Exclusion – An International* Study (Federation Press, Sydney, 1999), 18-47.
[48] Notably, AWAs were not measured against standards that a worker might be entitled to under a certified agreement. Stewart, above note 47, 36-37.
[49] Mitchell, O'Donnell and Ramsay, above note 34, 35.
[50] McCallum above note 36, 237.
[51] 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 note 36, 238, 241.
[52] Friend, W 'The Right to Strike' (1998) 23 *Alternative Law Journal* 95-96, 95.
[53] *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 209 ALR 116 ; (2004) 133 IR 49.
[54] Mitchell, O'Donnell and Ramsay, above note 34, 35.

litigation. Consequently unions were largely stripped of their main weapon used to assert bargaining power– the (legal) strike.

These reforms rapidly achieved one of the government's chief goals – a trend towards the de-unionisation of the Australian workforce and the marginalisation of unions in formal industrial relations institutions. Aside from the fact that less than 25% of the Australian workforce is unionised, where individuals do belong to a union, union exclusion and individualisation strategies made possible by regressions in Australian labour law have provided employers with sophisticated methods of avoiding dealing directly with unions.[55] Where unions are still able to participate in collective bargaining their bargaining power has been substantively eroded. Many unions have been forced to agree that established, collective pay structures, job descriptions, work rules and practices be supplanted with more flexibility in job responsibilities, working times and pay structures that are determined by individual performance.[56] The result is that bargaining processes mapped out by labour laws increasingly allowed corporations to focus on delivering shareholder value by reducing wages, intensifying work and introducing lower cost forms of work engagement with less and less interference from organised labour.[57]

In December 2005 the Howard government unleashed its second wave of industrial relations reforms. The *Workplace Relations Amendment (Workchoices) Act 2005* (Cth) ("***Workchoices***")[58] breaks the tradition of evolutionary reform in industrial relations by instigating the most radical change to Australia's system of industrial relations since the enactment of the *Conciliation and Arbitration Act 1904* (Cth). It has been suggested that the constitutional underpinning of Workchoices itself is revealing about its ideological orientation. By relying on the corporations power rather than the labour power *Workchoices* will reduce labour law to a sub-set of corporations law in which the focus will be on the needs of corporations. This will reinforce and consolidate the notion that employees are a mere appendage to productive processes.[59] Paradoxically, the changes wrought by *Workchoices* are not achieved by 'deregulation' – that is the withdrawal of regulation – but through unnecessarily prescriptive, voluminous and complex re-regulation.[60] *Workchoices* sets out to paralyse the state industrial relations systems. However, these changes have not successfully simplified industrial regulation into one national system. The state systems will continue to regulate, in regards to corporate and other employers, prescribed matters such as occupational health and safety, and the work relations of unincorporated employers that previously operated entirely within a state system.

Within the federal system the award making role of the Australian Industrial Relations Commission ("**AIRC**") will be transferred by a new wage fixing body called the

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[55] Stephen Deery and Richard Mitchell 'The Emergence of Individualisation and Union Exclusion as an Employment Relations Strategy' in Stephen Deery and Richard Mitchell (eds) *Employment Relations: Individualisation and Union Exclusion – An International Study* (Sydney: Federation Press, 1999) 1-18 5.

[56] Deery and Mitchell, above note 55, 11.

[57] Mitchell, O'Donnell and Ramsay, above note 34, 37.

[58] *Workchoices* substantially amended the WR Act.

[59] Ron McCallum 'The Australian Constitution and the Shaping of Our Federal and State Labour Laws' (2005) 10 *Deakin Law Review* 41-50.

[60] Andrew Stewart 'A Simple Plan for Reform? The Problem of Complexity in Workplace Regulation' (2005) 31 *Australian Bulletin of Labour* 210-236.

Australian Fair Pay Commission. The ACTU will no longer bring test cases to the AIRC for determination and no new federal awards will be made, because the AIRC has lost its powers to resolve industrial disputes by arbitration.[61] Instead the AFPC will have a broad discretion to fix the federal minimum wage and is under no obligation to hold any hearings at all for this purpose.[62]

In the bargaining process under *Workchoices* the no disadvantage test, arguably the most important safeguard in the operation of bargaining under the WR Act will be abolished. Instead a new standard will be assessed against annual leave, personal leave, unpaid parental leave, maximum working hours and rate of pay minima.[63] However, some of these minima are largely illusory safeguards. The 38 hour working week can be averaged out over 12 months effectively leaving no practical control on hours of work. *Workchoices* also provides that employers can request employees to cash out two weeks of the 4 week annual leave entitlement.[64] The effect of these arrangements is that employers will be able to reduce labour costs by using AWAs and non-union collective agreements to eradicate a range of typical award conditions.[65] Moreover under the institutional arrangements for the processing of agreements under *Workchoices,* AWAs and non-union collective agreements will be easier to certify providing an incentive for employers to use these instruments to exclude trade unions.[66] In addition, in an exercise in 'authoritarian micromanagement' designed to definitively deal with what matters do or do not pertain to the employment relationship, the Minister will be able to make a regulation prescribing matters that are prohibited from inclusion in agreements.[67] 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 that will in time be lost due to the abolition or irrelevance of industrial awards.

Finally *Workchoices* even more heavily proscribes trade union industrial action. The reforms appear to involve certain prohibitions on industrial action during the course of an agreement such as in the case of an employer's decision to retrench workers.[68] *Workchoices* strengthens the restriction on protected action by providing for an absolute prohibition on industrial action during the life of an agreement;[69] requiring secret ballots before industrial action is taken;[70] specifically excluding pattern

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[61] Joellen Riley and Troy Sarina 'Industrial Legislation in 2005' (2006) (forthcoming in the *Journal of Industrial Relations*)
[62] Riley and Sarina, above note 61.
[63] John Howe, Richard Mitchell, Jill Murray, Anthony O'Donnell, and Glenn Patmore 'The Coalition's Proposed Industrial Relations Changes: An Interim Assessment' (2005) 31 *Australian Bulletin of Labour* 189-209, 196.
[64] Riley and Sarina, above note 60.
[65] Howe, et al, above note 62, 196.
[66] Howe et al, above note 62, 204.
[67] Riley and Sarina, above note 61.
[68] David Peetz, 'Coming Soon to a Workplace Near You – The New Industrial Relations Revolution', (2005) 31 *Australian Bulletin of Labour* 90-111, 102.
[69] See sub-section 110(1) of WR as amended which provides that the prohibition applies "whether or not [the industrial action] relates to a matter dealt with in the agreement" thus overriding the common law exception established by the decision in *Australian Industry Group v AFMEPKIU* (2003) 125 IR 449 (Emwest).
[70] Section 109CZ of WR Act as amended.

bargaining;[71] and providing for a new remedy by way of direct application to a court for an injunction to stop or prevent industrial action by a union involved in pattern bargaining.[72] In addition the grounds for the Australian Industrial Relations Commission granting orders terminating or suspending bargaining periods and orders restricting the ability to initiate bargaining periods (which is the only period where protected action can take place) have been significantly extended. Not only will it be harder to take action protected from common law liabilities; in addition unprotected action will be more susceptible to legal sanction.[73] Legal sanctions will include new fines and the deregistration of a union.[74]

The overall effect of *Workchoices* is to engineer "a fundamental shift in power from labour to capital"[75] by further repressing strike action and further dismantling employment protections. This clearly indicates at the very least that traditional industrial strategies based on labour law and relations are becoming less and less effective for unions. Indeed following the enactment of the *Workchoices*, serious queries must be raised about whether labour law has outlived its utility for trade unions altogether.[76] In a more hostile employment relations environment and from a more marginal perspective in industrial relations generally, Australian trade unions have been forced to reconsider and broaden the mechanisms they deploy to achieve their goals. One innovative mechanisms 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*

It has been argued that employees are as much members of the firm as shareholders.[77] This is because they make considerable firm specific investments in the enterprise through their years of service. Employees contribute time, energy, physical strength, talent, skill and perhaps most importantly capital in the form of deferred cash payments (in exchange for leave and redundancy entitlements) to the corporation.[78] This indicates shareholders are not the only corporate stakeholder whose interests must be protected by regulation which enables them to safeguard their stake in corporations.[79] Because employees have less of an ability to exit from an enterprise, they may have a greater stake than shareholders in the future of that enterprise.[80] However, corporate law remains preoccupied with the rights of shareholders.[81] In

[71] Section 108D of WR Act as amended
[72] Section 111A of WR Act as amended.
[73] For example employers will no longer need to seek a certificate from the federal commission before commencing certain actions in tort because *Workchoices* repeals section 166A of the WR Act.
[74] Riley and Sarina, above note 60; Howe et al, above note 63, 206.
[75] Howe et al, above note 63, 206.
[76] 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.
[77] See discussion of C W Summer's views in Jennifer Hill, 'At the Frontiers of Labour Law and Corporate Law: Enterprise Bargaining, Corporations and Employees' (1995) 23 *Federal Law Review* 205-225, 215-216.
[78] Joellen Riley 'Lessons from Ansett; Locating the Employees' Voice in Corporate Enterprise' (2002) 27 *Alternative Law Journal* 112-115 and 141, 113
[79]Mitchell O'donnell and Ramsay above note 34 , 31.
[80] Hill, above note 77.
[81] Mitchell, O'Donnell and Ramsay above note 34, 17.

contrast employees as "non-shareholder stakeholders" are treated as outsiders to the firm.[82] There are no mainstream legislative provisions for the protection of employees as *employees* (rather than as *creditors*) under Australian corporate laws.[83] Directors do not generally owe duties to employees. Under corporations law employees' interests are 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.[84] Nevertheless, even then the position of employees in the situation of corporate collapses remains vulnerable.[85] It has been suggested that the reason behind this vulnerability is that employees continue to be effectively excluded from participatory mechanisms within the corporation.[86] The fixation of corporate governance on the relationship between corporate managers and shareholders, in contrast to broader stakeholder approaches to corporate law, has necessarily seen employee interests in the corporation side-lined.[87]

Additionally, 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 work 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.[88] This lack of engagement with employees through corporate governance mechanisms has meant workplace democracy has remained 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 firm[89] or the tendency towards the

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[82] Jennifer Hill, 'Corporate Governance and the Role of the Employee' in Paul Gollan and Glenn Patmore (eds) *Partnership at Work: The Challenge of Employee Democracy: Labor Essays 2003* (Pluto Press: Sydney, 2003) 110-121.

[83] Andrew Clarke, 'The Relative Position of Employees in the Corporate Governance Context: An International Comparison' (2004) 32 *Australian Business Law Review* 111-131, 115.

[84] Clarke, above note 83, 35; Mitchell, O'Donnell and Ramsay, above note 34, 18.

[85] See Riley above note 78 where she discusses the example of Ansett's collapse where, 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.

[86] Hill, above note 82.

[87] For a contemporary articulation of a broad stakeholder approach see Margaret Blair and Lynn Stout 'A Team Production Theory of Corporate Law' (1999) 85 *Viriginia Law Review* 247-328; for a seminal broad stakeholder piece see E Dodd, 'For Whom Are Corporate Managers Trustees?' (1932) 45 *Harvard Law Review* 1145.

[88] This is despite this scholarship providing specific guidance on how state and Commonwealth parliaments might be able to establish works councils: Ron McCallum and Glenn Patmore, 'Works Councils and Labour Law' in Paul Gollan, Ray Markey and Iain Ross (eds) *Works Councils in Australia: Future Prospects and Possibilities* (Federation Press: Sydney, 2002) 74-101; 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 *Melbourne University Law Review* 42; see also the essays in Paul Gollan, Ray Markey and Iain Ross (eds) *Works Councils in Australia: Future Prospects and Possibilities* (Federation Press: Sydney, 2002); Glenn Patmore, 'A New Light on an Old Hill - Building Industrial Democracy in Australia' (2001) 53 *Arena* 45-48. Patmore regards the Australian Labour Party's adoption of an innovative industrial democracy policy in 2000 as a promising development.

[89] Hugh Collins, 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws' (1990) 10 *Oxford Journal of Legal Studies* 353-380, 356.

virtual firm[90] whereby large enterprises contract out or outsource work, have 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 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 participation rights in those enterprises.

The banishment of employee interests from corporate law discourse by making shareholders the pre-eminent stakeholders inevitably sees issues raised by employees emerge by other means and/or in other forums.[91] 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.[92] It remains a controversial and contentious field of social relations today.[93] 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 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 this strategy has become less and less successful as unions and their members become increasingly marginalised in a hostile employment law and workplace bargaining environment. The recent phenomenon of shareholder activism by trade unionists can be seen as an attempt to deploy existing laws best suited to promoting employee interests, including occupational health and safety laws and the 100 shareholder rule, when employment laws have offered inadequate protection to employees, or other aspects of corporate law operate to exclude employee 'voice'.

## IV. JUSTIFICATIONS OF UNION SHAREHOLDER ACTIVISM

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

Currently Australian law allows (within certain restrictions) trade unions through shareholder groups to requisition and put resolutions at company meetings. This has given rise to considerable dissatisfaction from corporate leaders who have raised the questions about whether small groups of shareholders *should* have this legal capability.[94] For example, in the course of debate at the 2003 Boral Annual General Meeting, the response of some of the Boral executives to TWU participation was that

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[90] Lynn M LoPucki 'Virtual Judgment Proofing: A Rejoinder' 107 *Yale Law Journal* 1413-1434, 1433-1434.

[91] Hill above note 82, 121; Marleen O'Connor 'Employees and Corporate Governance - United States: Labor's Role in the American Corporate Governance Structure' (2000) *Comparative Labor Law and Policy Journal* 97-133.

[92] 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 is contentious. See Stephen Deery et al, *Industrial Relations: A Contemporary Analysis* (McGraw-Hill: Sydney, 2nd Ed, 2001) 7-8.

[93] Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press: Sydney, 4th Ed, 2005) 1.

[94] Darvas, above note 4, 391.

a group that was not *bona fide* was harassing them.[95] The implication was that groups such as trade unions should not be allowed to put shareholder resolutions or participate in company meetings.[96] However, arguments that suggest that shareholder activism by trade unions is illegitimate are largely misconceived. Obviously corporate managers are going to be dismissive of and openly hostile to union shareholder activism because it directly challenges the way in which decision-making at general company meetings is conducted by directors and managers. However, this managerial attitude towards union involvement does not necessarily mean that shareholders will hold similar views. What management criticisms of shareholder activism overlook or deliberately conceal is that the activation of the 100 shareholder rule by trade unions actually makes corporate law operate to align employee and shareholder interest 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. 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 sound, even if union shareholder activism does *not* promote 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.[97]

### *(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 suggests that it is effective in making managers accountable to shareholders and workers.[98] 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 activism can assist in overcoming the free-rider problem*

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

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[95] My personal notes of 2003 Boral AGM debate.

[96] 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 Law Review* 879-926, 901.

[97] See Frug above note 2 where he argues that many corporate law do not make managers more accountable but merely operate to legitimate managerial power.

[98] This section draws extensively on the literature from the USA on labour shareholder activism. In particular, see Stewart Schwab and Randall Thomas 'Realigning Corporate Governance: Shareholder Activism by Labor Unions' (1998) 96 *Michigan Law Review*1018-1090; Marleen O'Connor 'Organised Labor as Shareholder Activist: Building Coalitions to Promote Worker Capitalism' (1997) 31*University of Richmond Law Review* 1345-1398 ("O'Connor 1997"); Marleen O'Connor 'Employees and Corporate Governance - United States: Labor's Role in the American Corporate Governance Structure' (2000) *Comparative Labor Law and Policy Journal* 97-133. ("O'Connor 2000")

is a recipe for shareholder passivity. Berle and Means ground breaking, partly empirical study of American capitalism published in 1932 explained the causes of this shareholder passivity.[99] 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. [100] 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[101]. This is known as the problem of collective action. It is a problem because when shareholders fail to engage in monitoring of management a director's allegiance may shift from the shareholder constituency to fellow directors and management who fill the void.[102] 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.[103]

In contrast to the conventional view of the disenfranchised shareholder conveyed by corporate law scholars, labour economists have remarked that employees are residual claimants because of the firm specific investments they make in corporations and consequently employees develop long-term attachments to corporations.[104] These factors indicate employees will have greater incentive than other shareholders to monitor companies to ensure their long-term survival and profitability.[105] Moreover, in trade unions there is an absence of the normative influences that lead to passivity in

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[99] Adolph Berle and G Means *The Modern Corporation and Private Property* (New York: Macmillan, 1933).

[100] Berle and Means above note 99, 69. See also Bratton, W. 'The New Economic Theory of the Firm: Critical Perspectives from History' (1989) 41 *Stanford Law Review* 1427-1527, 1497; Galbraith, J, *The New Industrial Estate* (2nd Ed, London: Andre Deutsch, 1971), 73. The *Corporations Act 2001 (Commonwealth)* 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. It is argued that managers are strategically positioned to dominate the day to day affairs of the company and, through the proxy process, critical decisions of the general meeting such as who is elected as a director. See Sandra Berns and P Baron, *Company Law and Governance* (Oxford University Press, Melbourne, 1998) 241. In Australia in recent years there has been a significant rise of the number of small shareholders. 55 per cent of all adult Australians are either directly or indirectly shareholders. 44 per cent of adult Australians or 6.4 million people directly own shares. See Australian Stock Exchange Share Ownership Study 2004 available at http://www.asx.com.au/about/pdf/2004_share_ownership_booklet.pdf at 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, 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 *University of New South Wales Law Journal* 434-461, 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 and Ramsay above note at 27

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

[102] Montgomery and Kaufman cited in Stephen Conroy 'Labor's Approach to Corporate Governance – Empowering the Shareholder' (2003) 15 *The Sydney Papers* 26-37, 29.

[103] Conroy, above note 102.

[104] See O'Connor 2000 above note 98, 100.

[105] Schwab and Thomas above note 98, 1037.

other shareholders.[106] On the contrary, union members are exposed to the social conditioning of worker activism. Indeed unions have the political will and organisational capacities to overcome the collective action problems associated with formulating a coalition of active shareholders. The 100 shareholder rule allows unions to actually actively monitor 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 corporate managers that this captains of industry do not want shareholders to actually bring managers to account in the way that union activists have done. The self-serving objections of corporate leaders to union shareholder activism, is thus a strong indication that union involvement enhances shareholder capacities to effect change at general meetings and fills an important gap in the monitoring process created by problems of collective shareholder apathy. [107]

(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.[108] For example, the TWU proposals regarding the occupational health and safety performance of Boral were partly a reaction to increased interest by institutional investors in this kind of company performance indicator.[109] The union's investment in the research was worthwhile because the resolutions regarding the occupational health and safety performance of Boral received a much higher proportion of shareholder votes than traditional proposals such as resolutions giving the general meeting the power to determine executive remuneration. The results of the polls on the resolutions put by the Boral Ethical Shareholders group were as follows[110]:

[106] See Michael Whincop 'The Role of the Shareholder in Corporate Governance: A Theoretical Approach, (2001) 25 *Melbourne University Law Review* 418-465, 459.
[107] See Mitchell, O'Donnell and Ramsay, above note 34, 25.
[108] Schwab and Thomas, above note 98, 1090.
[109] See BT Finance Group, above note 25.
[110] M B Scobie, Boral Company Secretary, Letter to the Australian Stock Exchange reporting on the Outcome of Business and Declaration of Polls at 2003 Boral Annual General Meeting, 21 October 2003. The results of all six of these resolutions were decided by a poll rather than a show of hands.

| TWU shareholder proposal | Percentage of votes cast in favour of resolution |
|---|---|
| Resolution 9 to establish 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% |

It is clear from these poll results that Boral shareholders were more interested in the occupational health and safety performance of the company – a non-traditional investor concern – than more conventional corporate governance concerns regarding executive remuneration. 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 external assessment of safety management at Boral.[111] This is a welcome improvement in reporting that was probably triggered by union and shareholder pressure and ought to boost Boral's corporate reputation.[112] Where a union proposal leads to company reforms that boost corporate reputation and induce a favourable stock market reaction, union resolutions can operate to improve worker conditions *and* maximise long-term profits for all shareholders.[113]

(c) *Unions have special monitoring skills*

Unions through their members and through the inspection powers of their officials have access to information about company operations that other shareholders do not have access to.[114] Union members often can relay detailed messages to their union about the effectiveness of corporate policies 'on the ground' and so provide a critical bridge between written company policy and the actual implementation of that policy. This gives unions special monitoring abilities that "create value for other shareholders."[115] Unions might be regarded as a kind of expert stakeholder on workplace issues at a given company creating additional validity to shareholder activism by unions. Moreover, unions are experts that are independent. This contrasts with the position of institutional investors that may have close ties with the companies they invest in that can impede any action that opposes management.[116] The monitoring of occupational health and 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 occupational health and 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 company's performance in

[111] See *Boral Sustainability Report 2005*, 13.
[112] In June 2005 Boral was awarded a safety reporting award at the Australasian Annual Reporting Awards. Ibid.
[113] Scwhab and Thomas, above note 98, 1090.
[114] Ibid, 1037.
[115] Ibid.
[116] Ibic, 1038.

implementing occupational health and 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 and workplace dynamics*

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. Aside from the fact that there have been successful union proposals in the US,[117] there is good enough reason to reject this criticism on the basis that even unsuccessful resolutions can prompt executives to change corporate policy and practices.[118] The resolutions put by the TWU at the Boral annual general meeting lead to publicity about the company's occupational health and safety performance. It is likely that one of the effects of this publicity is that Boral will act to safeguard its reputation by improving its occupational health and safety practices. This is borne out in the Boral example because Boral is now is a company that has much more safety conscious policy and public persona than it ever has before. In other instances, the mere act of putting up a resolution may lead the company to negotiate with the union so that the resolution is withdrawn on the basis that the company will change corporate practices.[119] Moreover, shareholder activism can raise the public profile of the union, increase the unions leverage with a particular company and change workplace dynamics by demonstrating to management that workers can and will pro-actively pursue a role in corporate governance.[120]

(e) *Markets constrain 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.[121] 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.[122] 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. In the case of Boral, the trade union resolutions were disclosed as resolutions put by a trade union group in the company notice of the 2003 annual general meeting.[123] If, for example, shareholders foresee that union resolutions are motivated by collateral tactical

[117] Schwab and Thomas above note 98, 1029 discuss a resolution put by the Teamsters at a meeting of Fleming Companies Inc. to have shareholder approval of any poison pills that received 60.5% of the votes.
[118] O'Connor 1997, above note 98 , 1362.
[119] O'Connor 2000, above note 98, 114.
[120] See O'Connor 1997 above note 98, 1383.
[121] Schwab and Thomas, above note 98, 1024.
[122] Ibid.
[123] Boral Notice of Meeting 2003, 3.

concerns such as concurrent collective bargaining negotiations,[124] shareholders can discipline such resolutions by simply voting against them.[125]

Surprisingly a US empirical study[126] of union proposals found shareholders were not particularly suspicious of union proposals. The study found that union proposals receive as much or more support than do similar proposals by other shareholder groups even where the union proposal is put when there is a concurrent dispute or negotiation with management.[127] In the Australian context, the poll results from the Boral 2003 annual general meeting, the only additional shareholder initiated (rather than management initiated) proposal other than those put by the TWU was a resolution regarding the sustainability performance of Boral received. This resolution received a much lower vote than the TWU proposals regarding work safety.[128] This indicates that concern about opportunistic conduct of Australian as well as US 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 company is recognised and validated in various provisions of the Corporations Act. In particular, the replaceable rule in section 198A states that a company is managed "by or under the direction of the directors". The dominant role of directors in management has lead to significant legal constraints that qualify participation rights of shareholders at general meetings. One important limitation to members' rights to requisition meetings or to demand a resolution be put to a general meeting arose out of McLelland J's judgement in *NRMA v Parker*.[129] In that case it was held that such rights could not be exercised in relation to a matter of management exclusively vested in directors.[130] Accordingly, the type of resolutions that trade union shareholder groups are able to put at pre-planned annual general meetings are constrained by existing legal criterion regarding the allowable content of the shareholder resolution.

***(ii) Democratic action by shareholders as the central justification of corporate power***

*(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

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[124] O'Connor (1997) above note 98, 1383.
[125] Schwab and Thomas, above note 98, 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 note 106, 457. In the case of Boral, the directors notified shareholder 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, 9.
[126] Randall Thomas and Kenneth Martin 'Should Labor Be Allowed to Make Shareholder Proposals?' (1993) 73 *Washington Law Review* 41-73.
[127] Ibid, 41, 46.
[128] Resolution 8 put by the Boral Green Shareholders received 6.02% of the votes cast in the poll. See Scobie above note 110, at 3.
[129] (1986) 6 NSWLR 517.
[130] See ibid at 521; for comment see H A J Ford, R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (l2th ed, Butterworths: Sydney, 2005) 219.

objectives of the corporation. Such a theory can also assist in identifying the most appropriate participatory mechanisms through which stakeholder interests 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 in 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.[131] In particular, in the aftermath of corporate collapses of corporations such as HIH, OneTel, Ansett and others in Australia, and in the aftermath of Enron's collapse 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;[132] there continue to be stakeholder visions of the corporation that diverge from shareholder-centred models. These stakeholder visions that emphasize 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 is proposed by Professor Lynn Stout. Stout emphasizes the altruistic behaviour of directors. She argues that directors primarily respond to internal pressures such as "a director's sense of honor; her feelings of responsibility; her sense of obligation to the firm and its shareholders"[133] rather than actual external pressures from shareholders and law enforcement agencies. Thus, provided that we select directors who fit altruistic profiling,[134] 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.[135] 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.[136] According to this mediating model of the firm, directors' powers are (rightly) strengthened with shareholder consent. The

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[131] Hansmann and Kraakman assert that "There is no longer any serious competitor. . . ." to the shareholder primacy model. See Henry Hansmann and Reiner Kraakmann 'The End of History for Corporate Law (2001) 89 *The Georgetown Law Journal* 439, 439.

[132] Conroy, above note 102, 28

[133] 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* 1-25 , 8-9.

[134] Ibid, 21.

[135] See Stephen Bottomley 'From Contractualism to Constitutionalism: A Framework for Corporate Governance' (1997) 19 *Sydney Law Review* 277-313 303 where he discusses the assumption of "the dominion of the elected over the electors".

[136] Lynn Stout 'The Shareholder as Ulysses: Some Empirical Evidence on Why Investors in Public Corporations Tolerate Board Governance' (2003) 152 *University of Pennsylvania Law Review* 667, 668.

heightened powers of directors then enable them to protect workers' firm specific investments.[137] 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.[138] 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. 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.[139] 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.[140] 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."[141] In effect, in the absence of mandatory laws safeguarding the interests of 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 purchase of directors and corporations in contemporary capitalist societies.[142] (Glasbeek; Therese ALJ dec 2005).

*(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 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,[143] and the idea that non-shareholder stakeholders interests such as the interests of workers should included in corporate governance processes.[144] However, existing versions of the 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. Accordingly it is unnecessary here to examine how the democratic vision

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[137] Ibid 687.
[138] O'Connor 2000, above, note 98, 104.
[139] Lucian Bebchuck 'The Case for Increasing Shareholder Power' (2005) 118 *Harvard Law Review* 835-914, 841-842.
[140] Bebchuck, ibid.
[141] Above note 34, 17.
[142] 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' (2006) 30 *Alternative Law Journal*.
[143] Conroy, above note 102, 28-29.
[144] Lord Wedderburn, ' The Legal Development of Corporate Responsibility' in K Hopt and Gunther Teubner (eds) *Corporate Governance and Directors Liabilities: Legal Economic and Sociological Analyses on Corporate Social Responsibility* (Berlin: Walter de Gruter, 1984) 3-54.

of the firm might justify the inclusion of non-shareholder participants in corporate governance processes. Instead this section will illuminate 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.[145] This allows an analogy to be made between the constituent parts of a state and the constituent parts of a company. The accountability mechanisms of the democratic civic governance (governance of the state) can then be used to inform corporate governance (governance of corporations).[146] The board of directors might be likened to the legislature because company members elect it. Executive directors can be likened to the executive of governmental ministers because both operate as appointed leaders. Management of the company which has to account to the board of directors is similar to the public service which has to account to Parliament through Ministers.[147] Finally, shareholders as members of a company have a right to vote akin to the right to vote of the general electorate.[148]

The analogy between the state and the corporation is substantiated by recent empirical research that punctures classical liberal understandings of the body politic. [149] 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."[150]

The principal feature of market economies that leads to the decay of the classical liberal vision is the concentration of power in corporations. In what Roberto Unger describes as "post-liberal societies", "institutions that rival the state in power" emerge.[151] Thus contrary to classical liberalism, because business entities approximate the size and influence of governments,[152] the state is not the only

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[145] See Mary Stokes 'Company Law and Legal Theory' in M Twining (ed) *Legal Theory and Common Law* (Blackwell, 1986) 155, 180. One of the seminal works on the democratic or political model of the firm is Latham, 'The Body Politic of the Corporation' in Mason (ed) *The Corporation in Modern Society* (Harvard University Press, Cambridge, 1960), Ch ll.

[146] Julian Blanchard 'Corporate Accountability and Information – Lessons from Democracy' (1997) 7 *Australian Journal of Corporate Law* 1-42, 5; Duffy above note 100, 438.

[147] Duffy above note 100, 438.

[148] Bottomley above note 135, 296.

[149] See Sarah Anderson and John Kavanagh *The Top 200: The Rise of Global Corporate Power* (2000) Institute for Policy Studies http://www.ips-dc.org/Top_200.pdf last visited on 18 October 2005. This report found that of the 100 largest economies in the world, 51 are corporations.

[150] Roscoe Pound *Social Control Through Law* (United States of America: Archon Books, 1968) (first published by Yale University Press in 1942), 15.

[151] Roberto Unger *Law in Modern Society –Toward Criticism of Social Theory* (New York: Free Press, 1976) 201.

[152] See Ibid: See also Berle and Means above note 99, 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 naturall man" cited in

concentration of power that threatens individual autonomy.[153] Corporations increasingly have an influence on individual life.[154] 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.[155] 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.[156]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.[157] 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.[158] This is because persons whose interests 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.[159] The shareholder right to propose resolutions at company meetings is one mechanism that can operate to counter undemocratic

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Daniel Greenwood, 'The Semi-Sovereign Corporation' (2005) Legal Studies Research Paper Series, Research Paper No. 05-04, University of Utah.

[153] The Mason High Court made some moves towards recognizing the power of corporations in *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 500 in which Mason and Toohey stated "the resources which companies possess and the advantages which they tend to enjoy, . . . are much greater than those possessed and enoyed 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 *Corporate and Business Law Journal*127.

[154] Greenwood, above note 152, 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 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."

[155] Clifford Shearing 'A Constitutive Conception of Regulation' in Peter Grabosky and John Braithwaite (eds.) *Business Regulation and Australia's Future* (Australian Institute of Criminology, Canberra, 1993). Conversely departures from market order do not lead to substantive state control or guidance. Rather, in this regulatory space, centres of private economic power may determine economic objectives. See Terence Daintith 'Law as a Policy Instrument: A Comparative Perspective' in Terence Daintith (ed) *Law as an Instrument of Economic Policy: Comparative and Critical Approaches* (Berlin: Walter de Gruyter, 1988) 3-55, 7.

[156] Duffy above note 100, 434-435.

[157] 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* 39-79, 52.

[158] John Pound, 'The Rise of the Political Model of Corporate Governance and Corporate Control' (1993) 68 *New York University Law Review*1003-1071, 1029.

[159] Hill,above note 157, 53.

tendencies within corporations. It is central to the democratic model of the firm because it allows meaningful participation by shareholders in corporate governance through an ongoing process of monitoring of company 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."[160] 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: [161]

> "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 company, 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)."

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.[162] 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 enjoy.[163] Whilst recognising that there are practical differences between a state and a company, a company can still be seen as a species of political organisation[164] or a different kind of body politic to the state (but a body politic nevertheless). The civic governance metaphor has descriptive power because corporations have a requisite democratic structure and internal system of governance which is common to all bodies politic.[165] The democratic theory is useful as a prescriptive tool for promoting democratic developments in corporate governance.

*(c) Shareholder participation must be open to all types of shareholders*

The democratic vision of the firm and the ideal of corporate democracy justifies mechanisms such as the '100 shareholder rule' that facilitate shareholder participation by all kinds of shareholders. The fundamental basis of shareholder participation under that *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

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[160] Pound, above note 158, 1035.
[161] See Palmer J's judgement in *NRMA v Scandrett* (2002) 43 ACSR 401, 409.
[162] Duffy above note 99, 438; Greenwood, above note 152, 14.
[163] Andrew Fraser, *Reinventing Aristocracy: The Constitutional Reformation of Corporate Governance* (Aldershot: Dartmouth, 1998).
[164] Bottomley, above note 135, 292-293.
[165] Hill, above note 157, 51-57.

corporation and other shareholders.[166] But any group of 100 shareholders 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.[167] To imply that trade unions should not be allowed to put shareholder resolutions amounts to an 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 annual general meeting. 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 legitimation function in the corporate sphere in a similar fashion to the political sphere.

## IV. REACTIONS TO UNION SHAREHOLDER ACTIVISM

### A. Moves to Stifle Union Shareholder Activism

There have been a number of reactions from corporate managers and politicians designed to quell the rise of union shareholder activism in Australia.

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

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[166] See Schwab and Thomas, above note 98, 1023.

[167] The shareholder primacy perspective which concentrates on the accountability of managers to shareholders is also consistent with democratic theory because it can accommodate differing 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. See for example, Berle to the conclusion 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." Adolphe Berle 'Corporate Powers As Powers in Trust' (1930-1931) 44 *Harvard Law Review* 1049-1074, 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' in *New York Times Magazine*, September 13, 1970, 32. At times Ramsay and Anderson also appear to assume that the primary goal of the corporation is to pursue shareholder value. The shareholder primacy perspective contends that managers must act exclusively in the interests of shareholders; See for example Berle and Means. although the shareholder value perspective is a more economistic 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 making managers maximise the wealth of their shares.

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 annual general meeting ("**Resolution 3**") that the shareholders approve the adoption of a new company constitution. One of the main differences between the new Boral constitution and the pre-existing Boral company 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% of the shareholding.[168] This resolution relied on statutory provisions which specifically provided for the situation where a company's constitution may state that a special resolution does not have any effect unless a further requirement is complied with.[169] Resolution 3 was passed by at least 93% 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% 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 doesn't meet special requirements. This was an attempt, (that appears to have gone unchallenged), to insulate Boral, from future shareholder activism aimed at changing 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."[170] Boral's deployment of s136(3) is an attack on the participatory rights of shareholders.[171] 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.

### *(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 have the ability to requisition a general meeting.[172] 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.[173] Despite this the Howard government moved to eliminate this right of 100

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[168] Boral Limited, Notice of (Annual General) Meeting 2003, 5.
[169] Section 136(3) of the Corporations Act.
[170] Bryan Frith, 'Right to Clip Board Powers' *The Australian*, 2 December 2003, p20.
[171] 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.
[172] Subsection 249D(1)(b) of the Corporations Act.
[173] Between 1998 and 2002 only 5 special general meetings had been requisitioned by shareholders with at least 5% of the shareholding or by 100 shareholders. Submission by Stephen Bottomley, to

shareholders by introducing legislative provision that allowed a regulation to be passed whereby a different number of members was needed to call a meeting for a specified class of company.[174] Then a regulation was introduced that provided that for companies a meeting must be requisitioned by at least 5% of the members. However this regulation was disallowed when the Australian Labor Party and the Democrats combined forces in the Senate.[175] 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.[176] 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 company. . .".[177] 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.[178] The abolition of the right of 100 shareholders to requisition a meeting has been supported by the majority report of a Senate Committee Inquiry.[179]

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. Firstly, directors may refuse to requisition a meeting where the meeting would not be held for a proper purpose.[180] Secondly, shareholders may not be able to put a requisition that has as its object a matter which is solely within the authority of directors.[181] Thirdly, in a case where a requisition was declared invalid, it has been held that shareholder cannot exercise the right to requisition a meeting where the purpose of a resolution is to harass directors.[182]

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Parliamentary Joint Committee on Corporations and Financial Services: Inquiry into the Exposure Draft of the Corporations Amendment Bill (no.2) 2005 cited in the majority report of enquiry, 6..

[174] See discussion in Milne and Wakefield Evans, above note 4, 287 of s249D(1A) introduced by the *Corporate Law Reform Program Act 1999* (Cth).

[175] Duffy, above note 99, 441.

[176] *Corporations Amendment Bill (No.2) 2005* 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 and Wakefield Evans, above note 4, 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* 42 ACSR 37, 376.

[177] Explanatory Memorandum to the *Corporations Amendment Bill (No.2) 2005* Exposure Draft, p5.

[178] See ibid.

[179] Parliamentary Joint Committee on Corporations and Financial Services: Inquiry into the Exposure Draft of the Corporations Amendment Bill (no.2) 2005

[180] See Section 249Q of the *Corporations Act*; for comment and relevant cases see Paul Redmond, *Companies and Securities Law: Commentaries and Materials* (Lawbook Co: Sydney, 4th ed,2005), 353.

[181] Ford, Austin and Ramsay, above note 130 at 270-271.

[182] See *Australian Innovation Ltd v Petrovsky* (1996) 21 ACSR 218 cited in Ford, Austin and Ramsay, note 130, 270; Milne and Wakefield Evans above note 4, 288.

What such proposals to abolish shareholder rights trivialise is the manner in which shareholder participation in corporate governance can act as a check on untrammelled management power. This was one of the reasons for introducing such legislation provisions in the first place. Senator Andrew Murray's comments in relation to the Bill that introduced section 249D and 249N (that is, the '100 shareholder rule') into Parliament are instructive on this point:

> The peculiar thing about modern companies is that it is often the shareholder that is left behind in matters of power and matters of decision making. Companies worldwide have been taken over by two classes of beings. One is the managerial elite . . .Similarly, the director's class can sometimes be categorised in the same manner. There is a particular person who will find himself . . . repeated on countless companies because of the way the club operates. . . . They too operate in a system of power and control that can be to the detriment of shareholders *en masse*.[183]

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.[184]

The principle of shareholder democracy ought not be abandoned at precisely the point where shareholders are enabled to substantively exercise their rights such as situations where shareholders exercise the right to requisition a meeting under the 100 shareholder rule.

### *(iii) Litigation aimed at stifling future union shareholder activism*

Following the Finance Sector Union putting a resolution at the Commonwealth Bank's annual general meeting in November 2004 calling for an independent assessment of the Bank's restructuring policy; the bank commenced a federal court action against the Finance Sector Union. According to media reports[185] the bank has alleged that the shareholder activism by 150 to 200 bank staff was unprotected industrial action and that the action was a form of illegal coercion in breach of the coercion provisions of the WR Act[186] that was designed to pressure the bank into making an enterprise agreement with the union. 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. 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

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[183] Commonwealth Parliament, *Hansard*, Senate, Second Reading of the *Company Law Review Bill 1997* debate 24 June 1998, Senator Andrew Murray. 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 Ayotte, above note 55, 512.
[184] See Milne and Wakefield Evans, above note 44, 290.
[185] 'FSU unlawful in AGM Activity: CBA' CCH News Headlines Email Reports, 3 August 2005; 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.
[186] See former section 170NC of the WR Act.

significant economic pressure on the bank.[187] Moreover, it would be difficult to characterise the action as having the purpose of coercion given that the workers were pursuing shareholder issues separate to enterprise bargaining issues. There were 48 million votes or 11% of the votes in favour of the union resolution, indicating the union resolution were a corporate governance concern for a significant proportion of the bank's shareholding.[188] 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.[189]

## V 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. Unfortunately in recent years there has not been any shift on the employees' role in corporate governance, such as openness to the idea of corporate social responsibility towards a broad variety of stakeholders including employees,[190] or the achievement in practice of team production theories that emphasise the importance human capital.[191] 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.[192] 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.[193] 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 because the best way to deal with these concerns is to let the shareholder electorate decide. Moreover, 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

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[187] CCH above note 185.
[188] Sharon Caddie cited in Long, above note 185.
[189] Sharon Caddie cited in Long, above note 185.
[190] Dodd 'For Whom Are Corporate Managers Trustees?' (1931) 45 *Harvard Law Review* 1145-1163, 1156; Wedderburn, above note 144, 4.
[191] See Lynn Stout 'Power to People Soft' *Wall Street Journal*, 15 July 2003.
[192] O'Connor 1997, above note 98, 1347.
[193] Hill, above note 157, 63.

governance, the untrammelled power of those controlling large corporations would rightly be called into question. In the context of shareholder passivity, the actions of self-appointed corporate reformers such as unions in making directors and officers accountable takes on increased importance. The existence of democratic corporate governance rules alone cannot justify large-scale corporate power. Corporate democracy can only serve legitimating functions when actually put in to practice. Union shareholder activism operates to democratise the corporate sphere. The absence such shareholder activism would place a democratic justification of the large-scale corporation is 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 an ideology that legitimates large-scale bureaucracy. Accordingly initiatives to stifle union shareholder activism should be disparaged.

Clearly one preferable way of dispensing with complaints from corporate managers 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 that complementary corporate laws can be crafted that recognise employee interests. 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.