

RESEARCH REPORT

**From the Picketline
to the Boardroom:
Union Shareholder Activism
in Australia**

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I INTRODUCTION

Australian unions have recently begun a new phase of activism: they are utilising their power as shareholders in order to pursue employee interests. Since the well-documented campaign initiated by the Construction Forestry Mining and Energy Union at Rio Tinto's annual general meeting in 2000, unions have become increasingly willing to utilise various provisions contained in the *Corporations Act* to gain access to the company board and a new forum for addressing employee interests. The most common method of activism by union-shareholders has been the use of the '100-member rule' to put resolutions forward at a company's annual general meeting (AGM).¹ Other methods have included lobbying shareholders to support 'vote no' campaigns relating to resolutions proposed by directors at AGMs,² posing questions at AGMs in order to highlight particular employee issues,³ and, less commonly, calling extraordinary general meetings.⁴

At first glance, it appears that union shareholder activism in Australia is ineffective – no resolution put forward by a union has been passed at a company's AGM and 'vote no' campaigns against board resolutions have failed to garner significant support of other shareholders, thus leading some critics to dismiss its significance.⁵ However, when a broader analysis is applied, the effectiveness of union shareholder activism can be seen to be significant, particularly where it is used by unions as part of a wider campaign strategy. By placing matters on the board's agenda and opening a dialogue between the board and unions, targeted matters, from traditional corporate governance issues, to traditional employment issues, such as staff lay-offs and lack of adherence to labour rights, are opened up for scrutiny by other shareholders, the media and the wider public. This has the potential to facilitate action on the part of the board to resolve issues raised by unions, particularly where

¹ Pursuant to s.249N *Corporations Act* 2001.

² This method is made possible by s.249O(2) *Corporations Act* 2001, which allows shareholders the right to have information, relating to, inter alia, resolutions, distributed to all members, and ss.249X-Z and ss.250A-D, relating to proxy voting.

³ Pursuant to s.250S *Corporations Act* 2001.

⁴ Pursuant to s.249D *Corporations Act* 2001.

⁵ See e.g. Sue Boland, 'Can 'Shareholder Activism' Change Society?' in *Green Left Weekly* (2000), available at <www.greenleft.org.au/back/2000/424/424p15.htm>

some support of institutional investors is attained. It may also have the effect of influencing the future conduct of the board of directors, in their relationship with unions.

Concern has been expressed over the desirability and appropriateness of union shareholder activism: is the AGM an appropriate forum in which to pursue employee interests? Is the position of shareholder an appropriate role to pursue these interests? Criticism of union shareholder activism has sometimes assumed a fundamental conflict between shareholder and employee interests, and raises broader questions about the nature and purpose of the corporation and whose interests it should legitimately pursue. Should the company's sole focus be on the economic interests of the shareholders, or should the company attempt to balance the interests of all of its stakeholders, including employees?⁶ Where employee interests are constructed as being in opposition to profit maximisation, there is a conflict with traditional shareholder primacy theories of the corporation and notions of shareholder value. However, the conflict between employee and shareholder interests, as it relates to union shareholder activism, cannot be assumed without proper analysis. Some union shareholder campaigns in Australia have involved an alignment of employee and shareholder interests, as they focus on traditional corporate governance matters such as non-performance based executive remuneration and independence of board members. It can be argued that, as both employees and shareholders have a legitimate interest in the long-term economic well-being of the company, their interests are aligned.

However, unions have not confined their shareholder campaigns solely to corporate governance issues, but have also pursued interests which may be seen as being inimical, or at the least, irrelevant, to shareholder interests. For example, unions have launched campaigns aimed at halting job cuts and increasing employee entitlements. Unions have attempted to promote these traditional objectives as matters of concern to shareholders, and have couched the campaigns in the discourse of long-term corporate economic wellbeing – a company with good labour standards and practices will be more productive, better able to manage risk and

⁶ These questions reflect the divergence of the 'shareholder primacy theory' and the 'stakeholder theory' of the corporation: see Richard Mitchell, Anthony O'Donnell and Ian Ramsay, *Shareholder Value and Employee Interests: Intersections of Corporate Governance, Corporate Law and Labour Law*, Research Report, 8, available at Centre for Corporate Law and Securities Regulation, University of Melbourne <<http://cclsr.law.unimelb.edu.au/news/>>

more attractive to investors, particularly given the recent rise of ‘ethical investment’ practices in Australia.⁷ On the other hand, it may be argued that the interests of the shareholder whose sole concern is in securing maximum economic returns, and the interests of the employee in securing favourable working conditions, represent an inherent and irreconcilable conflict.

The contentious nature of union shareholder activism points to the need for an examination of the effectiveness, desirability and appropriateness of shareholder activist practices by unions in Australia. This paper first examines the development of union shareholder activism in Australia through a series of recent case studies in which Australian unions have utilised their role as shareholders to pursue employee interests. Also, the role of superannuation funds in Australian union shareholder activism is considered. Some of the information in this part of the paper has been obtained from interviews conducted with representatives of several unions, a major institutional investment fund manager, an investment advisory service and a corporate counsel.

Second, the legal basis for such practices is examined, by surveying relevant provisions of the *Corporations Act*. Next, union shareholder activism in the United States is analysed in order to highlight the effectiveness of aligning pension fund activism with union activism, which has been a significant and sustained development in the United States. Also, developments in the United Kingdom and Canada are outlined. Lastly, the objectives, methods, effectiveness and desirability of union shareholder activism are examined, through an analysis of the Australian case studies presented in this paper.

⁷ See generally, Environics International Ltd, The Prince of Wales Business Leaders Forum and The Conference Board, *The Millennium Poll on Corporate Social Responsibility: Executive Briefing* (1999) available at <<http://www.environics.net/eil/millennium/MPExecBrief.pdf>>; David Birch, *The Shareholders’ Project: Shareholder-Corporate Relations in Australia: Some New Economics, Corporate Citizenship and Sustainable Capitalism Perspectives* (2001), and Ethical Investment Association, in Business Council of Australia, *Company and Shareholder Dialogue: Fresh Approaches to Communication Between Companies and Their Shareholders* (2003) 15: “The level of socially responsible investment has doubled between 2001 and 2003, to at least \$21.3 billion at 30 June 2003.”

II DEVELOPMENT AND FORMS OF UNION SHAREHOLDER ACTIVISM IN AUSTRALIA

The use of shareholder rights and powers by unions as a strategy is a recent phenomenon in Australia, with the first union shareholder campaign launched against Rio Tinto in 2000. However, this campaign followed earlier cases of shareholder activism initiated by environmental groups, which “pioneered the shareholder activism now being embraced by trade unions.”⁸

A Early Developments: Environmental Shareholder Activism

In September 1999, the Australian Wilderness Society led an alliance of shareholders known as Wesfarmers Investors and Shareholders for the Environment (WISE), in petitioning the board of Wesfarmers Ltd to hold an extraordinary general meeting (EGM).⁹ WISE shareholders held 166 shares, or 0.005 per cent of Wesfarmer’s 268 million voting shares.¹⁰ Pursuant to the *Corporations Law* as it then provided,¹¹ WISE required only 100 shares in order to request the EGM. The purpose of the EGM was to prevent Bunnings Forest Products Ltd, a wholly-owned subsidiary of Wesfarmers, from conducting logging in Western Australia’s old-growth forests.¹² According to the Wilderness Society’s campaign manager, the resolutions dealt with “economic issues, such as the disclosure of profits derived from woodchipping operations, as well as environmental issues such as the contracting of an independent zoologist to investigate the effect of logging upon animals, and social issues such as the transferral of ownership of company houses...to Bunnings mill workers.”¹³ Prior to the EGM, the Wilderness Society distributed information about the logging practices of Bunnings to Wesfarmer’s shareholders, encouraging them to vote for the

⁸ Stephen Long, ‘Going for Rio: The Union That Took on a Company’ *Financial Review Weekend Edition*, 6 May 2000, 31.

⁹ The Wilderness Society, ‘WISE Move on Wesfarmers’ Forest Policies’, 2 September 1999, available at <www.wilderness.org.au/campaigns/corporate/bunnings/19990902_mr/>

¹⁰ Harry Perkins, Chair, Wesfarmers Ltd, ‘Notice of Extraordinary General Meeting’, 25 July 1999. Available at <wfc.vivid.global.net.au/uploads/pdfs/EGMNOM.pdf>

¹¹ The relevant section in the current *Corporations Act* 2001 is s.249D(1), which provides that a general meeting can be requisitioned by either:

- (a) shareholders entitled to at least 5% of the total voting rights in the company; or
- (b) 100 shareholders who are entitled to vote at a general meeting.

¹² The Wilderness Society, above n 9.

¹³ *Ibid.* For full text of the proposed resolutions, see Harry Perkins, above n 10.

resolutions put forward by WISE.¹⁴ The resolutions were not passed, with 98 per cent of shareholders voting against them.¹⁵

A month after Wesfarmer's EGM, North Ethical Shareholders Group, a group of North Ltd shareholders holding 122 voting shares, requisitioned an EGM in order to put forward resolutions aimed at halting mining by its subsidiary, ERA, at the Jabiluka uranium mine.¹⁶ After negotiations following some litigation, the shareholders and North Ltd agreed to the EGM being held on the same day as the company's AGM.¹⁷ The resolutions received only around 6 per cent of votes. However, according to a representative of the Australian Conservation Foundation, this was quite significant, as it meant that some institutional investors had voted for the resolutions.¹⁸ The 100-member rule, as it relates to requisitioning EGMs has been controversial, and attempts have been made by the Government to reform s.249D.¹⁹ One suggestion for reforming the section has been to repeal the 100 member numerical requirement for requisitioning an EGM, while retaining the 5% test.²⁰ This would effectively prevent many unions and other groups from using this strategy, particularly in larger companies, as it would require the acquisition of a substantial number of shares.²¹

B Unions as Shareholder Activists: Case Studies

Case studies of union shareholder activism in Australia are now outlined, in order to examine the particular goals and strategies of unions, as well as the perceived impacts of these shareholder campaigns.

¹⁴ The Wilderness Society, 'Wesfarmers Blind to Community Outrage', 8 July 1998, available at <www.wilderness.org.au/campaigns/corporate/bunnings/19980708_mr/>

¹⁵ Keith Kessell, Manager, Corporate Affairs, Wesfarmers Ltd, 'Wesfarmers Shareholders Reject EGM Motions', 2 September 1999, available at <www1.wesfarmers.com.au/company.asp?ID=382>

¹⁶ Stephen Long, above n 8, 31.

¹⁷ Mark Tapely, Parliament of Australia, *Research Note 18 2001-02: How Many Shareholders Should it Take to Call a Meeting?*, 12 February 2002, available at <www.aph.gov.au/library/pubs/rn/2001-02/02rn18.htm>

¹⁸ Stephen Long, above n 8, 31.

¹⁹ See Tapely, above n 17.

²⁰ Ibid: e.g. in April 2000, the Government attempted unsuccessfully to pass a regulation to this effect. The *Corporations Amendment Bill (No 2) 2005* contains a provision that abolishes the 100 member test for requisitioning an EGM while retaining the 5% test (ie, members with at least 5% of the votes that may be cast at a general meeting may require the directors to hold an EGM).

²¹ For example, a 5% total shareholding in Wesfarmers in 2001 was \$13.4 million –see *Huntleys' Shareholder: The Handbook of Australia's Largest Public Companies*, (2001) 20th ed, extracted in Mark Tapely, above n 17, 2.

1. The CFMEU's Campaign at the Rio Tinto 2000 AGM

Perhaps drawing upon the experience of union shareholder activism in the United States,²² as well as the earlier environmental shareholder activism, the first union shareholder activist campaign in Australia was the use, by the Construction Forestry Mining and Energy Union (CFMEU) of the former *Corporations Law* to put two resolutions forward at Rio Tinto's AGM in 2000.²³ The Rio Tinto union shareholder campaign arose out of a wider long-term dispute between the company and the CFMEU.²⁴ According to Peter Colley, National Research Director of the CFMEU and architect of the shareholder campaign, this wider dispute with Rio Tinto began in 1993.²⁵ At that time, Rio Tinto was engaged in an "aggressive de-unionisation policy"²⁶ across Australia, and there had been a "very long series of disputes."²⁷ According to Stephen Creese, General Counsel at Rio Tinto, the disputes were more localised and involved particular sites in the Hunter Valley and Queensland, at which a low level of productivity was identified.²⁸ Rio Tinto sought to impose direct contracts with employees, rather than have a process of collective bargaining.²⁹ Fred Higgs, then General Secretary of the International Federation of Chemical, Energy, Mine and General Workers' Unions (ICEM), stated that Rio Tinto viewed trade unions as "third parties that had no role in the workplace."³⁰ Following Federal and High Court litigation, picketing and strikes at sites in Australia, including picketing outside Rio Tinto's 1996 AGM,³¹ the CFMEU tactics grew "more sophisticated."³²

²² Stewart J. Schwab and Randall S. Thomas, 'Realigning Corporate Governance: Shareholder Activism by Labor Unions' (1998) 6 *Michigan Law Review* 1019, 1041.

²³ The *Corporations Law* has since been replaced by the *Corporations Act 2001*, of which s.249N is now the relevant provision relating to member-proposed resolutions at a company's AGM.

²⁴ Interview with Peter Colley, National Research Director, CFMEU, 20 October 2004; interview with Stephen Creese, Corporate Counsel, Rio Tinto, 25 November 2004. See also Rio Tinto, 'Response by Sir Robert Wilson, Rio Tinto Chairman, to Requisitioned Resolutions', Annual General Meeting, 24 May 2000, Brisbane.

²⁵ Interview with Peter Colley, above n 24; Australian Broadcasting Corporation, 'Trade Union Shareholder Activists,' Transcript of Interview: Elizabeth Jackson, Stephen Long, Joy Buckland and Peter Colley, 22 November 2003, available at <www.abc.net.au/rn/talks/8.30/busrpt/stories/s996522.htm>

²⁶ Interview with Peter Colley, above n 24.

²⁷ Australian Broadcasting Corporation, above n 25, 2.

²⁸ Interview with Stephen Creese, above n 24.

²⁹ *Ibid.*

³⁰ ICEM, 'Unions Announce 'Progress' With Rio Tinto: ICEM

Update No. 86/2000', October 2000, available at <www.icem.org/update/upd2000/upd00-86.html>

³¹ John Arbouw, 'The New Face of Shareholder Activism', *Company Director*, April 2000, 10.

³² Interview with Stephen Creese, above n 24.

After the failings of more traditional union methods, the CFMEU decided to explore non-traditional forms of union activism.³³ According to Peter Colley, Rio Tinto began budgeting for six strike months per year, and their “unlimited legal budget” had prolonged the dispute indefinitely,³⁴ thus insulating Rio Tinto from more traditional means of union activism. Peter Colley asserts that the rationale for the CFMEU shareholder campaign was tied directly to the broader context of its dispute with Rio Tinto and the stand-still this dispute had reached:

Unions had been in a major dispute with Rio Tinto dating back to 1993, when they began engaging in an aggressive de-unionisation campaign across all their sites in Australia. There’s been a very long-running series of disputes. The shareholder campaign was basically a development from that. And the fundamental rationale was that we had been negotiating with management, but having to go through a phalanx of lawyers and HR specialists, and weren’t getting anywhere with management. So it’s a legitimate and obvious tactic to take your case to other relevant parties within the company. That means the board of directors and the shareholders.³⁵

The CFMEU brought together five organisations, and coordinated the gathering of over 100 shares in Rio Tinto. The organisations included the Australian Council of Trade Unions (ACTU), the British Trades Union Congress (TUC), the American Federation of Labor – Congress of Industrial Organisations (AFL-CIO) and the International Federation of Chemical, Energy, Mine and General Workers’ Unions (ICEM), who together represented 41 million workers.³⁶ Pursuant to a provision of the *Corporations Law*, which has been replaced by s.249N(1)(b) of the *Corporations Act*, a resolution may be proposed at a company’s AGM where it is moved by “at least 100 members who are entitled to vote at a general meeting.”

In 2000, the unions (‘the Coalition of Rio Tinto Shareholders’) put forward 2 resolutions at Rio Tinto’s AGM in London and Brisbane.³⁷ The first resolution (resolution 7 in Australia) concerned the appointment of independent non-executive directors to the Board. It provided:

That, recognising the need for a strong and independent non-executive element on the Board, with a recognised senior independent member other than the chairman to whom concerns can be conveyed,

³³ Interview with Peter Colley, above n 24.

³⁴ Ibid.

³⁵ Australian Broadcasting Corporation, above n 25, 2.

³⁶ Coalition of Rio Tinto Shareholders, ‘Media Release: The International Shareholder Campaign with Rio Tinto’, 22 May 2000, available at <www.cfmeu.asn.au/mining-energy/policy/rio/corts/media05.html>

³⁷ Rio Tinto is a dual-listed company, being separately listed on stock exchanges in the UK and Australia. The constitution of Rio Tinto provides that both sets of public shareholders vote on resolutions that are of common interest. The votes from the first AGM (which, in 2000, was in London) are carried forward and declared at the second AGM (in Brisbane in 2000). The votes are then tallied together: interview with Stephen Creese, above n 24.

the board of Directors adopts and implements a policy that any person appointed as Deputy Chairman shall be independent of management and free from any business or other relationship that could materially interfere with the exercise of his or her judgement;

And: That for these purposes, the Board should identify in the annual report the Board's view of the independent status of each individual non-executive director as one who has not been employed by Rio Tinto or an affiliate in any executive capacity within the last three years, among other criteria.

And: That every annual report shall fully disclose any information necessary for shareholders to determine whether each non-executive director qualifies as independent, and that to assist shareholders in making these determinations, the company shall disclose all relevant contractual, financial, professional, personal or any other connection held by the Director with the Company.

The second resolution proposed by the unions (resolution 8 in Australia) concerned adherence to international labour standards, and provided:

That the Board of Directors adopt, implement, enforce, and monitor through systems open to independent verification, a credible workplace code of labour practice. Such a code should be based on the internationally agreed core human rights conventions of the United Nations' International Labour Organisation (ILO) which proclaim fundamental human rights at work, the principles of which are also reflected in the 1998 ILO Declaration on Fundamental Principles and Rights at Work, including the following principles:

1. All workers shall have the right to form and join independent trade unions and to bargain collectively (ILO Conventions 87 and 98);
2. Workers' representatives shall not be the subject of discrimination and shall have access to enable them to carry out their representative functions (ILO Convention 135);
3. There shall be no discrimination or intimidation in employment. Rio Tinto shall provide equality of opportunity and treatment regardless of race, colour, gender, religion, political opinion, trade union membership, nationality or national origin, social origin or other distinguishing characteristics (ILO Conventions 100 and 111);
4. Employment shall be freely chosen. There shall be no use of forced, bonded or prison labour; and
5. There shall be no use of child labour (ILO Conventions 138 and 182).

And: That the workplace code of labour practice provides for the Board of Directors to issue an annual report on the status of the Company's adoption, implementation, enforcement, monitoring and independent verification of the above-stated code.

Pursuant to the *Corporations Law*, the Board distributed the resolutions to all shareholders of Rio Tinto,³⁸ and was required to bear the costs involved in so doing.³⁹ In addition, the CFMEU utilised the *Corporations Law*⁴⁰ to compel Rio Tinto to send out a statement in support of the resolutions to all shareholders, encouraging them to vote for the resolutions. The statement made in support of resolution 7 expressed concern over the proposed

³⁸ Pursuant to a provision now contained in s.249O(2) of the *Corporations Act* 2001. According to information made available by Rio Tinto, the company was of the view that they had the discretion to circulate the resolutions, as they fell within the powers vested in the Board. See section IIIA below for a more detailed discussion on the legal basis for excluding member-proposed AGM resolutions.

³⁹ Pursuant to a provision now contained in s.249O(3) of the *Corporations Act* 2001.

⁴⁰ Pursuant to a provision now contained in s.249P(1)(a) of the *Corporations Act* 2001.

appointment of Leon Davis, former executive director of Rio Tinto, to the position of non-executive Deputy Chair. It made reference to the Combined Code on Corporate Governance of the London Stock Exchange and the Australian Investment and Financial Services Association (IFSA) Guidelines, and provided that:

[i]nstitutional investors demand a balanced Board and support a powerful independent voice on the Board...It would be in the Company's and all shareholders' interests if Rio Tinto had a truly independent Deputy Chairman on the Board. Such a policy would guarantee that the Board could bring its full independent judgement to strategic decision making.⁴¹

The statement in support of resolution 8 linked the adherence to international labour standards to shareholder value and provided:

Managing operations effectively and increasing shareholder value is in part contingent on public and governmental perceptions of, and support for, the company. The company's reputation – its record of good corporate citizenship – is one of its most valuable assets in enabling continued operation and growth. Furthermore, adherence to this code of labour practice would improve workplace relations and the company's ability to reliably supply products to its customers. Thus, shareholder value would be enhanced.⁴²

The Board provided a response to the resolutions and supporting statements. It distributed the resolutions and statements supporting them with its own response, recommending to shareholders that they vote against the resolutions. The Board stated that “[b]oth resolutions deal with matters that are vested in the authority of the Board. Nevertheless, your directors have decided that these resolutions should be put (forward).” It provided that “[y]our directors are unanimously of the opinion that neither resolution is in the best interests of shareholders or of the Company...[a]ccordingly, they recommend you vote against the two resolutions as they intend to do in respect of their own beneficial holdings.”⁴³ The Board opposed resolution 7 on the ground that the Board of Rio Tinto “includes a strong independent element”, as “[t]he composition of the Rio Tinto board has in recent times been about one half executive and one half non executive.”⁴⁴ It was thus sufficiently independent, and in line with the Combined Code on Corporate Governance of the London Stock Exchange, which at that time required at least one third of a board to be non-executive. In response to resolution 8, the Board referred shareholders to Rio Tinto's statement on business

⁴¹ Rio Tinto, ‘Addendum to Notice of Annual General Meeting’, 24 May 2000. Reproduced at <www.cfmeu.asn.au/mining-energy/policy/rio/corts/Resolut.html>

⁴² Ibid.

⁴³ Rio Tinto, ‘Addendum to Notice of Annual General Meeting’, 24 May 2000.

⁴⁴ Ibid. Reproduced with commentary by the Coalition of Rio Tinto Shareholders at <www.cfmeu.asn.au/mining-energy/policy/rio/corts/rebuttal.html>

practice titled *The Way We Work*, in which it was said Rio Tinto showed support for the ILO standards relevant to its business practices.⁴⁵

In addition to having information supporting the resolutions distributed to shareholders, the unions lobbied institutional investors to support the resolutions, notably, those who manage superannuation funds. Prior to the AGM, the CFMEU succeeded in its request to the Australian Securities and Investments Commission (ASIC) to compel the top five institutional investors in Rio Tinto to disclose the shareholders for whom they held shares.⁴⁶ The CFMEU drew on this information to lobby investors in the USA, the UK and Australia by way of “targeted mailings, a special purpose website and numerous direct consultations.”⁴⁷ The TUC reported, prior to the AGM, that several pension fund investors planned to vote for the resolutions, including Britain’s Cooperative Insurance Society, which at that time managed £23 billion of assets, and two local authority pension fund managers, with £5 billion under management. Also, the TUC claimed that the resolutions were supported by US-based Proxy Voter Services and the Australian Labour Union Cooperative Fund, with A\$1 billion of assets.⁴⁸ The first resolution on board independence was also reportedly endorsed by the Australian Shareholders Association and Independent Shareholder Services (now Corporate Governance International), a proxy voting service which primarily advises institutional investors.⁴⁹ The president of the Australian Institute of Superannuation Trustees, having been requested by unions to lobby for support for the resolutions, also claimed that she had been able to attract significant interest from some major investors.⁵⁰

⁴⁵ Ibid.

⁴⁶ Zoe Danial, ‘ASIC Ruling on Rio Tinto a Win for Shareholder Activism’, *The World Today Transcript*, 3 May 2000, Australian Broadcasting Corporation, available at

<www.abc.net.au/worldtoday/stories/s123320.htm> See also Stephen Long, above n 8, 30.

⁴⁷ Coalition of Rio Tinto Shareholders, ‘The International Shareholder Campaign Within Rio Tinto: Briefing Notes’, 22 May 2000, available at <www.cfmeu.asn.au/mining-energy/policy/rio/corts/media05.html>. See also Coalition of Rio Tinto Shareholders, ‘Open Letter to Fellow Rio Tinto Shareholders’, 20 April 2000, available at <www.cfmeu.asn.au/mining-energy/policy/rio/corts/letter1.html> (a letter which was distributed to Rio Tinto’s top 200 shareholders).

⁴⁸ John Monks, ‘Investors to Press Rio Over Rights’, *The Age*, Business Section, 6 May 2000, 2.

⁴⁹ Coalition of Rio Tinto Shareholders, above n 47, 3. The second resolution on labour standards was not endorsed by the organisations.

⁵⁰ Stephen Long, above n 8, 31.

The resolutions did not receive the required 50% of votes for the resolutions to be passed at Rio Tinto's AGM. However, the unions did not anticipate that the resolutions would be passed, nor was this the goal of the shareholder campaign. According to Peter Colley, the goal of the CFMEU was to seek a favourable resolution to their dispute with Rio Tinto, by facilitating enterprise bargaining negotiations.⁵¹ The two resolutions received significant support: resolution 7, on corporate governance, received 20.3% (113.8 million) of all shares voted, while resolution 8, on compliance with international labour standards, received 17.3% (95.4 million) of all shares voted.⁵² The level of support for the two resolutions was widely considered to be a significant result,⁵³ and was "at the upper end" of that expected by the CFMEU, who regarded it as a major result.⁵⁴ In particular, the level of support received for the resolutions meant that the CFMEU had obtained the support of some institutional investors.⁵⁵ Rio Tinto has said that the union shareholder campaign did not have an effect on their dealings with the CFMEU, and on their business practices more generally.⁵⁶ However, approximately six months after the company's AGM, Rio Tinto negotiated new collective agreements at all unionised sites in Australia,⁵⁷ and since the shareholder campaign "employee relations have improved and strikes and litigation have decreased."⁵⁸ According to the ICEM, "progress in signing enterprise bargaining agreements in Australia has been rapid since the May 2000 Annual General Meetings of the company."⁵⁹ The resolution of such a long-running dispute indicates that the shareholder campaign, combined with other union activities, may have exerted pressure on the company to facilitate the collective bargaining process.

⁵¹ Interview with Peter Colley, above n 24.

⁵² Rio Tinto, 'Results of Voting at 2000 Annual General Meetings of Rio Tinto PLC and Rio Tinto Limited', 24 May 2000.

⁵³ See e.g. Alan Kohler, 'Only Rio Tinto Could Get Away With It', *Australian Financial Review*, 30 May 2000, 19; 'Rio Tinto Appeals for Industrial Peace, 55 *Workers Online*, 26 May 2000, available at <www.workers.labor.net.au/55/news7_rio.html>; ICEM, above n 30.

⁵⁴ John Maitland, National Secretary, CFMEU, 'Shareholders and the Non-Financial Agenda' (2001), available at <www.cfmeu.asn.au/national/int_issues/20011203_Activism.html>

⁵⁵ Alan Kohler, above n 53.

⁵⁶ Interview with Stephen Creese, above n 24.

⁵⁷ John Maitland, above n 54, p.6 of transcript.

⁵⁸ John Maitland, above n 54. see also interview with Stephen Creese, above n 24, although Stephen Creese does not attribute the improved relationship to the shareholder campaign.

⁵⁹ ICEM, above n 30.

In addition to the shareholder resolutions, CFMEU members utilised the *Corporations Law* to pose questions to the Board during the AGM.⁶⁰ The questions related to Rio Tinto's relationship and dealings with the CFMEU. For instance, the CFMEU Vice President posed the following question to Leigh Clifford, Chief Executive: "can you tell shareholders – because I'm sure they are concerned with the production that's come out of New South Wales – what practical and tangible steps you'll be taking to achieve peace with Australian unions in your operations?" Leigh Clifford responded that Rio Tinto was comfortable in dealing with union representatives, and stated that the company was "willing to sit down and discuss with its employees and their representatives, collective arrangements which deliver world class performance in terms of productivity."⁶¹ Thus, the Board specifically addressed the issue of collective bargaining at the AGM.

The Rio Tinto shareholder campaign was said by the CFMEU to be a success. According to Peter Colley, the Rio Tinto Board had, prior to the shareholder campaign, delegated its dealings with unions to "hired hands" and the management was able to utilise the company's 'deep pockets' to pursue delaying tactics with the CFMEU,⁶² and insulate itself from the conflict. According to the union, once the shareholder campaign forced the board and senior management to address the issue, there was a "turnaround" in the relationship between the CFMEU and Rio Tinto:

With the shareholder campaign, top management in London had to get involved in dealing with the issue. And that was a major issue for them. They didn't want to have their time taken up by union activity. So that was a significant reason why they shifted.⁶³

That is, by placing the issue on the agenda of the Board, the shareholder campaign forced the Board to take action in order to resolve the dispute.⁶⁴ In addition, the support the unions obtained from institutional investors may have indicated to the Board that the issues of concern to unions were also of concern to a number of other, larger shareholders. This may

⁶⁰ The relevant provision is now contained in s.250S *Corporations Act*: the board must allow a "reasonable opportunity" for members to ask questions about the management of the company.

⁶¹ Rio Tinto, 'Annual General Meeting: Response by Leigh Clifford, Rio Tinto Chief Executive to Questions from Mark Watson, CFMEU Vice President Northern District (Hunter Valley), New South Wales', 24 May 2000.

⁶² Australian Broadcasting Corporation, above n 25, p.2 of transcript.

⁶³ Ibid.

⁶⁴ Interview with Peter Colley, above n 24.

have caused the Board to “sit up and take notice,”⁶⁵ as it represented “a massive vote of discontent against certain practices of the company” according to unions.⁶⁶ Further, the unions, by using the AGM as a forum in which to air their industrial issues with Rio Tinto, targeted the reputation of the company. According to one commentator, “shareholder activism is designed to needle a company perceived as anti-union and smear it with negative publicity. The resolution on board structure is a Trojan Horse for the unions’ central concern about bargaining rights.”⁶⁷ The shareholder campaign received wide media coverage, and Rio Tinto may have wanted to resolve the dispute with the CFMEU out of concern for its corporate reputation.

2. The TWU’s Campaign at the Boral 2003 AGM

In 2003, a group of shareholders, the ‘Boral Ethical Shareholders’, utilised s.249N(1)(b) of the *Corporations Act* to put forward 6 resolutions at Boral’s AGM. The Transport Workers’ Union (TWU) coordinated the campaign, and the shareholders were a group of 120 owner-truck drivers who had each purchased \$500 share parcels.⁶⁸ These shareholders held 0.01% of total voting shares in Boral.⁶⁹ The resolutions, which concerned workplace health and safety and executive remuneration, were said to arise out of concern with Boral’s lack of adherence to its occupational health and safety commitments.⁷⁰ One of the shareholder-truck drivers stated that “[a]s both shareholders and drivers with a long term commitment to the company we want Boral to be a long term success. Unless Boral seriously improves its workplace safety practices in our industry we are concerned this is just not going to happen.”⁷¹ However, the resolutions were also said to have arisen out of a broader industrial dispute between Boral and the TWU, namely, the discontinuation of contracts with 25 Canberra based owner-drivers in late 2002. This had resulted in strikes initiated by the TWU

⁶⁵ Alan Kohler, above n 53.

⁶⁶ John Maitland, above n 54, p.6 of transcript.

⁶⁷ Stephen Long, above n 8.

⁶⁸ Paddy Manning, ‘Building Blocks’ (2003) 121 (40) *Bulletin*, available at <<http://bulletin.ninemsn.com.au/bulletin/EdDesk.nsf/0/00a15c78a8f0faeeca256daf007473bb>>

⁶⁹ Boral, ‘Notice of Meeting 2003’, available at <www.boral.com.au/Images/common/pdfs/2003_nom.pdf?AUD=&Nodes=&site=Boral> p.9.

⁷⁰ ‘Drivers BBQ Boral’, *Owner / Driver Magazine*, 12 September 2003, available at <www.twu.com.au/news?block%5B63%5D%5Bitem%5D=216>, ‘Truckies Tip Safety on AGM Floor’ *Workers Online*, 5 September 2003, available at <http://workers.labor.net.au/194/news1_truckies.html>

⁷¹ ‘Drivers BBQ Boral’ above n 70.

and Federal Court action taken by the drivers alleging breaches of the *Trade Practices Act* 1974 (Cth) for Boral's failure to pay goodwill on their termination.⁷² In addition, the drivers were, at the time, facing Supreme Court action over alleged unlawful industrial measures taken in support of their contract negotiations with Boral.⁷³ Boral's General Manager of industrial relations, Kylie Fitzgerald, claimed that the TWU targeted Boral for a shareholder campaign due to these "ongoing legal and industrial disputes."⁷⁴

As required by s.249O(2) of the *Corporations Act*, the resolutions were distributed by the Board, and were included with Boral's 2003 'Notice of Meeting'.⁷⁵ The first resolution (resolution 9) concerned occupational health and safety and sought alterations to Boral's constitution through the addition of the following clause:

145A. The Board of the Company shall review its Health and Safety Management System in the manner detailed below, such review to be completed before the 2004 Annual General Meeting. A report thereon shall be provided by the Directors in the 2004 Annual Report:

- (i) By the formation of a Health and Safety Subcommittee of the Board of Boral Limited that is chaired by an independent non-executive director and consists solely of non-executive directors.
- (ii) To appoint an independent safety expert who will audit the system in accordance with the Australian Standard.
- (iii) To report in the 2004 Annual Report on key health and safety set by the sub-committee in a manner consistent with the Labour Practice and Decent Work Guidelines in the Global Reporting Initiative.
- (iv) To report in the 2003 Annual Report on the Company's performance against the Key health and safety targets set by the sub-committee in a manner consistent with the requirements of the Global Reporting Initiative."⁷⁶

The resolution was accompanied by a statement prepared by the Boral Ethical Shareholders. According to this statement, the shareholders sought to ensure more adequate adherence to Boral's safety standards and policies.⁷⁷ Prior to the AGM, the TWU conducted a 'safety audit' in the Sydney metropolitan area, and "found that safety issues were often not being addressed in a timely manner and there was frequently a failure to act on issues raised with local management...the Union audit also found that there was poor or non-existent genuine

⁷² Paddy Manning, above n 68, 'TWU to Put Resolutions to Boral's AGM', *Workplace Express*, 28 August 2003, available at <www.workplaceexpress.com.au/workplace/nav?id=56689&no=60962232182719>

⁷³ 'Asbestos Prospect for Home Buyers' 197 *Workers Online*, 26 September 2003, available at <www.workers.labor.net.au/197/news4_Prospect.html>, 'Truckies Tip safety on AGM Floor', above n 71, 'TWU to Put Resolutions to Boral's AGM', above n 72.

⁷⁴ Paddy Manning, above n 68.

⁷⁵ Boral, above n 69.

⁷⁶ *Ibid*, 3.

⁷⁷ *Ibid*, 15.

consultation around health and safety issues in the workplace.”⁷⁸ The shareholders linked these occupational health and safety concerns to traditional shareholder value:

Ongoing improvement in workplace health and safety is an area where workers and investors have a common interest. A failure to implement occupational health and safety policies at all levels of the company’s business represents a potential risk to shareholders and an actual risk to the Boral workforce. Industrial and investment interests can be aligned by improving the identification and management of workplace health and safety risks.⁷⁹

The Board opposed the resolution on the basis that current implementation measures for workplace health and safety standards were adequate, and that it is “appropriate and efficient for the full Board to review safety management and performance.”⁸⁰ The Board stated that “it is also efficient for the Managing Director to be accountable directly to the Board for operational matters such as safety rather than through the proposed Committee.”⁸¹ The Board’s statement also implied that the ‘real’ motivation behind the shareholder resolutions was the ongoing dispute between Boral and the TWU.⁸²

Resolutions 10 – 14 related to executive remuneration. Resolution 10 sought to alter Boral’s constitution by replacing a provision that remuneration of directors is determined by the Board, with a provision requiring that executive remuneration is determined at the company’s AGM, that is, by shareholders. Resolution 11 provided that “the company cease issuing any further options” under an executive option plan. Resolution 12 sought to require that “any subsequent form of long-term incentive plan for senior executives be put to shareholders for approval as an ordinary resolution at the Company’s 2004 Annual General meeting.” Resolution 13 sought approval for a requirement that the company “adopt a policy that any short-term incentive payable to an Executive Director be put to shareholders for approval”. Finally, resolution 14 sought to tie executive incentive-based remuneration to meeting occupational health and safety targets. It provided that “the company amend its senior executive remuneration policy to link 30% of the short-term incentives to the achievement of safety targets set by the Health and Safety Subcommittee.”⁸³

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Ibid, 10.

⁸¹ Ibid.

⁸² Ibid, 9: “Boral notes that there are ongoing legal disputes between Boral subsidiary companies and the TWU lorry owner drivers who are members in New South Wales and the Australian Capital Territory.”

⁸³ Ibid, 3.

The Boral Ethical Shareholders said, in their supporting statements, that the rationale for resolutions 10 – 13 was to ensure that shareholders had “greater involvement in how the company rewards its Directors and other members of the Management Team.” The statement in support of resolution 14 noted that it was aimed at ensuring that “senior executives have a genuine incentive to administer safety standards.”⁸⁴ The Board opposed the resolutions on the ground that, generally, “the Company’s ability to attract, motivate and retain high quality executives would be substantially restricted if shareholder approval is required before elements of remuneration for those executives can be determined.”⁸⁵

Several of the Boral Ethical Shareholders resolutions were endorsed by the Australian Council of Super Investors (ACSI), a not-for-profit organisation formed to provide research and advice to superannuation funds. In particular, ACSI suggested that superannuation trustees should consider voting in favour of resolution 9. In a Voting Alert Service, ACSI stated that the resolution is “worthy of informed consideration” as occupational health and safety is “a fundamental issue that could intimately impact on company performance”, and “[i]t is feasible to assert that from a long term investment perspective a good OHS record underpinned by appropriate review and reporting structures would be conducive to the ‘best financial interests’ of superannuation fund members whose investments are in a company.”⁸⁶ ACSI recommended that trustees vote for resolution 12 on shareholder approval for long term incentive plans for senior executives, and abstain in relation to resolutions 10, 11, 13 and 14, as ACSI had not adopted a policy of requiring shareholder approval for other remuneration issues.⁸⁷ ACSI’s voting recommendations indicate the potential for alignment of industrial interests with those of institutional investors, in particular superannuation trustees, which have an interest in the long term economic performance of companies in which they invest.⁸⁸

⁸⁴ Ibid, 16.

⁸⁵ Ibid, 10.

⁸⁶ Australian Council of Super Investors Inc., ‘ACSI Voting Alert Service: Boral Limited (BLD) 2003, AGM, 21 October 2003’, 7 October 2003, available at <www.acsi.org.au/documents/BLD.pdf> p. 4.

⁸⁷ Ibid, p.4 – 5.

⁸⁸ See section IIC, below.

None of the resolutions passed; however, resolutions 9 and 14, which concerned traditional union objectives, received the greatest support from shareholders with 17.03% (41,139,746) of total votes cast in favour of resolution 9, and 14.83% (36,249,454) of total votes cast in favour of resolution 14. The resolutions on executive remuneration, which could be considered to be a more traditional concern of shareholders, attracted less support: resolution 10 attracted 4.07% (9,952,907) votes in favour; resolution 11 attracted 6.40% (16,022,799) votes in favour; resolution 12 attracted 9.09% (22,685,153) votes in favour; and resolution 13 attracted 4.90% (11,969,187) votes in favour.⁸⁹

3. The FSU's 2003 Campaign to Appoint a Union Member to the Board of ANZ

In December 2003, the Financial Sector Union (FSU) ran a shareholder campaign targeting the AGM of the ANZ Bank. The FSU supported a move to nominate one of its representatives, Joy Buckland, as a candidate for the ANZ Board. At the time the shareholder campaign was launched, there had been a break down in wage negotiations between the FSU and ANZ, with employees covered by an expired 1998 agreement.⁹⁰ Tony Beck, National Secretary of the FSU, stated that the union had been “experiencing a growing anti-union attitude from the bank with a continued refusal to collectively bargain, refusing the right of entry of union officials and attempts to erode conditions of employment.”⁹¹ In June 2003, ANZ declared that it would no longer be involved in negotiating any enterprise bargaining agreements with the FSU.⁹² ANZ had also recently eliminated 17,000 full time jobs and closed 500 bank branches.⁹³

⁸⁹ Boral, Letter to Australian Stock Exchange, ‘Annual General Meeting – Outcome of Business and Declaration of Polls’, 21 October 2003, available at <www.boral.com.au/Images/common/pdfs/Results_2003_AGM_Polls.pdf?AUD=&Nodes=&site=Boral>

⁹⁰ Brad Norington, ‘Union Hides its Hand in Push for Seat on Board of ANZ’, *Sydney Morning Herald*, 27 October 2003, available at

<<http://www.smh.com.au/articles/2003/10/26/1067103270877.html?from=storyrhs&oneclick=true>>

⁹¹ Linda Rubinstein (ed.) ‘Joy for the ANZ Board’, 22 *ACTU Super*, November 2003, 3. Available at <http://www.actu.asn.au/public/news/1068079465_9038.html>

⁹² FSU Briefing Paper: Australian Council of Super Investors Inc. ‘ACSI Voting Alert Service: Australia and New Zealand Banking Group Limited (ANZ), 2003 AGM, 19 December 2003 at 10.00am’, 2 December 2003, 2. Available at <<http://www.acsi.org.au/documents/ANZ.Dec03.pdf>>

⁹³ Linda Rubinstein, above n 91, FSU Press Release, ‘ANZ Profit Paid for by Staff and Customers’, 24 October 2003, available at <http://www.fsunion.org.au/article_print.asp?artid=%205455>, FSU, ‘Joy’s Presentation to the ANZ AGM - 19 December 2003’, 23 December 2003, available at <http://www.fsunion.org.au/article_print.asp?artid=%205671>

Joy Buckland had a statement in support of her candidature distributed with ANZ's 2003 'Notice of Annual General Meeting',⁹⁴ pursuant to s.249P of the *Corporations Act*, in which she highlighted the need to ensure the long term economic growth of the bank through improved workplace practices, and a better alliance between all stakeholders:

The long term sustainability of shareholder wealth at ANZ relies upon an effective alliance between all stakeholders – shareholders, customers, staff and the community...Many of the communities which the ANZ is established to serve have in my view been let down by branch closures, service cut-backs and fee increases instituted in recent years. Both customers and staff of the bank are affected by these measures in their financial wellbeing and in the trust and confidence they place in the bank. The long term health of the business, and your investment in ANZ, depend on these measures being reversed.⁹⁵

In order to achieve this, she emphasised her 27 year employment history at ANZ, which included the role of branch manager, claiming that she brought “the first hand experience of a frontline staff member who witnesses daily the customer service experience” with which she was able to “bridge the gap between the board and the bank.”⁹⁶

The FSU launched a campaign encouraging all members who own shares in ANZ to vote in favour of Joy Buckland's candidacy.⁹⁷ Members of the Community and Public Sector Union and the ACTU were also encouraged to support the campaign.⁹⁸ Further, the FSU attempted to obtain the support of major superannuation funds and ran a campaign to encourage superannuation fund advisors and investors to vote in favour of Joy Buckland's candidacy.⁹⁹ The FSU campaign was supported by the Labour Union Co-operative Retirement Fund, which at that time held 600,000 shares in ANZ.¹⁰⁰ The Australian Council of Super Investors (ACSI) declined to make a recommendation on the candidature of Joy Buckland, as according to ACSI, the nomination of Buckland fell into the category of 'corporate social responsibility' rather than 'corporate governance'. As making recommendations on matters of corporate social responsibility is not within its mandate, ACSI recommended that “funds come to their own view” as to whether to vote for Buckland's nomination.¹⁰¹ The Australia

⁹⁴ Available at <<http://www.irasia.com/listco/au/anz/announcement/03index.htm>>

⁹⁵ Ibid, 4.

⁹⁶ Ibid.

⁹⁷ Vanda Carson, 'Union Chief in ANZ Board Tilt', *The Australian – Finance*, 3 November 2003, 38.

⁹⁸ Ibid, Norington, above n 90.

⁹⁹ Norington, above n 90, FSU, 'Joy to the Board', 19 December 2003, available at <http://www.fsunion.org.au/article_print.asp?artid=%205658>

¹⁰⁰ AAP Information Services, 'Support for Branch Manager's Tilt at ANZ Board', *AAP Newsfeed*, 4 December 2003.

¹⁰¹ Australian Council of Super Investors Inc., above n 92, 2.

Shareholders Association, on the other hand, recommended that shareholders vote against Joy Buckland's candidacy, as it was thought that her employment experience was insufficient for the Board position.¹⁰²

Central to the rationale of the campaign was the desire to open a dialogue between employees and the Board of ANZ. Joy Buckland stated that one of the main reasons for nominating for a position on the Board was her belief that "customers and staff aren't able to get any messages and communicate to the top echelons of the ANZ,"¹⁰³ and as such they "don't understand the customer experience."¹⁰⁴ The campaign allowed the FSU to bring matters of concern to employees to the attention of ANZ's shareholders, through Joy Buckland's nomination and her speech at the company's AGM.¹⁰⁵ Further, her nomination attracted significant media coverage,¹⁰⁶ which was used to highlight the FSU's concerns over the industrial practices of ANZ, and bring these issues to the attention of the wider community: "the FSU hopes that the publicity surrounding Buckland's campaign...will bring issues that concern employees and customers to the attention of shareholders and the wider community."¹⁰⁷ Carol Webb, National Training Coordinator for the FSU, stated that the campaign attempted, in part, to focus on the corporate image of ANZ. The campaign linked the need for ANZ to retain adequate staffing levels, good work practices and an image of "corporate responsibility" to the longer term price of ANZ's shares.¹⁰⁸ In attempting to have Joy Buckland appointed to the Board, which in turn allowed publication of her statement in support of her candidacy in the Notice of Meeting and also allowed her to make a speech at the AGM, the FSU endeavoured to bring employment issues to the attention of the shareholders in a manner which linked these issues with long term profit maximisation.

¹⁰² AAP Information Services, 'ASA Says it Will Vote in Favour of ANZ Chairman's Re-election', *AAP Newsfeed*, 15 December 2003.

¹⁰³ Australian Broadcasting Corporation, above n 25, p.2 of transcript.

¹⁰⁴ Andrew Fraser, 'Quixotic Board Tilt by Teller that Won't be Told', *The Australian – Finance*, 19 December 2003, 16.

¹⁰⁵ FSU, above n 93: "My election would mean that you would have a director that is working to ensure that empowerment of staff becomes a reality...I would argue for the need to put in place industrial agreements giving staff a sense of common purpose as well as eradicating poor management practices, taking ANZ a big step forward in its quest for recognition as an employer of choice...My election would mean working for better customer service through the recognition of the need to get staffing levels, training levels and sales targets aligned with customer needs."

¹⁰⁶ Interview with Carol Webb, National Training Coordinator, FSU, 18 October, 2004.

¹⁰⁷ Nicolas Way, 'Boardroom Raiding Party', *Business Review Weekly*, 4 December 2003.

¹⁰⁸ Interview with Carol Webb, above n 106.

The Board did not support Joy Buckland's candidature¹⁰⁹ and her nomination did not receive wide support from shareholders, with only 4.66% (31,037,681) votes cast in favour of her nomination.¹¹⁰ According to the FSU, it did not expect Joy Buckland to be elected to the Board, and the success of the shareholder campaign was not dependant on this.¹¹¹ The shareholder campaign formed an integral part of a wider union strategy to highlight various industrial issues within ANZ.¹¹² Carol Webb has stated that, generally, the FSU will use a shareholder campaign when it is attempting to reach an enterprise bargaining agreement with a company.¹¹³ In the case of ANZ, having Joy Buckland's name listed as a Board candidate and having her speak to the media and at the AGM formed part of a wider campaign strategy involving more traditional union tactics.¹¹⁴ Tony Beck of the FSU concurs:

Buckland's campaign is an integral part of the FSU's industrial campaign. Beck says that it draws public attention to issues such as branch closures, where staff and customers have common cause. In recent years, the FSU has been effective in forming coalitions to advance its industrial campaigns – community groups, local governments and politicians have been enlisted – and Buckland's bid for a board seat is a logical extension of the strategy.¹¹⁵

According to the FSU, the shareholder campaign “forced the Board to take notice and listen,”¹¹⁶ and following the AGM, an ANZ executive “agreed to meet with the FSU.”¹¹⁷ Further, it has been asserted that the campaign “managed to put a publicity dent in the bank's armour.”¹¹⁸ This suggests that the campaign may have been successful in its goal to bring employment issues to the attention of the Board and the public, in order to bring pressure to bear on the Board to address these issues. It is unclear, however, whether this has led to better relations or renewed negotiations between the FSU and ANZ.

¹⁰⁹ ANZ Notice of Meeting, above n 94.

¹¹⁰ ANZ Media Release, ‘ANZ Annual General Meeting Highlights’, 19 December 2003, available at <<http://www.anz.com/australia/support/library/MediaRelease/MR20031219.pdf>>

¹¹¹ Way, above n 107.

¹¹² Interview with Carol Webb, above n 106.

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ Way, above n 107.

¹¹⁶ FSU, ‘Joy's Bid Attracts 33 Million Votes’, *FSU Annual Report 2004*, 29 March 2004, available at <<http://www.fsunion.org.au/article.asp?artid=4989>>

¹¹⁷ Ibid.

¹¹⁸ John McCarthy, ‘ANZ Warns of Slowdown’, *Herald Sun – Business*, Melbourne, 20 December 2003, 77.

4. The FSU's Campaign at the CBA 2004 AGM

The FSU's campaign targeting the 2004 AGM of the Commonwealth Bank of Australia (CBA) formed part of a broader industrial campaign against the implementation of the CBA's "Which New Bank?" policy. It was also a response to failed attempts to negotiate a new enterprise bargaining agreement. The "Which New Bank?" policy, which was announced in September 2003, attempted to provide "a better, faster and more responsible service" through empowering and motivating staff and simplifying the processes of the CBA.¹¹⁹ The practical realisation of the policy is expected to result in 3,700 job losses over the next three years.¹²⁰ According to the CBA, the job losses "flow from the removal of 'unnecessary work' identified during the change program and arise from systems and process improvements."¹²¹ In addition to the reaction against these job losses, the shareholder campaign arose in the context of failed enterprise bargaining between the CBA and the FSU.¹²² In April 2004, the FSU commenced the renegotiation of the CBA's major enterprise bargaining agreements.¹²³ The CBA and the FSU could not reach an agreement and industrial action followed, including a series of work stoppages.¹²⁴

The FSU put forward a resolution ('resolution 6') at the CBA's 2004 AGM. The resolution, which was proposed by approximately 900 shareholders, sought to amend the CBA's constitution to require the Board to appoint an external auditor to review the impact of the "Which New Bank?" policy. The resolution provided:

That the Constitution of the Commonwealth Bank of Australia be modified by inserting, after article 21, a new article 22 as follows:

22. *Major Change Reviews*

22.1 Annual Major Change Reviews

(a) The board shall, in each financial year (commencing in the year ending 30 June 2005), cause a review to be conducted of the impact of each major change program implemented or undertaken by the company in that year.

¹¹⁹ David Murray, CEO, Commonwealth Bank of Australia, in 'Media Release: Commonwealth Bank Launches 'Which New Bank' Customer Service Vision', available at <http://about.commbank.com.au/group_display/0,1922,CH2071%255FTS9845,00.html>

¹²⁰ Blair Speedy, 'Boards to Face Tough Questions', *The Australian – Finance*, 1 November 2004, C32.

¹²¹ Commonwealth Bank of Australia, 'Statement Pursuant to Section 249P of the Corporations Act', undated, available at <<http://imagesignal.comsec.com.au/asxdata/20040917/pdf/00461201.pdf>>

¹²² Ibid; Geoffrey Newman, 'CBA Chief Faces Protest Vote', *The Australian – Finance*, 6 November 2004, 36.

¹²³ Commonwealth Bank of Australia, above n 121.

¹²⁴ Ibid.

It was proposed that the Board appoint an “independent expert” to conduct the review. The independent expert would be required to conduct an audit of the impact of a major change program on the following:

- (i) Staffing levels;
- (ii) Staff workloads;
- (iii) Staff engagement and morale;
- (iv) Customer service;
- (v) Customer satisfaction and strength of relationship;
- (vi) ‘Cost to serve’; and
- (vii) Such other matters as in the opinion of the independent expert are appropriate to be considered having regard to the nature of the program.¹²⁵

Proposed article 22.3 provided:

The independent expert engaged by the company to conduct a review shall be instructed to consult with representatives nominated by the Finance Sector Union of Australia for the purposes of assessing the impact of the program on the matters referred to in article 22.2(b).¹²⁶

The rationale for proposing the resolution is outlined in the FSU’s statement in support of the resolution, which was distributed to all shareholders pursuant to s.249P of the *Corporations Act*:

The resolution proposed by the shareholders associated with the Finance Sector Union of Australia (FSU) is based on the belief that the long-term sustainability of shareholder wealth at CBA relies upon an effective alliance between all stakeholders – shareholders, customers, staff and the community. A quality review should be undertaken on a regular basis to ensure the strategic direction of the Company is not disproportionately impacting one stakeholder to the possible detriment of another, or all, over the longer term...Many of the communities which the CBA is established to serve have, in the view of FSU, been let down by branch closures, service cut-backs and fee increases instituted in recent years. Both customers and staff of the Bank are affected by these measures in their financial wellbeing and in the trust and confidence they place in the Bank. In our view, the long-term health of the business, and your investment in CBA, depend on these measures being reversed...The aim of the independent quality review would be to objectively assess the impact of change programs such as Which New Bank... (it) will objectively identify factors that impact on staff performance and morale and the delivery of high quality customer service so as to improve the Bank’s financial performance for the benefit of all stakeholders.¹²⁷

Thus, the FSU attempted to link employment issues with the long-term economic wellbeing of the CBA, and in turn, the need to maximise shareholder returns. The Board unanimously opposed the resolution, and provided a statement in the Notice of Meeting sent to all shareholders, indicating its opposition to the resolution on three grounds. First, that the resolution is inappropriate, as the Bank “already has a duty to review operations of the

¹²⁵ Proposed article 22.2(b).

¹²⁶ Commonwealth Bank of Australia, ‘Notice of Meeting 2004’, 25 – 6, available at <http://shareholders.commbank.com.au/GAC_File_Metafile/0,1687,3994%25Fcba%25Fnom%25Ffinal,00.pdf>

¹²⁷ Commonwealth Bank of Australia, above n 121.

Bank.”¹²⁸ Second, the proposed resolution “breaches basic principles of corporate governance”, as the amendment:

...would impose on the Board an inflexible, disruptive method of evaluating change. It would vest critical judgements about major change programs in independent outsiders who lack the experience, knowledge and expertise of the Bank’s management and who are not accountable to shareholders... (as) contrasted with the Board’s accountability to shareholders. The amendment would entrench a role for the FSU in the conduct of the Bank’s affairs which is not appropriate... The FSU acts in its own interests, and as it perceives the interests of its members, not necessarily in the interests of the shareholders or the Bank and is not accountable to anyone but its own members.¹²⁹

Third, the Board stated that the AGM was “not the appropriate forum for these issues”, as the resolution was an attempt by “a very small special interest group”, constituting 0.0037% of all shareholders, “to use the AGM to further industrial aims”, rather than advancing the interests of all shareholders.¹³⁰

The FSU attempted to gain the support of both FSU members and other CBA employees, by encouraging them to either attend the meeting and vote for the resolution, or to appoint the FSU’s National Assistant Secretary as their proxy.¹³¹ The CBA has a high level of employee share ownership, owing to the granting of performance-based share bonuses.¹³² Also, FSU representatives campaigned for managers of superannuation funds and corporate governance advisors to these funds to support the resolution.¹³³ The level of support for the resolution from superannuation fund managers is unclear; however, the Australian Shareholders Association announced its intention to vote against the resolution, due to its belief that “the company constitution is not the appropriate repository for industrial relations issues.”¹³⁴

Approximately 10 per cent of votes (47,401,210 votes) were cast in favour of the resolution.¹³⁵ The FSU claimed that, regardless of whether the resolution was successful,

¹²⁸ Commonwealth Bank of Australia, above n 126, 23.

¹²⁹ Ibid, 24.

¹³⁰ Ibid.

¹³¹ FSU, ‘CBA Shareholder Campaign’, 14 October 2004, available at <http://www.fsunion.org.au/article_print.asp?artid=%206267>

¹³² Newman, above n 122.

¹³³ FSU, above n 131.

¹³⁴ Speedy, above n 120.

¹³⁵ J D Hatton, CBA Secretary, Letter to the Australian Stock Exchange, ‘Re. Commonwealth Bank of Australia Annual General Meeting’, available at

“there will have been a broad ranging discussion about challenges staff facing (sic) in their efforts to deliver the excellent service this bank commits to publicly and the negative impact of the bank’s failure to address workplace concerns and their impact on customers.”¹³⁶

Instead of having a positive effect on relations between the CBA and the FSU, the union shareholder campaign appears to have heightened tensions. The CBA has commenced legal action against the FSU, arguing that the shareholder campaign constituted unlawful industrial action designed to coerce the CBA into making an enterprise agreement.¹³⁷ The CBA claims the FSU actions breached s.170N C(1) of the *Workplace Relations Act* 1996 which provides that a person must not take or threaten to take any unprotected industrial action or other action with intent to coerce another person to agree to make an enterprise agreement.

5. The AWU’s Campaign at the BlueScope 2004 AGM

In 2004, approximately 120 shareholders affiliated with the Australian Workers’ Union (AWU) put forward five resolutions at BlueScope Steel’s AGM. The AWU maintained formally that the campaign arose out of its concern at various corporate governance and executive remuneration practices within the company. Bill Shorten, National Secretary of the AWU, stated that the resolutions were “designed to improve the long-term job opportunities and income security of AWU members through the best corporate governance standards at BlueScope.”¹³⁸ During his speech at the AGM of BlueScope, Bill Shorten further indicated that the AWU was not putting forward the resolutions in order to “resolve (their) industrial agreements”, but rather, because of the AWU’s legitimate interest in the corporate governance of BlueScope in its capacity as “a major stakeholder” of the company.¹³⁹

However, the campaign took place against the backdrop of failed enterprise bargaining negotiations and attempts by BlueScope to ‘de-unionise’ the company. The AWU and

<http://shareholders.commbank.com.au/GAC_File_Metafile/0,1687,4141%255F2004%252520annual%252520general%252520meeting%252520proxy%252520count%2525205%252520november%2525202004,00.pdf>

¹³⁶ FSU, above n 131.

¹³⁷ ‘CBA Legal Move a Threat to Activism’, *Australian Financial Review*, 24 March 2005, 9.

¹³⁸ AWU, ‘BlueScope Bosses Face Workers Resolutions at AGM’, 19 October 2004, available at <http://www.awu.net.au/national/news/1098145864_31432.html>

¹³⁹ Bill Shorten, National Secretary, AWU, ‘BlueScope Steel Ltd Annual General Meeting’, 25 November 2004, available at <http://www.awu.net.au/national/speeches/1101352076_17770.html>

BlueScope entered into enterprise bargaining negotiations in October 2003,¹⁴⁰ and have thus far failed to reach an agreement. According to the AWU, BlueScope failed to meet the AWU's requirements by not including improved superannuation and redundancy provisions in a renewed enterprise bargaining agreement.¹⁴¹ This led to numerous strikes across various BlueScope sites in mid-2004.¹⁴² This tends to indicate that the shareholder campaign formed part of the larger industrial campaign strategy by the AWU whereby the AWU attempted to reach a favourable enterprise bargaining agreement with BlueScope.

Three of the resolutions put forward by the AWU concerned corporate governance (resolutions 4 – 6), while the other two concerned executive remuneration (resolutions 7 and 8). Resolution 4 sought to restrict the term of non-executive directors to 10 years, through changes to the company's constitution.¹⁴³ The AWU claimed that resolution 4 sought to ensure sufficient Board independence as "independent directors who spend too long at one company lose their independence over time."¹⁴⁴ Resolution 5 sought to restrict 'golden handshakes' to departing executives, to "twice the total remuneration paid to that Director in the 12 months prior to retirement," through an amendment of the company's constitution.¹⁴⁵ Resolution 6 sought to exclude directors who hold more than three directorships in public listed companies, or 2 directorships and a chair of an additional public company, from being appointed to the Board.¹⁴⁶ According to the AWU, the rationale for putting forward resolution 6 was to ensure that directors are able to discharge their duties properly.¹⁴⁷

¹⁴⁰ Nicholas Way, 'In Practice: Executive Pay 'a Ritual'', *Business Review Weekly*, 13 May 2004, available at <http://www.awu.net.au/national/campaigns/bluescope/news_1096240196_13493.html>

¹⁴¹ AWU, 'BlueScope Record Profit Proves Justice of Redundancy Strike', 19 August 2004, available at <http://www.awu.net.au/national/news/1092899792_28204.html>, AWU, 'Western Part Strikes Against 'Greedy' BlueScope', 30 August 2004, available at

<http://www.awu.net.au/national/news/1093838732_29102.html>: "BlueScope workers are concerned about the company's refusal to include redundancy provisions in an enforceable enterprise agreement, not including bonuses in calculation of superannuation, and casualisation of the workforce."

¹⁴² Ibid. See also AWU, 'BlueScope Steel Hit By Strikes Over Fairer Super and Redundancy', 5 August 2004, available at <http://www.awu.net.au/national/news/1091666844_22325.html>

¹⁴³ BlueScope Steel, *Notice of Annual General Meeting*, 13 September 2004, 3.

¹⁴⁴ AWU, 'About the BlueScope Microscope Campaign', 28 September 2004, available at <http://www.awu.net.au/national/campaigns/bluescope/info_1096776301_23262.html>

¹⁴⁵ BlueScope Steel, above n 143, 3.

¹⁴⁶ Ibid.

¹⁴⁷ AWU, above n 144.

Resolutions 7 and 8 sought to restrict the total remuneration (including termination or retirement payments) of directors to no more than “20 times the average remuneration of all other employees of the company, unless approved by an ordinary resolution of the members of the company,” through the insertion of two new provisions into the company’s constitution.¹⁴⁸ The AWU stated that according to a study by John Shields and John O’Brien titled “The Buck Stops Here”, higher salaries for Chief Executive Officers can be associated with lower company performance. The study identified, as an optimal range of executive remuneration, between 17 and 24 times the average wage of company employees.¹⁴⁹ Thus, the AWU aimed to link restrictions on executive remuneration to enhanced company performance. In addition, the AWU utilised these resolutions, and the scale of executive remuneration in BlueScope, to highlight the comparative lack of benefits received by other employees, specifically in its recent enterprise bargaining negotiations with the company. According to the AWU, “BlueScope management is offering workers a 4.5% a year pay rise compared to the average 35% annual increase this year for the company’s top six executives.”¹⁵⁰ Bill Shorten stated that “BlueScope executives are collecting generous super packages for themselves while short-changing their workers,”¹⁵¹ thus using concerns over executive remuneration to highlight industrial matters in dispute with BlueScope.¹⁵² The AWU encouraged members who owned shares in BlueScope to vote by proxy for the resolutions.¹⁵³

The Board of BlueScope unanimously opposed the resolutions and outlined its reasons for this in its Notice of Meeting. In short, BlueScope argued that the resolutions were unnecessary as the company had already implemented best corporate governance

¹⁴⁸ BlueScope Steel, above n 143, 4.

¹⁴⁹ AWU, ‘BlueScope First Target of AWU’s Corporate Governance Reforms’, 3 October 2004, available at <http://www.awu.net.au/national/campaigns/bluescope/news_1096797769_7785.html>

¹⁵⁰ AWU, ‘AWU Rejects BlueScope Boss’s Attack’, 28 November 2004, available at <http://www.awu.net.au/national/campaigns/bluescope/news_1101588070_15807.html>

¹⁵¹ AWU, 19 August 2004, above n 141.

¹⁵² Bill Shorten has stated that “BlueScope CEO Kirby Adams last year received \$191,100 in superannuation alone as part of his \$3.4 million salary package. The company made a net profit of \$452 million in 2002 – 2003 and has forecast an even higher profit of \$550 million this year. Bluescope workers deserve the surety of having their redundancy conditions specified in an enterprise agreement”: AWU, above n 142.

¹⁵³ AWU, ‘How to Support the Campaign’, 5 October 2004, available at <http://www.awu.net.au/national/campaigns/bluescope/info_1096941706_21210.html>

practices.¹⁵⁴ Further, the resolutions would lock the Board into inflexible requirements which “would handicap BlueScope Steel relative to its peers and competitors.”¹⁵⁵ In particular, resolutions 7 and 8 on executive remuneration would restrict the company’s ability to “attract, motivate and retain high quality executives.”¹⁵⁶ At the AGM, the Chair of BlueScope further stated that “the AGM is not the proper forum for campaigns like this – which are not in the interests of all shareholders. In orchestrating a campaign around these resolutions, the leaders of the AWU are advancing union interests not those of shareholders.”¹⁵⁷

Jeremy Vermeesch, National Media Officer for the AWU has stated that the AWU’s aim in launching the shareholder campaign was not necessarily to have the resolutions passed at BlueScope’s AGM, as this would have been highly unlikely.¹⁵⁸ Instead, the rationale of the campaign was twofold: first, it was thought that, in bringing “moral pressure” to bear on the Board, it would be compelled to improve corporate governance standards. This was considered by the AWU to be a matter of concern and a legitimate goal for BlueScope employees, as a better governed company is likely to be in a stronger financial position and thus able to offer increased job security and employment opportunities.

Second, it was hoped that the shareholder campaign would open a dialogue between the Board of BlueScope and its employees, thus directly involving the Board in the debate over industrial relations.¹⁵⁹ Similarly, Bill Shorten stated that “I suspect we will lose the vote, but I hope we win the debate.”¹⁶⁰ During his speech at BlueScope’s AGM, Bill Shorten indicated that one of the goals of the shareholder campaign was to open a direct dialogue between the AWU and the Board of BlueScope, which had proved impossible through the use of traditional union strategies:

¹⁵⁴ BlueScope Steel, above n 143, 7.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid, 8.

¹⁵⁷ BlueScope Steel Ltd, ‘Chairman’s Comments on AWU Resolutions (4 – 8), 19 October 2004, available at <<http://www.bluescopesteel.com/corp/navajo/display.cfm/objectID.4BDA8A6F-5619-434F-B4D22C1536F40DEE>>

¹⁵⁸ Interview with Jeremy Vermeesch, National Media Officer, AWU, 15 October 2004.

¹⁵⁹ Ibid.

¹⁶⁰ Way, above n 140.

We have a CEO who is not talking to us. We have a Chairman failing to direct his CEO to talk to a major stakeholder... We are forced to be here because we cannot get a proper hearing through traditional routes... We want a fair hearing and we came here to be fairly heard.¹⁶¹

None of the five AWU-initiated resolutions was passed at the AGM, having received between 8% and 12% of votes.¹⁶² The Board of BlueScope was reported as being “delighted” by this result.¹⁶³ However, the AWU was also reported as being pleased with the result, as the level of support for the resolutions represented an estimated \$400 million of shares.¹⁶⁴ According to the AWU, this “indicates that employee shareholders are supported by a significant minority of other stakeholders in the company.”¹⁶⁵ Bill Shorten stated that:

Debating the issues at the BlueScope AGM has been a success in giving steelworkers a voice at the Board level, involving employee shareholders in their legitimate role as corporate stakeholders, and helping to open the way for a real dialogue between the AWU and management... We came to the meeting to be heard, and BlueScope has got the message. We had a company that would not talk to us, a company that had tried to ignore a legitimate stakeholder.¹⁶⁶

It has been argued that the campaign helped to make BlueScope “more open and accountable to shareholders and employees” and may thus “assist union campaigns for better wages and conditions.”¹⁶⁷

6. The ASU’s “Vote No” Campaign at the Qantas 2004 AGM

In late 2004, the Australian Service Union (ASU) launched a campaign encouraging shareholders to vote against three resolutions put forward by the Board of Qantas at its AGM. Two of the resolutions concerned executive remuneration, and this was the primary focus of the ASU’s campaign.¹⁶⁸ Through resolution 4, the Board of Qantas sought to increase the maximum aggregate amount of fees available for Non-Executive Directors from \$1,500,000 to \$2,500,000 per annum.¹⁶⁹ According to the Board, this increase would “give the Board the

¹⁶¹ Shorten, above n 139.

¹⁶² BlueScope Steel, ‘BlueScope Steel Shareholders Reject AWU Resolutions’, 19 October 2004, available at <<http://www.bluescopesteel.com/corp/navajo/display.cfm/objectID.AF4D3F2D-DD58-3308-92A47DD0751FCD4A>>

¹⁶³ Ibid.

¹⁶⁴ AWU, ‘BlueScope AGM Gets the Workers’ Message’, 21 October 2004, available at <http://www.awu.net.au/national/campaigns/bluescope/news_1098679547_4588.html>

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

¹⁶⁷ Way, above n 140.

¹⁶⁸ The ASU campaign also focused on resolution 3.1, which sought to re-elect Margaret Jackson to the Board, however, this matter was peripheral to the main focus of the campaign.

¹⁶⁹ Qantas, Notice of Meeting 2004, 15 September 2004, available at <<http://imagesignal.comsec.com.au/asxdata/20040913/pdf/00460035.pdf>>

ability over the next two to three years to increase Non-Executive Directors' fees in line with market conditions", and would also allow the Board "to possibly expand the membership of Committees."¹⁷⁰ Resolution 5 sought to extend a Qantas deferred share plan to two Executive Directors.¹⁷¹

At the time the shareholder campaign was taking place, the ASU was involved in negotiating renewed enterprise bargaining agreements with Qantas. Significantly, the ASU sought a 6% base pay increase in all classifications, which Qantas failed to agree to. Qantas responded by offering the ASU a 3% rise in base pay. A request for a 1% increase in superannuation entitlements was also rejected by Qantas.¹⁷² The ASU's campaign featured two strategies: a narrow campaign focused on what it said were the poor corporate governance practices identified in the resolutions, and a broader campaign highlighting the disparity between increases in executive remuneration and the remuneration of other employees of Qantas. The objective was to promote the industrial campaign for greater pay increases as part of the enterprise bargaining process.

The ASU campaigned to encourage its members who held shares in Qantas to vote against resolutions 4 and 5, by either attending the meeting or appointing an ASU member as their proxy. In a newsletter to its members, the ASU stated that the Qantas Board:

...is asking that the aggregate amount of Directors' fees be increased from \$1,500,000 to \$2,500,000 per year – an increase of 66%. The Board is also asking shareholders to approve a new share plan for CEO Geoff Dixon and Chief Financial Officer Peter Gregg. For Geoff Dixon this is up to a total of 450,000 bonus shares and for Peter Gregg up to 270,000 bonus shares for the period 2004 – 2006...At the same time this Board is telling staff that all they deserve is only a 3% wage increase.¹⁷³

The ASU stated that it was "strongly recommending to shareholders that they vote NO to all resolutions."¹⁷⁴ In addition, the ASU lobbied other shareholders, including investment fund advisors and managers of superannuation funds, to vote against the resolutions.¹⁷⁵ For

¹⁷⁰ Ibid, 3.

¹⁷¹ Ibid, 4.

¹⁷² ASU, 'All We Want is a Fair Share of the Spirit', 12 *Working to Live*, 13 October 2004, available at <http://www.asu.asn.au/media/airlines_qantas/20041013_qantas.html>

¹⁷³ ASU, 'The QF Board Want a 66% Pay Rise', 3 *Working to Live*, 22 September 2004, available at <http://www.asu.asn.au/media/airlines_qantas/20040922_qantas.html>

¹⁷⁴ Ibid.

¹⁷⁵ James Chessell, 'Qantas Board After 66% Pay Rise', *Sydney Morning Herald Online*, 14 September 2004, available at <<http://www.smh.com.au/articles/2004/09/13/1094927510243.html?oneclick=true>>

instance, according to Kathryn Watt, General Counsel for Vanguard Investments Ltd, a major institutional investment fund manager in Australia, the ASU sent a letter to Vanguard prior to its consideration of the Qantas resolutions, outlining its reasons for voting against the resolutions and encouraging Vanguard to do the same.¹⁷⁶ Whilst it is unclear how Vanguard voted on the resolutions,¹⁷⁷ Kathryn Watt, who is a member of Vanguard's Proxy Voting Committee, stated that the ASU letter was attached to committee materials and considered in the course of determining how to vote on the Qantas resolutions. Kathryn Watt also stated that the ASU letter outlined the non-cash benefits currently received by directors of Qantas, including free business-class air travel, a factor that the Vanguard committee considered to be relevant in considering resolutions 4 and 5, and which it would otherwise not have known.¹⁷⁸

The Australian Council of Superannuation Investors, representing 32 superannuation funds with \$85 billion invested in Australia,¹⁷⁹ recommended that its members vote against resolution 4 as the increase in directors' fees from \$1,500,000 to \$2,500,000 was "excessive", and the Board's justification that the rise in fees was required in order to attract high-calibre directors was "difficult to sustain."¹⁸⁰ The Australian Shareholders' Association also criticised resolution 4.¹⁸¹

Resolutions 4 and 5 were passed at the Qantas AGM. However, both resolutions received a significant number of votes against, especially compared with other resolutions considered at the AGM.¹⁸² Resolution 4 received approximately 8% of votes against (74,588,518 votes),

¹⁷⁶ Interview with Kathryn Watt, General Counsel, Vanguard Investments Ltd, 17 November 2004.

¹⁷⁷ This information is confidential.

¹⁷⁸ Above, n 176. The role of institutional investment managers is considered in more detail below (section IIC).

¹⁷⁹ Paul Robinson, 'Pay Dispute in the Wings for Qantas', *The Age – Business*, 5 October 2004, 1.

¹⁸⁰ Ibid: Mr Phillip Spathis, Executive Officer, ACSI, stated "We cannot really support the magnitude of the fees that Qantas is seeking. In the past we have approved increases of 30 per cent because companies were seeking new directors or were expanding the number of directors in the pool. But it is not clear that Qantas wants to expand the pool."

¹⁸¹ Chessell, above n 175: 'the ASA said the proposed pay rise was questionable, given Qantas used the announcement of a solid \$648.4 million profit last month to warn that record oil prices and competition from government-owned airlines such as Emirates had created an 'uneven playing field.'"

¹⁸² For full details, see Brett Johnson, General Counsel, Qantas, Letter to ASX, 'Results of Resolutions and Proxy Information – 2004 Annual General Meeting', 21 October 2004, available at <<http://www.qantas.com.au/info/about/investors/agms>>

while resolutions 5.1 and 5.2 received around 10% of votes against (91,657,987 for resolution 5.1 and 92,084,865 for resolution 5.2).¹⁸³ In addition, by posing questions to the Board at the AGM, the ASU was able to question the company's industrial relations practices, and compare the proposed 66% increase in executive remuneration with the 3% increase offered to other staff.¹⁸⁴ The campaign was "the subject of much public and media comment",¹⁸⁵ with the result that the ASU was able to increase public knowledge about the resolutions and the objectives of the ASU. Whether this will have an impact on the relationship between the ASU and the Board of Qantas is difficult to gauge at this early stage. However, it is interesting to note that an enterprise bargaining agreement was reached between the ASU and Qantas shortly after the AGM, and the ASU was not successful in its bid for a pay increase of 6%.¹⁸⁶

7. The ACTU's Campaign Targeting the James Hardie 2004 AGM

The shareholder campaign initiated by the Australian Council of Trade Unions (ACTU) targeting James Hardie Industries, formed part of a wider campaign, which attempted to secure adequate compensation for Australian victims who had been exposed to James Hardie's asbestos products. The broader campaign involved not only the ACTU, but also Unions NSW, and various asbestos support groups. It arose out of the failure by James Hardie to provide adequate compensation to those suffering asbestos-related diseases, including as a result of employment with the company.¹⁸⁷ At the time the campaign was launched, James Hardie's compensation fund, the Medical Research and Compensation Foundation (MRCF) was thought to be significantly under funded, and unable to provide for all asbestos-related claims.¹⁸⁸

¹⁸³ Ibid.

¹⁸⁴ An edited list of questions posed by the ASU at the Qantas AGM, along with answers by the Board is available at: ASU, 'The Qantas AGM Report to ASU Members', 4 *Working to Live*, 25 October 2004, at <http://www.asu.asn.au/media/airlines_qantas/20041025_agm.html>

¹⁸⁵ Ibid.

¹⁸⁶ The pay increase remained at 3%: ASU, 'Qantas EBA 7 Update', 15 *Working to Live*, 25 November 2004, available at <http://www.asu.asn.au/media/airlines_qantas/20041125_qantas.html>

¹⁸⁷ Interview with Linda Rubenstein, ACTU, 18 October 2004.

¹⁸⁸ A subsequent inquiry, funded by the NSW Government, found the fund to have a shortfall of \$1.5 billion: ACTU, 'James Hardie Negotiations Over Asbestos Compensation', 17 December 2004, available at <http://www.actu.asn.au/public/campaigns/jameshardie/james_hardie.html>

The shareholder campaign targeted James Hardie's AGM, which took place in Amsterdam in September 2004. The campaign centred around two of the Board resolutions put forward at the AGM. The first resolution (resolution 1) sought to adopt the annual accounts for the year ended 1 March 2004.¹⁸⁹ The ACTU opposed this resolution on the ground that the annual accounts made no provision for the compensation of asbestos victims.¹⁹⁰ The second resolution (resolution 4) sought to renew the authority of the Board to permit the company to buy-back its own shares.¹⁹¹ This resolution was opposed as, according to the ACTU, it represented an attempt by James Hardie to insulate itself from asbestos-related liabilities.¹⁹²

Prior to the AGM, the ACTU sent letters to 55 major fund managers within Australia.¹⁹³ The letter stated that "it can never be acceptable to shareholders for a company to disregard its obligations to compensate those with legitimate claims due to asbestos exposure." The letter also tied the need to ensure adequate compensation for asbestos victims with share value: "[t]he damage to (James Hardie's) reputation and the effect of consumer boycotts are likely to cause sustained damage to its share price and ultimate value unless this issue is resolved satisfactorily."¹⁹⁴ The letter encouraged the fund managers to take two steps in relation to James Hardie's AGM: first, to vote against resolutions 1 and 4;¹⁹⁵ and second, to ask questions about the issue and "make it clear that the company is expected to meet its obligations to victims and meet standards of good corporate citizenship."¹⁹⁶ The shareholder campaign was coupled with a wide-ranging media campaign, aimed at negatively impacting on James Hardie's reputation, and consumer boycotts of James Hardie's products.¹⁹⁷

¹⁸⁹ James Hardie Industries NV, Notice of Meetings 2004, 11 August 2004, 1, available at <www.ir.jameshardie.com.au/repositories/files/JAM%20NOM%202004.pdf>

¹⁹⁰ Interview with Linda Rubenstein, above n 187.

¹⁹¹ James Hardie, above n 189, 1.

¹⁹² ACTU letter to fund managers.

¹⁹³ Roz Alderton, 'Hardie Orders Internal Probe', *The Courier Mail – Finance*, 11 September 2004, 79.

¹⁹⁴ ACTU, above n 192.

¹⁹⁵ The reasons given for this are that "Resolution 1, to adopt the annual accounts, should be rejected on the basis that the accounts make no provision for asbestos-related liabilities... Resolution 4, to renew the Board's authority to acquire its own shares, should be rejected because of the company's past conduct in relation to the manipulation of its share capital in an attempt to insulate JHI(NV) from its asbestos-related liabilities of its predecessors and because available funds should be used to compensate victims rather than returned to shareholders": ACTU, above n 192.

¹⁹⁶ ACTU, above n 192.

¹⁹⁷ Roz Alderton, 'Unions Back Global Hardie Ban', *The Australian Online*, 23 November 2004, available at <<http://theaustralian.news.com.au/printpage/0,5942,11476566,00.html>>

Prior to the AGM, James Hardie withdrew resolution 1 which sought to adopt the company's annual accounts.¹⁹⁸ According to a press statement issued by James Hardie, the company deferred the resolution "to provide the opportunity, if necessary, to accommodate any impact which the recent Special Commission of Inquiry into the Medical Research and Compensation Foundation...might have on the company's Financial Statements."¹⁹⁹ It is unclear whether the shareholder campaign was responsible for James Hardie withdrawing the resolution. However, it is likely that the campaign was successful in focusing the attention of shareholders and the wider public on the issue of asbestos compensation, which could have increased the pressure on the James Hardie Board to increase the compensation to asbestos victims, which is what occurred. Resolution 4, on the other hand, was successfully passed at the AGM. However, it received a significant number of votes against, particularly when compared with other resolutions that were put forward by the Board: over 10 million shares were voted against resolution 4.²⁰⁰

In October 2004, shortly after the AGM, representatives of James Hardie and the ACTU commenced negotiation of a long-term funding agreement for future asbestos-related claims against the MRCF.²⁰¹ A Heads of Agreement was adopted on 21 December 2004, which provides for a long-term open-ended funding plan for a minimum of 40 years.²⁰² The Heads of Agreement formed the basis of a legally binding 'Principal Agreement' signed by James Hardie on 1 December 2005.²⁰³ It is difficult to assess the role of the shareholder campaign in persuading James Hardie to enter into the agreement. However, it is likely that the

¹⁹⁸ James Hardie, 'Company Statement: James Hardie Defers Resolution to adopt Accounts', 10 September 2004, available at <www.ir.jameshardie.com.au/repositories/files/2004.ASXRelease.DefersResolution.pdf>

¹⁹⁹ Ibid. The Special Commission of Inquiry was established in February 2004 to assess the financial position of the MRCF, in particular, its ability to make payments in relation to asbestos liabilities. At the time of James Hardie's AGM, it had not released its findings: see <www.ir.jameshardie.com.au/repositories/files/2004.ASXRelease.DefersResolution.pdf>

²⁰⁰ James Hardie Industries NV, Letter to the Australian Stock Exchange, 17 September 2004, available at <<http://www.asx.com.au/asxpdf/20040917/pdf/3mwp7twhq6gx7.pdf>>

²⁰¹ James Hardie, 'Company Statement: Update on Negotiations for a Long-Term Funding Agreement', 8 December 2004, available at <www.ir.jameshardie.com.au/repositories/files/ASX2004_Funding%20Agreement_8.12.04>.

²⁰² ACTU, 'Unions and Asbestos Groups Secure James Hardie Compo Agreement', 21 December 2004, available at <<http://www.twu.com.au/news.html?block%5B63%5D%5Bitem%5D=350>>, James Hardie, 'Company Statement: James Hardie Signs Heads of Agreement', 21 December 2004, available at <www.ir.jameshardie.com.au/repositories/files/2004.ASX.HOA_21.12.04.pdf>

²⁰³ ACTU, above n 202.

shareholder campaign, combined with other actions such as negative media publicity and threats of consumer boycotts, assisted in putting pressure on the Board, thus perhaps compelling the Board to enter into the agreement.

8. The AMWU's 2004 NRMA Campaign

In March 2004, members of the Australian Manufacturing Workers' Union (AMWU) requisitioned an Extraordinary General Meeting (EGM) of the National Roads and Motorists' Association Ltd (NRMA) members, pursuant to s.249D of the *Corporations Act*, and put forward two resolutions to be voted on at the meeting. The meeting requisition arose directly out of failed enterprise bargaining negotiations between the AMWU and the NRMA concerning the employment conditions of more than 400 roadside assistance patrol officers.²⁰⁴ The NRMA and the AMWU had been involved in enterprise bargaining negotiations since the expiry of a previous Enterprise Bargaining Agreement (EBA) in March 2003.²⁰⁵ The NRMA gave notice of termination of the EBA in an attempt, according to the AMWU, to contract out "at least 100 of the 412 existing patrol officer jobs"²⁰⁶ and claw back various employment conditions and entitlements which appeared on the previous EBA.²⁰⁷ A series of negotiations between the NRMA and the AMWU ensued, and finally reached a 'stand-still' in February 2004, when a decision was made by the AMWU to reject NRMA's 'final draft' enterprise bargaining offer.²⁰⁸ The apparent rationale for requisitioning the EGM related directly to these failed enterprise bargaining negotiations. According to the AMWU, "[m]onths of stopwork meetings, bans, lockouts and [Industrial Relations Commission] IRC appearances failed to break the stand-off."²⁰⁹ A decision was made to change tactics²¹⁰ and to "call for a general meeting of NRMA members to deal with the issues of maintaining current working conditions for patrolmen and to eliminate the discriminatory practice of having two sets of working conditions for patrolmen who carry out identical work."²¹¹

²⁰⁴ *NRMA v Parkin* [2004] NSWSC 296, para. 3.

²⁰⁵ *Ibid*, para. 9.

²⁰⁶ AMWU, 'Right Turn Ends in Court', 22 April 2004, available at <<http://www.amwu.asn.au/default.asp?Action=LoadArticle&ID=1535>>

²⁰⁷ AMWU, 'NRMA in Hit and Run', 29 June 2004, available at <<http://www.amwu.asn.au/default.asp?Action=LoadArticle&ID=1572>>

²⁰⁸ *NRMA v Parkin*, above n 204, paras 9 – 11.

²⁰⁹ AMWU, above n 206.

²¹⁰ *Ibid*.

²¹¹ *NRMA v Parkin*, above n 204, para. 11.

The AMWU sought to requisition the general meeting of NRMA members in order to put forward two resolutions, both attempting to insert new objects clauses into the constitution of NRMA. The proposed resolutions provided that:

1. The constitution be amended to insert at 3, Objects, a new paragraph (E) in the following terms:
 - (E) To ensure that Patrol Officers employed to provide road side assistance to the membership of the NRMA, are not disadvantaged in the provision of such service by having their current working conditions undermined.
2. The constitution be amended to insert at 3, Objects, a new paragraph (F) in the following terms:
 - (F) To ensure that fair and equitable remuneration and working conditions are available to all employees, further ensuring that such a package does not discriminate against existing Option 3 Patrol Officers.²¹²

In accordance with the requirements of s.249D, the request for the EGM was required to be supported by “at least 100 members who are entitled to vote at the general meeting.”²¹³ The sponsoring members of the AMWU (the Patrol Officers) were successful in securing 4,284 NRMA members signatures in support of the meeting requisition.²¹⁴ In order to secure the signatures, copies of the resolution were distributed to Patrol Officers at the AMWU meetings in March 2004. The Patrol Officers were instructed to approach NRMA members who they were able to contact in the course of their employment duties and request signatures.²¹⁵ In addition, Patrol Officers were requested to obtain signatures by taking the requisition document to “family members, sporting clubs, pubs and any place where there were likely to be members of the NRMA.”²¹⁶ These tactics were possible in a campaign targeting the NRMA, due to the wide membership of the company.²¹⁷

The NRMA challenged the validity of the resolutions in the New South Wales Supreme Court on the grounds that the meeting would not be held for a “proper purpose” and / or that the resolutions were void for uncertainty, thus making the meeting requisition invalid.²¹⁸

²¹² *NRMA v Parkin*, above n 204, para. 16.

²¹³ Pursuant to s.249D(1)(b).

²¹⁴ *NRMA v Parkin*, above n 204, para. 16.

²¹⁵ *Ibid*, paras. 18 – 19.

²¹⁶ *Turnbull v NRMA* [2004] NSWSC 577, para. 10.

²¹⁷ *NRMA v Parkin*, above n 204, para. 18 – 19.

²¹⁸ It was also argued that the resolutions were void on the ground that they were in conflict with an existing object in the NRMA constitution: *NRMA v Parkin*, above n 204, para. 49.

However, for the reasons outlined later in this paper, the Court held, at first instance, that the meeting requisition was valid.²¹⁹ This decision was upheld on appeal.²²⁰ Before the EGM was held, the Board of NRMA agreed to the terms and conditions recommended by the AMWU in a proposed EBA, on the condition that the AMWU agree to cancel the meeting request. The proposed EGM, which was projected to cost NRMA \$6 million, placed significant pressure on the NRMA Board to accede to the employment conditions requested by the AMWU, and resulted in a favourable outcome for the AMWU. Ross Turnbull, then president of NRMA stated, following the meeting requisition, that:

NRMA management and union/patrolmen representatives met about the unresolved issues concerning the patrolmen's Enterprise Bargaining Agreement (EBA). At these meetings, all outstanding issues were agreed. Management undertook to recommend the terms and conditions of the proposed EBA to the NRMA board for ratification. The union representatives undertook to recommend the proposed EBA to the patrolmen. They asked the NRMA board to cancel the union organised \$6 million...(EGM).²²¹

According to Ross Turnbull, this represented a “big win for both sides.”²²² The EGM was cancelled following an application to the New South Wales Supreme Court²²³ and the EBA was accepted by the Patrol Officers²²⁴ and was later registered in the New South Wales Industrial Relations Commission.²²⁵ The AMWU has stated that, following the submission of the EGM requisition request, “[i]n little more than a week, NRMA insistence on contracting out; forcing senior patrol officers onto weekend rosters; cutting mid-break shifts and using GPS to carry out surveillance on workers had been taken off the table”,²²⁶ thus representing a favourable result for the AMWU.

C The Role of Superannuation Funds in Union Shareholder Activism: Common Ground?

As noted above, it is a common practice for unions engaged in shareholder activism to lobby for support from superannuation trustees and managers. Superannuation funds hold a very

²¹⁹ *NRMA v Parkin*, above n 204.

²²⁰ *NRMA v Parkin* [2004] NSWSC 153.

²²¹ Ross Turnbull, Letter to Stephen Mayne, reprinted in ‘Ross Turnbull Replies to NRMA Attack’, available at <<http://www.crikey.com.au/articles/2004/07/05-0004.print.html>>

²²² *Ibid.*

²²³ *Turnbull v NRMA*, above n 216.

²²⁴ 90% of the Patrol Officers voted in favour of the agreement: *Turnbull v NRMA*, above n 216, para. 14.

²²⁵ *Turnbull*, above n 221.

²²⁶ *AWMU*, above n 207.

large portion of assets invested in the Australian share market. As at 31 December 2001, superannuation funds held \$495.3 billion in assets, and held approximately 20% of listed Australian equities.²²⁷ It is projected that the value of superannuation fund assets in Australia will double by 2010 and will reach around \$1,699 billion in 2020.²²⁸ The growth in value of the superannuation sector can be attributed primarily to a compulsory superannuation contribution scheme introduced in 1991, which currently requires mandatory 9% employer superannuation contributions.²²⁹ Australia currently has one of the highest share owning populations in the world, with 51% of adult Australians owning shares.²³⁰ According to a 2000 study, 73% of Australian shareowners own shares through their superannuation funds.²³¹ Superannuation funds have been labelled “the sleeping giants of shareholder activism.”²³² Indeed, the large investment stake held by the superannuation sector suggests a great potential to influence the behaviour of companies in Australia.

To what extent are unions able to ‘tap into’ this influence in order to further their shareholder campaigns? It is necessary to outline the structure of the Australian superannuation fund industry in order to determine the potential for alignment of their interests with the interests of unions in shareholder activist campaigns. As outlined above, shareholder activist practices in Australia have centred on the company AGM. For this reason, the focus of this section will be on examining the voting practices of superannuation funds and ascertaining the potential link between these practices and the interests promoted by union campaigns.

1. The Structure of Superannuation Funds in Australia: Who Holds the Voting Rights in Shares?

Most superannuation funds are constituted as trusts, separate from sponsoring employers,²³³ and directly invest in the share market.²³⁴ In directly invested superannuation funds, the

²²⁷ Philip Spathis, ACSI, ‘Corporate Governance and Superannuation Trustees’, *Corporate Citizenship*, December 2001, 1, 5, available at <[www.acsi.org.au/documents/Newsletter_5_\(Special_Edition\).doc](http://www.acsi.org.au/documents/Newsletter_5_(Special_Edition).doc)>

²²⁸ Ibid.

²²⁹ Ibid.

²³⁰ ASX 2003 Share Ownership Study, in Business Council of Australia, above n 7, 13.

²³¹ Birch, above n 7, 5.

²³² John Collett, ‘Shared Secrets’, *Sydney Morning Herald*, 2 April 2003, 7.

²³³ Paul Ali, Geof Stapledon and Martin Gold, *Corporate Governance and Investment Fiduciaries* (2003) 21.

²³⁴ Ali et al, *ibid*, 22.

registered holder of the shares, or “the person or the entity entered on the company’s register of members” may be the trustee of the fund or “a custodian engaged by the trustee.”²³⁵ The registered owner holds the shares on behalf of the superannuation fund’s beneficiaries. Pursuant to the *Superannuation Industry (Supervision) Act 1993* (Cth), the management and control of certain superannuation trusts must have equal representation of employers and employees.²³⁶ ACSI Executive Officer Philip Spathis states that, in practice, unions will generally nominate employee representatives to superannuation fund boards.²³⁷ This appears to afford unions potential to influence the investment strategies of superannuation funds, as it may increase the ability of these funds to align with union shareholder campaigns. In July 2000, the ACTU adopted a corporate governance policy “encouraging union trustees to decide whether their funds should use their votes and to determine the nature of that responsibility and how it should be exercised.”²³⁸ ACTU President Sharon Burrows has stated that “employee members sat on half the boards of funds that controlled almost 50 per cent of total superannuation assets of about \$200 billion. Board members face increasing pressure to invest in line with the interests and values of fund members as well as providing sound returns.”²³⁹

Superannuation trustees may either exercise voting rights attached to shares, or delegate these rights to a third party, for instance, a fund manager. In superannuation funds managed by third parties, it is common practice for fund managers to be delegated the power to exercise voting rights attached to the shares.²⁴⁰ However, there is some debate about whether

²³⁵ Ibid.

²³⁶ Section 89(1) provides:

“For the purposes of this Part, a fund complies with the basic equal representation rules if:

(a) both:

(i) the fund has a group of 2 or more individual trustees;
(ii) the group of trustees consists of equal numbers of employer representatives and member representatives;
or

(b) both:

(i) the fund has a single corporate trustee;
(ii) the board of the corporate trustee consists of equal numbers of employer representatives and member representatives.”

²³⁷ Interview with Philip Spathis, ACSI, 18 November 2004.

²³⁸ Spathis, above n 227, 17.

²³⁹ Quoted in Spathis, *ibid.*

²⁴⁰ Ali et al, above n 233, 55.

the practice of delegating all voting rights to a fund manager may constitute an unlawful fettering of discretion by a fund trustee.²⁴¹

2. The Extent to Which Superannuation Funds Exercise Voting Rights

Australian superannuation funds have traditionally been passive investors,²⁴² and proxy voting statistics show a rather low level of active participation in voting at company AGMs. Kathryn Watt states, using figures compiled by Corporate Governance International, that “[i]n the 2002 Australian proxy voting season, 41% of proxies were exercised. This figure stood at 35% in 1999 and 32% in 1998, indicating a slight trend toward increased voting.”²⁴³ However, the level of Australian proxy voting is around half the level of participation in the United States.²⁴⁴

Voting rights are not specifically required to be exercised under the *Corporations Act*, as voting is not mandatory for any shareholder. Likewise, the *Superannuation Industry (Supervision) Act 1993 (Cth)* (“the SIS Act”) and *Superannuation Industry (Supervision) Regulations (Cth) 1994*, which are the major pieces of legislation governing the superannuation sector, do not require superannuation fund trustees or managers to exercise voting rights. However, certain duties imposed pursuant to this legislation and in general law may require fund trustees and managers to vote on particular matters at a company’s AGM. The SIS Act, in s.52(1), provides a list of covenants to be included in the rules governing a superannuation entity. Relevantly, the following covenants by the trustee are taken to be included:

- (b) to exercise, in relation to all matters affecting the entity, the same degree of care, skill and diligence as an ordinary prudent person would exercise in dealing with property of another for whom the person felt morally bound to provide; and
- (c) to ensure that the trustee's duties and powers are performed and exercised in the best interests of the beneficiaries.

²⁴¹ See Ali et al, above n 233, 56.

²⁴² Spathis, above n 227, 4.

²⁴³ Kathryn Watt, ‘Proxy Voting Trends: Fund Managers in the United States of America and Australia’ (2003) 15 *Bond Law Review* 12, 16.

²⁴⁴ *Ibid*: in the 2002 voting season 80% of proxies were exercised in the USA.

Pursuant to general law, a trustee has a duty to exercise the standard of care of an ordinary prudent business person in administering a superannuation fund.²⁴⁵ The duty of care contained in the SIS Act and in general law compel trustees to “consider whether the power to exercise the voting rights attached to a trust’s equity investment should be exercised.”²⁴⁶ The trustees of superannuation funds must place themselves in a position where they can give genuine consideration to whether or not to cast a vote.²⁴⁷

Where a trustee engages an investment manager, the contract between the fund’s trustees and the fund manager typically stipulates that the fund manager has the power to exercise voting rights in relation to the shares.²⁴⁸ Additionally, s.601FC of the *Corporations Act* may be relevant to the exercise of the voting rights by fund managers. It provides that a responsible entity of a fund is required to:

- (b) exercise the degree of care and diligence that a reasonable person would exercise if they were in the responsible entity’s position; and
- (c) act in the best interests of the members and, if there is a conflict between the members’ interests and its own interests, give priority to the members’ interests.

Thus, whilst exercising voting rights attached to superannuation funds is not mandatory, there may be circumstances in which trustees and fund managers will breach their general law and statutory duties in not voting on certain AGM resolutions.

Some fund managers prefer to deal with companies ‘behind the scenes’ rather than, or as an adjunct to, voting at AGMs. The Chief Executive of the Investment and Financial Services Association (IFSA) states that “[f]und managers consider that picking up the phone and talking to the board or management is often more effective than only voting at meetings.”²⁴⁹ This type of influence is also fertile ground for unions, who may target companies with corporate governance problems and attempt to encourage superannuation trustees to raise these issues directly with company boards, outside the forum of the AGM.

²⁴⁵ *Australian Securities Commission v AS Nominees Ltd* (1995) 62 FCR 504 at 516.

²⁴⁶ Spathis, above n 227, 9.

²⁴⁷ Ali et al, above n 233, 33.

²⁴⁸ Ibid, 21.

²⁴⁹ Collett, above n 232.

3 How Are Decisions Made on Voting?

The primary legal barrier to support by superannuation funds for union campaigns is the duty, contained in general law and the SIS Act, for trustees to act in the best financial interests of fund beneficiaries. Under general law, a superannuation trustee owes a duty of loyalty to the beneficiary of a superannuation fund. This includes, inter alia, a duty to act in the interests of the beneficiary. The ‘interests’ almost exclusively mean the financial interests of the beneficiary.²⁵⁰ This is thought to be “consistent with commercial prudence.”²⁵¹ Further, pursuant to s.62(1) of the SIS Act, trustees and fund managers must satisfy a ‘sole purpose test’, that is, they must ensure that a superannuation fund is managed with the sole objective of maximising economic returns for beneficiaries. It follows that “voting should be conducted with the objective of promoting and maintaining the economic interests of fund members.”²⁵² Thus, superannuation fund trustees and managers may be prohibited from supporting union shareholder campaigns in Australia where the campaigns are not strictly concerned with maximising economic returns for fund beneficiaries. Where union shareholder campaigns are, however, related to corporate governance or risk management through, for instance, securing improved workplace health and safety practices, these campaigns may not be in opposition to the duty to maximise economic returns.

In addition to the legal barriers faced by trustees in aligning with union shareholder campaigns, an ACSI study of superannuation fund trustees has identified other impediments to funds engaging in activism, including:

- The external investment manager (but not necessarily the client) will often stand to gain more from exiting an investment rather than conveying a voice about how a company should be run;
- Collective action problems: invariably it is the case that in order to be effective, institutional investors activism requires several institutions to participate;
- Conflicts of interests issues can arise due to the fact that large institutional investors are likely to provide financial assistance to the companies in which they invest;
- Lack of information from company boards on proposed resolutions...
- Further, the debate is continuing on whether corporate governance can lead to higher returns. Trustees need to be able to justify the costs involved in increased monitoring.²⁵³

²⁵⁰ *Cowan v Scargill; Re Mineworkers’ Pension Scheme Trusts* [1985] Ch 270 at 287.

²⁵¹ *Harries v Church Commissioners for England* [1992] 1 WLR 1241 at 1246.

²⁵² Watt, above n 243, 36.

²⁵³ Spathis, above n 227, 16 – 7.

4. Possibilities for Aligning the Interests of Unions and Superannuation Funds

The legal duty to maximise profits is a barrier to the extent to which superannuation fund trustees and managers can align with union campaigns. However, there is some evidence to suggest that this rule does not completely diminish possibilities for these funds to support union shareholder campaigns. A qualitative study conducted by Irving Saulwick and Associates on superannuation trustees and fund managers' attitudes to investment-related issues found that some trustees and fund managers believe that "the industrial, environmental and social impact of a company can directly affect its profitability, so that they do take these factors into account when making investment decisions."²⁵⁴ One respondent, for example, noted that if a company has good employee working relations, "then you have a happy workforce and a more productive company."²⁵⁵ Another stated that:

I don't believe fiduciary obligations are solely equivalent to the bottom line. Investment return has to be balanced against risk. In terms of risk, all of those factors such as wider social issues come into play. For example, labour conditions or environmental issues can blow up and suddenly they are impacting on the bottom line. In this sense, wider social issues need to be considered in the context of risk.²⁵⁶

Kathryn Watt, General Counsel for Vanguard Investments, stated in an interview that Vanguard considers the long-term economic wellbeing of a company to be an important factor in ensuring maximum returns for members of superannuation funds.²⁵⁷ She stated that good industrial relations practices and the public reputation of a company in their treatment of workers are relevant factors in considering the long-term economic wellbeing of a company. However, she also stated that union shareholder campaigns will be most effective in gaining the support of superannuation fund managers where they focus their campaign on traditional corporate governance matters, such as executive remuneration, independence of the board and board workload. In determining how to vote in relation to particular AGM resolutions, Vanguard will give consideration to research conducted by unions. For example, during the ASU's 'vote no' campaign against Qantas, the ASU brought to the attention of Vanguard the non-monetary benefits received by Board directors; a factor that would

²⁵⁴ Irving Saulwick & Associates, *Shareholders Project: A Qualitative Study of Superannuation Trustees and General Financial Investment Managers' Attitudes to Investment-Related Issues: Report No. 2* (2001) 6, available at: < www.ethics.org.au/our_services/projects/shareholders_project/qualitative_study.pdf>

²⁵⁵ Ibid, 13.

²⁵⁶ Ibid, 19.

²⁵⁷ Interview with Kathryn Watt, above n 176.

otherwise not have been known by the Vanguard committee making the decision on how to vote on the resolutions highlighted by the ASU.

Two of Australia's largest superannuation funds, the combined Public Sector and Commonwealth Superannuation Schemes (PSS/CSS), which hold approximately \$10 billion under management,²⁵⁸ have also stated in relation to their corporate governance policy, that:

Our investment governance focuses on managing risk and is driven by the Board's primary investment objective to maximise long-term real returns whilst minimising short-term risks in order to safeguard the long-term interests of members.

We believe we have a responsibility to ensure the Fund is not exposed to undue risk because of poor governance behaviour and as such we actively pursue the principles of good governance in our own operations, our service providers and in the companies in which we invest.

Investment governance is considered to be the next frontier in risk management – it recognises that poor environmental, corporate and social practices can lead to a decline in investment values as much as financial risks.²⁵⁹

In relation to proxy voting, the policy provides:

In keeping with this principle, the Board has decided to exercise its right to cast proxy votes in the companies in which it invests. This more-active role for the Board underscores their commitment to ensure long-term shareholder value for members and sends a clear signal to company management groups that the Board, as a shareholder, will vote and actively consider every resolution in the best interests of its members.

The fairness of proposals affecting shareholder rights are judged:

- in the context of the organisation's legitimate obligations to all parties (including shareholders, creditors, management, employees, customers and suppliers); and
- in the likelihood of the proposal generating a reasonable return to shareholders.²⁶⁰

In line with this policy of risk management, in April 2003, the PSS/CSS called on Australian companies to improve public reporting of workplace health and safety risk management:

WH&S has long been cited as having a relationship with sound company management. Investors are increasingly interested in this aspect of risk management and believe companies stand to gain from improved WH&S reporting. It will improve trust, enhance the market's awareness of risk and companies will benefit from improved reputation and brand equity. In summary, companies that look after their workplace health and safety improve their chance of being sound long-term performers.

²⁵⁸ Business Council of Australia, above n 7, 16.

²⁵⁹ Commonwealth Superannuation Scheme, 'Governance of our Scheme', available at

<<http://www.css.gov.au/css/governance/governance.htm>>

²⁶⁰ Ibid.

Through their joint investment governance program, established to protect the long-term interests of their members, PSS/CSS and CSF are calling on companies to disclose relevant WH&S performance and risk management commentary to investors in their annual reports; and on fund managers and investment analysts to take a more active interest in WH&S risks.²⁶¹

It may not always be possible, for legal or pragmatic reasons, for superannuation funds to support union shareholder campaigns. However, there is scope for alignment of these interests, particularly where a fund's investment is focused on securing the long-term economic wellbeing of companies in which it has invested and the union campaign shares this objective. The effect on union shareholder campaigns of receiving support of superannuation funds can be significant. Whilst most superannuation funds do not have a controlling interest in Australian companies,²⁶² where these funds, particularly large funds, back union campaigns, they may exert significant pressure on the Board to address union issues.²⁶³ This may be the case particularly where there is a strong economic interest in doing so, such as addressing corporate governance problems.

III THE LEGAL BASIS FOR UNION SHAREHOLDER ACTIVISM IN AUSTRALIA

As outlined above, unions have utilised a variety of methods to facilitate shareholder activist campaigns, centred primarily on the company AGM. Some of these methods, including putting resolutions forward at AGMs and posing questions at AGMs, have their legal basis in the *Corporations Act*.

²⁶¹ Commonwealth Superannuation Scheme, 'Media Release: Super Funds Say: Companies Should Plug the Gap in Workplace Safety Risk Management Disclosure' 7 April 2003, available at <http://www.css.gov.au/css/news/gas_whs.html>

²⁶² Ali et al, above n 223, 31.

²⁶³ The Irving Saulwick & Associates study, above n 254, 9, found that whilst many respondents felt they could not influence the operations or policies of companies, "a significant minority felt they could". According to the study, "[a]n important factor is size. Big funds are more likely to feel they can have influence on the companies in which they invest, but small funds do not feel they can have an influence."

A The '100 Member Rule'

1. Putting Resolutions Forward at AGMs

Pursuant to s.250N of the *Corporations Act*, a public company must hold an AGM within 18 months of its registration and at least once every calendar year after its initial AGM.²⁶⁴

Section 249N(1) allows shareholders to put forward a resolution to be considered at a company's AGM (or any general meeting). It provides that:

- (1) The following members may give a company notice of a resolution that they propose to move at a general meeting:
 - (a) members with at least 5% of the votes that may be cast on the resolution; or
 - (b) at least 100 members who are entitled to vote at a general meeting.²⁶⁵

Unions have utilised s.249N(1)(b) by collecting signatures from at least 100 company shareholders (usually among union members) in order to put forward a resolution at a company's AGM. The use of s.249N(1)(a) to propose a resolution may not be possible for many companies, as it would involve ownership of a significant amount of share value in a company.²⁶⁶ Section 249N(2) provides that the notice must be in writing,²⁶⁷ "set out the proposed resolution";²⁶⁸ and be "signed by the members proposing the resolution."²⁶⁹ Where a Board receives a proposed resolution, it must be considered "at the next general meeting that occurs more than 2 months after the notice is given."²⁷⁰ Section 249O defines the requirements for giving notice of a shareholder resolution: s. 249O(2) provides that "[t]he company must give all its members notice of the resolution at the same time, or as soon as practicable afterwards, and in the same way, as it gives notice of a meeting"; s. 249O(3) provides that the company bears the costs of giving members notice of the resolution

²⁶⁴ The AGM must be held within 5 months of the end of the financial year: s.250N(2).

²⁶⁵ If the *Corporations Amendment Bill (No 2) 2005* is enacted as it currently provides, the 100 member numerical requirement will be replaced by a lower threshold of 20 members (Schedule 1, Item 3). However, the Parliamentary Joint Committee on Corporations and Financial Services has recommended against this amendment of s.249N(1)(b): *Inquiry into the Exposure Draft of the Corporations Amendment Bill (No 2) 2005*, May 2005, paras. 2.30 – 2.39. The Committee states, at para. 2.39, that "[t]wenty members, in proportion to the number of shareholders with an interest in most public companies, represents a negligible amount. The danger raised by submitters, of annual general meetings being hijacked to the detriment of the company and of mainstream shareholders, is genuine and should be avoided."

²⁶⁶ See statistics in Huntleys' Shareholder, above n 21.

²⁶⁷ Section 249N(2)(a).

²⁶⁸ Section 249N(2)(b).

²⁶⁹ Section 249N(2)(c).

²⁷⁰ Section 249O(1).

provided the company receives the notice in time to send it out to members with the notice of meeting.

The subject matter of a proposed resolution is not unlimited: it must not be more than 1,000 words in length or defamatory²⁷¹ and must not interfere with powers vested in the Board. For instance, in *Gramophone and Typewriter Ltd & Stanley*,²⁷² the court held that “even a resolution of a numerical majority at a general meeting of the company cannot impose its will upon the directors where the articles have confided to them the control of the company’s affairs.”²⁷³ Similarly, in *John Shaw & Sons (Salford) Ltd v Shaw*,²⁷⁴ the court stated:

A company is an entity distinct from its shareholders and its directors. Some of its powers may, according to its articles, be exercised by directors, certain other powers may be reserved for the shareholders in general meeting. If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of the shareholders can control the exercise of the powers vested by the articles in the directors is by altering the articles, or...by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves usurp the powers which by the articles are vested in the directors.²⁷⁵

In the context of considering the validity of a resolution proposed at an extraordinary general meeting,²⁷⁶ the court in *NRMA v Parker*²⁷⁷ held that “in general, a power vested by the constitution of a company exclusively in the directors cannot be effectively exercised, nor can it be effectively controlled or interfered with, by a resolution of members in a general meeting.”²⁷⁸ Thus, the subject matter of resolutions put forward by unions as shareholders is restricted by the division of powers and responsibilities contained in the company’s constitution. The resolution must not deal with matters of authority vested in company directors.

However, as we saw in the discussion of Australian case studies of union shareholder activism, on some occasions, unions have proposed as the subject matter of resolutions, issues that are regarded as being within the power of directors. An example is the resolutions proposed by the AMWU for the meeting it requisitioned of the members of NRMA. The

²⁷¹ Section 249O(5)(a).

²⁷² [1908] 2 KB 89.

²⁷³ *Ibid* at 105.

²⁷⁴ [1935] 2 KB 113.

²⁷⁵ *Ibid* at 134.

²⁷⁶ See below.

²⁷⁷ (1986) 6 NSWLR 517.

²⁷⁸ *Ibid* at 521.

resolutions dealt with the working conditions of one category of NRMA employees – a matter for directors and not shareholders. The reason these types of proposed resolutions have not been held to be invalid is that the resolutions are proposed as amendments to the company’s constitution. As was stated in *John Shaw & Sons (Salford) Ltd v Shaw*, above, shareholders can alter the exercise of powers by directors by altering the company’s constitution.

Section 249P is also a provision utilised by unions in shareholder activist campaigns. It provides that:

- (1) Members may request a company to give to all its members a statement provided by the members making the request about:
 - (a) a resolution that is proposed to be moved at a general meeting; or
 - (b) any other matter that may be properly considered at a general meeting.

The request may be made by “members with at least 5% of the votes that may be cast on the resolution” or “at least 100 members who are entitled to vote at a meeting.”²⁷⁹ The company is responsible for the costs of distributing a members’ statement if the statement is received in time to be distributed with the notice of meeting.²⁸⁰ The company is not required to comply with the request if the material is defamatory or more than 1,000 words in length.²⁸¹ This provision has been utilised by unions in attempts to obtain the support of other shareholders in backing resolutions proposed by unions, and also in attempts to encourage other shareholders to vote against Board resolutions.

2. Calling Extraordinary General Meetings

The requisition of an extraordinary general meeting (EGM) by shareholders is a process less commonly utilised by unions in conducting shareholder campaigns. Part 2G.2 of the *Corporations Act* provides that a general meeting of shareholders may be called by a

²⁷⁹ Section 249P(2). Item 5 of the *Corporations Amendment Bill (No 2) 2005*, if enacted, will reduce the 100 member numerical requirement in s.249P(2) to a 20 member threshold. The Parliamentary Joint Committee on Corporations and Financial Services has made a recommendation in favour of altering the numerical requirement to 20 members, with the proviso that the relevant statement be “no more than one page in length” and “received by the company by a suitable date, in order to enable distribution with the package of AGM materials.”: *Inquiry into the Exposure Draft of the Corporations Amendment Bill (No 2) 2005*, May 2005, para. 2.51. The Parliamentary Joint Committee did not support the proposal contained in the Bill to reduce the 100 member numerical threshold in s.249N(1) to 20 members: *ibid*, para.240.

²⁸⁰ Section 249P(8).

²⁸¹ Section 249P(9).

director, the members, or the court. Section 249D governs the requisitioning of EGMs by members. It provides that:

- (1) The directors of a company must call and arrange to hold a general meeting on the request of:
 - (a) members with at least 5% of the votes that may be cast at the general meeting; or
 - (b) at least 100 members who are entitled to vote at the general meeting.

The numerical requirement in s.249D(1)(b) may be altered by regulation.²⁸² Where a valid request is received by the directors, the meeting must be called “within 21 days after the request is given to the company”, and the meeting must be held not later than 2 months after the request is given to the company.²⁸³

In order to be valid, a members’ request for a general meeting must fulfil a series of technical requirements. The request must be in writing, state any resolution to be proposed at the meeting, be signed by members making the request and be given to the company.²⁸⁴ Also, the meeting request must be for a proper purpose,²⁸⁵ and the proposed resolution/s must not be void for uncertainty.²⁸⁶ In order to satisfy the proper purpose test the subject matter of the resolution sought to be passed “must be within the power of the members to consider and pass.”²⁸⁷ Thus, the meeting must not be convened in order to consider a resolution which is within the proper authority of the Board.²⁸⁸ In addition, the meeting must not be convened for “some extraneous purpose so as to constitute an abuse.”²⁸⁹ In considering whether an EGM request is invalid for improper purpose, regard must be had to the purpose of the “requisitionists as a whole”. Thus, where a request is made by union members along with a number of other company members, as was the case in *NRMA v Parkin*,²⁹⁰ it may be difficult to attribute the union objective to the entire group of requisitionists, thereby making it difficult to prove improper purpose. The courts have expressed reluctance about interfering

²⁸² Section 249D(1A).

²⁸³ Section 249D(5).

²⁸⁴ Section 249D(2).

²⁸⁵ Section 249Q.

²⁸⁶ *NRMA v Parkin*, above n 204.

²⁸⁷ *NRMA v Snodgrass* (2001) 19 ACLR 769.

²⁸⁸ See discussion of *NRMA v Parkin*, above.

²⁸⁹ *NRMA v Snodgrass*, above n 287.

²⁹⁰ Above n 204, para. 54.

with the rights of minority shareholders by too readily finding an improper purpose. In

Humes Ltd v Unity APA Ltd,²⁹¹ the court stated:

It can...be said that a minority shareholder is not acting bona fide in requisitioning a general meeting, if his objective is something other than the passing of the resolutions contained in the requisition... In my opinion this court should be very reluctant to interfere with a minority shareholder's statutory right to requisition a general meeting. I consider it should only do so when it is clear the purpose for calling the meeting is something other than the passing of the resolutions contained in the requisition.²⁹²

In *NRMA v Scandrett*,²⁹³ the court stated:

If the purpose for which the requisition is made is truly to have a meeting of members convened in order to consider and, if thought fit, to pass the resolution, then it does not matter that the requisitionist is motivated to pursue that purpose by ill-will or self interest.²⁹⁴

The court held, in *NRMA v Parkin*,²⁹⁵ that the fact that the EGM requisition arose directly out of the desire of the AMWU members to further their position in enterprise bargaining negotiations did not lead to the conclusion that the request was void for improper purpose.

The court stated that it could not conclude that Mr Parkin did not really want to have the resolutions passed:

I do not find that Mr Parkin has submitted the resolution without really wanting it to be put and passed. His position, in March before the requisition was submitted, was that if some solution to the industrial dispute, satisfactory to him, could be arrived at, then it might not have been necessary for the resolution to be put. However, if no satisfactory solution can be arrived at, then the evidence shows, it seems to me, that he wishes the resolutions to be considered by the members and, if they think fit, passed...In having the potential to improve the employees' bargaining position in future negotiations over wages and conditions there could be real advantage for Mr Parkin in having the resolutions passed...Thus, the attack on the resolutions as an abuse of process fails.²⁹⁶

The meeting request may also be declared invalid if the resolutions proposed to be passed at the EGM are void for uncertainty. Where a proposed resolution is "so vague as to be completely meaningless",²⁹⁷ the board may refuse to put the resolution to a meeting.

However, there must be more than "merely some vagueness about the resolution."²⁹⁸ In ascertaining whether a proposed resolution is void for uncertainty, the courts have used the

²⁹¹ (1987) 11 ACLR 641.

²⁹² Ibid at 645 and 647.

²⁹³ (2002) 171 FLR 232. This passage was relied on in *NRMA v Parkin*, above n 204, para. 56.

²⁹⁴ Ibid at 243.

²⁹⁵ Above n 204.

²⁹⁶ Ibid, para. 58.

²⁹⁷ *Totally and Permanently Incapacitated Veterans' Association of New South Wales v Gadd* (1998) 28 ACSR 549 at 556. Quoted in *NRMA v Parkin*, above n 204, para. 23.

²⁹⁸ Ibid.

test in *Upper Hunter District Council v Australian Chilling and Freezing Co Ltd*,²⁹⁹ a case concerning the legality of a contractual term. In *Upper Hunter*, the court held that:

...so long as the language employed by the parties...is not so obscure and incapable of any definite or precise meaning that the Court is unable to attribute to the parties any particular contractual intention, the contract cannot be held to be void or uncertain or meaningless...no narrow or pedantic approach is warranted.³⁰⁰

Thus, if a court is able to attribute meaning to a resolution, no matter how difficult this task may be, the resolution will not be void for uncertainty. Regard must be had to the possibility that ambiguities in the resolutions in the notice (of meeting) can be debated and amendments to the motions can be proposed.

The *Corporations Amendment Bill (No 2) 2005* will, if enacted, abolish the 100 member rule as it applies to the requisitioning of EGMs. Item 1 of Schedule 1 to the Bill proposes to replace s.249D(1) with the following:

- (1) The directors of a company must call and arrange to hold a general meeting on the request of members with at least 5% of the votes that may be cast at the general meeting.

The Parliamentary Joint Committee on Corporations and Financial Services, in its recent report on the Bill,³⁰¹ recommended in favour of the new provision, thus supporting the abolition of the 100 member rule as it applies to requisitioning EGMs.³⁰² The Committee found that the 100 member rule contained in s.249D(1)(b) of the *Corporations Act* affords significant opportunity for abuse and can result in “substantial costs for the company.”³⁰³ If the Bill is enacted, the scope for unions to utilise the EGM process as a form of activism will be severely limited. Campaigns such as the AMWU’s campaign against NRMA may no

²⁹⁹ (1968) 118 CLR 429. The court applied the *Upper Hunter* test to proposed EGM resolutions in *NRMA v Parkin*, above n 204, para. 48 (upheld on appeal: *NRMA v Parkin* [2004] NSWCA 153).

³⁰⁰ *Ibid* at 437.

³⁰¹ Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into the Exposure Draft of the Corporations Amendment Bill (No 2) 2005*, May 2005.

³⁰² *Ibid*, paras. 2.3 – 2.16.

³⁰³ *Ibid*, para. 2.14 – 2.15: “The Committee remains of the view that the 100 member rule should be abolished. While there is little history of the rule being abused, its potential for abuse remains clear...The Committee considers that sufficient other mechanisms exist for smaller shareholders to question company directors and influence company policy. Furthermore, the Committee is aware that any vexatious use of the 100 member rule will result in substantial costs to the company, and that these must be reflected in poorer investment returns for shareholders...the Committee considers that the 5% rule alone is sufficient to ensure that, in the extraordinary circumstances which would justify an extraordinary meeting, shareholders could requisition a meeting. This would probably (for practical purposes) require the recruitment of at least one institutional shareholder – and this in itself provides a safeguard against frivolous use of s.249D.”

longer be possible, as they would require the acquisition of a prohibitive amount of share value, unless unions were able to attract the support of a large investor or bloc of investors.

B The Use of Proxies

Pursuant to s.249X(1) and (1A), a person who is entitled to attend and vote at a company meeting may appoint a person or a body corporate to exercise their vote. This provision is a mandatory rule for public companies, and thus cannot be overridden by a provision in a company's constitution. The proxy need not be a member of the company. Pursuant to s.249Y, proxies have the same rights as a member:

- (a) to speak at the meeting; and
- (b) to vote (but only to the extent allowed by the appointment); and
- (c) join in a demand for a poll.

In order to appoint a proxy, a shareholder must fulfil certain technical requirements. Section 250A provides:

(1) An appointment of a proxy is valid if it is signed, or otherwise authenticated in a manner prescribed by the regulations, by the member of the company making the appointment and contains the following information:

- (a) the member's name and address;
- (b) the company's name;
- (c) the proxy's name or the name of the office held by the proxy;
- (d) the meetings at which the appointment may be used.

It is the obligation of the company to ensure that a proxy form is sent to all members entitled to appoint a proxy.³⁰⁴ In order to validly appoint a proxy, a shareholder must send the proxy appointment form to the company at least 48 hours before the relevant meeting.³⁰⁵

Unions have utilised the *Corporations Act* provisions on proxy voting to encourage members to vote on resolutions where they are unable to physically attend a meeting. Unions are thus able to encourage shareholders to appoint a union member to cast a proxy vote in favour of a union-backed resolution, or against a board resolution which a union is campaigning against.

³⁰⁴ Section 249Z

³⁰⁵ Section 250B.

C *The Ability to Pose Questions at a Company's AGM*

Pursuant to s.250S of the *Corporations Act*, “The chair of an AGM must allow a reasonable opportunity for the members as a whole at the meeting to ask questions about or make comments on the management of the company.” This provision has been utilised by unions as part of their shareholder campaigns by seeking to place specific matters directly before the Board, in the hope of compelling directors to address them.

IV COMPARATIVE STUDY: LABOUR SHAREHOLDER ACTIVISM IN THE UNITED STATES

Labour has been engaged in shareholder activism in the United States since the late 1980s.³⁰⁶ In recent years, US unions have become “the most aggressive of all institutional shareholders,”³⁰⁷ sponsoring far more shareholder campaigns than their Australian counterparts, with arguably more success at changing corporate practices. Like Australian unions, unions in the US have focused their shareholder campaigns on both traditional corporate governance matters and traditional union goals. They have also utilised a variety of tactics in securing influence in the boardroom, including the use of SEC Rule 14a-8, the US equivalent to s.249N of the *Corporations Act*, as their “weapon of choice.”³⁰⁸ However, the US experience of union shareholder activism is dominated by union pension funds and other labour-oriented investment funds, which have been either aligned with union campaigns or the catalysts for labour shareholder activism. This is distinct from the Australian experience, in which labour shareholder activism has originated from unions, or rather, collections of individual union members, who then may or may not gain the support of superannuation funds.

A *The Development of Labour Shareholder Activism in the United States*

Labour shareholder activism in the United States arose out of “the wave of corporate takeovers in the 1980s,” in which employee shareholders generally supported anti-takeover

³⁰⁶ Randall S. Thomas and Kenneth J. Martin, ‘Should Labor Be Allowed to Make Shareholder Proposals?’ (1998) 73 *Washington Law Review* 41, 47.

³⁰⁷ Schwab and Thomas, above n 22, 1019.

³⁰⁸ Thomas and Martin, above n 306, 41.

devices and employee stock ownership plans.³⁰⁹ Following this wave of takeovers, many companies were left with heavy debt loads and went through restructuring. As part of this restructuring process, many corporations dramatically downsized their workforces and shifted to using part-time and casual employees.³¹⁰ This resulted in a significant decrease in union membership and strength, as “millions of workers lost their jobs...(and) workers perceived that the unions were unable to protect their members from layoffs.”³¹¹ In the early 1990s, labour grew increasingly concerned at corporate management practices:

Labor perceived that managers, now insulated from the consequences of bad policies and poor performance by antitakeover devices, which labor had supported, were using their power to close plants, hire permanent replacement workers for striking employees, and pay themselves exorbitant salaries and benefits. From labor’s perspective, management simultaneously failed to focus on long-term investments in training, technology, and improved products.³¹²

As union membership declined, there was a significant increase in assets held in pension funds and employee stockholdings: combined assets of pension funds rose from US\$55 billion in 1983 to around US\$216 billion in 1993 and by 1993, around one in every five listed stock-exchange companies “had an average employee ownership of fifteen percent.”³¹³ Large public pension funds, such as the California Public Employees Retirement System (CalPERS), the nation’s largest pension fund,³¹⁴ have been engaged in shareholder activism since 1987,³¹⁵ directing their campaigns at corporate governance practices of targeted companies.³¹⁶ Unions and union pension funds frequently supported these corporate governance campaigns and gradually began to engage in shareholder activism through initiating their own campaigns.³¹⁷ They began to build alliances with other pension funds through shareholder groups³¹⁸ and utilised their combined assets to gain access to company decision-making processes.

³⁰⁹ Ibid, 47

³¹⁰ Ibid, 47

³¹¹ Ibid: “union membership fell from 20 percent of the total public and private workforce in 1983 to roughly sixteen percent by 1992.”

³¹² Thomas and Martin, above n 306, 48.

³¹³ Ibid.

³¹⁴ CalPERS <<http://www.calpers.ca.gov/index.jsp?bc=/investments/home.xml>>

³¹⁵ Thomas and Martin, above n 306, 49.

³¹⁶ Diane E. Lewis, ‘Unions Seeking Leverage as Shareholders’, *The Boston Globe*, 7 April 1996, 71.

³¹⁷ Thomas and Martin, above n 306, 49.

³¹⁸ Ibid.

Pension fund assets in the United States have come to represent “tremendous shareholder voting power” and the benefit plans of union members account for approximately US\$5 trillion in assets.³¹⁹ Assets held in union-affiliated pension plans represent a significant proportion of this wealth. Some of the large union pensions funds, including Teamsters, the Service Employees (S.E.I.U), the Union of Needle Trades, Industrial and Textile Employees (UNITE), and the United Brotherhood of Carpenters and Joiners America, promote shareholder activism.³²⁰ The American Federation of Labor-Congress of Industrial Organisations (AFL-CIO) has begun to coordinate the voting power of separate pension funds.³²¹ The AFL-CIO’s affiliated union pension plans represent “more than 66 national and international unions and their membership of more than 13 million workers”, accounting for US\$400 billion,³²² thus holding significant shareholder power. The AFL-CIO recognises the perceived need to utilise pension funds in order to benefit employees as workers and shareholders. AFL-CIO Secretary-Treasurer Richard Trumka claims that:

There is no more important strategy for the Labor Movement than harnessing our pension funds and developing capital strategies so we can stop our money from cutting our own throats.³²³

Shareholder activism by labour unions and pension funds has been on the increase since the 1990s. For instance, labour funds submitted 80 shareholder proposals in 1994;³²⁴ 105 in 2001; and 381 in 2003.³²⁵ In 2004, union-sponsored funds submitted 43 per cent of all shareholder initiated corporate governance proposals.³²⁶

B. Rationale for Union Shareholder Activism in the United States

The motivation behind labour shareholder initiatives in the United States is not always obvious³²⁷ or uniform.³²⁸ Corporate management often claims that union shareholder initiatives in the US form part of a “corporate campaign” to gain concessions for workers at

³¹⁹ Rosanna Landis Weaver, IRRC Corporate Governance Service, *Labor Shareholder Activism in 2002 and 2003*, 1.

³²⁰ Marleen O’Connor, ‘Union Pension Power and the Shareholder Revolution’ (1999) Paper prepared for The Second National Heartland Labor-Capital Conference, 4 – 5.

³²¹ *Ibid*, 1.

³²² Weaver, above n 319, 1.

³²³ O’Connor, above n 320, 3.

³²⁴ Thomas and Martin, above n 306, 50.

³²⁵ Weaver, above n 319, 1.

³²⁶ AFL-CIO <<http://www.aflcio.org/corporateamerica/paywatch/retirementsecurity>>

³²⁷ Marleen O’Connor, ‘Labor’s Role in the American Corporate Structure’ (1997) 22 *Comparative Labor Law and Policy Journal* 97, 113.

³²⁸ Thomas and Martin, above n 306, 42.

the expense of other shareholders.³²⁹ It is generally agreed that some shareholder campaigns are launched against companies in which a union is engaged in an industrial dispute or enterprise bargaining negotiations. They are used as an alternative or complement to picketing and striking, in order to strengthen a union's bargaining position.³³⁰

However, Schwab and Thomas assert that shareholder activism by unions cannot be dismissed as simply "an old dog's new tricks."³³¹ In addition to the objective of furthering labour interests, unions are also concerned with the financial performance of companies and many union campaigns are aimed at 'enlarging the corporate pie' or preventing corporate mismanagement.³³² Such campaigns can benefit workers (as employees and shareholders through their pension funds) and other shareholders. In addition, even where union shareholder campaigns are used as a weapon in an industrial dispute or bargaining process, this need not compromise the interests of other shareholders: where a union shareholder campaign targets the corporate governance of an underperforming company in which it is concurrently engaged in enterprise bargaining, other shareholders may support the campaign if it is in their own interests to do so, without supporting the wider union initiative or objective.³³³ Schwab and Thomas also note the goal of labour to become more involved in corporate decision-making:

In recent decades, unions have become increasingly frustrated at their lack of influence over basic corporate policy. Shareholder activism is a promising way of getting the attention of top management and the board of directors.³³⁴

Engaging in shareholder campaigns may allow unions to by-pass traditional channels of communication with companies as they open a dialogue directly with senior management and directors.

³²⁹ Schwab and Thomas, above n 22, 1022 – 1023.

³³⁰ Ibid, 1034 – 1035.

³³¹ Ibid, 1023.

³³² O'Connor, above n 320, 7.

³³³ Schwab and Thomas, above n 22, 1031.

³³⁴ Ibid, 1023.

C. Strategies of Labour Shareholder Activists

In the US, unions and union pension funds have utilised a number of mechanisms to attempt to alter the practices and performances of companies. However, as is the case in the Australian market, the shareholder campaigns are centred around the company AGM.

1. Shareholder Proposals under Rule 14a-8

The most common method of shareholder activism is the use of SEC Rule 14a-8 to put forward shareholder proposals at a company's AGM.³³⁵ These proposals may take two forms: traditional non-binding proposals and, less commonly, binding by-law amendment proposals.³³⁶ These proposals are usually filed by trustees of union pension funds or current / retired union members who own shares.³³⁷ A shareholder, in order to file a proposal, must have continuously held at least US\$2,000 in market value or one percent of the company's securities for at least one year by the date the proposal is submitted.³³⁸ A company is obliged, pursuant to Rule 14a-8(a), to include a shareholder's proposal in its proxy materials for an upcoming shareholders' meeting provided that the proposal meets various procedural and substantive requirements. Relevantly, the proposal must not relate to a personal grievance against the company or seek to further a personal interest,³³⁹ and it must not deal with a matter which concerns the ordinary business operations of the company.³⁴⁰ The shareholder submitting the proposal is permitted to provide a short statement in support of the proposal – a technique used by unions to encourage proxy votes in favour of the resolution.³⁴¹

Usually, union shareholder proposals relate to standard corporate governance matters, and according to Schwab and Thomas “[t]he amazing thing about these union-sponsored

³³⁵ 17 C.F.R § 240 (1997). O'Connor, above n 320, 11.

³³⁶ Schwab and Thomas, above n 22, 1042.

³³⁷ Diane E. Lewis, 'Unions Seeking Leverage as Shareholders', *The Boston Globe*, 7 April 1996, 71.

³³⁸ Rule 14a-8(a) 17 C.F.R § 240 (1997). Also, the shareholder must attend the meeting to present the proposal and is limited to one proposal per meeting.

³³⁹ Rule 14a-8(c)(4), 17 C.F.R § 240 (1997).

³⁴⁰ Rule 14a-8(c)(7), 17 C.F.R § 240 (1997). See Schwab and Thomas, above n 22, 1049 – 51 and Thomas and Martin, above n 306, 53 – 60 for a detailed examination of the application of the “personal grievance” and “ordinary business” exclusions to Rule 14a-8 shareholder proposals.

³⁴¹ Schwab and Thomas, above n 22, 1043: unions also independently solicit proxies.

proposals is how ordinary they are, from the perspective of any institutional investor.”³⁴² Union shareholder proposals have commonly focussed on such issues as poison pills, classified boards, board independence and ‘golden parachutes.’³⁴³ The reason for this, it is argued, is that unions have a legitimate interest in securing good management practices and the long-term economic wellbeing of a company, but also, by focussing on these matters, unions are more likely to gain the support of other shareholders – most notably, large pension funds.³⁴⁴

Large pension funds in the US, like their Australian counterparts, generally have “long-term investment horizons”: when unsatisfied with the performance or practices of a company, they may not be able to do the “Wall Street Walk” and sell all shares in a company without depressing the market price.³⁴⁵ Instead, it is in the interests of large pension funds to attempt to improve the performance of an underperforming company through changing its practices. This provides unions with an opportunity to target underperforming companies with poor workplace practices or union relations. In seeking to create a corporate governance system which is responsive to shareholder interests, unions align their campaigns with the interests of other shareholders.³⁴⁶ This maximises their ability to get the attention of the Board, and is said to contribute to the success of union shareholder activism in the US.³⁴⁷ Unions’ corporate governance proposals have enjoyed some measure of success. For instance, in the 1994 proxy season, unions won more majority votes for their proposals (seven) than any other investor group.³⁴⁸ In the 1998 proxy season, 14 union initiated corporate governance proposals were passed.³⁴⁹

More recently, unions have begun to focus their shareholder campaigns on claims of excessive executive remuneration, which has come to dominate the substantive content of

³⁴² Schwab and Thomas, above n 22, 1045.

³⁴³ Ibid. See also Thomas and Martin, above n 306, 61.

³⁴⁴ O’Connor, above n 320, 6.

³⁴⁵ O’Connor, above n 320, 5.

³⁴⁶ Thomas and Martin, above n 306, 61.

³⁴⁷ O’Connor, above n 327, 113.

³⁴⁸ Schwab and Thomas, above n 22, 1045.

³⁴⁹ O’Connor, above n 320, 13.

union shareholder proposals.³⁵⁰ The issue of executive remuneration has allowed unions in the US to highlight the concurrency of shareholder and worker interests. Unions have claimed that excessive executive remuneration reduces the value of shareholdings.³⁵¹ In addition, unions have used the disparity between the remuneration of senior executives and other employees in order to highlight social issues.³⁵² Focussing on wage disparities is a tactic long utilised by unions in the collective bargaining process and “the perceived greed of top executives is often mentioned in union leaflets.”³⁵³ In bringing this issue to the boardroom via shareholder proposals and ‘vote no’ campaigns, unions have created another forum to highlight pay disparities and raise awareness among other shareholders and the public during collective bargaining and corporate campaigns. The AFL-CIO has been active in its campaign to address perceived excessive executive remuneration, and established an “executive paywatch” website in 1997 designed to assist unions in shareholder campaigns. It is stated on the website:

A reasonable and just compensation system for executives and workers is fundamental to the creation of long-term corporate value. However, the past two decades have seen an unprecedented growth in compensation only for top executives and a dramatic increase in the ratio between the compensation of executives and rank-and-file workers...What’s wrong with CEOs taking a disproportionate share of the wealth? The problem is that excessive CEO pay takes the dollars out of the pockets of shareholders – including the retirement savings of America’s working families. Moreover, a poorly designed executive compensation package can reward decisions that are not in the long-term interests of a company, its shareholders and employees.³⁵⁴

The AFL-CIO’s website has a database on the remuneration of US executives. The objective of the website is not only to create transparency in relation to executive remuneration packages but also to mobilise individual pension fund beneficiaries, unions, union pension funds and perhaps other shareholders in supporting union shareholder campaigns.

³⁵⁰ Weaver, above n 319, 2: In the 2003 proxy season, the “vast majority” of proposals submitted by union funds dealt with executive remuneration. See also AFL-CIO, ‘What Is Wrong With CEO Pay – And What Union Funds Are Doing About It’ (2005), available at <www.aflcio.org/corporateamerica/paywatch/retirementsecurity>. 40% of union shareholder corporate governance proposals related to executive remuneration.

³⁵¹ O’Connor, above n 327, 119.

³⁵² O’Connor, above n 327, 120. See e.g. AFL-CIO, ‘2004 Trends in CEO Pay’, available at <www.aflcio.org/corporateamerica/paywatch/pay/>. “In 2004, the average CEO of a major company received \$9.84 million in total remuneration, according to a study by remuneration consultant Pearl Meyer & Partners... This represents a 12 percent increase in CEO pay over 2003. In contrast, the average nonsupervisory worker’s pay increased just 2.2 percent to \$27,485 in 2004.”

³⁵³ Weaver, above n 319, 6.

³⁵⁴ AFL-CIO, above n 326.

Rule 14a-8 proposals have also been used by unions to address social / industrial issues more directly. For example, in 1996 the Union of the Needletrades, Industrial and Textile Employees submitted a shareholder proposal to The Gap Inc's AGM as part of a high-profile campaign initiated by the National Labor Committee, a union-affiliated workers rights organisation, on the treatment of women employed in Central American sweatshops who produce clothing for The Gap.³⁵⁵ Apparently in response to the campaign the company established an independent monitoring regime to monitor suppliers in the Central American countries where the clothing is produced. The union withdrew the resolution.³⁵⁶

In 2002, the AFL-CIO and the International Federation of Chemical, Energy, Mine and General Workers' Unions (ICEM), along with several other unions and faith based organisations, used the shareholder proposal rule as part of a wider corporate campaign against Unocal, which, according to the AFL-CIO, participated in an oil pipeline project in Burma partially constructed by forced labour.³⁵⁷ The resolutions, which were initiated by a union pension fund (LongView Collective Investment Fund), called on the board of Unocal to "adopt, implement and enforce a code of conduct based on the ILO's conventions on workplace human rights" and link executive remuneration to the company's "ethical and social performance."³⁵⁸ The resolutions were supported by the UK's Trade Union Council which contacted over 100 pension funds in order to obtain their support, along with several large US pension funds including CalPERS.³⁵⁹ The resolutions were not passed. However, the resolution calling on the board to adopt a code of conduct received 31.3 percent of votes in favour, which was labelled "a great success for global labour solidarity", by ICEM's General-Secretary Fred Higgs.³⁶⁰ The TUC's Institutional Investment Officer, Tom Powdrill, claimed:

³⁵⁵ Lewis, above n 316.

³⁵⁶ Ibid.

³⁵⁷ AFL-CIO, 'Fighting Forced Labor in Burma, Shareholders Take Oil Giants to Task', 6 September 2002, available at <<http://www.aflcio.org/issuespolitics/globaleconomy/ns0522a2001.cfm>>

³⁵⁸ Ibid.

³⁵⁹ Investor Responsibility Research Center (IRRC) 'Social Proposals Attain New Heights', 14 June 2002, available at <http://www.irrc.org/company/06142002_Season.html>

³⁶⁰ ICEM, 'Big Unocal Shareholder Support for Worker Rights Proposal', 22 May 2002, available at <<http://www.icem.org/update/upd2002/upd02-21.html>>

To have one in three of your shareholders supporting a resolution that puts the issue of operating in Burma centre stage is something that the company cannot ignore. Taken with the high abstention rate it is clear that the company is approaching the point where there is widespread investor unease.

Already Unocal CEO, Charles Williamson has responded to the growing investor concern with the company's human rights and labour rights practices by telling shareholders that he will take the issue up with the Unocal board of directors.³⁶¹

2. Binding By-Law Amendments

Some shareholder proposals under Rule 14a-8 can be an effective method to encourage company boards to change corporate practices. However, they are usually proposed as non-binding resolutions. Unions have also submitted binding by-law amendment resolutions which, like non-binding resolutions, deal with a range of matters.³⁶² Schwab and Thomas claim that binding by-law resolutions have great potential for unions to influence the conduct of company boards as boards faced with these resolutions “will need to take unions’ actions very seriously or risk becoming takeover targets of potential acquirers alerted to their vulnerability by a successful shareholder vote.”³⁶³

3. “Vote No” Campaigns

Unions have also supported or initiated campaigns withholding support for resolutions proposed by company boards. These campaigns have predominantly focussed on the issues of executive remuneration and board composition.³⁶⁴ According to Schwab and Thomas, the interest of a union in supporting or initiating a vote no campaign against proposed executive remuneration packages is likely twofold: “to protect the value of its capital investment from management self-enrichment and to point out the inequalities of management’s negotiating position in negotiating compensation for rank-and-file workers.”³⁶⁵

4. ‘Behind the Scenes’ Meetings with Company Executives

According to Marleen O’Connor, in focusing shareholder proposals on “wedge issues” which will gain the support of public pension funds, unions are able to have “behind the scenes”

³⁶¹ TUC, ‘Unocal Sees Biggest Ever Vote on Burma’, 22 May 2002, available at <<http://www.tuc.org.uk/international/tuc-4885-f0.cfm>>

³⁶² O’Connor, above n 320, 11.

³⁶³ Schwab and Thomas, above n 22, 1058.

³⁶⁴ Ibid, 1072.

³⁶⁵ Ibid, 1074.

meetings with company managers.³⁶⁶ She claims that “[i]t is commonly understood among those in the institutional investor community that unions may discuss labor issues as well as corporate governance matters” at these meetings.³⁶⁷ This form of activism may be used in cases where unions are engaged in a broader corporate campaign aimed at gaining benefits for workers or collective bargaining negotiations. The influence unions have on managers, compared with other larger shareholders, has been questioned.³⁶⁸ However, where a union is able to negotiate directly with company managers, with the understanding that it may withdraw its shareholder proposal on a favourable outcome, there is probably scope for the union to exert some influence in these meetings.³⁶⁹

V OTHER COMPARATIVE DEVELOPMENTS

It appears there are few instances of shareholder activism by unions in other countries. However, there have been some developments in the United Kingdom and Canada to suggest that union shareholder activism may become more prevalent in the future.

A *United Kingdom*

In the United Kingdom, the Trade Union Congress (TUC) has recently begun to mobilise labour pension funds.³⁷⁰ The TUC has initiated a number of shareholder campaigns focussed mainly on executive pay, in which it has encouraged member union trustees and other institutional investors to vote down executive pay proposals that are claimed to be excessive.³⁷¹ The TUC has also targeted other corporate governance matters, such as board independence, performance based executive remuneration, and employee share ownership schemes.³⁷² At the core of the TUC’s efforts is its Member Trustee Network, consisting of

³⁶⁶ O’Connor, above n 320, 8.

³⁶⁷ Ibid.

³⁶⁸ Schwab and Thomas, above n 22, 1024: “we suspect that unions are less able than other institutional shareholders to exercise influence through informal, behind-the-scenes discussions”.

³⁶⁹ O’Connor, above n 320, 8.

³⁷⁰ Organisation for Economic Co-operation and Development (OECD), *Corporate Governance in OECD Member Countries: Recent Developments and Trends (Revised)* DAF/CA/CG (2000) 1 – Revised, 16.

³⁷¹ Trade Union Congress (TUC), *Trade Unions and Investor Activism*, available at <www.gurn.info/topic/corpgov/kptuc03.pdf>, 1.

³⁷² OECD, above n 370, 16.

1000 member-nominated trustees who are collectively responsible for over 260 billion pounds (approximately a third of total UK pension fund assets).³⁷³

In recent campaigns targeting GlaxoSmithKline, Corus, HSBC and BskyB, the TUC has sent voting alerts to its Member Trustee Network advising trustees of its opposition to particular board remuneration proposals and advising them to encourage their fund managers to vote against the proposals.³⁷⁴ It is claimed that these voting alerts have directly affected the voting decisions of some pension funds,³⁷⁵ and that “having a clear trade union line on particular votes may have also given confidence to other investors – both pension funds and perhaps some fund managers – to depart from the ‘industry’ line.”³⁷⁶ In addition, creating public scrutiny of excessive executive remuneration has “symbolic value” as, according to Brendan Barber, General Secretary of the TUC, the shareholder campaigns send out a “negative signal” to the wider public, highlighting differences in board remuneration and remuneration of ‘front-line’ employees.³⁷⁷

It is likely that union shareholder activism will continue to gain prominence in the UK. The TUC has expressed a commitment to increasing coordination of trade union investors in the future as “[w]orking collectively trade union investors could aim to play a much larger role in developments in shareholder activism and socially responsible investment and debates on corporate governance.”³⁷⁸ Further, the TUC has expressed an interest in gradually moving beyond campaigns focussing on traditional corporate governance concerns to directing their campaigns at traditional union objectives.³⁷⁹ For example, the TUC states that trade union investments could be mobilised for “a vote against the report and accounts of companies with poor health and safety reporting.”³⁸⁰ According to Brendan Barber:

³⁷³ TUC, above n 371, 2.

³⁷⁴ *Ibid.*, 13.

³⁷⁵ *Ibid.*

³⁷⁶ *Ibid.*

³⁷⁷ ‘UK Fund Managers Start to Embrace Worker-Related Interests’ *The Australian – Finance*, 15 September 2003, 28.

³⁷⁸ TUC, above n 371, 11.

³⁷⁹ *Ibid.*, 18.

³⁸⁰ *Ibid.*, 15.

Increasingly, people in the trade union movement recognise that a part of the long-term wellbeing of a company is that it is not going to be exposed to reputational risk... Emphasis on corporate social responsibility is being forced up the agenda of all companies, and offering good working conditions and fair pay sits comfortably with the more recent demands on ethical, environmental and reporting standards.³⁸¹

B Canada

The Canadian experience of labour shareholder activism has also focused on the coordination of labour's capital investment in companies in order to improve corporate practices and performance. In 2000, the Shareholder Association for Research and Education (SHARE), a national non-profit organisation, was created in order to "help pension funds and other investors build sound investment practices, protect the interests of plan beneficiaries, and contribute to a just and healthy society."³⁸²

SHARE coordinates the activities of Canadian union pension funds and also conducts educational programs for trustees of union pension funds. Its board of directors has a majority of union representatives. SHARE has attempted to tap into the significant wealth held in Canadian trustee pension funds, estimated at Can\$600 billion,³⁸³ to change the practices and performance of targeted companies. In Canada, as in Australia, many pension fund trustees delegate management of their funds, including voting rights in shares, to external fund managers.³⁸⁴ SHARE focuses on encouraging pension fund trustees to monitor voting practices of fund managers and influence their voting practices in accordance with SHARE's recommendations. SHARE's activities focus on delivering educational programs for pension fund trustees; conducting research and facilitating policy reform on a variety of issues, including, among other relevant issues, socially responsible institutional investment and corporate social responsibility; monitoring proxy voting practices and shareholder activism.³⁸⁵

³⁸¹ Above n 377, 28.

³⁸² SHARE, 'SHARE Launches Newsletter' (2001) 1 *Prospectus* 2, available at <<http://www.share.ca/index.cfm/fuseaction/page.inside/pageID/6FD238FB-B0D0-157F-F4F1031B380225A8/index.cfm>>

³⁸³ *Ibid.*

³⁸⁴ *Ibid.*, 3.

³⁸⁵ SHARE <<http://www.share.ca/index.cfm/fuseaction/page.inside/pageID/6FCB85DC-B0D0-157F-F45E616F173AE464/index.cfm>>

SHARE's campaigns focus on the company AGM and it assists its affiliate organisations in the following:

- facilitating institutional shareholder dialogue and action
- drafting and filing shareholder proposals
- presenting proposals at corporate annual general meetings
- coordinating internationally with other institutional shareholders.³⁸⁶

Each year, SHARE has coordinated various shareholder proposals at company AGMs relating both to corporate governance issues and corporate social responsibility. It has a mandate to facilitate activism on behalf of its affiliates “on a variety of issues that affect share value and the long-term interests of pension beneficiaries.”³⁸⁷ SHARE's corporate governance proposals relate mainly to board independence, auditor fee disclosure and the separation of chair and CEO.³⁸⁸ It has also been active in coordinating corporate social responsibility proposals initiated by its affiliate organisations, some of which have concerned labour issues. For instance, in the 2001, 2002 and 2003 AGM seasons, two Canadian pension funds (Working Enterprises Ltd, the staff pension plan of the Canadian Labour Congress, and a Montreal area firefighter's pension plan) submitted a proposal at the Hudson's Bay Company AGM. Similar resolutions were put forward at the AGM of Sears Roebuck and, through a campaign coordinated with the US-based AFL-CIO Office of Investment and the Interfaith Center for Corporate Responsibility, at the AGM of Wal-Mart. The three targeted companies are the largest retailers in Canada and the pension funds initiating the campaigns expressed concern about working conditions in foreign clothing production facilities.³⁸⁹ The Hudson's Bay 2003 resolution (which was essentially the same as the Sears resolution) proposed that the Board of Directors:

1. Amend the Hudson's Bay Company Code of Vendor Conduct and standard purchase contracts to reflect fully the principles contained in the International Labour Organisation (ILO) Declaration on Fundamental Principles and Rights at Work;
2. Establish an independent monitoring process that assesses adherence to the amended Code;

³⁸⁶ SHARE, 'Shareholder Action: Overview'

<<http://www.share.ca/index.cfm/fuseaction/page.inside/pageID/6FE51FC6-B0D0-157F-F4D3F23B0F54D9B3/index.cfm>>

³⁸⁷ SHARE, 'Shareholder Action: SHARE Initiatives',

<<http://www.share.ca/index.cfm/fuseaction/page.inside/pageID/7511A06C-B0D0-157F-F4AA08EFD775EB8B/index.cfm>>

³⁸⁸ Ibid.

³⁸⁹ SocialFunds, 'Major Canadian Retailers Receive Resolutions on Sweatshops' 29 January 2001, available at <www.socialfunds.com/news/print.cgi?sfArticleId=483>

3. Report annually in writing on adherence to the amended Code through an independent and transparent process, the first such report to be completed by January 2004.³⁹⁰

The shareholders linked improved labour standards with the long-term economic success of the company. The Hudson's Bay resolution supporting statement provided that:

Shareholders are concerned about potentially adverse financial effects on the Company and shareholder value resulting from failure to effectively monitor working conditions in facilities where the Company's goods are produced. Negative publicity, consumer boycotts, worker lawsuits, and divestiture or avoidance by investors are frequent responses to revelations of abusive working conditions...Assurance that our Company has an effective code of conduct will increase its attractiveness to investors and consumers. Alternatively, uncertainty about the effectiveness of the Company's code suggests that potential information on the frequency and scope of independent monitoring and a summary of the results, will contribute to such assurance.³⁹¹

At Hudson's Bay 2001 AGM, the proposal received 15.2% of votes in favour; in 2002, the proposal received 36.8% of votes in favour – a significant increase. In 2003, the proposal was withdrawn by the sponsoring shareholders after successful negotiations between the union pension funds and the company yielded a favourable result for the shareholders.

SHARE stated that:

The 2003 proposal filed with Hudson's Bay was withdrawn after the company committed to ensuring that its suppliers operate in a manner consistent with the spirit of the ILO core labour standards, to reviewing the wording of its Code of Vendor Conduct, and to on-going dialogue with shareholders. The Company is the first Canadian retailer to publish an annual report on Corporate Social Responsibility.³⁹²

Conversely, the Sears proposal peaked in 2001 with 10.2% of votes in favour. In 2002, it received 6.2% of votes in favour and in 2003, 7.7% of votes in favour.³⁹³ The campaigns also included "discussions" between the companies, the coalition of shareholders proposing the resolutions and SHARE, and verbal statements in support of the resolutions made by representatives of the shareholders at the AGMs. Further, the media coverage of the 2001 campaigns was considered by SHARE to be sufficiently extensive to be labelled "a success" and had "an important public impact."³⁹⁴

³⁹⁰ SHARE, above n 387.

³⁹¹ Ibid.

³⁹² Ibid.

³⁹³ Ibid.

³⁹⁴ SHARE, 'FTQ and SHARE Join Forces on Sweatshop Labour' (2001) 2 *Prospectus* 1, available at <<http://www.share.ca/index.cfm/fuseaction/page.inside/pageID/6FD238FB-B0D0-157F-F4F1031B380225A8/index.cfm>>

In the case of the Hudson Bay's campaign, it is likely that the shareholder campaign, including the AGM resolutions, the continuing dialogue between the pension funds and the company, and the media coverage of the campaign, placed pressure on the company to enter into negotiations with the shareholders and commit to altering its corporate practices.

VI ANALYSIS OF UNION SHAREHOLDER ACTIVISM IN AUSTRALIA

A Objectives and Rationale of Union Shareholder Activism

The objectives of union shareholder activism are not necessarily common to all campaigns; however, in analysing case studies of shareholder activism by labour unions in Australia, several points may be identified in relation to the rationale or perceived objectives of these campaigns.

1. Unions Using Shareholder Activism to Resolve Industrial Disputes

In all of the case studies referred to above, unions in Australia have engaged in shareholder activism against the backdrop of an industrial dispute with a company, such as perceived attempts by companies to de-unionise their workplaces, refusals to bargain collectively or disputes flowing from the enterprise bargaining process itself. In several cases, these disputes had been long-running had reached a stand-still at the time the shareholder campaigns were launched, thus suggesting that shareholder campaigns have often been employed by unions as a last resort to resolve an industrial dispute with a company. The Rio Tinto campaign, for instance, arose out of a long-running dispute between the company and the CFMEU, and was aimed at ending this dispute on terms favourable to the union. In the face of a perceived strategy by Rio Tinto to de-unionise its workplaces, the CFMEU had utilised more traditional methods to advance its interests, such as strikes, litigation and picketing; however, Rio Tinto appeared unperturbed by these tactics. The CFMEU had expressed frustration at the apparent ability of Rio Tinto's management to remove itself from directly addressing the concerns of the CFMEU and to use its resources to insulate itself from the conflict, through budgeting for strikes and prolonging litigation. The campaign was aimed at forcing the management of Rio Tinto to recognise the CFMEU as a bargaining

agent and deal directly with the concerns of the union, in the hope this would end the attempted de-unionisation of Rio Tinto's workplaces.

Similarly, other union campaigns have used shareholder activism as a means of bringing pressure to bear on a company's management during enterprise bargaining negotiations, particularly in circumstances where these negotiations have reached a stand-still. Both campaigns initiated by the FSU took place during enterprise bargaining negotiations, and in the context of significant job losses and perceived anti-union sentiment. As noted above, according to Carol Webb, National Training Coordinator of the FSU, the FSU will generally use shareholder activism when it is trying to reach an enterprise bargaining agreement with a company. The FSU has utilised shareholder activism where a company has refused to enter into negotiations (as was the case in the ANZ campaign) or where negotiations have effectively broken down (which had occurred prior to the CBA campaign).

Likewise, the AWU's campaign targeting BlueScope's 2004 AGM was initiated in the context of enterprise bargaining negotiations, which had broken down a year before the company's AGM, resulting in strikes. Whilst the campaign centred on various corporate governance and executive remuneration practices, it was a response, in part, to these failed enterprise bargaining negotiations. It was hoped that the shareholder campaign would directly involve the board in the dispute, thus placing pressure on the board to resolve the dispute on terms favourable to the union. The ASU's 'vote no' campaign targeting the Qantas AGM also took place against the backdrop of failed enterprise bargaining negotiations. It used two board resolutions relating to executive remuneration to launch a campaign aimed at increasing shareholder and public awareness of the perceived poor pay increases offered by Qantas in its wage negotiations with the union. It was hoped that, in focusing shareholder and public attention on the dispute, pressure would be brought to bear on the board to resolve the dispute and concede to the ASU's proposed wage increase. The AMWU's campaign involving the NRMA was directly connected to failed enterprise bargaining negotiations between the union and the NRMA, which concerned the retention of existing jobs and employment conditions. Throughout the negotiations, the NRMA was apparently unresponsive to more traditional union tactics, such as strikes and litigation. Thus

the AMWU utilised shareholder activism in order to ‘break the stand-off’ between the AMWU and the NRMA and resolve the dispute on terms favourable to the union.

It appears, then, that unions in Australia are engaged in shareholder activism as a new means to an old end (a new forum by which to pursue industrial interests, such as pay increases), rather than as a new end in itself (that is, monitoring and promoting the financial wellbeing of a company as shareholders). As will be outlined below,³⁹⁵ in constructing shareholder campaigns, unions have emphasised their unique interests as workers and shareholders and have asserted that they do, in fact, have an interest in the financial wellbeing of companies. However, this alignment may be more accurately conceived of as a tactic, rather than a fundamental rationale for union shareholder activism.

2. The Broader Context of Union Shareholder Activism in Australia: the Need to Forge a Role in Regulating Industrial Relations

The ability of company management to pursue shareholder value, at the expense of the interests of labour, is constrained by labour law.³⁹⁶ Until fairly recently, Australian unions enjoyed a prominent role within the labour law regulatory framework and thus their ability to pursue industrial interests was significant. Industrial legislation promoted “a symbiotic relationship between Australian unions, compulsory conciliation and arbitration and the award system for regulating wages and conditions.”³⁹⁷ Unions were given significant powers and protections and were largely integrated into the labour law regulatory system.³⁹⁸

However, unions in Australia have experienced a recent decline in their power and influence. In the 1990s, conservative state governments began restructuring the labour law system in order to emphasise direct negotiation of employment conditions at the workplace level, in place of a centralised award-based system of regulation. In the process, the role of unions in regulating workplaces was reduced.³⁹⁹ These reforms were followed by the introduction of the Commonwealth *Workplace Relations Act* 1996, which was enacted with the election of

³⁹⁵ See Section VI C.

³⁹⁶ Mitchell, O’Donnell and Ramsay, above n 6, 28.

³⁹⁷ Breen Creighton and Andrew Stewart, *Labour Law* (2005) (4th ed) 483.

³⁹⁸ Mitchell, O’Donnell and Ramsay, above n 6, 32.

³⁹⁹ Creighton and Stewart, above n 397, 48.

the Coalition government in 1996. Under the *Workplace Relations Act*, the federal government sought to “facilitate ‘free’ bargaining between employers and individual employees and groups of employees or with trade unions at the enterprise level,” in place of a centralised system of awards.⁴⁰⁰ Trade unions were conceived of as ‘third parties’ to the employer / employee relationship, and as such, their role and powers were greatly reduced, thus limiting their ability to advance industrial interests within the framework of labour law.⁴⁰¹

This reduced role of unions in the labour law context can help to explain the recent use by unions of the *Corporations Act* to attempt to forge a role in influencing the conduct of companies. According to John Maitland, National Secretary of the CFMEU, “[u]nions are not going to confine their bargaining to the workplace when the prevailing laws so heavily circumscribe what can take place at that level” and will increasingly utilise shareholder activism in a context in which a union’s power to bargain collectively is subject to “highly restrictive labour laws.”⁴⁰² Where the power and influence of unions has been greatly diminished within the labour law context, unions look to shareholder activism as a means by which to exert influence over company management and forge a role in regulating workplace relations. In many of the case studies examined above, unions have used shareholder activism to gain direct access to company boards, in order to open a public dialogue with boards and shareholders, thereby attempting to exert influence over the boards’ industrial relations policies.⁴⁰³

As noted above, Peter Colley, of the CFMEU, has maintained that a “fundamental rationale” for the Rio Tinto shareholder campaign was to bring the company’s de-unionisation policy

⁴⁰⁰ Shelley Marshall and Richard Mitchell, *Enterprise Bargaining, Managerial Prerogative and the Protection of Workers Rights: an Argument on the Role of Law and Regulatory Strategy in Australia Under the Workplace Relations Act 1996 (Cth)*, Centre for Employment and Labour Relations Law and Centre for Corporate Law and Securities Regulation, University of Melbourne Law School (2005), 4.

⁴⁰¹ *Ibid.*, 21.

⁴⁰² Maitland, above n 54, 3. See also Suzanne Hammond, Community and Public Sector Union, *We’re the Voice! Business Groups Have Become Anxious About Workers Using Their Voice in Shareholder Annual General Meetings*, 29 October 2004, available at <http://cpsu-spsf.asn.au/public_interest/1004/141.html>: “When faced with hostile governments, worker shareholder activism provides an alternative means of securing fair work practices.”

⁴⁰³ Opening a dialogue with the board may be considered a means by which unions use shareholder activism, as well as being an end (goal) in itself: see section VIC below.

directly before the board, rather than through “a phalanx of lawyers and HR specialists.”⁴⁰⁴ Likewise, the FSU’s campaign at ANZ’s AGM arose partly out of the union’s frustration at being excluded from the management’s decision-making processes relating to the company’s industrial relations. Initiating a shareholder campaign was aimed at allowing the FSU to communicate directly with the board, in a public forum. Also, the AWU’s campaign at BlueScope’s AGM was aimed, in part, at directly involving the board in the debate over industrial relations in the company. The union had expressed frustration at being “ignored” by the company’s management, and, as noted above, proposing resolutions at the company’s AGM allowed the AWU to “open a real dialogue between the AWU and management” and gave workers “a voice at the board level.”⁴⁰⁵ Thus, in a context in which the influence of unions in determining industrial relations policy within the labour law framework has diminished, it appears that unions have utilised shareholder activism in an attempt to forge a more significant voice in the determination of these matters.

B Which Unions Utilise Shareholder Activism?

The unions in Australia that have utilised shareholder activism as a strategy by which to pursue industrial interests are predominantly large, well resourced unions. The unions involved in the case studies outlined above are among the largest unions in Australia. John Maitland, National Secretary of the CFMEU states that:

weak unions can’t mount shareholder campaigns. It requires more resources that are quite different from what unions conventionally call upon in a bargaining dispute. Site delegates and industrial officers – the bread and butter structure of most unions – are not skilled with shareholder issues...It is large strong unions with the ability to think long term and strategically that are entering the field of shareholder activism.⁴⁰⁶

Unions do require a new skills base in order to launch a shareholder campaign – particularly where this campaign (as is often the case) is framed in terms of improving the corporate governance practices of target companies. It follows, then, that better resourced unions are in the best position to expand and diversify their skills base in order to construct an effective shareholder campaign.

⁴⁰⁴ Australian Broadcasting Corporation, above n 25, 2.

⁴⁰⁵ AWU, above n 164.

⁴⁰⁶ Maitland, above n 54, 2.

C How Unions Use Shareholder Activism in Advancing Industrial Interests

Union shareholder campaigns in Australia have focused on company AGMs, or, to a much lesser extent, the requisition of an EGM, and have used relevant provisions of the *Corporations Act* in connection with a company's AGM / EGM in order to advance industrial interests. Using the framework of corporate law has required unions to broaden their interests in companies as traditionally perceived, by emphasising their dual stake in the company as both workers and shareholders.

1. The Conceptual Framework: Linking Worker and Shareholder Interests

In utilising corporate law to advance industrial matters, unions have sought to link the interests of company workers with the interests of shareholders. The main reason is that, in order to gain support for their campaigns, unions have to make the subject matter of these campaigns relevant to the wider shareholder base. In all of the case studies referred to above, unions have attempted to gain the support of other shareholders, in the hope that a larger vote would represent significant support for the union, thus bringing pressure to bear on the board to address the union-mandated issue. Some of the unions have focused their campaigns on perceived corporate governance problems in the targeted company in order to gain support from larger investors. The Rio Tinto campaign, in part, addressed board independence: that is, the need for “a strong and independent non-executive element on the Board.”⁴⁰⁷ One of the union sponsored resolutions sought to oppose the appointment of a former executive director to the position of non-executive deputy chair. In drafting the resolution on board independence, the CFMEU referred to several prominent codes on corporate governance, which specified that boards should have a minimum allocation of non-executive directors, in order to ensure that “the Board could bring its full independent judgement to strategic decision making,”⁴⁰⁸ a matter which is in the interests of all shareholders. Likewise, the AWU's campaign targeting BlueScope also focused, in part, on perceived problematic corporate governance practices in the company, such as board independence and director's workloads.

⁴⁰⁷ Resolution 7: see section IIB above.

⁴⁰⁸ Rio Tinto, above n 41.

Unions have justified this focus on corporate governance issues by maintaining they have a legitimate interest in the corporate governance practices of companies, as a poorly governed company is likely to impact negatively not only on workers but also shareholders. Linda Rubinstein, Senior Industrial Officer at the ACTU, states that unions “have a general interest in companies being well managed and successful”⁴⁰⁹ as “[b]adly managed companies will make bad decisions which will end up with operations closed down and workers sacked.”⁴¹⁰

Several union shareholder campaigns have focused on the issue of executive remuneration. These campaigns have served the dual purposes of allowing unions to address a corporate governance issue which directly impacts on the company’s ‘bottom line’ and is thus thought to be in the interests of all shareholders, and to serve a symbolic purpose by highlighting the disparity between workers’ entitlements as opposed to senior executive and directors’ entitlements, in the midst of enterprise bargaining negotiations. The ASU’s ‘vote no’ campaign at the Qantas 2004 AGM, centred on two board resolutions seeking to increase the aggregate amount of fees payable to board members. The ASU sought to appeal to large institutional investors by maintaining that the increase was excessive. It also used the proposed increase to highlight the disparity between the increase of 66% in directors’ remuneration, with the union’s inability to negotiate a 6% pay increase during enterprise bargaining. The Boral and BlueScope campaigns also focused on the issue of executive remuneration, in addition to other corporate governance matters. The AWU sought to highlight the disparity between the remuneration and benefits offered to executives of BlueScope with that being offered to workers during enterprise bargaining negotiations.

Other union shareholder campaigns have sought to link worker and shareholder interests in a different way: by emphasising the ability for poor workplace practices to impact negatively on the long-term economic wellbeing of the company. The CFMEU, in the campaign against Rio Tinto, argued that poor work practices negatively affect the reputation of the company – one of its most valuable assets. Thus, having a credible code of labour practice was essential in ensuring the long-term economic sustainability of the company. Similarly, the ACTU’s

⁴⁰⁹ Linda Rubinstein, *Corporate Governance*, available at <http://www.fsunion.org.au/news/public/1116912772_31308.html> p. 1 of transcript.

⁴¹⁰ *Ibid*, 2.

campaign against James Hardie emphasised the negative effect that the company's denial of adequate compensation for asbestos victims was likely to have on the company's reputation, and thus ultimately on its share price. The TWU's campaign against Boral sought, in part, to highlight the impact of poor workplace health and safety practices on shareholder wealth, in order to attract votes from a wider shareholder base. The FSU's campaigns targeting both the ANZ and CBA linked workers' interests with shareholder interests by maintaining that staff lay-offs and bank closures had impacted negatively on the two banks' quality of customer service, thereby jeopardising the long-term economic performance and shareholder wealth of the companies.⁴¹¹

2. How are Companies Selected? Targeting Companies with Corporate Governance Challenges

As noted above, unions have attempted to align their interests as workers and shareholders in union shareholder campaigns. This has meant, in some circumstances, that unions will address corporate governance matters in proposed AGM resolutions, in order to increase the likelihood of receiving votes in favour of these proposed resolutions. As a result, unions will, at times, specifically target a company with perceived unsound corporate governance practices. John Maitland, National Secretary of the CFMEU, states that union shareholder activism is:

best used where we identify shortcomings in the management and corporate governance of a company which we feel is to the disadvantage of both shareholders and employees. Companies with poor corporate governance are not fully accountable to the needs of shareholders. Poor corporate governance may include the pursuit of employment practices which are needlessly high risk, needlessly expensive and that are destructive of long term value for shareholders. In this context, employees and shareholders in a company may find common ground in increasing the accountability of company directors and management.⁴¹²

Perceived problematic corporate governance practices are therefore one criterion used by a union in deciding whether to initiate a shareholder campaign. This allows unions scope to appeal to the wider shareholder base, a significant portion of which may be interested in

⁴¹¹ Ibid, 4: "The Finance Sector Union's primary concern is that when banks close branches and cut staff some of their members lose jobs, while others get stressed out managing increased workloads and furious customers... There is no doubt that public hostility to the big banks is growing, fuelled by these cutbacks... together with steadily rising fees. These are issues for shareholders."

⁴¹² John Maitland, above n 54, 3.

remedying a company's unsound corporate governance practices in order to protect their own financial investments.

3. Using Shareholder Activism as Part of a Larger Campaign Focused on Corporate Reputation

Shareholder activism will often be utilised by unions in the midst of a wider campaign against a company, and will form part of a broader corporate campaign. A broad 'corporate campaign' is a coordinated campaign using a variety of tactics, such as consumer boycotts, public-relations strategies, AGM-related activity, and court action.⁴¹³ In Australia, shareholder activism has been used by unions as a complementary or supplementary tactic to corporate campaigns or traditional union industrial campaigns, which have focused on targeting the reputation of a company in order to pressure its management into supporting interests promoted by unions. The ACTU's campaign against James Hardie is an illustration of this. This campaign formed part of a broad corporate campaign, including consumer boycotts and the generation of negative media publicity, in order to target the corporate image of James Hardie and bring political, economic and moral pressure to bear on the company's management, to encourage it to provide adequate compensation to asbestos victims. The union shareholder campaign used the negative publicity to encourage shareholders to vote against two board resolutions. The ACTU maintained, in letters sent to major James Hardie shareholders, that the company's failure to secure adequate compensation for asbestos victims negatively affected its corporate image and therefore its share price.

The ASU's 'vote no' campaign targeting Qantas also highlights the use of shareholder campaigns in the context of a broader corporate campaign. The ASU's shareholder campaign formed part of a broad campaign aimed at seeking a favourable outcome in wage negotiations with Qantas. The ASU used its opposition to two board resolutions in order to illustrate the disparity between the proposed board 66% 'pay rise' and the union's inability to negotiate a 6% pay rise with the company. The shareholder campaign received significant media coverage, which drew public attention to the enterprise bargaining negotiations. The

⁴¹³ Schwab and Thomas, above n 22, 1033.

ASU, then, used the shareholder campaign to generate coverage for its wider industrial campaign, in the hope this would bring pressure to bear on the board to resolve the dispute on terms favourable to the union.

Likewise, the FSU campaign to have a member appointed to the board of ANZ constituted one strategy in a broader corporate campaign focusing on the corporate reputation of the bank. Carol Webb of the FSU maintains that the shareholder action was used to highlight particular industrial practices and bring public attention to these matters, thereby causing greater transparency and accountability in the company's treatment of workers.⁴¹⁴

4. Bringing Economic, Political or Moral Pressure to Bear on the Board

In all of the case studies outlined above, it has not necessarily been the intention of unions to have their resolutions passed, or to have particular board-sponsored resolutions voted down. Instead, the campaigns have relied on the premise that, in using shareholder powers to highlight various industrial or corporate governance matters, the board will feel compelled to resolve the particular issue/s mandated by unions. In particular, unions have relied on the support of larger shareholders and the wider public (through media coverage of shareholder campaigns) to increase pressure on the board to resolve an industrial dispute on terms favourable to the union. In attempting to gain support for their campaigns from the wider shareholder base, unions have particularly focused on lobbying superannuation funds. The CFMEU, for instance, had many consultations, designed a campaign-specific website and sent targeted mailings in order to gain the support of large institutional investors for its campaign against Rio Tinto. Similarly, the FSU sought the support of superannuation funds as an integral part of its campaigns against both the ANZ and the CBA. Both of the union 'vote no' campaigns centred on tactics designed to encourage major institutional investors in Qantas and James Hardie to vote against the relevant board resolutions. In particular, the ASU and ACTU sent letters to major superannuation fund managers and advisors, encouraging them to vote against the board-proposed resolutions.

⁴¹⁴ Interview with Carol Webb, above n 106.

The requisitioning of an EGM has also been a tactic employed by unions in order to bring economic pressure to bear on company boards, as illustrated by the TWU's campaign against the NRMA. The TWU, through the requisitioning of an EGM which would have cost the NRMA an estimated \$6 million, sought to bring pressure to bear on the board to resolve its industrial dispute with the union. The union was able to use the threat of an EGM to gain sufficient leverage in its negotiations with the company to have the dispute resolved in its favour.

5. Using the AGM to Open a Direct Dialogue with Management

In focusing shareholder campaigns on the AGM, unions are able to open a public dialogue directly with a company's board – an option that may not otherwise be available. Unions have endeavoured to use the AGM to force the board to consider the issue and respond. Several unions have maintained that the ability to open a direct dialogue with the company board forms both a rationale for union shareholder activism and a method of activism by which to achieve a particular result. Unions have used both the power to propose resolutions and the power to pose questions to the board at a company's AGM, to place a matter on the board's agenda. The CFMEU, in its campaign against Rio Tinto, forced the board to consider, in a public forum, its industrial relations practices by both placing a resolution relating to the company's industrial practices on the agenda and questioning the board directly about its relationship with the union. This prompted the Chief Executive to state that the board was “willing to sit down and discuss with its employees and their representatives, collective arrangements.”⁴¹⁵

The FSU has also used the AGM to open a direct dialogue with company boards concerning industrial issues. The campaign to have one of its members appointed to the board of ANZ allowed the FSU, through the board candidate, to communicate directly with the board its concern over various industrial practices within the company. The FSU's campaign against the CBA also allowed the union to have a direct “broad ranging discussion”⁴¹⁶ about various workplace practices and challenges within the company. The AWU's campaign targeting

⁴¹⁵ Rio Tinto, above n 61.

⁴¹⁶ FSU, above n 131.

BlueScope allowed the union to bring industrial matters directly to the attention of the board at the AGM, where this had proved impossible through more traditional union measures.

6. Unions Emphasising a Role as ‘Inside Monitors’ of Company (mis)Management

Several unions, as part of their shareholder campaigns, have emphasised their unique role and ability to monitor company performance from an ‘insider’ perspective. The TWU’s shareholder campaign against Boral was based, in part, on information gained from a union-sponsored ‘safety audit’ of Boral workplaces. The FSU’s campaign to have a member, Joy Buckland, appointed to the board of the ANZ relied on Ms Buckland’s ‘insider’ knowledge of the bank’s operations and perceived industrial and customer service problems in order to promote her candidacy. Also, the ASU, in its ‘vote no’ campaign against the board-sponsored remuneration proposal at the Qantas 2004 AGM, was able to bring the non-cash benefits currently received by directors of Qantas to the attention of the superannuation fund managers and advisors it lobbied. These benefits may not otherwise have been brought to the attention of fund managers, as maintained by Kathryn Watt of Vanguard Investments.⁴¹⁷

D The Effectiveness of Union Shareholder Activism

No Australian union shareholder campaign has resulted in a union sponsored resolution being passed at a meeting of shareholders. However, in several of the Australian case studies discussed above, unions have been successful in negotiating favourable outcomes with companies during, or at the conclusion of, a shareholder campaign. The unions examined in the case studies are generally not attempting to have shareholder resolutions passed, but use the proposed resolutions to bring pressure to bear on a company in the hope of gaining access to high level company decision making processes and influencing the company’s practices and conduct toward unions and workers.

⁴¹⁷ Interview with Kathryn Watt, above n 176.

1. Factors Contributing to the Effectiveness of Union Shareholder Activism

(a) The Effectiveness of Placing a Matter Directly on the Board's Agenda

It is evident from the case studies that shareholder activism is predominantly used by unions in Australia as part of a broader campaign strategy designed to pressure management into specific action, most likely a favourable outcome in enterprise bargaining negotiations. In the face of declining union membership (union membership has declined from 50 percent of all Australian workers 20 years ago to only 23 percent today⁴¹⁸) and the ability of large wealthy companies to use their 'deep pockets' to insulate themselves from more traditional union actions such as strikes and picketing, shareholder activist campaigns against companies provide an alternative focus. Peter Colley, architect of the Rio Tinto campaign and National Research Officer for the CFMEU, maintains that union shareholder activism will be most effective when used as one tactic in a broader campaign, involving both traditional and non-traditional union methods.⁴¹⁹ Particularly where unions have been engaged in a prolonged industrial dispute with a company and have been unable to reach an agreement, a shareholder campaign can have the benefit of putting matters directly on the agenda of the board.

Schwab and Thomas claim that in the US, “[i]n recent decades, unions have become increasingly frustrated at their lack of influence over basic corporate policy” and that “[s]hareholder activism is a promising way of getting the attention of top management and the board of directors.”⁴²⁰ Unions in Australia have also used shareholder activism to place a matter directly on the agenda of the board, and this, in certain circumstances, has appeared to have helped influence the board to resolve an issue with the relevant union. The Rio Tinto campaign, for instance, used the AGM process to place the issue of collective bargaining on the board's agenda by proposing a relevant resolution and questioning the board over its relationship with the CFMEU.

Placing a matter on the agenda at an AGM, and questioning the board at the AGM has the effect of compelling senior management and directors to directly consider a matter. Michael

⁴¹⁸ Mitchell, O'Donnell and Ramsay, above n 6, 35.

⁴¹⁹ Interview with Peter Colley, above n 24.

⁴²⁰ Schwab and Thomas, above n 22, 1023.

Passoff, from *As You Show*, a US organisation involved in shareholder campaigning, states that:

...it is important to remember that the CEOs want to use their annual shareholder meetings to show off how well the company is doing...A company can cut a deal with shareholders, see a resolution withdrawn before a meeting and avoid...PR disasters...The good esteem of the shareholders – even minor ones – is a commodity in its own right.⁴²¹

Where significant support of shareholders is obtained for a union sponsored resolution, directors may feel pressured to respond. Questioning the board at a company's AGM may also be a useful tactic in bringing pressure to bear on directors to address an industrial issue, as it opens a direct dialogue between unions and directors that may not otherwise be open. Michael Passoff claims that "the resolution process remains powerful...because it allows for strong questioning by shareholders and strong questioning can put company leadership on the spot."⁴²² The CFMEU's campaign was aimed at using the AGM to have the board of Rio Tinto consider industrial relations policies of the company. The FSU's campaign against the ANZ, in opening a direct line of communication between the union and the company, was said by the union to have effectively "forced the Board to take notice and listen."⁴²³ The AWU's campaign against BlueScope likewise proved a "success in giving steelworkers a voice at the board level" and opening the way for "a real dialogue between the AWU and management"⁴²⁴ according to the union. The AWU maintained that the effect of this was to ensure that the actions of the company are more transparent, which it hoped would assist the AWU in obtaining more favourable wages and working conditions in its enterprise bargaining negotiations.

(b) The Effects of Gaining the Support of the Wider Shareholder Base

Where unions have been successful in gaining significant support from institutional shareholders or from a group of shareholders representing a significant stake in a company, this may signal to the board that issues of concern to unions may also be of concern to the wider shareholder base. This may, in turn, compel the board to take action to resolve the particular industrial relations dispute that is either the subject, or catalyst for the shareholder

⁴²¹ In Jan Frel, CorpWatch, 'Tis the Season for Shareholder Activism', 4 May 2005, available at <http://www.corpwatch.org/print_article.php?id=12195>

⁴²² Ibid.

⁴²³ FSU, above n 116.

⁴²⁴ AWU, above n 164.

campaign. The CFMEU, in its campaign against Rio Tinto, received significant support from other shareholders, in particular, from some superannuation funds. This was thought to signal to the board that other larger and more influential shareholders may have been in support of the union's position. The success of the campaign in apparently prompting the company to engage in collective bargaining with the CFMEU was largely attributed by the union to the significant number of votes the union-sponsored resolutions received.

(c) *Focus on Corporate Reputation*

The reputation of a company is important. Improvements in a company's reputation have been shown to "increase sales, assist in attracting and retaining staff, improve productivity of staff, affect share price and reduce costs of capital."⁴²⁵ A good corporate reputation can also lower a company's risk.⁴²⁶ This allows unions to link the governance / employment practices of a company to favourable economic returns and claim legitimacy in addressing employee interests while wearing the 'shareholder hat.' In so doing, unions can be more effective in their attempt to garner the support of other shareholders. For example, the AWU's James Hardie campaign relied on the decline in the company's reputation to encourage shareholders to vote against several board resolutions.

(d) *Union Shareholder Activism Does Not Rely on Labour Law*

Union shareholder activism operates within the framework of corporate law and does not rely on labour law. The advantage of this approach is that its effectiveness is not directly reduced by changes to labour law. As noted above, the introduction of the *Workplace Relations Act 1996* (Cth) had the effect of tightening restrictions on industrial action. It is likely that industrial relations law reforms announced by the Federal Government in 2005 and enacted in December 2005 (the *Workplace Relations Amendment (WorkChoices) Act 2005*) will further diminish the ability of unions to organise industrial action. In light of this erosion of the ability of unions to coordinate industrial action in response to workplace matters and during enterprise bargaining, union shareholder activism may become more significant.

⁴²⁵ Deni Greene Consulting Services, Standards Australia and Ethical Investment Services, 'A Capital Idea – Realising Value from Environmental and Social Performance' (2001) 13 available at <<http://www.deh.gov.au/industry/finance/publications/capital-idea/part1.html>>

⁴²⁶ Ibid, 18.

However, because norms of shareholder value are entrenched in Australian corporate law,⁴²⁷ there are limits on the extent to which corporate law can be used to pursue union/industrial objectives.

2. Obstacles to the Success of Union Shareholder Activism

Unions face several obstacles in using shareholder activism to gain concessions for workers. Utilising the position of shareholder to further the interests of labour means that campaigns must be couched in terms of profit (a matter of ‘legitimate concern’ to shareholders), in order to obtain wider shareholder support and thus place sufficient pressure on a company’s management.

(a) Limitations on the Subject Matter of Shareholder Campaigns

It has been argued that union action and interests are ‘watered down’ in shareholder campaigns, as they are “usually couched in terms of what would be most profitable for the company.”⁴²⁸ Indeed, it is necessary for unions to frame proposals in terms of profit in order to gain the support of other shareholders. Schwab and Thomas maintain that “union-shareholder activism will remain quixotic unless the proposals plainly attempt to maximise overall firm value, rather than promote narrow union interests.”⁴²⁹ However, a focus on corporate reputation can increase the scope for unions to relate workplace issues to maximising economic returns, thus expanding the potential subject matter of shareholder campaigns.

(b) Difficulties in Gaining the Support of Other Shareholders

As union shareholder campaigns rely on support from other shareholders, where this is not obtained, the campaign will lack impact. Unions in Australia have experienced some difficulty in obtaining support from other shareholders, particularly large institutional investors. This also appears to be the case in the US as “employment-related shareholder proposals raise the possibility that labor is acting in a self-interested manner, which should

⁴²⁷ Mitchell, O’Donnell and Ramsay, above n 6, 17-25.

⁴²⁸ Ibid, 3.

⁴²⁹ Schwab and Thomas, above n 22, 1036.

make other shareholders less likely to support their actions.”⁴³⁰ Even where union resolutions deal with matters of traditional concern to shareholders and are couched in terms of maximising economic returns, shareholders may be cautious of supporting union resolutions. This is especially likely to be the case where company directors unanimously oppose union-backed resolutions, as they are likely to do.⁴³¹

The potential effectiveness of aligning unions with superannuation funds in launching shareholder campaigns has been illustrated by the comparative study of labour shareholder activism in the United States, outlined above. US unions appear better placed to influence the practices and decisions of targeted companies than their Australian counterparts. This may be attributed, in part, to the more entrenched nature of union shareholder activism in the US. Labour shareholder activism in the US has been an ongoing practice for several decades in contrast to the more recent Australian experience. However, the influence of union shareholder activism in the US can perhaps be largely attributed to the role of union pension funds and their willingness to align with unions, especially in traditional corporate governance and executive remuneration campaigns. In the US, unions have often taken their prompts from large pension funds, with their influential voting power. Australian unions, on the other hand, must attempt to encourage traditionally more passive institutional investors to support their campaigns, which have a greater focus on traditional industrial matters. The alliance between unions and pension funds in the US has been prompted, in part, by the relatively active voting practices of US pension funds, which are roughly double that of Australian shareholders.⁴³² The effectiveness of union shareholder activism in Australia, which relies on the premise that significant shareholder support will bring pressure to bear on the board, will thus be limited by the difficulty in gaining support from large institutional investors.

⁴³⁰ Ibid, 1086.

⁴³¹ Mitchell, O’Donnell, and Ramsay, above n 6, 22. See also SHARE, *Key Proxy Vote Survey: Executive Summary* (2004) 5, regarding Canada available at <<http://www.share.ca/index.cfm/fuseaction/page.inside/pageID/6FE4AD28-B0D0-157F-F403836031A56969/index.cfm>>

⁴³² AGM Monitor, December 2002 in Watt, above n 243, 16. Also, pursuant to the *Employee Retirement Income Security Act*, US pension funds are required to exercise their voting rights and, if exercised by external fund managers, voting decisions must be disclosed to pension plan trustees. These legal developments may contribute to the influence of union shareholder activism in the US: see Watt, above n 243, 17.

(c) *Limited Permissible Scope of Resolutions*

The subject matter of shareholder resolutions is limited in that the resolution must not deal with matters that are vested in the board of directors under either the *Corporations Act* or the company's constitution.⁴³³

VII AN APPROPRIATE FORUM? THE DESIRABILITY OF UNION
SHAREHOLDER ACTIVISM

The use of the shareholder position by unions raises important questions about the desirability of the nature and extent of employee representation within the corporate governance structure. Traditional shareholder primacy theories of the corporation dictate that the purpose of a corporation is to act as “a legal instrument whereby shareholders are able to maximise their wealth.”⁴³⁴ Thus, in utilising corporate law and corporate governance mechanisms as a means of pursuing industrial ends, does labour intrude upon the shareholder primacy conception of the corporation, which currently dominates corporate governance discourse in Australia?⁴³⁵ Schwab and Thomas claim that:

Labor unions often face a potential conflict of interest when they act as shareholders. On the one hand, they could be attempting to increase firm value in order to maximise their residual share as shareholders. On the other hand, they could be sacrificing their shareholder value in order to protect jobs or otherwise help their members.⁴³⁶

In assessing the desirability of union shareholder activism, it is necessary to ascertain what interests unions are pursuing.

A Unions Wearing the Shareholder Hat

Instances of union shareholder activism in Australia have arisen out of an industrial dispute between a company and union. Thus, union shareholder activism has not been a means by which unions advance their interests in a company solely as shareholders. In theory, union shareholders could focus solely on increasing the financial performance of companies in which they hold shares, in the absence of a background of industrial disputes. To this end,

⁴³³ See above, section IIIA.

⁴³⁴ These theories are outlined in O'Donnell, Mitchell and Ramsay, above n 6, 4.

⁴³⁵ *Ibid*, 9.

⁴³⁶ Schwab and Thomas, above n 22, 1074.

unions in Australia may be capable of forging a new role in monitoring (mis)management and helping to facilitate sound corporate governance practices. According to Schwab and Thomas, “[t]o do so, unions need to focus their shareholder voting initiatives in areas where they have special advantages in monitoring management.”⁴³⁷ Where unions in the United States have focused primarily on maximising economic returns, “the limited available evidence suggests that union-shareholder activism may improve profitability for all shareholders.”⁴³⁸ This suggests that, in wearing the shareholder hat and focusing on economic returns, unions will fall within the shareholder primacy conception of the corporation. However, this could greatly alter the nature and role of unions as organisations designed to directly advance the interests of their members.

B Unions Wearing the Other Stakeholder (Employee) Hat

In using shareholder activism to gain benefits for employees, it may be argued that unions are not directly aligning their campaigns with the interests of other shareholders. Unions may be motivated to ensure their interests are directly represented in the broader managerial processes of a company. Because “workers’ ongoing entitlements and expectations are directly affected by the success or otherwise of strategic decisions made by management,”⁴³⁹ labour has an interest in gaining access to managerial decision-making. As labour law developments erode the influence of unions in shaping the practices of corporations,⁴⁴⁰ union shareholder activism can be used to forge unions a role in these processes. Thus, unions may be motivated to use shareholder activism to directly place the interests of workers on the agenda of a company’s board.

The interests of the worker may be broader than, or even conflict with, the interests of shareholders. For example, unions may seek employee entitlements which will cut into the overall profits of a company. When these interests are pursued via union shareholder activism campaigns, several challenges arise. First, advancing employee interests through shareholder activism could be considered to be an improper use of corporate law, especially

⁴³⁷ Ibid, 1025.

⁴³⁸ Ibid, 1031.

⁴³⁹ O’Donnell, Mitchell and Ramsay, above n 6, 30.

⁴⁴⁰ See above, section VI A(1).

when viewed through the lens of the shareholder primacy theory of the corporation. That is, if the objective of the shareholder is to maximise the value of the company, then using shareholder powers to advance other interests, which conflict with profit maximisation, can be considered to be an inappropriate use of the *Corporations Act*. Second, union shareholder campaigns can be costly for a company. The NRMA case study highlights the costs involved in allowing unions to requisition EGMs in order to resolve industrial disputes. Third, it may be argued that the role of the Board is to maximise the overall value of the corporation for shareholders generally, and unions, in pursuing their own agenda within the corporate governance framework, run the risk of skewing this balance in favour of their interests.

However, various market forces have prevented unions from focussing exclusively on employment issues when instigating shareholder campaigns and unions are most likely to pursue an agenda that allows them to align their interests with other shareholders. The reality is that unions in Australia rely on securing the support of other shareholders (particular large institutional investors) in order to obtain significant voting support for union sponsored resolutions.

C Can Unions Align Shareholder and Employee Interests?

The majority of union shareholder campaigns in Australia attempt to align the interests of shareholders and employees. In seeking direct gains from a company for their members, but focusing on matters of concern to other shareholders (for example, independence of directors and perceived excessive executive remuneration) in order to achieve these gains, unions have endeavoured to align the interests of shareholders with their interests in pursuing workplace entitlements. Such campaigns are arguably more effective in encouraging corporations to negotiate with unions and secure a favourable outcome for workers, as they are more likely to attract the support of other shareholders, in particular, large institutional investors who have an interest in the long-term economic wellbeing of the corporation.

To what extent is this attempt at aligning the interests of shareholders and employees possible? Some commentators have argued that if unions are “true to their labor movement values” they “are not going to see corporate policies in the same light as other

shareholders.”⁴⁴¹ However, the case studies outlined above demonstrate three main ways by which unions in Australia have attempted to align their interests with the interests of the general shareholder. First, unions have emphasised the common interests of labour and shareholders in ensuring the long-term economic success of companies. That is, unions have advanced the argument that labour has a legitimate interest in the strategic management of a company: as both employees and shareholders, they are interested in maintaining favourable working conditions and in ensuring the long-term success of the company. The relatively recent increase in shareholder wealth held by employees through their superannuation funds adds weight to this position:

Now workers as savers and investors have interests that need protecting. And because they are not pure investors; because they are primarily workers, they need protection that helps combine their interests as workers with their interests as investors.⁴⁴²

Second, unions have emphasised the impact of corporate reputation on the bottom line. They have argued that securing sound work practices has a positive effect on the reputation of a company, thus making it more profitable. Third, unions have maintained that favourable working conditions for employees means that companies will be more productive and better able to manage risk, thereby ensuring secure economic performance of the company and in turn, affording greater potential returns for shareholders.

VIII CONCLUSION

The ability of companies to insulate themselves from the effects of traditional union action and the erosion of unions’ influence under Australian labour law has been the catalyst for the recent initiation of union shareholder activism in Australia. Cases of union shareholder activism typically have arisen in the context of failed enterprise bargaining or other disputes between a company and union. Whilst no union shareholder campaign has, to date, been successful in having a union sponsored resolution passed by shareholders, some campaigns have apparently exerted sufficient pressure on company boards to secure a favourable result for unions. This has usually occurred where the shareholder activism has constituted one part of a wider campaign against a company and where the union shareholder action has the support of large institutional investors, such as superannuation funds. Particularly where

⁴⁴¹ Edward B. Rock, ‘The Logic and (Uncertain) Significance of Institutional Shareholder Activism’ (1991) 79 *Georgetown Law Journal* 445, 471 – 2.

⁴⁴² Maitland, above n 54, 4.

Australian unions are able to align their interests with these investors, as has characterised labour shareholder activism in the United States, it is likely that union shareholder activism in Australia will gain additional prominence and influence.