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SHAREHOLDER MEETINGS: KEY ISSUES AND DEVELOPMENTS

INTRODUCTION

Over recent years shareholder activism has become an increasingly common feature of the corporate landscape. This paper outlines the principal legislative provisions regulating the calling of general meetings by members and others and associated legislative tools available to shareholders. It focuses on some related practical issues, including:

- the grounds for mounting a legal challenge to proposed resolutions;
- applications for extension of the statutory timetable to call and hold meetings under section 249D of the *Corporations Act*;
- the available avenues to terminate the calling and holding of meetings following the receipt of a section 249D request; and
- a possible approach to overcome the ease of reliance on the 100 member rule.

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1 CONVENING GENERAL MEETINGS

1.1 Division 2 of Part 2 G.2 of the *Corporations Act 2001* (**Act**) provides four ways in which a general meeting of shareholders or members can be called, namely:

- by a director or the Board;
- by the directors in response to a request by members;
- by the members; and
- by the Court.

By Board

1.2 The common law recognises that the Board may convene a general meeting or a meeting of one or more classes of members when they consider it appropriate to do so. That power must, of course, be exercised in good faith for the benefit of the company and for proper corporate purposes. The Act now codifies these principles: a meeting of members must be held for a proper purpose and at a reasonable time and place: **sections 249Q and 249R**.

1.3 Once a general meeting has been convened, the directors cannot postpone it unless they are specifically authorised by the constitution to do so.[1]

By single director

1.4 Constitutions often expressly permit a single director to convene a meeting of members. In the case of a company to which the replaceable rules apply, a single director may call a meeting of members: **section 249C**. In the case of Australian incorporated companies listed on the ASX, a single director may call

[1] *Smith v Paringa Mines Ltd* [1906] 2 Ch 193; *McPherson & Ors v Mansell & Ors* [1995] 13 ACLC 767; *Bell Resources Ltd v Turnbridge Pty Ltd & Ors* [1988] 6 ACLC 842.

a meeting of members despite anything in the company's constitution: **section 249CA**.

By directors on requisition by members: section 249D

1.5 Under **section 249D(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 a general meeting[2]; or
- at least 100 members[3] who are entitled to vote at a general meeting.[4]

1.6 The request must:

(a) be in writing;

(b) state any resolution to be proposed at the meeting;

(c) be signed by the members making the request; and

(d) be given to the company: **section 249D(2)**.

1.7 Separate copies of a document setting out the request may be used for signing by the members if the wording of the request is identical in each copy: **section 249D(3)**.

1.8 The percentage of votes that members have is to be worked out as at the midnight before the request is given to the company: **section 249D(4)**.

Statutory timeframe and Extension of Time

1.9 The directors must call the meeting within 21 days after the request is given to the company and the meeting must be held no later than 2 months after that date: **section 249D(5)**. The obligation to call the meeting is imposed on the directors, but the obligation to hold the meeting is imposed on the company[5]. The requirement that the meeting must be "held" means that the business of the meeting, namely the resolution(s) set out in the request, must be completed within the statutory timeframe of 2 months[6]

1.10 The statutory time frames for calling and holding of a meeting requisitioned by members can be extended by the Court under section 1322(.4). The Court must not make an extension of time order under that section unless it is satisfied that "no substantial injustice has been or is likely to be caused to any person": **section 1322(6)(c)**.

1.11 The law concerning the requirement of section 1322(6)(c) was summarised by Santow J in the following terms:

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2 On a poll held by a "mutual" company (typically a company limited by guarantee) each member will generally have 1 vote. A company limited by guarantee is a "public company" within the meaning of the Act: sections 112 (1) and 9.

3 The 100-shareholder threshold has been part of Australian company law for a long period; however, prior to the Company Law Review Act 1998 (Cth) the 100 shareholders had to have an average paid-up sum per shareholder of at least $200.

4 The numerical test can be changed by regulation in relation to a particular company or a particular class of company. The regulation may specify the number as a percentage of the total number of members of the company. See section 249D (1A).

5 *ASIC v NRMA* [2003] 21 ACLC 186 at 190.

6 *ASIC v NRMA*; see also *Guss v Veenhuizen* (1976) 2 ACLR 337.

"In that regard I should note that the cases have been determined that "injustice" within s 1322(6)(c) requires 'the Court to consider real, and not merely insubstantial or theoretical prejudice' (*Elderslie Finance Corp Ltd v ASC* (1993) 11 ACSR 157; 11 ACLC 787 at 790) and that a degree of prejudice to a person or persons may be outweighed by the 'overwhelming weight of justice': *Re Compaction Systems Pty Ltd* [1976] 2 NSWLR 477; (1976) 2 ACLR 135 at 150. Moreover, as I said in *Super John Pty Ltd v Futuris Rural Pty Ltd* (1999) 32 ACSR 398 at 402 [14]:

> '…detriment per se is not the same as substantial injustice; that must depend on whether the remedial order in giving rise to that detriment is unjust in the sense of causing such prejudice overall as to be unfair or inequitable, taking into account the interests of all of those directly affect by such dispensation.'"[7]

1.12 The imperative to seek, and the prospects of successfully obtaining, an extension of time order under section 1322(4) will depend on the particular circumstances, including:

- the nature of the resolution or resolutions set out in the request;
- the practicalities associated with the calling and/or holding of the meeting, eg. the printing and mail out of the notices of meeting, hire of venue, etc;
- the costs of calling and holding a special general meeting;
- the interval between the time of receipt of the request and the date of the next scheduled general meeting (usually the AGM);
- whether or not the resolution(s) set out in the request are the subject of a legal challenge.

1.13 Two recent section 1322 applications involving requests under section 249D given to (our client) the NRMA are illustrative. The first, *NRMA v Snodgrass*; *NRMA v Dupree*[8], concerned two separate requests to consider resolutions for the removal of 8 named directors and the remaining 6 directors respectively. Both requests were served in June 2002. NRMA sought an order under section 1322(4) extending the time for the calling and holding of the meeting until the time of calling and holding the 2002 annual general meeting which was due to be held during November 2002. The grounds of the application were cost savings, the difficulty in complying with the statutory timetable and the relatively short period between the earliest possible date for holding a special meeting (September 2002) and the AGM (mid to late November 2002). In view of NRMA's large membership base of approximately 2 million members, the cost of calling and holding a special general meeting was in the order of $2.6 million. The cost savings of holding the meeting on the same day

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7 *NRMA Insurance Group Ltd v Spragg* (2001) 38 ACSR 174. Affirmed in *NRMA v Parkin* [2004] NSWSC 296 per Campbell J.

8 [2002] 42 ACSR 371; [2002] NSWSC 590.

as the AGM were in the order of $1.4 million. The mail out period for the notices of meeting was approximately 21 days.

1.14 Windeyer J declined to grant an extension of time order in the terms sought. However, his Honour did grant an order extending the statutory timeframe by 5 weeks to accommodate the particular logistical issues which confronted NRMA. In declining to extend the timeframe so that they corresponded with the AGM timetable, His Honour made the following observations (at pages 376 and 377):

> "I do not consider blanket type factional removal resolutions are suitable for debate at an annual general meeting of this company in a non-election year. It is essential that the financial and other statutory business of this meeting be given proper attention which is unlikely to happen in the heated atmosphere which is almost certain to be generated by these proposed resolutions. Nor do I consider it a good idea to consider them in a separate meeting on the same date but prior to the annual general meeting. One can take judicial notice of the fact that on past experience that would make it very difficult to determine a certain time for the commencement of the annual general meeting and members attending both could well be worn out well before the annual general meeting came to an end. A meeting summoned for the day prior to the annual general meeting has some attraction but on balance not sufficient to justify such an order. The reasons for this are that the result of the meeting could throw the annual general meeting into disarray. It is possible that six directors only would remain. On what seems to be the present balance of power it might be difficult for them to conduct the annual general meeting. It is also possible that as a result of the meeting the company would have no directors. It is not beyond the bounds of possibility that members may be so disillusioned and fed up with the ructions at directors' level in their company that they would vote in favour of both the Snodgrass and the Dupree resolutions thinking that administration in some form might be preferable to the existing position. This consideration would also apply if the resolutions became part of the business at an annual general meeting."

1.15 I should mention by way of postscript that the special general meeting was called for the last day of the period ordered by the Court. However, shortly after it commenced the chairman adjourned the meeting because the venue was insufficiently large to accommodate all those who wished to attend. In further proceedings, the Court granted a further extension to hold the meeting by a further period of approximately 3 months (to coincide with the 2002 AGM as well as the date on which another special general meeting was to be held to consider yet another resolution to remove certain directors (appointed subsequent to the receipt of the first two requests) the subject of yet another section 249D request). The "separation" issues which influenced Windeyer J's earlier decision were, in substance, no longer relevant, largely because the business of the 2002 AGM included Board sponsored resolutions to "spill" all directors in office at the time of the meeting and to elect 14 continuing directors

from the 30 candidates standing for election at that meeting as well as the confluence of those resolutions and the 3 separate director removal resolutions the subject of the 3 section 249D requests.

1.16 The second case, *NRMA v Parkin*[9], concerned a section 249D request setting out 2 proposed resolutions to amend NRMA's constitution which, in broad terms, sought to entrench outdated work practices and minimum pay and conditions for NRMA's roadside assistance patrols. The request was served on 18 March 2004. NRMA instituted legal proceedings challenging the validity of the resolutions. It also sought orders extending the time for calling and holding the meeting up to the dates for the calling and holding of the 2004 AGM (to be held in October or November 2004). Campbell J accepted that in view of the logistical issues it would not be practically possible for NRMA to hold a special general meeting before mid July 2004. His Honour also accepted that the costs savings resulting from a special meeting being held on the same day as the AGM were in the order of $2.3 million.

1.17 Campbell J. noted that "it cannot be said that the requisitionists have a legal right to have the resolutions submitted to a meeting and decided upon within any particular period of time, given the power of extension contained in section 1322. However, it would be a frustration of Parliament's intention in creating the right for requisitionists to call a meeting if the meeting, once called, were unduly delayed". His Honour concluded as follows (at paragraphs 74 and 75):

> "In all the circumstances, I have come to the view that it would not be appropriate to delay the calling of the requisitioned meeting for as long as the Annual General Meeting. The delay in doing so would be of the order of four months beyond what is necessary to achieve the presentation of the resolution to a meeting in an orderly way, and within the practical confines of an organisation as large as NRMA.
>
> The fact that calling the special meeting would involve the expenditure of $2.35 million more than would be required to be spent if the resolution were to be put to the Annual General Meeting or on the same day as the Annual General Meeting is a significant matter. The NRMA, however, has of the order of two million members, and the amount of money which is expended in this fashion, more than would be needed if the resolution were to be put to an Annual General Meeting, is thus of the order of $1 a member. I am told the standard fee for membership of NRMA is $77 per annum. Put in that context, it does not seem to me that the case has been made out for a delay of any longer than mid July."

1.18 Where the validity of the resolutions set out in a section 249D request is subject to legal challenge, the Court may be willing to grant an extension of time order under section 1322 pending the outcome of those proceedings and, if applicable, any appeal. A change in circumstances after the date on which an earlier section 1322 order is made may justify the grant of a further

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[9] [2004] NSWSC 296.

extension order. Again, the Court must be satisfied that no substantial injustice has been or is likely to be caused to any person by granting it.[10]

1.19 Where section 1322(4) extension orders are sought, an order that the defendant, who would ordinarily be the actual or apparent "prime mover" of the request, be appointed as the representative of all the requisitionists should also be sought so as to bind all the requisitionists to any order made by the Court. In New South Wales such an order is made under Part 8, Rule 13 of the Supreme Court Rules. In my experience, such representative orders are usually made by consent.

Failure of directors to call a general meeting: section 249E

1.20 If the directors fail to call the meeting within the 21 day time limit, then members with more than 50% of the votes of all of the members who made the request can proceed to call the meeting themselves: **section 249E(1)**. In those circumstances, the company will be liable for the reasonable expenses of the members in calling a meeting: **section 249E(4)**. The company may be able to recover the amount of those expenses from the directors. However, if a director proves that he or she took all reasonable steps to cause the directors to comply with section 249D, he or she will not bear an individual liability for the expenses. If a director who is liable for the amount does not reimburse the company, the company must deduct the amount from any sum payable as fees to, or remuneration of, the director: **section 249E(5)**.

1.21 The potential enlivening of section 249E should be taken into account in the formulation of orders seeking an extension of the statutory timetable under section 249D(5).

1.22 The power given to the requisitionists to convene a meeting as a result of the directors' failure to do so under section 249E is not a personal right[11]. "It is a power which is given to them to exercise as ministers or officers of the company for the purpose and subject to the same supervision by the Court as the powers given to the directors to summon meetings. It is not a personal proprietary right of shareholders, but a ministerial right passed on to them as quasi officials of the company, to act in convening a meeting in place of the directors. The same principle must apply as to the time and place for which the meeting should be called as applies to the directors themselves"[12].

Challenging resolutions set out in requests

1.23 The right to request the calling and holding of a general meeting under section 249D must be exercised bona fide and for a proper purpose: **section 249Q**.

1.24 The statutory and common law position is adequately summarised by Windeyer J in *NRMA v Snodgrass*.[13]

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10 *NRMA v Parkin* (No. 2) [2004] NSWSC 496.
11 *Re Ariadne Australia Ltd* (1990) 8 ACLC 1000.
12 *Adams v Adhesive Pty Ltd* (1932) 32 SR(NSW) 398 at 401. Affirmed in *Ariadne*.
13 (2001) 19 ACLC 769.

> "Section 249Q of the Law was introduced by the Company Law Review Act 1998 (Cth). Why it was introduced is uncertain as it is accepted that it brought about no change in the existing common law. Thus provided that the resolution sought to be passed is within the power of the members to consider and pass, and provided the meeting is called for that purpose and not for some extraneous purpose so as to constitute it an abuse, there is no restriction on the power to requisition: see for example, *Humes Ltd v Unity APA Ltd* [1987] VR 467; *Howard v Mechtler* (1999) 30 ACSR 434; *Australian Innovation Ltd v Petrovsky* (1996) 14 ACLC 1257; Ford, *Principles of Company Law*, 9th ed, 7.123. The common law position was explained in *National Roads & Motorists' Assn v Parker* (1986) 6 NSWLR 517. Members cannot, by resolution, take upon themselves decisions on management matters, exclusively vested in the directors, as that would be beyond power and a meeting called for such purpose would not be for a proper purpose. On the other hand, where the constitution of a company provides that "subject to the law and other provisions of the constitution" the management control of its business and affairs shall be vested in the directors as is the case with r 52 of the constitution of NRMA relevant to this case, the constitution can be amended so that the particular subject matters of management are to be dealt with as the constitution provides."

1.25 In *Humes v Unity APA Ltd*[14] Beach J accepted that so long as the right given to members, including minority members, to requisition a meeting was exercised in good faith and for the purposes for which it was conferred, even though the requisitionist had a personal interest, the requisition would be valid. His Honour made the following observations:

> "It can only 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." (at pg 645)
>
> "The question for me to determine then is whether or not Unity APA 's purpose in requisitioning the general meeting is to have the resolutions it proposes placed before the meeting and passed, or whether its objective is something other than that. It is however no part of my function to determine the prospects of success or failure of those resolutions. "(at pg 646)
>
> "In my opinion this court would 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. "(at pg 647)

[14] (2001) 11 ACLR 641.

1.26 In *NRMA v Parkin*, Campbell J endorsed the following observations made by Palmer J in *NRMA Limited v Scandrett*[15]

> "For the sake of completeness, I should deal with Mr Einfeld' s submission that if a requisitionist has more than one purpose in exercising the requisition power under s 249D(1), one proper and the other improper, then the power is invalidly exercised.
>
> In my opinion, this submission confuses the purpose for which a requisition is made with the motive of the requisitionist in making it. 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.
>
> The rationale underlying the law in this regard is the same as that which applies in the law relating to abuse of process. In *Williams v Spautz* (1992) 174 CLR 509; 107 ALR 635, the majority said (at CLR 526; ALR 650) that an abuse of process occurs when the purpose of bringing the proceedings is not to prosecute them to a conclusion but to use them as a means of obtaining some advantage for which they are not designed or for some collateral advantage beyond what the law offers. However, if a litigant institutes proceedings to invoke a remedy for which the law provides in such proceedings, then there will not be an abuse of process "even if the [plaintiff] is spurred on by intense personal animosity, even malice, against the defendant: it is not the law that only a plaintiff who feels goodwill towards a defendant is entitled to sue": *Swansson v R A Pratt Properties Pty Ltd* (2002) 42 ACSR 313 at 321; *Dowling v Colonial Mutual Life Assurance Society Ltd* (1915) 20 CLR 509 at 521—2; 21 ALR 425 at 435-6; *IOC Australia Pty Ltd v Mobil Oil Australia Ltd* (1975) 11 ALR 417 at 426-7; 2 ACLR 122 at 131."

1.27 A resolution set out in a request may also be declared invalid because it is technically defective. For example, in *NRMA v Bradley*[16] a proposed resolution which purported to restrain NRMA from paying the legal costs incurred by a former director in defending certain legal proceedings against him by ASIC was declared invalid because it was inconsistent with a provision in NRMA's constitution under which the former director was entitled to be indemnified for those costs (except to the extent prohibited by section 199A(3)(c)). A further proposed resolution to amend NRMA's constitution so as to bring about a reduction in the number of directors was also declared invalid because it infringed section 203D and by its terms was otherwise unclear as to which particular directors were to be removed from office.

1.28 In *NRMA v Scandrett*[17], a proposed resolution set out in a section 249D request to remove unnamed directors who may be appointed to fill any casual vacancies that arose after the date of receipt by the company of the notice of

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[15] (2002) 171 FLR 232 at 243.
[16] [2002] NSWSC 788.
[17] [2002] NSWSC 1123.

intention to move the resolution was declared invalid because it contravened sections 203D(1) and (2). The Court noted that the effect of the resolution was that any such future director would be denied the right to put their case to members in accordance with sections 203D(3), (4) and (5).

Industrial Disputes, etc.

1.29 In recent times, unions have demonstrated an increased willingness to employ the corporate processes available under the provisions of the Corporations Act relating to the convening of meetings and/or the circulation of section 249P statements to achieve, or place pressure on achieving, the resolution of industrial disputes between companies and their employees.

1.30 A recent example was a dispute as to work practices and pay and conditions between NRMA and the AMWU (the union representing the majority of NRMA's roadside assistance patrol officers). The backgrounds facts are as outlined in *NRMA v Parkin*[18].

1.31 A request under section 249D in the following terms was served on NRMA:

> "Pursuant to Section 249(D) of the Corporations Act and Clause 9.2 of the National Roads and Motorists Association Limited Constitution, we, the following members of the National Roads and Motorists Association call upon the Directors of the NRMA to arrange for and hold a General Meeting.
>
> In accordance with Section 249 (D)(b) of the Corporations Act, we would propose the following special resolutions be considered and if thought fit passed by the General Meeting:
>
> 1. The constitution shall 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 shall 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".
>
> Further pursuant to Section 249P of the Act, we hereby appoint John Parkin as our representative for the purposes of providing a statement."

[18] [2004] NSWSC 296.

1.32 The Court accepted that the signatures to the request were collected by the Patrol Officers from members to whom they had rendered roadside assistance.

1.33 NRMA challenged the validity of the request on the grounds that the resolutions:

- were invalid for uncertainty;
- would conflict with other provisions of NRMA's constitution; and
- were propounded for an improper purpose.

1.34 NRMA argued that the directors were under no obligation to put forward a resolution which was so vague and unintelligible as to be meaningless (relying on *Totally & Permanently Incapacitated Veterans' Association of NSW Limited v Gadd*[19]) and that the proposed new constitutional objects were incapable of any definite or precise meaning (thus failing the test in *Upper Hunter County District Council v Australian Chilling and Freezing Co. Limited*[20]). The improper purpose argument rested on the proposition that the dominant purpose of the request was to apply pressure on NRMA to accept the AMWU's latest offer as to the terms and conditions of engagement of the Patrol Officers, thus constituting harassment or oppression of NRMA and an abuse of the power in section 249D to requisition a meeting.

Ambiguity of proposed resolutions

1.35 NRMA also argued that the criterion for uncertainty of an object of a corporation was that the stricter test adopted in *Cotman v Brougham*[21], namely that the objects and powers of a company must be defined in clear and unambiguous terms. At first instance, the Court rejected that argument and held that the appropriate test was the more forgiving test in *Upper Hunter* as articulated by Sir Garfield Barwick in the following terms:

> "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. In the search for that intention, no narrow or pedantic approach is warranted, particularly in the case of commercial agreements. Thus will uncertainty of meaning, as distinct from absence of meaning or of intention, be resolved."

1.36 The decision of Campbell J. at first instance was confirmed by the New South Wales Court of Appeal[22]. In essence, the Full Court concluded as follows:

1. "Ambiguity does not mean uncertainty."
2. "The ambiguity of the resolutions would be a weighty argument in the defence of claims against directors or other officers that may arise from ambiguous resolutions being

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19 [1998] 28 ACSR 549.
20 [1967] 118 CLR 429 at 436-437.
21 [1918] AC 514 at 521-522
22 *NRMA v Parkin* [2004] NSWCA 153.

passed. That the resolutions may cause litigation, inconvenience and expense to NRMA is readily apparent. However mere ambiguity (not constituting uncertainty) in expression in defining and delimiting the powers of a company is insufficient reason to hold that those provisions are invalid."

3. Whilst the resolutions were replete with ambiguities, it would be possible for the Court to determine their meaning in the context of the actual circumstances of a live dispute.

Hold the horses

1.37 On occasions, the underlying issues which prompted the service of a section 249D request (such as an industrial dispute) and/or a section 249N notice of resolution may be resolved by negotiation or other means. On what basis can the calling and/or holding of the meeting be aborted?

1.38 Although I am not aware of any specific authority on the point, as far as I am aware the generally accepted view is that the 249D/249N processes can only be terminated if all of the requisitionists or, perhaps such number of them as results in the number of requisitionists falling below 100, agree to do so in writing. Invariably the collection of signed consents to withdrawal, particularly in a timely way, is a practical impossibility.

1.39 NRMA was faced with that scenario in *Parkin*. The industrial dispute was resolved and the AMWU did not wish to press the resolutions set out in the 249D request and a later 249N notice of resolution. The union official appointed by the requisitionists to prepare and give a section 249P statement in support of the resolutions (by the terms of the actual request/notice) withdrew the 249P statement. The AMWU also undertook not to prepare, circulate or give to NRMA any future requests or notices of resolution which in any way related to the terms and conditions of engagement of the Patrol Officers. Approximately 3,600 members signed the original request and 199 members signed the later 249N notice of resolution. It was not practicable to endeavour to obtain signed consents to withdrawal from all or nearly all of the signatories – the Notice of Meeting had been printed and was about to be dispatched.

1.40 Against that background, NRMA sought orders under section 232 and 233 on the grounds, in broad terms, that the calling of the meeting and the passing of the resolutions would be contrary to the interests of the members of NRMA as a whole and so within section 232(d). In the alternative, NRMA argued that these actions were, in the circumstances, oppressive to, unfairly prejudicial to, or unfairly discriminatory against the members of NRMA and so within section 232(e).

1.41 After reviewing the case law touching on sections 232 and 233 (and their statutory predecessors), Campbell J. concluded that as a matter of principle the operation of section 249D was subject to the orders under sections 232 and 233. His Honour made the following observations:

> "I have earlier quoted the wording of section 249D *Corporations Act 2001* (Cth). If the wording of that section is taken on its own, then it

imposes an absolute obligation on directors of a company to call and arrange a general meeting in the circumstances set out in that section. However, it is not to be taken on its own; rather, it is to be taken in its context in the statute as a whole. It has been repeatedly held that the obligations under section 249D can be modified by an order of the court made under section 1322, to alter the time limits laid down by that section: *National Roads and Motorists' Association Ltd v Scandrett and Another* [2002] NSWSC 1123; (2002) 43 ACSR 401 at [61]; *NRMA v Scandrett* [2002] NSWSC 1038; *NRMA Insurance Ltd v Carroll* [1999] NSWSC 1022; (1999) 32 ACSR 655 at [16]; *NRMA v Parkin* [2004] NSWSC 296. I see no reason why, by similar reasoning, the wording of section 249D cannot also be made subject to the possibility of the court making an order under sections 232 and 233 *Corporations Act 2001* (Cth)."

"There is authority for the predecessor of sections 232 and 233 *Corporations Act 2001* (Cth) being used to make an order that a company meeting be held: (*Australian Securities Commission v The Multiple Sclerosis Society of Tasmania* (1993) 10 ACSR 489). It is a more significant exercise of power to decide that a company meeting, which would otherwise be held, out not be held. However, in my view, it is within power for the Court to make such an order in an appropriate case."

1.42 Campbell J. also concluded that an order that a meeting not be held comfortably falls with the scope of an order "regulating the conduct of the company's affairs in the future" – section 233(1)(c). His Honour also noted that power of the Court to make an order under sections 232 and 233 is a power which must be exercised with the greatest of care. He noted:

> "The court is extremely reluctant to interfere, in advance, with the ordinary processes of company democracy. It is a well-established rule of thumb that a court will, only in the rarest of circumstances, injunct the holding of a company meeting. Questions of what is, or is not, in the interests of the members as a whole are often best left to be decided by the officers, organs and procedures of the company itself, or by the court deciding, after events have happened, whether those events fall short of a legally required standard of conduct by virtue of them not having occurred in the interests of the members as a whole. If the court is asked to make an order under section 233 on the ground that some proposed course of conduct is contrary to the interest of the members as a whole there will frequently be factual difficulties in demonstrating with sufficient certainty that that course of conduct is indeed contrary to the interests of the members as a whole. All these matters combine to show that it is likely to be only in a very rare case that a Court will decide to order that a company meeting validly requisitioned need not be held, or that a resolution validly proposed need not be put to a meeting."

1.43 Campbell J concluded that if the meeting were to be held it would be "an empty charade" and made orders directing that the meeting not be called or held and that the 249N resolution not be included in the business of NRMA's next occurring general meeting. The particular facts of Parkin's case, especially those relating to the gathering of the signatures to the request/notice of resolution, may limit the availability of section 232/233 orders in other cases. That said, the case is important in that it establishes a potential legal solution to the issue of halting the relevant corporate processes where that is desired by the prime movers.

By members: section 249F

1.44 Members with at least 5% of the votes that may be cast at a general meeting have an independent power to call, and arrange to hold, a general meeting. The members calling the meeting must pay the associated expenses: **section 249F(1)**. The meeting must be called in the same way (so far as possible) as general meetings of the company are called and the percentage of votes that members have must be worked out as at midnight before the meeting: **sections 249F(2) and (3)**.

1.45 A meeting convened by members under section 249F may be postponed by the directors provided a power of postponement is conferred by the company's constitution and the power is exercised in the interests of the company as a whole, not for the benefit of the directors.[23]

By the Court: section 249G

1.46 The Court may order a meeting of the company's members to be called if it is impracticable to call a meeting in any other way, on the application of any director or any member who would be entitled to vote at the meeting: **section 249G**. The Court can give directions where it orders a meeting for it to be convened, held and conducted as it thinks fit and can give ancillary or consequential directions: **section 1319**.

Members' rights for resolutions at general meetings: section 249N – section 249O

1.47 Under **section 249N(1)** members may give a company notice of a resolution that they propose to move at a general meeting. If such a notice of resolution is given, the resolution must be considered at the next general meeting that occurs more than two months after the notice is given: **section 249O(1)**. The notice of resolution must be given 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 the meeting.

1.48 The notice must:

(a) be in writing;

(b) set out the wording of the proposed resolution; and

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[23] *Pinnacle VRB Pty Ltd v Ronay Investments Pty Ltd* (2000) 18 ACLC 733.

(c) be signed by the members proposing to move the resolution. **section 249N(2)**.

1.49 As is the case with requests under **section 249D**, separate copies of a document setting out the notice may be used for signing by members if the wording of the notice is identical in each copy and the percentage of votes that members have is to be worked out as at the midnight before the members give the notice: **sections 249N(3) and (4)**.

1.50 A related provision is the statutory right of members to require the company to distribute to its members certain statements. Under **section 249P** members may request a company to give to all its members a statement provided by the members making the request about a resolution that is proposed to be moved at a general meeting or any other matter that may be properly considered at a general meeting. The request must 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 the meeting.

1.51 The company bears the cost of distributing a copy of the 249N notice of resolution or 249P statement if it is received in time to send it out to members with the notice of meeting. If a company does not receive the notice of resolution or statement in time to send it out with the notice of meeting, the members making the request are jointly and individually liable for the costs of distributing it unless the company in general meeting resolves to meet the expenses itself: **sections 249O(4) and 249N(8)**. The company is not required to distribute the notice of resolution or statement if it is more than 1,000 words long or defamatory: **sections 249O(5)(a) and 249P(9)(a)** or, if the members making the request are responsible for the expenses of distribution, unless the members give the company a sum reasonably sufficient to meet the expenses that it will reasonably incur in making the distribution: **sections 249O(5)(b) and 249P(a)(b)**.

1.52 For the purposes of section 249P, the word “defamatory” is given its usual meaning at common law; namely, whether the meaning of the publication in question has a tendency to lower the plaintiff in the estimate of the ordinary reasonable reader. In deciding whether a statement to be given to members is defamatory, it is not relevant to determine whether any of the defences available under the State Defamation Acts (including substantial truth and public interest, contextual truth, reasonableness, comment and unlikelihood of harm in the circumstances of the publication) would be available.[24]

1.53 Even if only part of a 249P statement were defamatory, the consequence of section 249P9(a) is that the statement as a whole could then be characterised as defamatory, and the company would not be obliged to circulate it.[25]

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[24] *NRMA v Snodgrass* (2002) 20 ACLC 1664; *Culhaci v Telco Australia Ltd* [2002] FCA 42; *Re Harbour Lighterage Ltd* [1968] 1 NSWR 439.

[25] *NRMA v Snodgrass*; *Re Harbour Lighterage Ltd*.

2 "100 Member Rule"

2.1 As mentioned, under sections 249D(1), 249N(1) and 249P(2), 100 members only may request a general meeting to be called and held, give a notice of resolution that they propose to move at the next scheduled general meeting and request that a statement about a proposed resolution (or any other matter that may be properly considered at a general meeting) be given to all the company's members. Each of those sections allows a different number of members to be prescribed in relation to a particular company or a particular class of company by the Regulations: **sections 249D(1A), 249N(1A) and 249P(2A)**.

2.2 The so called 100 member rule has been controversial for some years now. Clearly it allows a relatively small number of members to requisition / propose resolutions / distribute statements. In the case of NRMA, which has 2 million members, 100 members is less than .005% of the total membership. The costs of complying with requests etc made by such a low number of members can be substantial, not to mention the inconvenience and other implications for the company and its directors (whether or not the resolutions are ultimately passed).

2.3 There have been various proposals for change of section 249D (at least). They are outlined below.

2.4 In October 1999, the Parliamentary Joint Statutory Committee on Corporations and Securities[26] recommended that the numerical test be repealed so that the sole test to requisition a general meeting be that shareholders hold at least 5% of the issued share capital of the company. The Committee found that the current provision, a numerical shareholder threshold, was "administratively complex and uncertain." The Companies and Securities Advisory Committee (now the Companies and Markets Advisory Committee) also endorsed this approach.[27]

2.5 The then Government introduced a regulation in April 2000 to increase the numerical for a public company threshold from 100 members to 5% of the total number of members.[28] The Senate disallowed the regulation in June 2000.[29] While Green, Democrat and ALP senators acknowledged the potential for the abuse of the requisition procedure, they felt that the proposed threshold was too high and would prevent small shareholders from raising legitimate issues.[30]

2.6 In December 2002, the Government announced it intended to amend section 249D of the Act.[31] On 24 December 2002, the Government issued an

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[26] Parliamentary Joint Statutory Committee on Corporations and Securities, *Report on Matters arising from the Company Law Review Act 1998*, 1999.

[27] Companies and Securities Advisory Committee, *Shareholder participation in the modern listed public company: Final Report*, June 2000, p. 9.

[28] Corporations Amendment Regulations 2000 (No. 4).

[29] Under the *Acts Interpretation Act 1901* (Cth) the effect of the disallowance motion was to render the regulation repealed: s 48(6).

[30] Commonwealth Parliamentary Debates, *Senate Hansard*, 28 June 2000, p. 15892-15901 http://www.aph.gov.au/hansard/senate/dailys/ds280600.pdf.

[31] Parliamentary Secretary to the Treasurer Press Release No.060 "Government aims to remove 100-member rule for special general meetings" 2 December 2002 at http://parlsec.treasurer.gov.au/parlsec/content/pressreleases/2002/060.asp.

exposure draft of the Corporations Amendment Bill 2002 for consultation. The exposure draft proposed a sole test (for all companies) of members with at least 5% of the votes that may be cast at a general meeting and in doing so, removed the regulation-making power under sub-section 249D(1A). It would appear that there is no present intention to introduce a Bill in terms of the exposure draft.

The Boral approach

2.7 Boral Limited tackled the issue of the ease of reliance on the 100 member rule by way of changes to its constitution proposed and adopted at its 2003 AGM. The relevant constitutional provision reads as follows:

> "(a) A special resolution to modify or repeal the Constitution of the Company, or a provision of the Constitution of the Company does not have any effect unless the requirement set out in Article [X](b) has been complied with.
>
> (b) A special resolution to modify or repeal the Constitution of the Company, or a provision of the Constitution of the Company must, prior to the notice of the meeting of Members at which the special resolution is to be considered, being given to Members, either:
>
> (i) have been approved by a resolution of the Board; or
>
> (ii) have been proposed by Members with at least 5% of the votes that may be cast on the resolution."

2.8 The legal efficacy of these further requirements is derived from sub-section 136(3). As you will be aware, ordinarily a special resolution is required in order to modify or repeal a company's constitution (sub-section 136(2)). Sub-section 136(3) permits the specification of further requirements which must be complied with before such a special resolution is effective. For ease of reference, it provides as follows:

> "The company's constitution may provide that the special resolution does not have any effect unless a further requirement specified in the constitution relating to that modification or repeal has been complied with."

2.9 It should be noted that the "5%" requirement does not impinge on the statutory right of "100 members" (ie. more than 100 members but less than 5% of the total number) (or of members with at least 5% of the votes) under section 249D to requisition a general meeting to consider a resolution not involving an amendment to the company's constitution – eg. the removal of one or more directors. Likewise, it does not impinge on the statutory rights under section 249N to give notice of such a resolution at the next scheduled general meeting (being one occurring more than 2 months after the notice is given). Equally, the "5%" requirement does not impinge on the right of "100 members" to request a company to give a statement about a resolution or any other matter that may be properly considered at a general meeting under section 249P.

2.10 Despite the amendments to Boral's constitution being approved by an overwhelming majority of the votes cast on the resolution adopting it, it has been the subject of a considerable degree of controversy. It remains to be seen whether Government will amend sections 249D and/or 249N to allow 100 members to propose a resolution to amend a company's constitution irrespective of any further requirement in the constitution for the purposes of sub-section 136(3) and, if so, whether any such amendment will be apply only to listed public companies. As I understand it, the Corporations Committee of the Law Council of Australia has signalled that it would have no objection to an amendment of section 249N in the case of listed public companies which would, in effect, preserve the 100 member rule as it applies to that section irrespective of any further requirement along the lines of that contained in Boral's constitution.

John McCombe

Partner

Corrs Chambers Westgarth

john.mccombe@corrs.com.au

Direct Line: (02) 9210 6328

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