Labour activism in the corporate sphere has been a feature of corporate governance for a number of decades in the United States of America. In the last few years, Australian trade unions have followed the lead of their US counterparts by proposing resolutions at annual general meetings. This shareholder activism is an important avenue for employees to pursue their concerns.

Union shareholder activism in Australia has focused on annual general meetings (AGMs) at listed companies. At Rio Tinto’s AGM in 2000, the Construction Forestry Mining and Energy Union (CFMEU) put a resolution calling on the corporation to appoint an independent deputy chairman and independent non-executive directors. The CFMEU also put a resolution urging Rio Tinto to adopt International Labour Conventions on workers’ rights, including rights to collective bargaining. At the Boral AGM in October 2003, the Transport Workers’ Union put a resolution to establish a board safety committee and appoint an independent safety auditor. The Transport Workers’ Union also put another resolution proposing to link executive incentives to safety targets. At the Commonwealth Bank of Australia’s annual general meeting in November 2004, the Finance Sector Union of Australia put a resolution that an independent expert be engaged by the bank to assess the impact of restructuring at the bank that was estimated to lead to significant job losses. In October 2004, the Australian Workers’ Union put resolutions regarding executive remuneration and the job tenure of directors at the AGM of Bluescope Steel.

This article addresses the causes and justifications of union shareholder activism in Australia.

The 100-member rule

The legal mechanism that has enabled union shareholder activism in Australia is what is known as the ‘100-member rule’ (or 100-shareholder rule). This rule is constituted by two separate statutory rights. The first is the right under s 249N(1) of the Corporations Act 2001 (the Act). This section enables 100 (or more) shareholders entitled to vote to propose a resolution at a pre-planned general meeting. This shareholder activism is an important avenue for employees to pursue their concerns.

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Satisfying employee and shareholder demands in an era of union shareholder activism

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- Clearly identifiable corporate governance and workplace law factors have precipitated the rise of union shareholder activism
- Union shareholder proposals can be effective in promoting both employee and shareholder interests
- Governance professionals have to effectively manage union shareholder activism by improving corporate policy and practice to address any underlying employee discontent

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the exercise of the right from 100 shareholders to 20 shareholders. To date, trade unions have not been exercising the right to requisition meetings (although there is nothing currently stopping them from exercising that right). Rather, they have concentrated on putting resolutions at AGMs under s 249N of the Act. Consequently, even if the federal government’s proposed amendments eventually become law, we are still likely to see the continuation of union shareholder activism in its current form for the foreseeable future.

**Causes of union shareholder activism**

Why has union shareholder activism emerged in the last few years as a significant feature of corporate governance in Australia? The motivations for organised labour actively engaging in corporations as shareholders can be best understood by charting changes to Australian labour law and by examining the non-recognition of employees under corporate laws. What becomes apparent from this analysis is that there is a mismatch between the formal exclusion of trade unions and their members under Australian laws and the de facto power of trade unions and workers.

**The formal exclusion of employee interests**

Australian corporate law and governance largely remains preoccupied with the relationship between corporate officers and shareholders. There are no mainstream corporate law statutory provisions for the protection of employees as employees (rather than as creditors). Employees’ interests are only taken into account in exceptional circumstances such as in failed companies where employees have certain rights to their entitlements as creditors.

This aspect of the Australian corporate governance framework encourages companies to adhere to a shareholder ‘value’ model of the corporation and discourages the implementation of broader stakeholder visions of the firm. Accordingly, employees continue to be treated as outsiders to the firm and hence are effectively excluded from many decision-making processes within the company. This is in stark contrast to corporate governance in some European jurisdictions where work councils add an additional tier of worker representation.

Historically, the exclusion of employee interests in Australian corporate governance was unproblematic because trade unions could have their concerns adequately dealt with under labour laws. However, recent changes to workplace laws have stripped workers and unions of many protective laws, institutions and workplace bargaining strategies. Trade unions and their members are becoming increasingly marginalised in a changed employment law and workplace bargaining environment. Traditional industrial strategies based on labour law and relations are becoming less effective for unions.

The detail of the *Workplace Relations Amendment (Workchoices) Act 2005* (Cth) (Workchoices) has been summarised in a previous article in this journal. I will mention but two of many of the changes Workchoices has made. Firstly, the Australian Council of Trade Unions (ACTU) will no longer bring test cases to the federal industrial commission for determination. Secondly, Workchoices even more heavily proscribes strike action. These examples illustrate how Workchoices operates to marginalise the position of trade unions and their members. Indeed, following the enactment of the *Workchoices*, serious queries must be raised about whether labour law might outlive its utility for trade unions altogether.

**The de facto importance of workers**

Workchoices eliminates union strategies that focused on binding industrial awards and communications powerful disincentives to trade unions considering engaging in strike action. This allows companies to consolidate their focus on delivering shareholder value by reducing wages, intensifying work and introducing lower-cost forms of work engagement with less interference from organised labour.7

However, a legislative schema cannot abolish the underlying value that employees bring to companies. Neither will it erase trade union power in certain key Australian industries. Employees make considerable firm-specific investments in the enterprise through their years of service. Workers contribute human capital to corporations in the form of time, energy, physical strength, talent and skill. Perhaps more importantly, employees contribute financial capital in the form of deferred cash payments (in exchange for leave and redundancy entitlements) to the corporation.8 This indicates that employees are an equally important corporate stakeholder as shareholders. Indeed, because employees have less of an ability to exit from an enterprise, they may have a greater stake than shareholders in the future of that enterprise. Particularly in certain industries, workers can capitalise on their pivotal place in companies by organising into influential trade unions.
Therefore there is an awkward combination of a labour movement that continues to be viable and a somewhat myopic regulatory framework that makes shareholders the pre-eminence of stakeholders. This inevitably results in issues raised by employees emerging by other means and/or in non-conventional forums. This should come as no surprise to those persons familiar with the pluralist viewpoint on workplace relations. Historically, workplace relations have been hotly contested. It remains a controversial and contentious field of social relations today. If dispute resolution mechanisms are not provided, and workplace issues go unresolved, they are inevitably manifested in other ways. Consequently, trade unionists have not only focused more on their powers under safety laws, but have also become savvy to corporate governance strategies. The recent expansion of the trade union repertoire of legal strategies has seen trade unions increasingly trigger the 100-member rule to promote employee interests.

**How union shareholder activism is effective**

The major justification of union shareholder activism is that such activism is effective in monitoring corporate directors and officers. Union shareholder activism works effectively because it addresses problems of collective action, aligns employee and shareholder interests and deploys unions’ competitive advantage. These aspects of union shareholder activism can work even where union resolutions are not passed.

**Overcoming the collective action problem**

Widely dispersed shareholdings and diversified share portfolios is a recipe for shareholder passivity. Berle and Means’ seminal study of American capitalism published in 1932 explained the causes of this shareholder passivity: they postulated that there was a chasm between strategically positioned management that controlled corporations and a body of dispersed and largely disenfranchised shareholders whose ‘ownership’ of the corporation did not entail any influence on corporate decision making. This separation of ownership and control means that shareholders do not have the practical ability or political will as a group to monitor the performance of managers. This is known as the problem of collective action. It is a problem because, when shareholders fail to engage in the monitoring of management, a director’s allegiance may shift from the shareholder constituency to fellow directors and management. This in turn provides a fertile environment for passive board cultures such as the blind faith in leadership that occurred at HIH before its collapse.

In contrast to the ‘disenfranchised’ shareholder, employees make firm-specific investments and consequently develop long-term attachments to corporations. These factors indicate employees will have greater incentive than other shareholders to monitor companies to ensure their long-term survival and profitability. Moreover, when employees form trade unions, they gain the organisational capacities to overcome the collective action problems associated with formulating a coalition of active shareholders. The 100-shareholder rule allows unions to monitor management where the general shareholdership does not have any incentive to do so. Union involvement enhances shareholder capacities to effect change at general meetings. This worker involvement in corporate governance fills an important gap in the monitoring process created by the problems of collective shareholder apathy.

**Aligning worker and shareholder interests**

The view that union resolutions will *diverge* from the interests of other shareholders becomes less persuasive as unions become more sophisticated in their participation as shareholders. In fact, the contrary position is becoming more likely as unions intentionally *align* their own interests with that of other shareholders by carefully researching the viability of mooted proposals. Unions in so doing transform their approach from a purely adversarial collective bargaining one to a strategic, cooperative corporate governance approach.

One example of where union and institutional investor interests align is in the reporting of the work safety performance of corporations. Investors are becoming more interested in such non-traditional investor concerns. Institutional investors may even give priority to these concerns over conventional corporate governance concerns regarding executive remuneration. This investor focus has encouraged a number of listed companies such as BHP, CSR, Qantas and Rio Tinto to establish a board work safety committee.

Where a union proposal is intentionally aligned with shareholder interests and this leads to a corporation to make positive reforms, the market reputation of that corporation can be boosted. This in turn can induce a favourable stock market reaction. In these situations, governance changes can improve worker conditions and maximise long-term profits for all shareholders.

**The competitive advantage of unions**

Union members often can relay detailed messages to their union about the effectiveness of corporate policies ‘on the ground.’ In this way, workers
provide a critical bridge between written corporation policy and the actual implementation of that policy. This gives unions special monitoring abilities that can be used to create value for other shareholders. Professor Ian Ramsay calls this part of the ‘competitive advantage’ of trade unions.

One area where unions maintain considerable leverage and competitive advantage is in occupational health and safety matters. Unions, through their members and through the inspection powers of their officials, have access to information about corporate operations that other shareholders do not have access to. Unions can bring this competitive advantage into corporate governance through union resolutions. In this way, unions might be regarded as a kind of expert stakeholder on workplace issues bringing additional value to the corporations.

**Unsuccessful union resolutions**

Although there has been at least one successful non-binding union proposal in the US, none of the resolutions put by trade unions in Australia have achieved a majority of shareholders’ votes. However, a number of union resolutions have achieved between 10 per cent and 20 per cent of the total of shareholder votes polled. A resolution in this category is not something to be complacent about. This kind of shareholder activism can raise the public profile of the union, increase the union’s leverage with a particular corporation and change workplace dynamics by demonstrating that workers can proactively pursue a role in corporate governance. Accordingly, there are good reasons why corporate officers should carefully consider unsuccessful union resolutions. Corporations may wish to limit any damage to corporate reputation by improving the implementation and transparency of corporate policy vis-à-vis workers. Where a union proposal is received by a corporation, the corporation may wish to negotiate a deal with the union so that the resolution is withdrawn. Most importantly, companies must be prepared to directly deal with trade unions to address underlying employee discontent.

**Legitimate constraints on union shareholder activism**

McLelland J’s judgment in *NRMA v Parker* indicate there may be significant legal limitations on what kind of resolutions could be put to a general meeting. In that case, McLelland indicated that the shareholder right to put a resolution could not be exercised if the subject is a matter exclusively vested in the directors.

However, it is probable that the market constraints on union shareholder activism are more important than any legal limitations. If a trade union acts to further the interests of its members at the expense of other shareholders interests, markets will adequately constrain such opportunistic initiatives. Crucially, the need for unions to persuade other shareholders to vote for their resolutions eliminates proposals that deviate too far from the goals of the majority of shareholders. In Australian listed companies’ meetings, the Notice of Meeting can inform shareholders of who puts a resolution. So shareholders can assess any union resolution with the knowledge that a union has proposed it. If shareholders foresee that union resolutions are motivated by concurrent collective bargaining negotiations, then shareholders can discipline such resolutions by simply voting against them.

It may be better to have a union resolution voted down than have a corporation attempt to avoid having the resolution proposed. Putting a resolution allows the employees involved to vent their concerns and may take some of the heat out of the underlying work issue.

Surprisingly, a US empirical study of union proposals found shareholders were not particularly suspicious of union proposals. The study found that union proposals received as much or more support than do similar proposals by other shareholder groups. This held true even where the union proposal was put when there was a concurrent industrial dispute with management. This study indicates that concern about opportunistic conduct unions in putting shareholder resolutions is overstated.

**Companies move to restrict shareholder rights**

Unfortunately, some corporations have failed to see the value that union shareholder activism might bring to corporate governance and have reacted to repress future shareholder participation in AGMs.

The management at Boral passed a resolution at the 2003 AGM to adopt a new corporate constitution. Under the new constitution, any special resolution put by 100 shareholders seeking...
to modify or repeal a constitutional provision does ‘not have any effect’ unless it is approved by the board or unless it is proposed by shareholders with at least five per cent of the shareholding.\textsuperscript{16} This resolution relied on s 136(3) of the Act. Section 136(3) effectively provides that a corporation’s constitution may state that a special resolution does not have any effect unless a further requirement is complied with. Boral’s resolution not only undermines the ability of unions to put resolutions but also undermines the participatory rights of all small minority shareholders at Boral.

In another recent development, the Commonwealth Bank commenced a federal court action against the Finance Sector Union after the members of the union attended the bank’s 2004 AGM and the union put a resolution at that AGM. The bank has alleged that the shareholder activism by bank staff was unprotected industrial action and that the action was a form of illegal coercion in breach of the coercion provisions of the Workplace Relations Act 1996 (Cth).\textsuperscript{17} If the court finds that the bank has successfully established it was coerced by the union, it would undermine the ability of workers to exercise their rights as shareholders of a corporation.

**Conclusion**

Contrary to some corporations’ approach to union shareholder activism, the interests of workers should be included in corporate governance processes so that the underlying value that workers bring to corporations is recognised. Union shareholder activism should be treated as a means of including the worker’s voice within corporate decision-making processes.

Some union shareholder activism in Australia has involved a genuine effort to align employee and shareholder interests. This kind of union involvement in corporate governance can assist companies to simultaneously improve worker conditions and maximise shareholder value. Even where trade union shareholder activism is driven by collateral collective bargaining concerns, it should not be disallowed. To avoid negative publicity and to promote a genuine dialogue with workers, the best way to deal with union resolutions is to let the shareholders decide. In light of the increase in union shareholder activism, it may be advisable that corporate managers become more open to ideas of corporate social responsibility and shift towards a broad stakeholder model of the firm. Over time, it would be desirable that corporate laws are crafted that more adequately recognise employee interests. Until then, governance professionals and trade unions will have to continue to directly deal with each other through union resolutions at AGMs.

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**Notes**

1. Corporations Amendment Bill (No 2) 2005 Exposure Draft
2. Parliamentary Joint Committee on Corporations and Financial Services: Inquiry into the Exposure Draft of the Corporations Amendment Bill (No 2) 2005
3. It should be noted that the Bill as revised following the consultation period is listed to be heard in the autumn sittings of parliament as the Corporations Amendment Bill (2006), but to date it has not been released, and thus it is unclear if this proposal remains
11. See for example, Workplace Health and Safety Governance, BT Financial Group, April 2003
17. See former s 170NC of the Workplace Relations Act.