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Visions and Revisions of the Shareholder

1. Introduction

The most abiding vision of shareholders in public companies in the 20th century was one-dimensional. It was the familiar image of shareholders as a dispersed and marginalized group, inevitably separated from their investment as a result of the division between ownership and control.[1] This basic premise underpins and explains a wide array of doctrinal developments and debate in modern corporate law—matters as fundamental as the shift in division of powers between board and general meeting, free transferability of shares and the economic justifications for limited liability.

Several recent developments have undermined the appropriateness of a one-dimensional image of the role of shareholders. The first of these is the preoccupation in recent years with corporate governance,[2] coupled with the rise of institutional investment.[3] Corporate governance has become a matter of international concern, in the wake of a global trend away from direct regulation by government.[4] Many international reports have focused on the issue of corporate governance, or specific aspects of governance, such as managerial re-

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1. See Romano, "Metapolitics and Corporate Law Reform," 36 *Stan. L. Rev.* 923 (1984); Herman, *Corporate Control, Corporate Power: A Twentieth Century Fund Study* 9 (1981).

2. For factors contributing to the current preoccupation with corporate governance, see Margaret M. Blair, *Ownership and Control: Rethinking Corporate Governance for the Twenty-First Century* 6-11 (Brookings Institution, Washington, 1995).

3. See for example, Black, "Shareholder Passivity Reexamined," 89 *Mich. L. Rev.* 520 (1990); Roe, "A Political Theory of American Corporate Finance," 91 *Colum. L. Rev.* 10 (1991), challenging the inevitability of the received vision of shareholders.

4. See, for example, Rose, "Government, Authority and Expertise in Advanced Liberalism," 22 *Economy and Society* 283, 298 (1993); Black, "Constitutionalising Self-Regulation," 59 *Mod. L. Rev.* 24 (1996); Bush, "Stimulating Corporate Self-Regulation – The Corporate Self-Evaluative Privilege: Paradigmatic Preferentialism or Pragmatic Panacea," 87 *Nw U. L. Rev.* 597 (1993).

muneration.[5] While the primary focus of these reports tends to be the role, responsibility and accountability of directors,[6] the reports also necessarily involve questions as to the appropriate role and rights of shareholders in corporate governance.[7] Nonetheless, considerable divergence on the issue of the appropriate role for shareholders emerges in these reports.[8]

Differing visions of the role of shareholders in the corporation also emerge in corporate governance scholarship. This reflects ambiguity in the definition of "corporate governance" itself. There is a schism between definitions which are restricted to the relationship between shareholders and managers, and those which expand corporate governance to include a wider range of persons associated with the corporate enterprise.[9] This divergence is a modern reflection of the traditional debate on the theoretical nature of the corporation itself.[10]

A second important development has been the rise of comparativism in corporate governance scholarship. While the extent to which comparativism may be useful as a "tool of law reform"[11] in this area is controversial,[12] given important underlying environmental differences between jurisdictions, it has nonetheless contributed to the rec-

5. See, for example, *The Financial Aspects of Corporate Governance* (the Cadbury Committee Report) (1992); *Corporate Practices and Conduct* (the Bosch Committee Report) (3d ed. 1995); *Committee on Corporate Governance: Final Report* (the Hampel Committee Report) (1998); OECD, *OECD Principles of Corporate Governance* (OECD, Paris, 1999); *Directors' Remuneration*: Report of a Study Group Chaired by Sir Richard Greenbury (1995); *Report of the National Association of Corporate Directors (NACD) Blue Ribbon Commission on Director Compensation: Purposes, Principles, and Best Practices* (1995).

6. Some would say that this is hardly a new phenomenon, in that the legitimacy of centralized management power has always been the key feature of corporate law. See, for example, Stokes, "Company Law and Legal Theory," in William L. Twining (ed.), *Legal Theory and Common Law* 155 (1986).

7. See Sealy, "Corporate Governance and Directors' Duties," 1 *NZ Bus. L.Q.* 92 (1995).

8. The reports also reflect a tension as to whether the primary role of corporate governance should be to ensure managerial accountability or to enhance efficiency. See Dignam, "A Principled Approach to Self-Regulation? The Report of the Hampel Committee on Corporate Governance," 19 *Company Lawyer* 140 (1998); Hill, "Deconstructing Sunbeam – Contemporary Issues in Corporate Governance," 67 *U. Cin. L Rev.* 1099 (1999).

9. See Ramsay, "The Corporate Governance Debate and the Role of Directors' Duties," in Ian Ramsay (ed.), *Corporate Governance and the Duties of Company Directors* 2, 2-3 (1997); Blair, supra n. 2, at 3-4.

10. See generally Bratton, "The New Economic Theory of the Firm: Critical Perspectives from History," 41 *Stan. L. Rev.* 1471 (1989); Millon, "Theories of the Corporation,"[1990] *Duke L.J.* 201.

11. Kahn-Freund, "On Uses and Misuses of Comparative Law," 37 *Mod. L. Rev.* 1 (1974).

12. See, for example, Romano, "A Cautionary Note on Drawing Lessons from Comparative Corporate Law," 102 *Yale L.J.* 2021 (1993). See also Kahn-Freund, id., 6ff.

ognition of a wider range of possible governance structures,[13] in which the shareholder's role may differ. The concentration of stock holdings[14] and greater emphasis on "relational investing" under the German bank-oriented model,[15] for example, present a clear counterpoint to traditional U.S. governance structures.[16] It is this contrast in governance forms that created such a high level of interest in the merger between Daimler-Benz AG and Chrysler Corporation.[17]

A final development has been in the area of, what might be termed, organizational comparativism. There has been renewed interest[18] in viewing investor-owned firms, not in isolation, but as part of a wider matrix of associations.[19] The broadened focus of this approach recognizes a smorgasbord of flexible governance structures, in which the role of participants may differ significantly.[20] This trend has contributed to a growing sense that there is no single "right" form of organizational structure.[21]

This article traces a number of visions of the role of shareholder which can be discerned at various times in corporate law. These images of the role of shareholder overlap and recur in different forms, providing a richer and more complex picture of the shareholder's relationship with the company than that which is sometimes assumed in corporate law scholarship.[22] In some instances, these images are his-

13. See Fanto, "The Role of Corporate Law in French Corporate Governance," 31 *Cornell Int'l L.J.* 31, 33-34 (1998); Roe, "Path Dependence, Political Options, and Governance Systems," in Klaus J. Hopt & E. Wymeersch, *Comparative Corporate Governance* 165 (1997).

14. See Roe, "German Codetermination and German Securities Markets," [1998] *Colum. Bus. L. Rev.* 167, 178-79.

15. See, for example, Visentini, "Compatibility and Competition Between European and American Corporate Governance: Which Model of Capitalism?," 23 *Brook. J. Int'l L.* 833 (1998): Singhof & Seiler, "Shareholder Participation in Corporate Decisionmaking under German Law: A Comparative Analysis," 24 *Brook. J. Int'l L.* 493 (1998); Baums, "Corporate Governance in Germany: The Role of the Banks," 40 *Am. J. Comp. L.* 503 (1992).

16. See generally Pinto, "Corporate Governance: Monitoring the Board of Directors in American Corporations," 46 *Am. J. Comp. L.* 317 (1998). See also, however, André, "Cultural Hegemony: The Exportation of Anglo-Saxon Corporate Governance Ideologies to Germany," 73 *Tulane L. Rev.* 69 (1998).

17. See Akre, "DaimlerChrysler begins the hard work of merging two cultures," *J. Commerce*, November 18, 1998, 6A.

18. For earlier examples of such an approach, see Chafee, "The Internal Affairs of Associations Not for Profit," 43 *Harv. L. Rev.* 993 (1930); Philip Selznick, *Law, Society, and Industrial Justice* (1969), ch. 2; Stewart, "Organizational Jurisprudence," 101 *Harv. L. Rev.* 371 (1987).

19. See, for example, Henry Hansmann, *The Ownership of Enterprise* 1-8 (1996).

20. See Orts, "The Future of Enterprise Organization," 96 *Mich. L. Rev.* 1947 (1998).

21. See Drucker, "Management's New Paradigms," *Forbes Global Business & Finance*, October 5, 1998, 52.

22. See, for example, Roe, supra n. 13, at 165, 175; Rock, "America's Shifting Fascination with Comparative Corporate Governance," 74 *Wash. U. L.Q.* 367, 369 (1996), who states that "Berle and Means' influence on corporate law scholarship has been so

torically and progressively linked; in others, they are merely dichotomies inherent in corporate law. Against the backdrop of these evolving images, the paper then examines some contemporary Australian developments concerning the role of the shareholder, in the courts, under legislation and in the commercial realm. These developments include the controversial decision in *Gambotto's* case,[23] the strategy of using shareholder consent as a regulatory device, and the implications of institutional shareholder activism. These examples demonstrate a tension and an ambivalence about the appropriate role of the shareholder in modern corporate law.

2. Changing Visions of the Shareholder

Many different images of the shareholder have at times underpinned corporate law debate.[24] The various ways in which shareholders can be characterized within the corporate structure have important implications for two major issues concerning the role of shareholders in corporations — first, the appropriate level of shareholder participation in corporate governance, and secondly, the status of shareholder interests, specifically whether they should be treated as paramount within the corporate structure. Participatory rights and status of interests are closely interconnected and provide a useful focus for examining the implications of different images of the shareholder in corporate law discourse.

(a) The Shareholder as Owner/Principal

The vision of shareholders as the "owners" of the corporate enterprise has an old and influential pedigree. The aggregate or partnership model of the corporation,[25] which was prevalent in the 19th century, assumed such a role for shareholders, just as it assumed a principal/agent relationship between the shareholders as owners and their agent directors. Although the contemporary nexus of contracts theory of the corporation again speaks of a principal/agent relationship between shareholders and directors, this modern reconstruction lacks the traditional hallmarks of agency that were implicit in the 19th century shareholder-centered view of the corporation. Thus, traditional corporate theory assumed that the role of directors was to

fundamental and deep-seated that American corporate law academics can hardly conceive of alternative approaches."

23. *Gambotto v. WCP Ltd.* (1995) 69 *ALJR* 266.

24. See generally, Hill & Ramsay, "Institutional Investment in Australia: Theory and Evidence," in Gordon R. Walker & Brent Fisse (eds.), *Securities Regulation in Australia and New Zealand* 289, 291ff. (1994).

25. See, for example, Radin, "The Endless Problem of Corporate Personality," 32 *Colum. L. Rev.* 643 (1932).

carry out the will and implement the interests of shareholders,[26] and that within standard principles of agency law, shareholders had a formal right to control their agents.

The "shareholder as owner" vision under the aggregate theory was of great significance in the development of corporate law. In the U.S., it was used to counter the view of the corporation as a creation of the state under the restrictive concession theory; rather, the aggregate model represented the corporation as a natural and, most importantly, private organization, in which shareholders were akin to partners.[27] Early rules, such as vested rights, under which unanimous consent of shareholders was required for any fundamental corporate change, reflected this role for shareholders within the corporate structure.[28] Also, traditional tolerance by the courts of a low standard of skill and care in directors was based upon the assumption that the shareholders as principals should be more careful in selecting their agents.[29]

If shareholder assertion of ownership rights were the ideal, it was an ideal which bore an ever-decreasing resemblance to reality, with the growth of large public corporations at the turn of the 20th century.[30] Indeed, some commentators doubt whether, outside the context of the close corporation, shareholders ever occupied a position where they both owned and controlled the corporation, and view this "ideal" as itself another myth of corporate law.[31] If it is a myth, however, it is a tenacious one, with modern courts still sometimes relying upon it either to accord or to deny rights to shareholders.[32] The introduction

26. See Brudney, "The Independent Director — Heavenly City or Potemkin Village?," 95 *Harv. L. Rev.* 597, 602 (1982).

27. See Horwitz, "*Santa Clara* Revisited: The Development of Corporate Theory," 88 *W. Va. L. Rev.* 173, 204 (1985); Smith, "The Shareholder Primacy Norm," 23 *J. Corp. L.* 277, 302-03 (1998). The aggregate theory of the corporation was seen as hostile to both state regulation and to the burgeoning management corporation. See Bratton, supra n. 10, at 1471, 1489.

28. See, for example, Carney, "Fundamental Corporate Changes, Minority Shareholders, and Business Purposes," [1980] *Am. Bar. Found. Res. J.* 69; MacIntosh, "Minority Shareholder Rights in Canada and England: 1860-1987," 27 *Osgoode Hall L.J.* 561 (1989); Horwitz, id. at 200.

29. See generally Trebilcock, "The Liability of Company Directors for Negligence," 32 *Mod. L. Rev.* 499 (1969); Bird, "The Duty of Care and the CLERP Reforms," 17 *Company and Securities L.J.* 141 (1999).

30. See Mason, "Introduction," in Edward Sagendorph Mason (ed.), *The Corporation in Modern Society* 5 (1960), for the view that "those days are gone forever" when corporate ownership by shareholders could be taken seriously.

31. See Werner, "Corporation Law in Search of Its Future," 81 *Colum. L. Rev.* 1611, 1612 (1981); Hetherington, "When the Sleeper Wakes: Reflections on Corporate Governance and Shareholder Rights," 8 *Hofstra L. Rev.* 183, 194 (1979).

32. For a modern use of the argument that the courts will not intervene to hold directors to account since the shareholders should themselves appoint directors of skill and good character, see *Re Enterprise Gold Mines NL* (1991) 3 ACSR 531. See further Hill, "Protecting Minority Shareholders and Reasonable Expectations," 10 *Company and Securities L.J.* 86, 102 (1992).

in 1985 of a statutory provision in Australia dealing with shareholder inspection rights[33] provides such an example. Although at common law shareholder rights of inspection, in contrast to those of directors, were extremely narrow,[34] in one of the first decisions dealing with the new statutory provision, *Re Humes Ltd.*,[35] Beach J laid the groundwork for a remarkably liberal interpretation of the section. Citing U.S. authority, the judge included as justification for a generous right of access to shareholders the statement that "the books and property of the corporation really belong to the shareholders, and the reality cannot be overthrown by the fiction of law that a corporation is an artificial person or entity apart from its members."[36]

(b) The Shareholder as Beneficiary

Increasing recognition of the separation between ownership and control in public companies — the fact that ownership of shares no longer carried the traditional incidents of property ownership — together with the triumph of the entity theory of the corporation, led to a revision of the image of shareholders in the early 20th century. In the U.S., a partnership model of the corporation became anachronistic in the light of the new commercial reality of management corporations, in which collective action problems for shareholders and managerial command of proxy machinery were seen as decisive in shifting control.[37] Under the entity theory too, shareholder preeminence was by no means necessary or self-apparent, and it has been argued that the entity theory was influential in legitimating big business and centralized management at the time.[38]

The division between ownership and control thus implied both great power to managers and impotence of shareholders. Their newly perceived vulnerability was at the heart of Berle's characterization of shareholders as "beneficiaries" for whom managerial powers are held in trust. The beneficiary classification, while treating the interests of shareholders as preeminent, deflated their rights of participation. This reflected the assumption that participation by shareholders in corporate governance was not feasible.

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33. Section 265B *Companies Code* (now s 247A *Corporations Law*).

34. See *Burn v. London and South Wales Coal Co.* (1890) 7 TLR 118; *R v. Merchant Tailors' Co.* (1831) 2 B & Ad 115; *Mutter v. Eastern and Midlands Railway Co.* (1888) 38 Ch D 92, 106; *Edman v. Ross* (1922) 22 NSWR 351, 358.

35. (1987) 5 ACLC 64.

36. Id., at 67.

37. See Easterbrook & Fischel, "Voting in Corporate Law," 26 *J. Law and Economics* 395, n 1 (1983), quoting Berle and Means.

38. See Horwitz, supra n. 27, at 173, 176, 223-24. Cf. however Bratton, supra n. 10, at 1471, 1511-13; Millon, supra n. 10, at 201, 240ff.

Although Berle and Dodd[39] reached very different conclusions to the celebrated question, "For whom are corporate managers trustees?," their shared axis was concern about the specter of unbridled managerial power.[40] Berle's "minimalist version"[41] of managerial powers is as revealing for the choice of legal relationship as it is for choice of *cestui que trust.* Although not clearly distinguished in early English legal history, there are significant differences between the agency and trust relationship.[42] The powers, discretion and consequently third party liability of a "mere agent" are far narrower than those of a trustee.[43] The trustee analogy was used to justify the conclusion that directors should be subject to more stringent duties.[44]

Thus Berle's treatment of shareholders as *cestuis que trust*, rather than principals in an agency relationship, was an acknowledgment that shareholders had lost both *de jure* and *de facto* control of corporations.[45] With this basic premise, Berle's solution was to seek equitable controls over management's apparently absolute powers to ensure that those powers were harnessed for profit maximization for shareholders.[46] Nonetheless, given the difficulties of enforcement of such managerial duties, shareholders would in practice still be "virtually helpless."[47] Notably absent from the debate was any alternative solution based upon restructured internal corporate governance.

In spite of the differences between an agency and trust relationship, it has been argued that the two models performed the same function of attempting to legitimate bureaucratic control, by portraying mana-

39. Dodd's response, which was to provide the grounding for the corporate social responsibility debate, viewed directors as trustees for a broader constituency, including groups such as consumers and employees as well as shareholders.

40. See Berle, "Corporate Powers as Powers in Trust," 44 *Harv. L. Rev.* 1049, 1073 (1931); Dodd, "For Whom Are Corporate Managers Trustees?," 45 *Harv. L. Rev.* 1145, 1147 (1932); Berle, "For Whom Corporate Managers *Are* Trustees: A Note," 45 *Harv. L. Rev.* 1365 (1932).

41. See Teubner, "Corporate Fiduciary Duties and Their Beneficiaries: A Functional Approach to the Legal Institutionalization of Corporate Responsibility," in Klaus J. Hopt & Gunther Teubner (eds.), *Corporate Governance and Directors' Liabilities: Legal, Economic and Sociological Analyses on Corporate Social Responsibility* 149ff. (1985).

42. K.S. Jacobs & W.M.C. Gummow, *Jacobs' Law of Trusts in Australia* 11-12 (6th ed. 1997).

43. Id. One of the hallmarks of true agency, lacking in the modern corporate setting, is that the agent is subject to "the continuous control" of the principal. See Dallas, "Two Models of Corporate Governance: Beyond Berle and Means," 22 *JL Ref.* 19, 34-35, n. 42 (1988); Pinto, supra n. 16, at 317, 324, 327.

44. See Ogus, "The Trust as Governance Structure," 36 *U. Tor. L.J.* 186, 194 (1986).

45. See Dodd, supra n. 40, at 1145, 1146.

46. This approach was epitomized by the famous decision in *Dodge v. Ford Motor Co.*, 204 Mich 459, 170 NW 668 (1919). Cf. Dodd, id., who eschewed this paramount role for shareholder interests.

47. See Weiner, "The Berle-Dodd Dialogue on the Concept of the Corporation," 64 *Colum. L. Rev.* 1458, n. 8 (1964).

gerial power as constrained either by shareholder/principals in the agency context or by strengthened fiduciary dictates in the trust scenario.[48]

In the UK, terminology describing directors as "trustees" dates back to the mid-18th century.[49] There is considerable academic debate as to whether directors were ever technically trustees in the early days of joint stock companies.[50] The language of "directors as trustees" has persisted in corporate law parlance,[51] in spite of an increasing divergence of their respective functions in the modern commercial world.[52]

Nonetheless, some recent Australian cases have expressly rejected both the terminology and implications of viewing directors as trustees. In *Daniels v. Anderson*,[53] for example, all members of the New South Wales Court of Appeal accepted that the trustee analogy was outdated and failed to reflect commercial reality.[54] Clarke and Sheller JJA used this proposition to justify the existence of a common law action for negligence against directors; Powell JA, on the other hand, used it to support less extensive duties for directors than apply to trustees.[55] In *ASC v. AS Nominees Ltd.*,[56] while it was held that trust principles may have a ripple effect on the duties of directors in a trustee company, Finn J stated tersely that this was "not to reignite the arid debate on whether directors are trustees."[57]

Paradoxically, the Court of Appeal's decision in *Daniels v. Anderson*,[58] while purporting to reject a trustee model for directors in Australia, moved closer to the consequences of such a model in one significant way. Historically, a fundamental difference between the

48. Frug, "The Ideology of Bureaucracy in American Law," 97 *Harv. L. Rev.* 1277, 1305 (1984).

49. *Charitable Corporation v. Sutton* (1742) 2 Atk 400. For use of the trust concept in 19th century U.S. case law, see Smith, supra n. 27, at 277, 301ff.

50. Cf. Keeton, "The Director as Trustee," 5 *Current Legal Problems* 11 (1952), suggesting these origins for the terminology, and Sealy, "The Director as Trustee," [1967] *Camb. L.J.* 83, refuting such claim. On this question, see also *Daniels v. Anderson* (1995) 16 ACSR 607, 748-749 (per Powell J). See generally, Saleem Sheikh, *Corporate Social Responsibilities* 147ff. (1996).

51. See, for example, *State of South Australia v. Marcus Clark* (1996) 19 ACSR 606, 644.

52. See, for example, Ralph K. Winter, *Government and the Corporation* 32-33 (1978); Sealy, supra n. 50, at 83, 86, 89.

53. (1995) 16 ACSR 607.

54. Id., 656-58 (per Clarke and Sheller JJA); 750-51, 753, 755 (per Powell JA). See also Sealy, "Directors' 'Wider' Responsibilities — Problems Conceptual, Practical and Procedural," 13 *Monash U. L. Rev.* 164, 165-66 (1987); Sheikh, supra n. 50, at 150-51 (1996).

55. See Keeton, supra n. 50, at 11, who criticizes such divergence from trust principles as having led to a progressive decimation of directors' responsibilities.

56. (1995) 18 ACSR 459.

57. Id., 470.

58. (1995) 16 ACSR 607.

liability of directors and trustees was that a passive trustee would be personally responsible for failure to discharge the trust, while a passive director would generally not incur liability where delegation of powers had occurred.[59] The decision in *Daniels v. Anderson*,[60] together with developments in the area of directors' liability for insolvent trading,[61] blurred this distinction by curtailing the extent to which directors can legitimately delegate their responsibilities and rely upon the judgement of other corporate officers.[62]

The influence of both the shareholder as owner/principal and the shareholder as beneficiary converge in the terminology of the general meeting's role in curing directors' breaches of duty. Although sometimes treated as constituting a "waiver" of breach, implying an application of trust law under which a fiduciary may be protected from liability by obtaining the informed consent of the beneficiary,[63] many cases also refer to a resolution of the general meeting as "ratification" of the board's conduct, reflecting principles of agency law.[64]

(c) The Shareholder as Bystander

Given the factors which prompted Berle's characterization of shareholders as cestuis que trust, it was perhaps inevitable that shareholders would eventually become "bystanders"[65] to decisions affecting their investments. This position was a by-product of the managerialist paradigm of the large corporation, which dominated corporate law for more than half a century, describing the firm as a power structure with management strategically placed at its core.[66] However, its roots were apparent as early as the 1860s when Charles Francis Adams Jr., describing tension between shareholder and management interests in the Erie Railroad, stated that the idea of inquiries by ordinary shareholders into the affairs of Erie was regarded by management as "downright impertinence."[67]

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59. Sealy, supra n. 50, at 83, 87-88.
60. (1995) 16 ACSR 607.
61. See generally Hill, "The Liability of Passive Directors: *Morley v. Statewide Tobacco Services Ltd.*," 14 *Syd. L. Rev.* 504 (1992).
62. See *Daniels v. Anderson* (1995) 16 ACSR 607, 665-668. For tension under current Australian law as to the scope of legitimate delegation, see generally Bird, supra n. 29, at 141.
63. See P.D. Finn, *Fiduciary Obligations* 51 (1977).
64. Compare, for example, *Bamford v. Bamford* [1968] 2 All ER 655 (Plowman J) and *Winthrop Investments Ltd. v. Winns Ltd.* [1975] 2 NSWLR 666. See generally Fridman, "Ratification of Directors' Breaches," 10 *Company and Securities L.J.* 252 (1992).
65. See Buxbaum, "The Internal Division of Powers in Corporate Governance," 73 *Cal. L. Rev.* 1671, 1683 (1985), who states: "[t]o some degree the legislatures are responsible, but to a far greater degree it is the courts that are relegating shareholders to the questionable role of bystanders."
66. See Bratton, supra n. 10, at 1471, 1475-76.
67. Quoted in Herman, supra n. 1, at 6-7.

Much 20th century corporate doctrine restricted the participatory role of shareholders in corporate governance. It assumed the existence of a clear line defining managerial powers, carving out a domain which was constitutionally off-limits to shareholders. Thus, in England and Australia it was apparent from 1906 that, no matter what the position may have been under an earlier agency analysis of the relationship between shareholders and directors,[68] when managerial powers were vested in the directors under the company's articles of association the general meeting was powerless to override decisions of the board,[69] even by unanimous shareholder agreement. In the U.S., management's power was even stronger given that directors were generally protected against removal from office in the absence of "just cause."[70] Management's power and discretion continued to grow in the 20th century. The old agency model continues, however, to inform the terminology of residual powers, which are often referred to as "reverting" to the general meeting, in spite of the fact that these powers are no longer viewed as having been delegated to the board by the shareholders.

The technical rules on company meetings have long reflected a managerialist paradigm. Not only were shareholders banished decisively from managerial decisions; Australian cases such as *NRMA v. Parker*[71] made it clear that shareholders in general meeting do not even have the power to communicate their views and opinions on management matters to the board. Shareholders' ancillary powers, such as the power to appoint and remove directors, were attenuated by the practical difficulties of exercising such powers, by management's superiority through proxy and agenda control,[72] and by judicial decisions which continued the oligarchical trend[73] of *Cuninghame's* case, relying on a strong entity conception of the corporation. For example, in *LC O'Neil Enterprises Pty Ltd. v. Toxic Treat-*

68. See, for example, *Isle of Wight Rly Co. v. Tahourdin* (1884) 25 Ch D 320.

69. *Automatic Self-Cleansing Filter Syndicate Co. Ltd. v. Cuninghame* [1906] 2 Ch 34. For the parallel shift in U.S. law, see Horwitz, supra n. 27, at 173, 214ff. (1985)

70. A director can be removed without cause only if the relevant statute allows. See, e.g., MBCA s 8.08 and Del s 141(k), which permit removal with or without cause.

71. (1986) 4 ACLC 609.

72. See Levine & Plott, "Agenda Influence and Its Implications," 63 *Va. L. Rev.* 561 (1977); *Re Dorman Long & Co. Ltd.* [1934] Ch 635, 657-58. For a modern statement of this phenomenon, see comments by Ries that "Australia's Corporations Law, and most company articles of association, ultimately vest 90 per cent of the power over the choice of election methodology with established boards, who set the rules under which their members are elected. . . .Small shareholders, no matter how well organised and motivated, just ain't in the game when the big boys gang up": Chanticleer, "Big boys show how it's done," *Australian Financial Review*, November 20, 1996, 52.

73. See Eisenberg, "Megasubsidiaries: The Effect of Corporate Structure on Corporate Control," 84 *Harv. L. Rev.* 1577, 1602 (1971), stating that "[l]egally as well as practically, the board of directors is an independent power center within the corporation."

ments Ltd.,[74] the court severely limited the circumstances in which shareholders could themselves convene a general meeting, thus, according to Kirby P's dissent, denying shareholders the means of "self help."[75]

A number of recent reforms to the rules of company meetings in Australia[76] reflect an interesting retreat, however, from a managerialist paradigm relegating the shareholder to status of bystander. These provisions seem designed to facilitate greater involvement and "voice" for shareholders.[77] Section 249F of the *Corporations Law*, for example, reverses the decision in *LC O'Neil Enterprises Pty Ltd. v. Toxic Treatments Ltd.*,[78] by giving members with 5% of voting rights an absolute power to convene a general meeting. The reforms introduce a statutory right for members to ask questions or make comments on the management of the company,[79] in contrast to *NRMA v. Parker*,[80] which took the view that this was outside the role and function of shareholders. In spite of fears by the business community that these changes will lead to disruption of general meetings by small vocal minorities, the provisions may be too innocuous in practice to have a significant effect on shareholder participation in corporate governance.[81]

In the U.S., the right of shareholders to submit, at the company's expense, proposals for action in the general meeting under SEC Rule 14a-8 has provided a counterbalance to the image of shareholders as "bystanders." Rule 14a-8 has been particularly important in allowing

74. (1986) 4 ACLC 178.

75. Id., 180.

76. The reforms were introduced into the *Corporations Law* by Part 2G.2, Sch 1, *Company Law Review Act* 1998. The Act commenced on July 1, 1998. Rapid advances in communications technology will inevitably bring further reforms to the law of company meetings in Australia, creating greater potential for shareholder participation. See generally Companies and Securities Advisory Committee, *Shareholder Participation in the Modern Listed Public Company*, Discussion Paper, 1999; Boros, *The Online Corporation: Electronic Corporate Communications*, Discussion Paper 1999.

77. The provisions are arguably consistent with a shift from "managed corporation" to "governed corporation." See Pound, "The Promise of the Governed Corporation," [1995] *Harv. Bus. Rev.* 89, and see further below under "The Shareholder as Participant in a Political Entity" and "The Institutional Shareholder as Managerial Partner (or 'The Collectivization of Shareholder/Management Interests')."

78. (1986) 4 ACLC 178.

79. Section 250S. See also s 250T, which allows members as a whole to question the company's auditor or representative if present at the annual general meeting.

80. (1986) 4 ACLC 609.

81. The Parliamentary Joint Committee on Corporations and Securities, *Report on the Draft Second Corporate Law Simplification Bill 1996*, November 1996, 20-25, pointed out, for example, that ss 250S and 250T do not entitle every member to ask questions or make comments, only "the members as a whole." Also, the provisions do not impose any duty to answer the shareholders' questions. The Parliamentary Joint Committee considered that s 250T should be strengthened by actually *requiring* that the auditor or representative be present to take questions at the annual general meeting of a listed company.

shareholders a forum concerning issues of social responsibility and corporate governance.[82] The court in *Medical Committee for Human Rights v. SEC*[83] viewed the rule as critical in ensuring shareholder participation in decisions concerning their investment. Nonetheless, shifting interpretations by the SEC as to the scope of the "ordinary business" exception to the shareholder proposal rule have excluded shareholders from involvement in corporate decision-making on a range of significant issues.[84]

Yet another device by which shareholders were effectively excluded from participation in investment decisions was via the mechanism of the corporate group. This device enabled assets to be vested in a subsidiary and beyond the purview of the ultimate investors, thus replicating the original division between ownership and control.[85]

One variant of the bystander model, with benign consequences for shareholders, is the image of shareholders as *innocent* bystanders.[86] The assumption that shareholders are removed from decision-making power, and therefore lacking in any personal responsibility for corporate actions, has protected the inviolable status of limited liability in the public corporation context. In contrast, the courts have been more prepared to lift the corporate veil in close corporations with no division between ownership and control, where shareholders will be more directly "responsible" for corporate actions.[87] Hansmann and Kraakman's[88] proposal to impose liability for corporate torts on passive shareholders in public companies represented a radical break

82. See generally, William L. Cary & Melvin A. Eisenberg, *Corporations* 362-74 (7th ed. 1995); Robert C. Clark, *Corporate Law* 371-83 (1986). In the Canadian context, see Cheffins, "*Michaud v. National Bank of Canada* and Canadian Corporate Governance: A "Victory" for Shareholder Rights?," 30 *Can. Bus. L.J.* 20 (1998), suggesting that, due to background differences in the corporate landscapes, shareholder proposals are unlikely to have as much impact on Canadian corporate governance as in the U.S.

83. 432 F.2d 659, 680-681 (DC Cir 1970).

84. See generally Lazaroff, "Promoting Corporate Democracy and Social Responsibility: The Need to Reform the Federal Proxy Rules on Shareholder Proposals," 50 *Rutgers L. Rev.* 33 (1997); McCann, "Shareholder Proposal Rule: Cracker Barrel in Light of *Texaco*," 39 *Boston College L. Rev.* 965, 973ff. (1998) For discussion of amendments to the shareholder proposal rules adopted by the SEC in 1998, see Roth, "Proactive Corporate-Shareholder Relations: Filling the Communications Void," 48 *Cath. U. L. Rev.* 101 (1998).

85. See Eisenberg, supra n. 73, at 1577.

86. Contrast, however, the view of Justice Brandeis of the US Supreme Court that "[t]here is no such thing. . .as an innocent stockholder. He may be innocent in fact, but socially he cannot be held innocent. He accepts the benefits of a system. It is his business and his obligation to see that those who represent him carry out a policy which is consistent with the public welfare." Osmond K. Fraenkel, *The Curse of Bigness: Miscellaneous Papers of Louis D. Brandeis* 75 (1965, c1934).

87. See, for example, Note, "Should Shareholders Be Personally Liable for the Torts of Their Corporations?," 76 *Yale L.J.* 1190, 1196ff. (1967) Thompson, "Piercing the Corporate Veil: An Empirical Study," 76 *Cornell L. Rev.* 1036 (1991).

88. Hansmann & Kraakman, "Toward Unlimited Shareholder Liability for Corporate Torts," 100 *Yale L.J.* 1879 (1991).

with this tradition. Their proposal avoided personal responsibility as a basis for personal liability; instead justification for liability was found in the benefits of the shareholders' role as residual equity owners and their efficiency as risk-bearers. On the Hansmann and Kraakman approach, wide dispersion and diversification of shareholding in public companies, the very features which had supported an innocent bystander model, were transformed into a justification for shareholder liability, under a risk-bearing efficiency rationale.[89]

Within the framework of a managerialist paradigm of the firm, the question of whether the role of bystander was a satisfactory one for shareholders depended upon legitimation issues in the pro/anti-managerialist debate. For anti-managerialists, who argued that management held power without accountability and therefore without legitimacy, the further attenuation of shareholder participation in corporate decision-making merely exacerbated the central problem. Pro-managerialists, on the other hand, by-passed these concerns over legitimacy, stressing, as justification for their superior position within the firm, the expertise of managers and their capacity for statesmanlike conduct.[90]

(d) The Shareholder as Participant in a Political Entity

The corporation has sometimes been viewed as analogous to a system of private government,[91] with managerial powers approximating those of government authorities. Kirby J, of the Australian High Court, for example, has called corporations "mini-democracies."[92] This image of the corporation is hardly a recent phenomenon, yet it has been somewhat neglected in contemporary corporate law.[93] Hob-

89. See, generally, Hill, "Corporate Groups, Creditor Protection and Cross Guarantees: Australian Perspectives," 24 *Can. Bus. L.J.* 321, 325-27 (1995); 38 *Corp Practice Commentator* 381, 385-87 (1996).

90. Bratton, supra n. 10, at 1471, 1476; Frug, supra n. 48, at 1276, 1282-83, 1328-34.

91. See, for example, Mason, supra n. 30, at 1, 6-7; Morgan, "Interests, Conflict, and Power: Organizations as Political Systems," ch. 6, *Images of Organization* 141 (1986); Latham, "The Body Politic of the Corporation," in Mason (ed.), *The Corporation in Modern Society*, id., 218; Brewster, "The Corporation and Economic Federalism," in Mason (ed.), *The Corporation in Modern Society*, id., 72; Steinmann, "The Enterprise as a Political System," in Hopt & Teubner (eds.), supra n. 41, at 401; Bottomley, "Taking Corporations Seriously: Some Considerations for Corporate Regulation," 19 *Fed. L. Rev.* 203 (1990); Pound, "The Rise of the Political Model of Corporate Governance and Corporate Control," 68 *NYU L. Rev.* 1003 (1993).

92. "Justice Michael Kirby — legal departures," [1994] *Company Director* 19, 20. See also Visentini, supra n. 15, at 833, who expresses the view that social democracy may be implemented and furthered by participation of citizens in the governance of firms. The provision of such a forum for citizen discussion is one of the possible justifications for the shareholder proposal rule under U.S. law. See Clark, supra n. 82, at 383.

93. See Hansmann, "Worker Participation and Corporate Governance," 43 *U. Tor. L.J.* 589, 590 (1993); Hansmann, supra n. 19, at 4.

bes, who found the rise of corporations threatening to the State's authority, noted with suspicion "the great number of corporations; which are as it were many lesser commonwealths in the bowels of a greater, like worms in the entrails of a man."[94] A political metaphor of the corporation has important implications for the role of shareholders, both in terms of their participatory rights and the status of their interests within a corporate commonwealth.

The origins of a political image of the corporation are not difficult to trace. Under liberal theory, the corporation occupied an equivocal and intermediate position within the State/individual dichotomy as a result of its group characteristic.[95] While through one lens, organizations could be viewed as protectors of individual rights, they could also be viewed as more closely allied, or analogous, to the State itself. In the early phases of corporate law, special charters were obtained direct from the sovereign or state, combining public and private goals.[96] Even the real entity theory, which succeeded in displacing the concession model by recharacterizing the corporation as "private" and separate from the State, mirrored representative democracy in its reliance on majority rule.[97]

Commentators have offered a range of justifications for viewing the corporation as a system of private government. For some, a political metaphor is apt for its descriptive power, in that corporations have a structure and internal systems of authority common to all bodies politic.[98] According to Latham, where these essential elements exist, so too does a political system, "whether one calls it the state or the corporation."[99] On this analysis, legitimization of control is a central concern of political institutions and corporations alike.[100]

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94. Hobbes, *Leviathan* 218 (1651) (1924), cited in Latham, supra n. 91, at 218, 218-19.

95. See generally Frug, "The City as a Legal Concept," 93 *Harv. L. Rev.* 1057 (1980); Mark, "The Personification of the Business Corporation in American Law," 54 *U. Chi. L. Rev.* 1441, 1445 (1987); Selznick, supra n. 18, at 37-38.

96. Mark, "Some Observations on Writing the Legal History of the Corporation in the Age of Theory," in Lawrence E. Mitchell (ed.), *Progressive Corporate Law* 67, 68-69 (1995).

97. See Horwitz, supra n. 27, at 173, 218-19; Hager, "Bodies Politic: The Progressive History of Organizational 'Real Entity' Theory," 50 *U. Pitt. L. Rev.* 575 (1989).

98. See Latham, supra n. 91, 218, 220, who lists these essential characteristics as:- (1) authoritative allocation of principal functions; (2) symbolic system for ratification of collective decisions; (3) operating system of command; (4) system of rewards and punishments; (5) institutions for enforcement of common rules. See also Bottomley, "From Contractualism to Constitutionalism: A Framework for Corporate Governance," 19 *Syd. L. Rev.* 277 (1997).

99. Latham, id.

100. Dallas, "Working Toward a New Paradigm," in Mitchell (ed.), supra n. 96, at 35.

Commentators have also focused on the political nature of decision-making within the corporation,[101] specifically the need for corporate managers to balance conflicting interests, as justifying the metaphor.[102] For Aristotle, politics was precisely this — the means to create order and common goals from divergent interests in society.[103] "Corporate governance," that shibboleth of the 90s, itself has clear political overtones.[104]

Some theorists adopt a normative argument to the effect that persons whose interests are affected by decisions of either political or social institutions should be involved in the decision-making process. This approach presents the ideal of participatory democracy as a counterpoint to management-centered bureaucracies.[105] It also stresses the importance of "voice" over "exit," which is the primary focus for market-based theories of the firm.[106]

Yet another approach, akin to that of Hobbes, examines the relationship of corporations with the outside world, viewing their economic, social and political power as rivalling that of governmental bodies.[107] This approach focuses on large public companies with bureaucratic structures. It clearly underpinned the reasoning of the majority judges in the Australian High Court decision, *Environment Protection Authority v. Caltex Refining Co. Pty Ltd.*,[108] which denied corporations the protection of the privilege against self-incrimination. In so doing, the majority judges stressed the great power and resources of the modern public corporation. Perhaps the most extreme version of this approach is represented by Gore Vidal's statement in the press that the United States is "governed by international corporations which [do] not take politicians seriously."[109]

Governments can be democratic or authoritarian. A persistent theme in the literature discussing the political dimension of the corporation

101. See, for example, Dallas, supra n. 43, at 19, 25; Hansmann, supra n. 93, at 589, 591; Hansmann, supra n. 19, at 4.

102. See Steinmann, supra n. 91, at 401, 402; Morgan, supra n. 91, at 141.

103. Morgan, id., 142, 148.

104. Bottomley, supra n. 98, at 277.

105. Bratton, supra n. 10, at 1471, 1497.

106. See generally Pound, supra n. 91, at 1003, who argues that a political model of corporate governance has now supplanted market-based theories.

107. See, for example, Brewster, supra n. 91, at 72, who states "[w]e are bound to become increasingly uncomfortable when we contemplate the modern corporation as a power with many of the trappings of sovereignty." See also J.E. Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (1993), ch. 1; Robert A. Monks & Nell Minow, *Watching the Watchers: Corporate Governance for the 21st Century* (1996), 15, 29-31; Stokes, supra n. 6, at 155, 176; Blumberg, "The Politicalization of the Corporation," 26 *Bus. Law.* 1551 (1971).

108. 178 CLR 477 (1993). See, generally, Hill, "Corporate Rights and Accountability — The Privilege Against Self-Incrimination and the Implications of *Environment Protection Authority v. Caltex Refining Co. Pty Ltd.*," 7 *Corp. & Bus. L.J.* 127 (1995).

109. "Vidal votes for chaos on his way to heaven," *Sydney Morning Herald*, January 24, 1997, 3.

is that, in spite of the appropriateness of the metaphor, it is only "make-believe democracy" which exists in the corporate commonwealth,[110] that corporations are in reality profoundly undemocratic systems of government.[111] Nonetheless, in spite of the inherent criticism of corporate power underlying much of this literature,[112] commentators such as Pound,[113] have adopted the model optimistically, as a contemporary panacea for managerial failure. In Australia, too, Bottomley has advocated a political model of "corporate constitutionalism" as a blueprint for doctrinal changes to reflect a democratic ideal for corporations.[114]

Successful theories are not only descriptive, but also influence policy outcomes. A political theory of the corporation has implications for shareholder participation in corporate governance. If directors are characterized as the "elected representatives"[115] of shareholders, this would suggest that, while not necessarily entitled to the full panoply of rights appropriate under an ownership model, shareholders are entitled to at least some level of meaningful participation in corporate governance.[116]

The implications of a political model are, however, variable depending upon who count as "citizens" and the choice of legitimate interests to be considered in corporate decision-making.[117] Some models assume that the board of directors represent a single constituency of the shareholders, whose interests are preeminent.[118] From the perspective of status of interests, such a model differs little from a trust model or a contractual theory of the firm.

Other political models, however, assume broader citizenship within the corporate commonwealth.[119] It is these models which stress that

110. Latham, supra n. 91, at 218, 225.

111. Id., 223; Morgan, supra n. 91, at 141. See generally Jacoby, "Corporate Government: Autocratic or Democratic?," ch. 8, *Corporate Power and Social Responsibility: A Blueprint for the Future* 165, 178, who disagrees with this common perception. On the dangers of accepting the metaphor of democracy where equality of power does not exist, in the different context of collective bargaining, see Stone, "The Post-War Paradigm in American Labor Law," 90 *Yale L.J.* 1509 (1981); Stone, "Re-Envisioning Labor Law: A Response to Professor Finkin," 45 *Md. L. Rev.* 978 (1986).

112. For criticism of the model's moralistic overtones, see Teubner, "Unitas Multiplex: Corporate Governance in Group Enterprises," in David Sugarman & Gunther Teubner (eds.), *Regulating Corporate Groups in Europe* 67, 74 (1990).

113. Pound, supra n. 41, at 1003. Cf. Smith, "Institutions and Entrepreneurs in American Corporate Finance," 85 *Cal. L. Rev.* 1 (1997).

114. Bottomley, supra n. 98, at 277.

115. See Buxbaum, supra n. 65, at 1671, n. 1.

116. Professor Buxbaum describes this basic point as "a defensible if not an essential position" in corporate law. Id., 1672.

117. See Mason, supra n. 30, at 1, 6.

118. Jacoby, supra n. 111, at 165, 171.

119. See, for example, Brewster, supra n. 91, at 72, who states that the modern corporation governs "a constituency whose interests are different from, and often at odds with, ownership" (72-73); Chayes, "The Modern Corporation and the Rule of

organizations have multiple constituencies and must create unified goals among people with diverse and conflicting interests.[120] The concept of industrial democracy and codetermination as a means to integrate workers' interests into corporate governance[121] is based upon a political model of the corporation, expanded to include employee interests.[122] Further extension to the model can take into account interests of other groups such as consumers, and even the "public interest."[123] This political model views the organization as "a coalition of diverse stakeholders. . .with multiple goals."[124] Communitarian scholarship in the U.S. constitutes an explicit rejection of the primacy of shareholder interests, and a recognition of the vulnerability of non-shareholder constituencies within the corporation.[125] In keeping with this image, Philip Selznick has suggested the need for a transition from the idea of *managing* corporations to that of *governing* communities.[126]

A political model highlights the issue of power in the corporate realm, which is invisible under market-based contractual models of the corporation.[127] In highlighting the existence of power, it also recognizes the need for checks and balances in decision-making and for accountability of management.[128] Where citizenship is interpreted to extend beyond shareholders and their interests, the focus of fiduciary duties will shift to improving the processes, procedures and fairness of managerial decisions.[129] This will have practical implications in suggesting that governance structures should be revised to provide for

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Law," id., 25, 41; Philip Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* 346-47 (1992).

120. Selznick, id., 231; Steinmann, supra n. 91, at 401, 402, 418; Gareth Morgan, *Images of Organization* 142 (1986).

121. See, for example, Davies, "Employee Representation on Company Boards and Participation in Corporate Planning," 38 *Mod. L. Rev.* 254 (1975); Vagts, "Reforming the 'Modern' Corporation: Perspectives from the German," 80 *Harv. L. Rev.* 23 (1966). See generally Hill, "At the Frontiers of Labour Law and Corporate Law: Enterprise Bargaining, Corporations and Employees," 23 *Fed. L. Rev.* 204, 218-221 (1995).

122. See Morgan, supra n. 120, at 145-146; Mason, supra n. 30, at 1, 6; Davies & Wedderburn, "The Land of Industrial Democracy," 6 *Ind. L.J.* 197, 200-01 (1977); Drucker, supra n. 21, at 52.

123. See Steinmann, supra n. 91, at 401, 411-14.

124. Morgan, supra n. 120, at 154.

125. Millon, "Communitarianism in Corporate Law: Foundations and Law Reform Strategies," in Mitchell (ed.), supra n. 96, at 1. See generally "New Directions in Corporate Law," Special Issue, 50 *Wash. and Lee L. Rev.* 1373ff (1993). See also Sullivan & Conlon, "Crisis and Transition in Corporate Governance Paradigms: The Role of the Chancery Court of Delaware," 31 *Law and Soc. Rev.* 713 (1997), arguing that recent case law reflects the emergence of a multifiduciary model of governance, "transforming shareholder primacy into constituency equivalency and private law into public law" (at 717).

126. Selznick, supra n. 119, at 237, 289ff.

127. Teubner, supra n. 112, at 67, 71-72, 74; Dallas, supra n. 43, at 19, 26.

128. Bratton, supra n. 10, at 1471, 1497-1498.

129. See, for example, Kubler, "Dual Loyalty of Labor Representatives," in Hopt & Teubner (eds.), supra n. 41, at 429, 441-42.

participation and representation of interests at the level where strategic decision-making takes place.[130]

According to some political commentators, a hallmark of advanced liberal governments is a tendency to govern, not directly, but by harnessing the "regulated and accountable choices of autonomous agents,"[131] thereby creating a form of private government. In emphasizing the self-regulatory nature of large corporations,[132] the political metaphor can redirect attention to matters such as internal justice systems,[133] "corporate cultures,"[134] and the way in which corporations, like governments, can interact with, and mold, the behavior of constituents[135] and society itself.[136]

Due to its historical connection with the now defunct concession theory of incorporation, a political model of the corporation is sometimes dismissed as equally passé.[137] Nonetheless, a political model is able to accommodate a number of important contemporary changes in the commercial world better than many other models. It is therefore worthy of renewed attention.

Many of the classic distinctions and categories in the corporate context, which supported an image of the corporation as "private" and shareholder-centered, have become increasingly blurred. Thus, the boundaries between "public" and "private" enterprise are less clear-cut today,[138] particularly in view of the modern tendency of governments to transfer a greater range of "public services" to the private

130. Steinmann, supra n. 91, at 401, 423.

131. Rose, supra n. 4, at 283, 298; Ewick, "Corporate Cures: The Commodification of Social Control," 13 *Studies in Law, Politics, and Society* 137, 139 (1993).

132. Selznick, supra n. 119, at 231; Black, supra n. 4, at 24.

133. See Brent Fisse & John Braithwaite, *Corporations, Crime and Accountability* 81 (1993).

134. See Hill & Harmer, "Criminal Liability of Corporations — Australia," in H. de Doelder & Klaus Tiedemann (eds.), *La Criminalisation du Comportement Collectif: Criminal Liability of Corporations* 71, 86-89 (1996).

135. For interesting contemporary scholarship on the interlocking relationship between government and governed, see Burchell, "Liberal Government and Techniques of the Self," 22 *Economy and Society* 267 (1993); Rose, supra n. 4, at 283; Cruikshank, "Revolutions Within: Self-government and Self-esteem," 22 *Economy and Society* 327 (1993); Ewick, supra n. 131, at 137.

136. See Drucker, supra n. 21, at 52, who states that "[t]he institution. . .does not simply exist within, and react to, society. It exists to produce results on and in society" (at 63).

137. The model is also at odds with the economic "nexus of contracts" model of the corporation favored under the Australian Government's current corporate reform program. See Corporate Law Economic Reform Program, *Directors' Duties and Corporate Governance: Facilitating Innovation and Protecting Investors, Proposals for Reform*, Paper No 3 (1997), 60-61. Note, however, that the Australian Prime Minister has recently articulated a potentially inconsistent model, that of the "good corporate citizen": Howard, *The 1999 Corporate Public Affairs Oration,* Centre for Corporate Public Affairs, March 26, 1999, 3-4.

138. Mason, supra n. 30, at 1, 16-19; Frug, supra n. 95, at 1057, 1128ff.

sector, in effect, privatizing social welfare.[139] The distinctiveness of share capital itself has diminished, blurring the line between debt and equity.[140] Also blurred is the traditional boundary between shareholders and employees, given that behind the shareholding facade of pension funds lies a vast proportion of a country's working population.[141]

(e) The Shareholder as Investor (or "The Shareholder as Bystander and That's the Way it Ought to Be")

The contractual theory of the firm,[142] which views the corporation as a nexus of contracts, provides a sharp contrast to political models of the corporation. Whereas political models with broad citizenship focus on the resolution of conflicts of interest within the firm, the very concept "within the firm"[143] is meaningless to contractual theorists, who deconstruct the firm into a series of private exchanges between resource holders.[144] Collective aspects of the organization itself dissolve under this relentlessly individualistic approach.[145]

Many commentators have lamented the gradual attenuation of shareholder participatory rights, viewing it as a sad evolutionary fact which should either be reversed or compensated for by external controls.[146] Law and economics theorists, however, focusing on the capital raising function of public corporations and the shareholder's role as investor,[147] have seen a restricted participatory role as unproblematical. According to Professor Manne, for example, "if the principal economic function of the corporate form [is] to amass the funds of investors, *qua* investors, we should not anticipate their demanding or wanting a direct role in the management of the com-

139. Mason, id., 16-17; Ewick, supra n. 131, at 137, 139. It is this development which forms the backdrop to the Australian Prime Minister's recent support for a "new social coalition," in which corporations would play a greater role in the community; Howard, supra n. 137, 3-4.

140. See Dallas, supra n. 100, at 35-36; Mason, supra n. 30, at 1, 3, stating that "[t]he equity owner is joining the bond holder as a functionless *rentier.*"

141. See Buxbaum, "Institutional Owners and Corporate Managers: A Comparative Perspective," 57 *Brooklyn L. Rev.* 1, 28-29 (1991).

142. For a lucid exposition of the contractual theory of the corporation, agency theory and the efficient capital market hypothesis, see Butler, "The Contractual Theory of the Corporation," 11 *Geo. Mason U.L. Rev.* 99 (1989). See also Frank H. Easterbrook & Daniel R. Fischel, *The Economic Structure of Corporate Law* (1991), ch 1.

143. Steinmann, supra n. 91, at 401, 407; Bottomley, supra n. 98, at 277.

144. Jensen & Meckling, "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure," 3 *J. Fin. Econ.* 305 (1976).

145. For criticism of this side of the contractual theory of the corporation, see Teubner, supra n. 112, at 67, 70ff.

146. See generally Werner, supra n. 31, at 1611; Romano, supra n. 1, at 923.

147. See Buxbaum, "Corporate Legitimacy, Economic Theory, and Legal Doctrine," 45 *Ohio St. L.J.* 515, 526 (1984), describing the transformation of the shareholder from "king of the corporation to king of the market."

pany."[148] In other words, the fact that shareholder participatory rights are limited is not a cause for angst;[149] far from representing the evisceration of shareholder power, it is perfectly natural and consonant with the structure and nature of the corporation.

At first blush, the contractual theory of the corporation appears very different from a "shareholder as owner" model. Under the contractual theory, shareholders are not "owners,"[150] they are merely one group of resource holders, on an equal footing with other groups such as managers, creditors, employees, customers.[151] Nonetheless, the apparent difference between the two models is ultimately superficial. While the contractual theory deprecates shareholder participatory rights in corporate governance, it resurrects shareholder interests to preeminence,[152] through the guiding principle of "profit maximization." With its minimal participatory rights, but primacy of shareholder interests, the contemporary contractual theory most closely resembles, paradoxically, a trustee/beneficiary model.[153] But, while the trustee model assumed that direct shareholder intervention was impossible, contractual theorists generally view intervention as inappropriate and unnecessary, since the constraints of the market will force managers to act "*as if* they have the shareholders' interests at heart."[154] Indeed, Easterbrook and Fischel deride proposals for greater participatory rights for shareholders, viewing shareholder apathy as the response of rational investors in business entities.[155]

The image of shareholders under a contractual theory as "investors" who invest "in the investment, not in the corporation,"[156] treats share ownership as a fungible within the marketplace for stock. Under this analysis, the hub of shareholder protection should be located outside the corporation, in ensuring a fair and open market, offering shareholders ease of entry and, crucially, exit. The "Wall Street Walk" is

148. Manne, "Our Two Corporation Systems: Law and Economics," 53 *Va. L. Rev.* 259, 260-61 (1967). For a recent parallel argument that institutional investor passivity is a natural result of economic evolution, see Smith, supra n. 113, at 1.

149. See, for example, Winter, "State Law, Shareholder Protection, and the Theory of the Corporation," 6 *J. Legal Stud.* 251 (1977). See also Mark, supra n. 96, at 67, 71, who states that, according to contractarians, "[t]he putative abuse of shareholders. . .is largely mythical."

150. Butler, supra n. 142, at 99, 107.

151. Easterbrook & Fischel, "Voting in Corporate Law," 26 *J. Law and Economics* 395, 396 (1983).

152. See, for example, Macey, "An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties," 21 *Stetson L. Rev.* 23 (1991). See generally Bratton, "The 'Nexus of Contracts' Corporation: A Critical Appraisal," 74 *Cornell L. Rev.* 407, 427ff. (1989); Dallas, supra n. 43, at 19; Millon, supra n. 10, at 201, 229-31.

153. See Frug, supra n. 48, at 1277, 1311.

154. Butler, supra n. 142, at 99, 122.

155. Easterbrook & Fischel, supra n. 151, at 395, 396. See also Winter, supra n. 149, at 251, 263.

156. Buxbaum, supra n. 147, at 515, 526.

seen as a more efficient way to deal with unsatisfactory management than intervention in corporate affairs.[157] Relying on this approach, it has been argued that shareholders exchanged corporate control for marketability of their shares.[158] In this way, management's control is legitimated as stemming from a voluntary, consensual arrangement with shareholders. By rendering the corporation itself essentially "private" through the device of contract, little scope is given for government intervention to protect shareholders.[159] Rather, protection should occur through regulation of the securities market, specifically by mandatory disclosure rules.[160] Takeovers are relied upon to ensure the accountability of management.[161]

This model of shareholders has given important insights into the effect of a stockmarket on the expectations of shareholders. It is reflected in a number of restrictive judicial decisions, where in determining whether a shareholder has a "proper purpose" or has been harmed "qua shareholder" under a statutory provision, the courts have limited this to interference with the shareholder's economic interests.[162]

(f) The Shareholder as Cerberus

A number of developments in Australian corporate law appear to cast the shareholder in a new role. This image of the shareholder is one of guardian or monitor of managerial decision-making. This role manifests itself both at a procedural and substantive level. Broad procedural monitoring is reflected, for example, in the Investment and Financial Services Association (IFSA)[163] guide for recommended

157. In other words, in clear contrast to a political model of the corporation, "exit" is seen as more important than "voice" for shareholders under a contractual model. Steinmann, supra n. 91, at 401, 408.

158. See Werner, "Management, Stock Market and Corporate Reform: Berle and Means Reconsidered," 77 *Colum. L. Rev.* 388, 397 (1977); Hetherington, supra n. 31, at 183, 200-02.

159. Bratton, supra n. 10, at 1471, 1480. For criticism of the power of the contractual model to privatize and legitimate the corporation, see Buxbaum, supra n. 147, at 515, 520; Millon, supra n. 10, at 201; Teubner, "Enterprise Corporatism: New Industrial Policy and the 'Essence' of the Legal Person," 36 *Am. J. Comp. L.* 130, 131 (1988).

160. See generally Blair & Ramsay, "Mandatory Corporate Disclosure Rules and Securities Regulation," in Gordon Walker, Brent Fisse & Ian Ramsay (eds.), *Securities Regulation in Australia and New Zealand* 55 (2nd ed. 1998).

161. See Rock, supra n. 22, at 367, 374; Werner, supra n. 158, at 388, 403-04. However, the efficacy of takeovers as a reliable constraint on managerial powers has been questioned from both a theoretical and practical perspective. See Pinto, supra n. 16, at 317, 338 n. 109; Prentice, "Some Aspects of the Corporate Governance Debate," in D.D. Prentice & P.R.J. Holland (eds.), *Contemporary Issues in Corporate Governance* 25, 36-38 (1993).

162. A classic example is *State ex rel Pillsbury v. Honeywell Inc.* (1971) 291 Minn 322, 191 NW 2d 406.

163. This organization was previously named the Australian Investment Managers' Association (AIMA).

corporate practice.[164] The principles of good corporate governance contained in this guide are remarkably detailed, and affect matters such as the composition of boards, appointment of non-executive directors, and key board committees and performance evaluation.[165] Recent successful lobbying by IFSA's predecessor for greater disclosure of director and executive remuneration also falls within this category of procedural monitoring.[166]

Under Australian corporate law, monitoring also applies to specific management decisions. By ensuring that certain questionable managerial actions are referred to the shareholders in general meeting, various provisions of the *Corporations Law* and the Australian Stock Exchange (ASX) Listing Rules use shareholder consent as a regulatory device and transform shareholders into monitors. This function for shareholders is consistent with a political model of the corporation. Under the related party transaction provisions of the *Corporations Law*,[167] for example, shareholder monitoring promotes corporate self-regulation and seeks to ensure that shareholders have participation rights in transactions where there are dangers of conflict of interest, or self-dealing, by the company's controllers. Effective shareholder monitoring of such transactions can arguably benefit all groups within the corporate enterprise.

This role for shareholders can also be viewed as akin to that of Cerberus, guardian of the underworld. In assessing the suitability and effectiveness of shareholders in this role, it is well to remember that Cerberus occupies an ambiguous role in Greek mythology. Cerberus is generally regarded as fearsome. However, since the dog's main function was to bark at the dead (who, as shades, could not be frightened or harmed anyway), its role might appear largely ceremonial. Furthermore, stories abound of Cerberus failing in its guardianship duties vis-a-vis the living. In the Æneid, for example, the Sybil en-

164. IFSA, *Corporate Governance: A Guide for Investment Managers and Corporations* (IFSA Guidance Note No. 2.00, July 1999).

165. Cf. the much-vaunted, but far from onerous, Australian Stock Exchange (ASX) Listing Rule 4.10.3, which came into effect on 1 July 1996 and avoids any prescriptive rules on content, merely requiring that an entity disclose in its annual reports its main corporate governance practices, if any. There has been controversy over the effectiveness of the operation of ASX Listing Rule 4.10.3. See generally Ramsay, "Models of Corporate Regulation: The Mandatory/Enabling Debate," in Ross B. Grantham & C.E.F. Rickett (eds.), *Corporate Personality in the 20th Century* 215, 247-49 (1998).

166. See Hill, "Remuneration Disclosure in Australia," AIMA Research Paper, No.1/1996. The more stringent disclosure requirements sought by institutional investors were ultimately included in the *Company Law Review Act* 1998 (Cth). See van Leewen, "Corporate Crackdown: Executives forced to reveal their salaries," *Australian Financial Review*, June 26, 1998, 1.

167. Chapter 2E *Corporations Law*. On self-regulatory strategies in corporate governance generally, see Bratton & McCahery, "Regulatory Competition, Regulatory Capture, and Self-Regulation," 73 *N.C. L. Rev.* 1861 (1995).

sures that Æneas can pass into Hades by the simple device of tossing a cake soaked in honey and a sleeping drug to the dog;[168] Orpheus, searching for Eurydice, lulls the dog to sleep with his lyre.[169] We are not told whether Cerberus' multiple heads created additional collective action problems.

The metaphor of Cerberus is a revealing one in the corporate context. Traditional assumptions about shareholder passivity in public companies make the question of their fitness for a guardianship and regulatory role under Australian corporate law a relevant and important issue.[170]

(g) The Institutional Shareholder as Managerial Partner (or "The Collectivization of Shareholder/Management Interests")

Another possible vision of shareholders in the age of large institutional investors is an image of shareholders as full-scale partners with management in the control of corporations and in corporate decision-making. In the post-takeover period, a number of scholars supported this model, which overlaps with a shareholder-centered political view of the corporation, on the basis that it constitutes a desirable reassertion of owner control and managerial accountability to shareholders, which was lacking for much of the 20th century.[171] Under this model, the wheel has come full circle — shareholder interests are entrenched and made dominant by strong participatory rights in the management of corporations. Shareholders and board members are reconnected under a scheme of shared power.[172] The potential resurrection of the role and interests of shareholders is clearly viewed as a "return to Eden" by some scholars.

The image of shareholders as partners in management has both a descriptive and normative limb. The descriptive limb points to the increasing influence of institutional shareholders, which has challenged traditional assumptions about shareholder passivity and lack of influence.

A number of diverse developments in the Australian commercial world suggest greater coordination between institutional shareholders, and closer ties between the institutions and corporate management. First, the growth of institutional investors, fanned by the

168. Donna Rosenberg, *World Mythology: An Anthology of the Great Myths and Epics* (1986). Heracles, by covering himself in a protective lion skin, also succeeded in carrying the monster off from its post in the Underworld. Id., 32.

169. Michael Grant, *Myths of the Greeks and Romans* 267 (1962).

170. See further below under "Shareholder Consent as a Regulatory Device - The Shareholder as Cerberus."

171. See, for example, Pound, supra n. 91, at 1003; Pound, supra n. 77, at 89.

172. Pound, supra n. 77, at 90. For skeptical views about the likelihood of this form of governance occurring, see Fisch, "Relationship Investing: Will It Happen? Will It Work?," 55 *Ohio St. L.J.* 1009 (1994); Smith, supra n. 113, at 1.

introduction of the Superannuation Guarantee Charge, altered the traditional pattern of widely dispersed shareholdings.[173] The formation in 1990 of the predecessor to IFSA, a body representing almost all major institutional investors in Australia, decreased the difficulties of collective action and effectively created a coalition of shareholder interests. In Australia, particularly, market capitalization and equity turnover is highly concentrated in the top fifty listed companies,[174] making reliance on the Wall Street Walk, the standard form of relief under an investor model of the shareholder, more difficult for institutions with large shareholdings. In a number of matters, shareholders have acted collectively, and the Australian Securities and Investments Commission (ASIC) has issued a class order[175] to ensure that collective action by institutional investors in corporate governance matters is not constrained by the restrictions on acting in concert under the Takeover Rules. In the corporate sector, the growing power of institutions is reflected in the creation of the position of shareholder liaison officer within many companies. A final commercial development, which, more than any other, may guarantee the preeminence of shareholder interests, is the rise of pay-for-performance remuneration, which can tie managerial reward to profit-maximization for the benefit of shareholders. These developments suggest a novel "collectivization" of shareholder and management interests.

The normative argument claims that a model of shared power between shareholders and management is desirable because it provides greater legitimacy for the exercise of managerial power and ensures that management will maximize corporate performance for the benefit of shareholders.

Nonetheless, there are a number of dangers inherent in a model of the shareholder as managerial partner, and in the "collectivization" of institutional shareholder and management interests. It is both interesting, and disconcerting, that this shift to the collectivization of shareholder and management interests has occurred precisely at a time when there has been an unprecedented "decollectivization" of labor interests in Australia through new systems of enterprise bargaining, decline in union membership and increased labor market

173. See generally Parliamentary Joint Committee on Corporations and Securities, *Inquiry into the Role and Activities of Institutional Investors in Australia,* Issues Paper, November 1994, ch 2. See also Hill & Ramsay, supra n. 24, at 289, 298; Ramsay, Stapledon & Fong, "Corporate Governance: The Perspective of Australian Institutional Shareholders," 18 *Company and Securities L.J.* 110, 111 (2000).

174. Hill & Ramsay, id., 294.

175. See ASIC, Policy Statement 128, *Collective Action by Institutional Investors,* January 14, 1998.

flexibility.[176] Many labor lawyers are concerned about the effects of decollectivization on worker interests. There is as yet, however, little recognition by labor lawyers of the extent to which changes within the corporate realm, which have strengthened the interests of shareholders, have increased employee vulnerability.

In Australia, the controversial decision to close BHP's steel operations in Newcastle arguably reflected the development of closer ties between shareholders and management, since it was suggested in the financial press that institutional pressure had been a powerful influence on management's decision.[177] Concern for shareholder interests by BHP management was certainly far less pronounced in the preceding decade.[178]

Professor Gordon has noted that that while corporate profits increased by 250% from 1980-1995 in the U.S., wages of average workers actually declined in real terms during that period, producing "circumstances in which shareholders are gaining and workers are not."[179] There is growing concern that these developments have contributed to greater inequality in the distribution of wealth, which can be disruptive of social unity and inspire backlash at a political level.[180] A message from contemporary developments is that it may be dangerous to have governance structures where shareholder and management interests are collectivized and labor interests are not.

Another danger of a model elevating institutional investors to managerial partners is that the interests of powerful institutional inves-

176. See Gordon, "Employees, Pensions, and the New Economic Order," 97 *Colum. L. Rev.* 1519, 1530-32 (1997); Katz, "The Decentralization of Collective Bargaining: A Literature Review and Comparative Analysis," 47 *Industrial and Labor Relations Review* 3 (1993); McCallum, "Crafting a New Collective Labour Law for Australia," 39 *J. Ind. Rel.* 405 (1997).

177. Contrast the reporting of the proposed closure in the *Sydney Morning Herald* and *Australian Financial Review*. "BHP's real target: 8,000 jobs," *Sydney Morning Herald*, April 30, 1997, 1; "BHP's rescue operation: Investors welcome radical surgery for ailing division," *Australian Financial Review*, April 30, 1997, 1. BHP ultimately spent $700 million in dealing with worker and community aspects of the steelworks closure, and the company's CEO announced that in future there would be greater emphasis on shareholder interests in any corporate restructuring. See Oldfield and Kitney, "Anderson declares limits on corporate social responsibility: BHP signals its brave new world," *Australian Financial Review*, May 5, 1999, 1.

178. In this respect, see National Companies and Securities Commission, *Report on the Cross Investments between The Broken Hill Proprietary Company Ltd. and Elders IXL Ltd.* (1986).

179. Gordon, supra n. 176, at 1519, 1534. Gordon also notes that, while it is popularly believed that employees have benefited from increases in the stock market via their pension funds, this is illusory in the case of the traditionally dominant type of scheme, the defined benefit scheme, where often it is the firm, as plan sponsor and residual claimant, that benefits, rather than the employees. Id., 1520-21, 1538ff.

180. See Gordon, id., 1520; Orts, supra n. 20, at 1947, 1965-66; Roe, "Backlash," 98 *Colum. L. Rev.* 217 (1998). See also, Calabresi, "The Pointlessness of Pareto: Carrying Coase Further," 100 *Yale L.J.* 1211, 1228 (1991) on the inevitability of distributional analysis.

tors may, or may not, be congruent with the interests of other shareholders.[181] Indeed, one of the basic tenets of corporate law is that shareholders may vote in their own best interests, a proposition which assumes that shareholders' interests may diverge.[182] There also exists the danger of entrenchment of corporate managers through alliances with institutional investors.[183] A final problematical aspect is the fact that the managers of institutional investors are themselves generally subject to weaker market and governance constraints than corporate managers.[184]

3. Some Visions of the Shareholder in Recent Australian Corporate Law Developments

(a) Gambotto *and the Vision of the Shareholder as Owner (or "Plus ça change, plus c'est la même chose")*

In the early 1960s, a leading corporate law commentator stated that the days of viewing shareholders in public companies as owners with proprietary rights were "gone forever";[185] no longer could anyone take this image of the shareholder seriously. The High Court of Australia, however, in *Gambotto v WCP Ltd*,[186] showed that it takes the image of shareholders as owners seriously indeed.

Few decisions in Australian corporate law have provoked more commentary and controversy than *Gambotto*. The outcome of the decision was that an amendment to the company's articles of association, enabling a person holding 90% or more of the company's shares to acquire compulsorily the remaining shares, was held to be invalid. The traditional test of validity for a resolution altering a company's articles had been to ask whether the resolution was passed "bona fide for the benefit of the company as a whole."[187] The majority judges in *Gambotto* however imposed a more stringent test for alterations to the corporation's articles involving expropriation of shares or "valua-

181. For dangers in this regard, see, for example, Rock, "Controlling the Dark Side of Relational Investing," 15 *Cardozo L. Rev.* 987 (1994); Fisch, supra n. 172, at 1009, 1036, 1038ff; DeMott, "Agency Principles and Large Block Shareholders," 19 *Cardozo L. Rev.* 321 (1997); Romano, "Pension Fund Activism in Corporate Governance Reconsidered," 93 *Colum. L. Rev.* 795 (1993).

182. See DeMott, id., 334-36, contrasting the constraints which would apply to large block shareholders if they were characterized as agents for other shareholders, with the current legal position where no such fiduciary relationship is presumed to exist.

183. See Conard, "Beyond Managerialism: Investor Capitalism?," 22 *JL Ref.* 117, 119 (1988).

184. Rock, supra n. 22, at 367, 377.

185. Mason, supra n. 30, at 5-6. For a contemporary version of this position, see Blair, "A Contractarian Defense of Corporate Philanthropy," 28 *Stetson L. Rev.* 27, 29-30 (1998).

186. (1995) 69 *ALJR* 266.

187. *Allen v. Gold Reefs of West Africa Ltd.* [1900] 1 Ch. 656 at 671.

ble proprietary rights attaching to shares."[188] According to the majority, an alteration to permit expropriation would be justified only if for a proper purpose, in that significant detriment or harm to the company would result from the minority's continuing shareownership.[189] The goal of the majority shareholders in *Gambotto*, namely to reduce the company's taxation liability by approximately $4 million did not satisfy this test of validity.[190]

The decision in *Gambotto* surprised many commentators, given a number of key factual features of the case. The first of these was the small shareholding of the dissenting minority. Industrial Equity (through wholly-owned subsidiaries) owned 99.7% of issued shares in WCP Ltd. Of the 50,590 shares in minority hands, the dissenting shareholders owned only 15,898. Secondly, the approach of the majority judgment in the High Court enabled a small minority in the case to withstand a buy-out of their shares at a price considerably above a valuation report, which itself was conceded by minority shareholders to be both independent and fair.

Thirdly, the decision undercut traditional principles of majority rule and free alterability of the articles,[191] effectively giving minority shareholders a veto right for corporate reconstructions, unless the majority shareholders could show that the expropriation was necessary to avoid serious detriment to the company. The court's approach effectively reverts to the old 19th century concept of vested rights, the inflexibility of which majoritarianism was designed to overcome. Finally, the case involved shareholding in a public company, not a closely-held company. The courts are rightly wary of "freeze-outs" in the context of closely-held corporations, where members may be particularly vulnerable to oppression since the corporate business will often constitute their livelihood and valuation of shares may be more

188. The majority judges considered that a different test would apply where no expropriation of shares or proprietary rights attached to shares was involved. In those circumstances, they stated that an alteration to the articles would be valid, unless ultra vires, beyond any purpose contemplated by the articles, or oppressive: see 69 *ALJR* 266, 271 (1995).

189. Additionally to the proper purpose requirement, the expropriation must not operate oppressively on minority shareholders. Id.

190. According to the High Court, the majority cannot expropriate the minority "merely in order to secure for themselves the benefit of a corporate structure that can derive some new commercial advantage by virtue of the expropriation" (id.). Only McHugh J, while agreeing that the majority shareholders bore the onus of establishing that the amendment was not oppressive, considered that the restructuring of the company for the purpose of achieving tax savings was a proper commercial objective. Nonetheless, McHugh J thought that the majority had failed to discharge the onus of showing that the transaction was not oppressive, in terms of fairness of price and disclosure (id., 279).

191. For strong criticism of this aspect of the case, see Whincop, "*Gambotto v. WCP Ltd.*: An Economic Analysis of Alterations to Articles and Expropriation Articles," 23 *Aust. Bus. L. Rev.* 276 (1995).

difficult where no market exists.[192] Shares in public corporations are treated to a much greater extent as fungibles, in accordance with an image of shareholders as investors.[193] The judgments in *Gambotto* fail however to distinguish between oppressive conduct in these two contexts.

The decision in *Gambotto* is underpinned by an image of shareholders as owners of the corporation, with full-blown proprietary interests. According to the joint judgment of Mason CJ, Brennan, Deane and Dawson JJ, the freedom to alter the articles of association is to be interpreted against the backdrop of these proprietary rights, and is constrained by them.[194]

The High Court decision in *Gambotto* has received much attention precisely because its outer limits are so unclear, as are the full implications of a proprietary model of shareholder rights. It has been asked, for example, whether deference to the proprietary nature of share ownership would prohibit the introduction of an anti-greenmail article, designed to ensure that individual shareholders cannot force a buy-out of their shares at a price or on terms not available to other shareholders. Would such an article interfere with members' proprietary rights?[195]

Gambotto is also radically out of step with the U.S. approach in this area,[196] where the basic presumption is that minority shareholdings are prima facie defeasible, subject to a requirement of entire fairness and the ability of the court to examine the buy-out price through the appraisal remedy.[197] The High Court's adherence to property rules, under which the holder of entitlements is given veto rights, is in marked contrast to the greater reliance on liability rules in the U.S.,

192. See Hill, supra n. 32, at 86.

193. See Fridman, "*Gambotto v. WCP Ltd.*: An Analysis of the High Court Decision," 6 *Butterworths Corp. L. Bulletin* 4, 6-7 (1995).

194. Mason CJ, Brennan, Deane and Dawson JJ rejected the respondents' argument, that an alteration to the articles allowing expropriation will be *prima facie* valid unless the minority shareholder discharges the onus of proving either improper purpose or oppression, on the basis that such approach "tilts the balance too far in favour of commercial expediency and fails to attach sufficient weight to the proprietary nature of a share": see (1995) 69 *ALJR* 266, 272.

195. See DeMott, "Proprietary Norms in Corporate Law: An Essay on Reading *Gambotto* in the United States," in Ramsay (ed.), *Gambotto v. WCP Ltd.*: *Its Implications for Corporate Regulation* (Centre for Corporate Law and Securities Regulation, 1996) 90, 96.

196. Note, however, that the Australian legislature has now intervened. Chapter 6A of the *Corporate Law Economic Reform Program Act* 1999, which commenced operation on March 13, 2000, introduces a more flexible compulsory acquisition regime, designed to reverse the effect of the *Gambotto* decision.

197. See DeMott, supra n. 195, at 90, 97; Mitchell, "The U.S. Approach Towards the Acquisition of Minority Shares: Have We Anything to Learn?," 14 *Company and Securities L.J.* 283 (1996). On the function of the appraisal right in this context, see generally, Thompson, "Exit, Liquidity, and Majority Rule: Appraisal's Role in Corporate Law," 84 *Geo. L.J.* 1 (1995).

which allows enforced trade for an objectively determined price.[198] This divergence is a clear reflection of the different images of the shareholder underpinning each approach.[199]

Implicit in the High Court's characterization of shareholder rights as proprietary in *Gambotto* is the view that shareholders' rights are predominant within the corporate structure and coextensive with the interests of company itself. The majority judges took the view that advancing the interests of the company as a commercial entity was not a valid justification for the expropriation of minority shares. McHugh J, in contrast, thought that the realization of tax savings was a "legitimate business objective," capable of sustaining expropriation, thereby recognizing the interests of the corporation as an on-going commercial enterprise.

There is a tension between the approach of the majority in *Gambotto* and that adopted in a number of other developing areas of corporate law, such as takeovers. Although, Australian case law has traditionally taken the view that directors faced with a takeover must act for the benefit of the shareholders as a whole, rather than the corporation as a commercial entity,[200] several cases have supported a broader conception of the corporation's interests than simply the interests of its shareholders. In the takeover context, this has been welcomed by some on the basis that the old shareholder-centered model of the corporation is "a relic of a less complex age" and is "out of step with the world of business dealings, economics, and even industrial law."[201]

(b) Shareholder Consent as a Regulatory Device - The Shareholder as Cerberus

As discussed earlier, a number of statutory provisions use shareholder consent as a regulatory device, to screen conduct which would otherwise be prohibited. It is in this context that shareholders are treated as monitors in legitimating certain corporate conduct.

Corporate regulation lies across a broad spectrum. Duty-based controls, such as fiduciary duties imposed to constrain managerial discretion, are dependent upon judicial monitoring to ensure compliance.[202] As in other fields of law, both "crystal" and "mud"

198. DeMott, id.; Calabresi & Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral," 85 *Harv. L. Rev.* 1089, 1092 (1972).

199. See generally Burgman & Cox, "Reappraising the Role of the Shareholder in the Modern Public Corporation: *Weinberger's* Procedural Approach to Fairness in Freezeouts," [1984] *Wis. L. Rev.* 593, 624ff.

200. See, for example, *Ngurli Ltd. v. McCann* (1953) 90 CLR 425.

201. Corcoran, "Managers and Majorities in Takeover Regulation," in Walker & Fisse (eds.), supra n. 160, at 759, 765-66.

202. Parkinson, supra n. 107, at 73.

rules (or rules and standards) are used as regulatory techniques.[203] Crystal rules are those with clear, sharp, determinate boundaries, directives which define *ex ante* whether conduct is or is not permissible, and allow for little discretion in the decision-maker.[204] No such clarity exists with mud rules, or standards. Their hazy penumbra requires the *ex post* exercise of judicial discretion based upon an array of specific factual and contextual matters, as well as social values.[205] Standards are often perceived to promote substantive equality and fairness, as opposed to the formal equality under crystal rules.[206] In many situations, the distinguishing features of rules and standards are blurred, with regulation comprising hybrids of the two.

Corporate law has long struggled with the difficulty of using crystal rules to define and quarantine transactions which are clearly detrimental to the corporation from those which are commercially justified. The familiar uncertainty under Anglo-Australian law as to scope of the "financial assistance" prohibition[207] is a good example of this difficulty.[208] The Jenkins Committee in England, for example, while recognizing that the open-ended language of the section gave rise to uncertainty and could possibly catch unobjectionable conduct, nonetheless recommended against a more crystalline formulation of the rule, stating that it would not be "wise to attempt any more precise formula for describing the sort of transaction which may be the means of giving financial assistance."[209] The reason for this is that the more determinate and certain is the rule, the more easily it may be evaded.[210] It is a feature of rules that they often suffer from over

203. See Rose, "Crystals and Mud in Property Law," 40 *Stan. L. Rev.* 577 (1988). See also Kennedy, "Form and Substance in Private Law Adjudication," 89 *Harv. L. Rev.* 1685, 1687-1713 (1976); Mark Kelman, *A Guide to Critical Legal Studies* (1987), ch 1. In the corporate law context, see DeMott, "Oppressed But Not Betrayed: A Comparative Assessment of Canadian Remedies for Minority Shareholders and Other Corporate Constituents," 56 *LCP* 181, 220-221 (1993); Williams, "The Fallacies of Contemporary Fraudulent Transfer Models as Applied to Intercorporate Guaranties: Fraudulent Transfer Law as a Fuzzy System," 15 *Cardozo L. Rev.* 1403, 1452ff (1994).

204. According to Sullivan, "[r]ules embody a distrust for the decisionmaker they seek to constrain": Sullivan, "Foreword: The Justices of Rules and Standards," 106 *Harv. L. Rev.* 24, 64 (1992).

205. Kennedy, supra n. 203, at 1685, 1688.

206. Williams, supra n. 203, at 1403, 1454. For other relative merits and demerits of rules and standards, see Sullivan, supra n. 204, at 24, 62ff; Kelman, supra n. 203, at 40-45.

207. The "financial assistance" section traditionally took the form of a prohibition against a company giving financial assistance for the purpose of, or in connection with, the acquisition by any person of shares in the company or its holding company. The Australian section has recently been recast as a permission, subject to conditions, in s 260A *Corporations Law*, which was introduced in 1998. See, generally, Ford, Austin & Ramsay, *Ford's Principles of Corporations Law* (9th ed. 1999), para. [24.670].

208. See generally, Austin, "The 'Financial Assistance' Prohibition," in R.P. Austin & Richard Vann (eds.), *The Law of Public Company Finance* (1986), ch 8.

209. *Report of the Company Law Committee* (1962, Cmnd 1749), para [180].

210. See Sullivan, supra n. 204, at 24, 62-63; Horwitz, "The Rule of Law: An Unqualified Human Good?," 86 *Yale L.J.* 561, 566 (1977). On the other hand, the rules

or under-inclusion, while standards side-step this problem by conferring greater discretion on the decision-maker.[211]

The use of shareholder consent as a regulatory device under Australian corporate law cuts an uneasy path through the twin poles of regulation by crystal and mud rules. The trigger for the introduction of the "related party" transaction provisions in Australia, for example, was the perception that broad fiduciary duties *per se* had been dismally inadequate as a constraint on managerial powers in the 1980s. By prohibiting certain types of conduct which are prone to abuse, subject however to consent by the general meeting, the related party transaction provisions cure the problem of over-inclusion under crystal rules, through the mechanism of shareholder consent. From this perspective, the shareholders can be seen as adopting a legislative function by defining more narrowly the conduct which is offensive. Viewed from the perspective of mud rules or standards, the shareholders may be regarded as exercising the role of decision-maker. Thus, the critical use of discretion based upon contextual and factual considerations to assess the transaction, which would in the case of standards reside in the court, shifts to the shareholders in general meeting. On either analysis, the shareholders' role as a screening device for questionable transactions is a significant one.[212]

Although in recent times most attention in Australia has focused on shareholder consent under the related party transaction provisions, general meeting approval is used as a regulatory device in a number of other sections of the *Corporations Law* and the Australian Stock Exchange (ASX) Listing Rules. In relation to the financial assistance prohibition, the technique was recommended by the Jenkins Committee in its 1962 Report as a way to fine-tune the scope of the prohibition,[213] however it was not introduced into the Australian provision

on a company giving financial assistance in connection with the acquisition of its shares are nowhere near as muddy as they might be. These transactions could be dealt with under normal fiduciary duty principles. Instead, the legislature has targeted financial assistance specifically, on the basis that such transactions are particularly prone to abuse.

211. Sullivan, id., 58-59.

212. Interestingly, a similar approach is recommended by Black and Kraakman to regulate self-interested corporate transactions in emerging capitalist economies, where outside legal authority may be weak or ineffectual. See Black & Kraakman, "A Self-Enforcing Model of Corporate Law," 109 *Harv. L. Rev.* 1911, 1912-20, 1958-59 (1996). The authors favor procedural protections rather than an absolute prohibition on some categories of suspect transaction, on the basis that a procedural approach balances corporate flexibility and shareholder protection (id., 1916). See also Nikulin, "The New Self-Enforcing Model of Corporate Law: Myth or Reality," 6 *DCLJ Int'l L. & Prac.* 347 (1997).

213. *Report of the Company Law Committee*, (1962, Cmnd 1749), para. [178]. The Jenkins Committee also recommended the filing of a statutory declaration of solvency by the directors.

until almost 20 years later.[214] The technique was also introduced in 1989 in conjunction with reforms enabling companies to purchase their own shares under share buy-back schemes.[215]

Shareholder consent also has a powerful role as a monitoring device under the ASX Listing Rules. It applies in a number of specific circumstances, which could be subject to abuse: where the company issues more than 15% of its capital;[216] issues capital otherwise than *pro rata* to its directors or their associates;[217] acquires or disposes of substantial corporate assets to closely connected persons;[218] or sells its main undertaking.[219]

The related party transaction provisions therefore follow a tradition in Australia of utilizing shareholder consent in a guardianship role. The basic structure of the provisions is as follows. Chapter 2E *Corporations Law*[220] enacts a broad prohibition against a public company or its child entity conferring a financial benefit on a related party of the public company.[221] The general prohibition is subject to a number of exceptions.[222] Additionally, infringing transactions which are not salvaged by any of the specific exceptions may be legitimized via approval by ordinary resolution of the general meeting.[223] As with an increasing number of shareholder consent provisions, judicial decisions and reform proposals, the approval must be given by disinterested members.[224]

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214. The shareholder consent provision was originally introduced in Australia as s 129(10) *Companies Code*, later appeared as s 205(10) *Corporations Law* and is now contained in s 260B *Corporations Law*. Section 260B forms part of a revised set of provisions dealing with financial assistance in Part 2J.3 *Corporations Law*, which was introduced by the *Company Law Review Act* 1998. The new provisions potentially narrow the range of circumstances in which shareholder consent is required: see *Company Law Review Bill* 1998, *Explanatory Memorandum*, para [12.76]-[12.77]. See generally Austin, supra n. 208, at ch. 8; Ford, Austin & Ramsay, supra n. 207, at para. [24.670]ff.

215. Part IV Division 3A *Companies Code*. The relevant provisions on share buybacks are now found in Part 2J.1, Division 2, *Corporations Law*.

216. See ASX Listing Rule 7.1.

217. See ASX Listing Rule 10.11.

218. See ASX Listing Rule 10.1.

219. See ASX Listing Rule 11.2.

220. Pt 3.2A *Corporations Law* was the predecessor of Ch. 2E, which was introduced under the *Company Law Review Act* 1998. Further amendments to Ch. 2E were made under the *Corporate Law Economic Reform Program Act* 1999. See generally Ford, Austin & Ramsay, supra n. 207, at para. [9.470]ff.

221. Section 208 *Corporations Law*.

222. See Hanrahan, "Transactions with Related Parties by Public Companies and their 'Child Entities' Under Part 3.2A of the Corporations Law," 12 *Company and Securities L.J.* 138, 150ff (1994).

223. See ss 217-227 *Corporations Law*.

224. See s 224 and 225 *Corporations Law*. See generally Boros, "The Implications of Gambotto for Minority Shareholders," in Ian Ramsay (ed.), *Gambotto v. WCP Ltd.: Its Implications for Corporate Regulation* 82 (1996).

The reliance on disinterested shareholders brings into focus a key difference between viewing shareholders as monitors and the image of shareholders as owners. If monitoring by shareholders is seen as an alternative form of corporate regulation, a requirement that the decision-maker be disinterested is of fundamental importance. If however a private model of the corporation is adopted, with the shareholders regarded as owners, this requirement becomes less relevant. The latter model accounts for a number of strongly majoritarian 19th century decisions, such as *North-West Transportation Co. Ltd. v. Beatty,*[225] holding that since a share was personal property of the member, the right to vote could be exercised as a member pleased, even in the member's own interests.[226]

While the majority judges in *Gambotto* used the rhetoric of property entitlement for shareholders, they appeared to balk at the full implications of that model, leaving open the question of whether interested shareholders could vote on a proposed amendment of articles to allow expropriation, if the expropriation were otherwise for a proper purpose.[227] On the High Court's own reasoning it would appear that, provided a proper purpose for the alteration to the articles were established, majority shareholders could themselves, as holders of property rights, vote in their own self-interest.[228] Yet this conclusion would be out of step with both modern requirements of disinterested voting and with the High Court's own pro-minority shareholder stance in *Gambotto.*

The shift towards disinterested shareholder voting reflects another major development identifiable in contemporary corporate law — namely, the "proceduralization" of corporate law. The courts have become increasingly reluctant to interfere with the substance and outcomes of corporate decision-making, but have shifted their focus to issues of fairness in the decision-making process itself.[229]

The extent to which shareholder consent provides a serious constraint on managerial decisions under the related party transaction provisions is unclear. The contours of a number of the exceptions to shareholder consent, such as the "reasonable remuneration" exception,[230] are vague and malleable, and it has been argued that the

225. (1887) 12 *App Cas* 589, where a defendant director was able to use his majority shareholding in general meeting to approve certain actions which he had taken as director.

226. On the tension between this principle and the doctrine of fraud on the minority, see generally, Rixon, "Competing Interests and Conflicting Principles: An Examination of the Power of Alteration of Articles of Association," 49 *Mod. L. Rev.* 446 (1986). See also MacIntosh, supra n. 28, at 561, 599ff.

227. *Gambotto v. WCP Ltd.* (1995) 69 *ALJR* 266, 272.

228. See Boros, supra n. 224, at 82.

229. See Kubler, supra n. 129, at 429, 441-42.

230. Section 211 *Corporations Law.*

"arm's length terms" exception[231] offends the spirit of the Companies and Securities Advisory Committee's original proposal, in that it should be the *potential* for conflict in such situations which is objectionable, whether or not the transaction is made on commercial terms.[232] It certainly appears odd that the shareholders' role, rather than being to discriminate between commercial and uncommercial transactions within the gamut of transactions which are vulnerable to abuse, should be restricted to approving those which are on their face uncommercial. Nonetheless, it may be that the prophylactic effects of the provisions are invisible, since we cannot know the extent to which the mere threat of a general meeting vote may deter management from proceeding with a questionable transaction, or, at least, to restructure the transaction so that it is more palatable to shareholders, before seeking approval.[233]

Irrespective of the scope of transactions subject to shareholder approval under Chapter 2E of the *Corporations Law*, the question remains whether the shareholders in general meeting are in this, and in the other instances where their consent is used as a legitimating device, able to fulfil that function, or whether, like Cerberus, they will be imperfect guardians at best.

Institutional Investors as Players in the Corporate Governance Game—The Goodman Fielder Fracas and the Coles Myer Melée

Under the most pervasive 20th century visions of the shareholder, a monitoring role for shareholders would be paradoxical, if not absurd. Features of the corporate landscape regarded as inevitably fostering passivity were widely dispersed shareholdings, (resulting in collective action difficulties),[234] free-rider problems,[235] centralized and strategically superior managerial power, the availability of the Wall Street Walk, and the superior efficiency of the market for corporate control as a disciplinary mechanism.[236] On Easterbrook and Fischel's model of the rationally apathetic shareholder, the logical con-

231. Section 210 *Corporations Law*.

232. See Hanrahan, supra n. 222, at 138, 142-3, 152ff; Hadden, "The Regulation of Corporate Groups in Australia," 15 *UNSW L.J.* 61, 75 (1992).

233. See Black & Kraakman, supra n. 212, at 1911, 1917.

234. According to collective action theory, individual shareholders only initiate or oppose management where the ultimate benefits outweigh the costs of action. Since the ultimate benefits will be shared *pro rata* with other shareholders (enabling these to free-ride), the precondition of benefits outweighing costs is rarely satisfied. See generally, Rock, "The Logic and (Uncertain) Significance of Institutional Shareholder Activism," 79 *Geo. L.J.* 445, 453-63 (1991).

235. See Black, supra n. 3, at 520, 527-28.

236. Id., 522.

clusion is that "none of the voters has the appropriate incentive at the margin to study the firm's affairs and vote intelligently."[237]

In the past, institutional investors were regarded as, if anything, more apathetic than widely dispersed natural shareholders, and treated as "short-term profligates,"[238] a view echoed in some of the submissions to the Parliamentary Joint Committee on Corporations and Securities[239] inquiry into institutional investors in Australia. This disparaging image of institutional investors reemerged in the Coles Myer affair, discussed below, when the then Prime Minister of Australia publicly attacked fund managers for shortsightedness in investment strategies.[240]

Such an image of shareholders and their relationship with the corporation makes reliance upon them, as effective corporate monitors, problematic to say the least. There is a tension between the assumption under collective action theory, that a shareholder will only have the appropriate incentive to become adequately informed on proposals where the ultimate benefits outweigh the costs, and the fact that under, for example, the voting rules for shareholder approval of related party transactions, those who stand to benefit from the proposal are prevented from voting.[241] If the traditional assumptions about shareholder passivity were correct, a guardianship role for shareholders would be largely ceremonial and ineffective as a regulatory tool.

The dominant assumptions about the role and conduct of shareholders have, however, been seriously questioned in the last decade.[242] Institutional investors are taking greater interest in voting today, a matter which provides some hope that use of shareholder consent as a regulatory device may not be ineffectual. Voting of proxies was in the past low for institutional investors, and in Australia there was often confusion as to whether the fund manager or trustee was em-

237. Easterbrook & Fischel, supra n. 37, at 395, 402.

238. Buxbaum, supra n. 141, at 1, 28. See also Gilson & Kraakman, "Reinventing the Outside Director: An Agenda for Institutional Investors," 43 *Stan. L. Rev.* 863 (1991).

239. Parliamentary Joint Committee on Corporations and Securities, *Inquiry into the Role and Activities of Institutional Investors in Australia* (1994). See, for example, the submission of the Australian Shareholders' Association, which blamed the lack of shareholder control over corporate management on institutional investors, "[t]he culprits. . .who have functioned as passive, short-term and self-interested investors who have abrogated their fiduciary responsibilities as trustees" (at 10).

240. See Shires, "PM blasts 'donkey' funds managers: The Coles Myer Affair," *Australian Financial Review*, October 20, 1995, 14; Toohey, "Labor's big business family," *Australian Financial Review*, March 1, 1996, 25.

241. For other obstacles to institutional investors adopting an active role in governance, see generally, Stapledon, "Disincentives to Activism by Institutional Investors in Listed Australian Companies," 18 *Syd. L. Rev.* 152 (1996); Holland, "Self Regulation and the Financial Aspects of Corporate Governance," [1996] *JBL* 127.

242. See, for example, Roe, supra n. 3, at 10; Black, supra n. 3, at 520.

powered to exercise the relevant votes.[243] Certain U.S. institutional investors are now required to cast their proxy votes on domestic shares and many are following suit as a matter of course on their international equity holdings.[244] Guideline 2 of the IFSA *Guide for Investment Managers and Corporations*[245] recommends that members "should vote on all material issues at all Australian company meetings where they have the voting authority and responsibility to do so." Guideline 3 recommends that investment managers should have in place a clear written policy concerning the exercise of voting rights. These principles recognize that voting rights are a "valuable asset of the investor which should be managed with the same care and diligence as any other."[246] Another important development in the commercial arena in both Australia and the U.S. is the emergence of specialist proxy advisory services for institutional investors.

There has been a growing number of examples of institutional activism in Australia.[247] Two such examples, at Goodman Fielder Ltd. in 1994 and at Coles Myer Ltd. in 1995, can be seen as watershed case studies in redefining the role of shareholders in corporate governance in Australia.[248] The actions of the institutional investors in these companies exemplify the gap between commercial reality and traditional corporate theory. They also demonstrate some possible dangers of shareholders shifting from a role as monitor to one of full managerial partner.

The Goodman Fielder scenario, unlike some earlier instances of institutional investor activism, which had been triggered by extreme circumstances,[249] arose as a result of continuing underperformance by the company, the market value of which had dropped more than 15% to approximately $1.8 billion, as against a 35% rise in the All Ordinaries Index. Dissatisfied with the company's performance, Good-

243. See Griffin, "Institutional Investors in Australia: A Shareholder's Perspective," paper presented at the AIMG Conference on *Corporate Governance and Australian Competitiveness: The Role of Institutional Investors*, Sydney, 1993, 5.

244. Id. See generally, Stapledon, "Should Institutional Shareholders Be Required to Exercise their Voting Rights?," 17 *Company and Securities L.J.* 332 (1999).

245. IFSA, *Corporate Governance: A Guide for Investment Managers and Corporations* (IFSA Guidance Note No. 2.00, July 1999).

246. Id., at 16.

247. See, generally, Hill, "Institutional Investors and Corporate Governance in Australia," in Theodor Baums, Richard M. Buxbaum and Klaus J. Hopt (eds.), *Institutional Investors and Corporate Governance* (1994) 583, 600ff.; G.P. Stapledon, *Institutional Shareholders and Corporate Governance* (1996), 189ff.

248. Another high profile example relates to BHP Ltd, a 113 year old company known as "the Big Australian," which was subjected to on-going institutional investor pressure throughout 1998 over removal and replacement of the company's CEO. See generally, Bird & Hill, "Regulatory Rooms in Australian Corporate Law," 25 *Brook. J. Int'l L.* 555, 596-97 (1999).

249. Such an example was institutional investor pressure resulting in the removal of half the board and the managing director of Bennett & Fisher Ltd in 1991 and 1992. See "MD gets the boot in big Bennett clean-out," *The Age*, May 9, 1992, 25.

man's major institutional investors,[250] holding around 18% of the company's shares, requisitioned a general meeting to remove certain members of the board and reconstitute it.[251]

An acrimonious proxy battle[252] was ultimately avoided when an agreement was reached, with the board yielding to the institutions' pressure. The events at Goodman Fielder, however, are interesting in that they showed the fine line which can exist between monitoring through the reassertion of standard shareholder rights (in this case, appointment and removal of non-executive directors) and actual interference by shareholders in the management of a public corporation under a managerial partnership model. The institutions had been at pains to avoid the appearance of involvement in managerial matters, providing no blueprint of any particular strategy to lift the company's fortunes. In this they were strongly criticised by Goodman, and by other shareholders, as being "disruptive without offering any solutions."[253] In a last minute turn of events, however, the institutions demanded that their three nominee directors (replacing resigning incumbents) should be granted a collective power of veto over all major board decisions.[254] This demand, branded by the Goodman board as "unworkable and illegal,"[255] would have unambiguously shifted the institutional investors into a role as managerial partners, consistent with the reemergence of an ownership model of the corporation. The demand was, however, swiftly retracted after two of the institutional investors[256] threatened to withdraw their support for the other dissidents unless the power of veto were jettisoned.[257]

The events at Coles Myer demonstrated that institutional investor activism is not the fail-safe corporate panacea that some commentators would suggest; even when institutional investors become involved in issues of corporate governance, their victories can

250. These investors comprised the AMP Society (AMP), Bankers Trust Australia (BT Australia), the NSW State Authorities Superannuation Board, together with Doug Shears' Agrifoods group.

251. See "Ganging Up On Goodman," *The Bulletin*, September 6, 1994, 71.

252. See "Goodman: the final showdown," *Australian Financial Review*, August 17, 1994, 1; "Are institutions prepared to fight?," *Sydney Morning Herald*, September 6, 1994, 47, describing as the critical factor in the likelihood of a compromise being reached, "whether any or all of the institutions have become uncomfortable with the option of a full frontal proxy attack. . ."

253. "Ganging Up On Goodman," supra n. 251, at 71, 72. This echoes the concern in academic literature as to "the competence of institutional investors as corporate decisionmakers." See Fisch, supra n. 172, at 1009, 1036-37; Smith, "Corporate Governance and Managerial Incompetence: Lessons from Kmart," 74 *N.C. L. Rev.* 1037, 1115ff (1996)

254. See "It's high noon for agreement at Goodman" and "What the dissidents really want," *Sydney Morning Herald*, September 7, 1994, 41.

255. "It's high noon for agreement at Goodman," id.

256. The institutional investors concerned were AMP and BT Australia.

257. "Goodman resolution like a Cambodian peace treaty," *Sydney Morning Herald*, September 8, 1994, 33.

sometimes be Pyrrhic at best. The same institutions responsible for the boardroom changes at Goodman Fielder,[258] attempted to remove a number of directors from the Coles Myer board, following revelations in the financial press concerning the controversial Yannon transaction,[259] which had effectively resulted in a multi-million loss for Coles Myer. They also attempted to reform corporate governance practices in the company.[260]

Coles Myer epitomized the type of situation where institutional investor monitoring can be most beneficial,[261] since the Yannon transaction raised conflict of interest and related party transaction issues with the outside commercial interests of the Coles Myer chairman, Mr. Solomon Lew. The transaction resulted in loss to Coles Myer as a commercial entity, indirectly harming all stakeholders, not simply its shareholders.[262]

Nonetheless, the ultimate outcome in Coles Myer was less than decisive and fell far short of the institutions' original goals. Although one financial commentator described the actions of the institutions as "a victory for the institutions, for good corporate governance and for Australia's reputation in the international capital markets,"[263] the board level changes accepted by the institutions at the time were a clear compromise position, accepted to avoid a major public struggle at the annual general meeting.[264] A number of institutions later

258. BT Australia, AMP, and the State Superannuation Board of NSW (later Exicom Ltd.) held a combined shareholding of 15% in Coles Myer and were supported by a number of smaller institutional shareholders.

259. The exact circumstances behind the Yannon transaction became the subject of a long-running Australian Securities and Investments Commission (ASIC) investigation, which ended only in January 2000, when ASIC announced that no charges would be laid over the Yannon affair. See "ASIC probe forced Coles Myer to clear the boards," *Australian Financial Review*, January 8, 2000. Briefly, the transaction was as follows. In 1990, Coles Myer granted a guarantee covering a loss by Yannon Pty Ltd. Yannon had been acquired by CS First Boston for the purpose of acquiring $25 million of convertible preference shares in Premier Investments, a company controlled by Coles Myer shareholder and chairman, Solomon Lew. The preference shares were issued by Premier as part of a refinancing following Premier's $450 million purchase of Coles Myer shares. Coles Myer subsequently incurred an $18 million loss under the guarantee. The Yannon transaction came to light following the dismissal of Coles Myer's finance director, Philip Bowman, who raised questions about the propriety of the transaction. See generally Frith, "Coles investors should move to reinstate Bowman," *The Australian*, September 13, 1995; Hurst, "Sacked director wins $1.7m deal," *Australian Financial Review*, May 30, 1996, 26.

260. See, for example, Korporaal, "Coles must have independent chair," *Sydney Morning Herald*, September 11, 1995, 21.

261. See Dunstan, "Coles Myer fight won't be the last," *Australian Financial Review*, November 2, 1995, 8, stating that Coles Myer was a classic example of how "pension fund capitalism" operates.

262. See Smith, "The Shareholder Primacy Norm," 23 *J. Corp. L.* 277, 285 (1998).

263. Frith, "Coles compromise is still a victory for the institutions," *The Australian*, October 20, 1995, 36.

264. Under this compromise, Solomon Lew was removed from the position of chairman, but was permitted to remain on the board.

chose to exercise the option of "exit" over "voice," which substantially weakened the continuing influence of the institutional bloc.[265]

Coles Myer subsequently recovered $12 million of its losses, via a settlement with a number of parties including Mr. Lew. Nonetheless, there remained widespread dissatisfaction among many shareholders about the level of disclosure in the Yannon settlement,[266] the company's continuing poor financial performance at that time, and a large increase to the chief executive's remuneration package.[267] Solomon Lew successfully stood for reelection to the board, as a result of a deal struck with major shareholders[268] — his position and influence at Coles Myer proved to be surprisingly resilient in the face of institutional investor activism.[269]

The events at Goodman Fielder and Coles Myer show that a greater participatory and monitoring role for institutional shareholders in corporate governance is not only feasible, but has the potential to enhance corporate accountability and to legitimate managerial decisions.[270] Nonetheless, these case studies also demonstrate that there are possible dangers in this, and that institutional monitoring cannot be a complete solution to the problem of managerial accountability. One problem is the blurred boundary between shareholder monitoring and interference with managerial functions.[271] Goodman Fielder suggests that a vision of institutions as reasserting ownership rights, and so bridging the gulf between ownership and control, is misguided as a model on which to base these new developments.[272] Full part-

265. By late 1996, BT Australia had sold its stake in Coles Myer, while AMP had reduced its holding to around 2% and Axiom to around 1.33%: Hurst, "Big Coles investors back vote against Lew," *Australian Financial Review*, November 13, 1996, 21. Nonetheless, in the late 1990s, Coles Myer's performance improved dramatically, causing some institutions to rebuild their stakes in the company. See "AMP, BT build Coles Myer share," *Australian Financial Review*, October 21, 1998; "Coles Myer Profit: About as good as it gets," *Australian Financial Review*, October 8, 1999. Recently, however, this growth has appeared to stall: "Coles Myer's bumpy ride with beaten favorites," *Sydney Morning Herald*, March 11, 2000.

266. "Big Coles investors back vote against Lew," id.

267. Hurst, "Coles makes Bartels the $2.8m man," *Australian Financial Review*, October 29, 1996, 1; Hurst, "Bartels received $1m shares," *Australian Financial Review*, February 3, 1997, 19.

268. Stretton, "How Solly survived," *Australian Financial Review*, October 24, 1996, 20; Hurst, "Lew survives stormy Coles AGM," *Australian Financial Review*, November 20, 1996, 1.

269. See Stretton, "How Solly survived," id.; Ries, "Lew may be set for a comeback," *Australian Financial Review*, February 28, 1997, 80. Lew also proved to be resilient in the face of ASIC's investigation of the Yannon transaction, emerging from "one of the most controversial chapters in Australian corporate history with his reputation and fortune intact": "Final Coles Myer Act: Lew walks free," *Sydney Morning Herald*, January 8, 2000.

270. See, for example, Talbot-Stern, "The shortcut to better boards: Corporate governance — Keeping business honest," *Australian Financial Review*, January 2, 1996, 13.

271. See Smith, supra n. 253, at 1037.

272. Pound, supra n. 91, at 89; Buxbaum, supra n. 141, at 1, 28.

nership rights in management would unjustifiably privilege the sectional interests of shareholders over other groups "enmeshed with corporate enterprise."[273]

In Australia, a counter-trend to the rise of institutional investment has been the return to the market by many small private investors, as a result of a series of high-profile floats in recent times.[274] It cannot be assumed that the institutional investors' interests will always be aligned with those of smaller shareholders.[275] Indeed, early in the Coles Myer saga, there was speculation that the institutional investors might not wish to enter the fray, given their own stake in the management rights to Coles Myer's $650m pension fund.[276] The greater the role given to shareholders in corporate decision-making, the more likely it will be that doctrines such as oppression, traditionally confined to the close corporation context, will appear in the arena of public corporations where majority and minority interests are in conflict.

4. Conclusion

The message of this article is a simple one. It is to argue that the underlying commercial terrain in this area has altered fundamentally and irrevocably,[277] and it is important to reexamine the issue of the shareholder's legitimate role in the corporation. We need imagery enabling us to conceive of alternative approaches to corporate governance, and ancillary legal doctrine, which makes sense in a modern commercial environment.

It is not surprising that a one-dimensional model of the past, such as the "shareholder as owner," is inadequate today and can result in a disjunction between law and reality.[278] An examination of the variety of possible roles for shareholders in the corporate enterprise is justified, if only on the basis of CS Lewis' aphorism that "[t]o have a

273. Buxbaum, supra n. 147, at 515. See also Teubner, supra n. 159, at 130, stressing corporate autonomy to the exclusion of sectional interests within the corporation.

274. According to the ASX, Australia now ranks first in the world for the level of direct share ownership by individuals, as a result of this series of major privatizations and demutualizations. See Australian Stock Exchange (ASX), *2000 Share Ownership*, 22.

275. See generally Hill, supra n. 247, at 584, 602-03.

276. Mychasuk, "Coles super gags critics," *Sydney Morning Herald*, September 23, 1995, 31.

277. In Australia, for example, the advent of the Superannuation Guarantee Charge has placed the country within Robert Clark's fourth and final stage of financial capitalism, with the government appropriating the savings-decision function itself. See Clark, "The Four Stages of Capitalism: Reflections on Investment Management Treatises," 94 *Harv. L. Rev.* 561, 565-66 (1981).

278. See comments by Professor Hopt, in Richard M. Buxbaum, Hertig, Hirsch & Hopt (eds.), *European Business Law: Legal and Economic Analyses on Integration and Harmonization* 243 (1991).

choice of metaphors. . .is to know more than we know when we are the slaves of a unique metaphor."[279]

279. Lewis, "Bluspels and Flalansferes," in Max Black (ed.), *The Importance of Language* 36, 46 (1962).