

CLERP 9 MINORITY REPORT

AUSTRALIAN DEMOCRATS

SENATOR ANDREW MURRAY

Executive summary

In this Minority Report we have briefly outlined our broader philosophical position, and the areas in which we will be seeking to amend the CLERP 9 legislation. To a limited extent we have also indicated our reaction to the recently circulated amendments proposed by the Australian Labor Party (ALP).

Our amendments will include:

- **Requiring disclosure of all executives' and employees' packages that are more than 20 times the full-time adult ordinary time earnings. Based on the December 2003 weekly figure of \$937.70¹, this would require reporting of all remuneration packages of over \$975,208.**
- **A binding vote being required to approve the remuneration and retirement packages of *all* directors whether executive directors or non executive directors.**
- **Amending section 249D to ensure that such members hold marketable parcels of shares, which could be defined as a minimum of 100 shares per shareholder at a value of not less than \$500 per parcel.**
- **Extending the requirement to vote on material corporate governance resolutions to fund managers.**
- **Requiring shareholders of companies to approve a political donations policy at least once every three years.**

Introduction

The Australian Democrats are and have been strongly supportive of the process and intent of the Corporate Law Economic Reform Programme (CLERP). Over nearly a decade of reform, we have been engaged in the community, the Committee and in the Senate at every stage of the CLERP process, as well as Financial Services Reform (FSR) and all the previous manifestations.

1 ABS, Average Weekly Earnings (6302.0)

I support the Report of the Committee. Nevertheless despite its quality, it is lacking in a number of respects. Hence this minority report.

The Democrats recognise that the majority of changes proposed by the CLERP 9 legislation will improve corporate governance. In some areas, the legislation makes considerable leaps forward in terms of accountability and good process.

CLERP 9's provisions will be supported by us and should be commended; however, we should recognise that the legislation is not really disturbing the fundamental relationship between shareholders, executives, directors and the auditor.

Many seem to believe that traditional Australian ways of dealing with such relationships should not be disturbed. We make the point that other countries have different and workable models, and Australia should keep an open mind on productive change. We also make the point that the traditional relationship between shareholders, executives, directors and the auditor in Australia has been exposed as having some real weaknesses.

Community concern requires more than process changes

Like all politicians and political parties, we respond to voter concerns.

Community concern with corporate governance is alive and strong. Community concern is less concerned with law than with ethics and morality. It wants its expectations met.

Our judgement is that Australians are looking for more than process and technical changes in corporations law. They are looking for legislation to drive a change to corporate behaviour that is value-driven from a moral and responsible perspective, particularly with respect to wider society.

Legislative and regulatory change needs to catch this mood and reflect it. As a broad judgement, we believe that CLERP 9 does not reflect this mood.

It is self-evident that corporate law needs to be practical and effective and able to contribute to and facilitate the growth of Australia's national wealth.

The process of corporate law reform needs to take heed of the realities of domestic and international markets. It also has to ensure that society's values, needs and demands are properly reflected in corporations law. To do that requires attention to or at least a perspective from the behavioural sciences, ethics, and moral philosophy.

Better process and checks and balances in the corporations law are genuinely helpful in restraining the unscrupulous, greedy or delinquent. Far better would be a change to corporate culture and values to win back some of the community trust that business—particularly big business, has lost.

The PricewaterhouseCoopers report into the recent \$360 million National Australia Bank foreign exchange trading scandal found that:

The Board and CEO must accept responsibility for the 'tone at the top', and for the environment in which management did not report openly on issues in the business.²

The community has told politicians 'it wants something done'. That general message has been heard and will result in more prescription. CLERP 9 is one vehicle. It does not go far enough.

In a democracy, social principles are buttressed by law based on moral obligation, and work best when reinforced by a belief that you can trust the participants to work to the spirit of those principles and morals.

Put simply, in Australia and much of the Western World, society has passed judgement. Those who run corporations are often condemned as amoral at best and immoral at worst, and to be untrustworthy and unethical.

In making a speech to some academics recently, I had a look at the social contract. Some of my observations there are relevant to my theme.

John Ralston Saul is a scholar of the modern corporation. His studies focus on the fundamental questions of power, obligation and responsibility, and whether 'society' consents to actions taken by organisations on its behalf.

I agree that what underpins corporate legitimacy is the notion of consent, narrowly and specifically in the case of shareholders, and broadly by society.

Saul tells us that of the one hundred top economies in the world, fifty-one are corporations. Such great power needs restraint.

The most common method of successfully restraining power is through democratic means. In important respects, corporations are democracies. Social principles govern democracies, and the social contract is founded on moral obligation.

Political philosophy and moral philosophy should inform decisions taken on corporate governance. In my opinion, the thoughts of history's great thinkers are useful.

Adam Smith is often misused. His hidden hand is said to operate for the benefit of society through the beneficial aggregation of self-interest. But he never said that means it operates in a moral vacuum.

Locke thought consent could only be given by the majority, who delegate to authority the codification and enforcement of moral standards and laws.

2 PricewaterhouseCoopers, *Investigation into foreign exchange losses at the National Australia Bank*, 12 March 2004, p. 38. See <http://www.nabgroup.com/vgnmedia/download/pwcreport.pdf>.

Rousseau—like Smith—thought that men could not consent to something contrary to their interest. The 'general will' of men, in giving consent imposed a moral obligation. The common good means that duty replaces appetite.

Whatever the philosophical difficulties of the consent concepts—and there are many—the common thread is that our society still rests on the base of the social contract, and consent.

Political obligation arises from the consent of the governed. The governed in Australia are telling the political establishment that the corporate bureaucrats who run big business have lost their sense of duty, obligation and responsibility and are instead acting greedily, selfishly and irresponsibly.

This may be profoundly unfair to the majority of business men and women, but broadly, that is the message we're getting. So, if we are to be true to the social contract, reform is needed.

In a post-HIH Australian corporate world, the Government understand, as we do, that good regulation and good governance contribute to wealth creation and economic stability.

HIH was symptomatic of a global disease. Enron did immense damage to the American economy and its international standing. So did Parmalat to Italy and the European Union's standing in corporate matters.

Unfortunately for some, the message does not seem to be fully understood. The President of the Business Council of Australia, Mr Hugh Morgan, was recently reported to have said:

But I look at the Enron situation and yeah, Ok, in a multitrillion-dollar economy what's the outcome? The system works—these people were not only gross, they were conducting illegal activities and they've gone to jail, which is where they should be.³

The Democrats do not believe that the Enron situation shows 'the system works'. In our opinion, the greed and corruption that led to the debacles of HIH and Enron can be limited or restrained by much stronger corporate governance.

If you read the evidence, the underlying message is that the business world would prefer to keep the status quo. That should ring alarm bells. Many still don't get it.

To continue with the status quo would be a green light to more corporate disasters.

3 *Australian Financial Review*, 'Morgan hungry for more reform', 17 May 2004, p. 69.

An interesting Treasury paper⁴ by Gordon de Brouwer notes that countries with greater governance on a macroeconomic level have greater wealth, economic growth and development. This is not a coincidence.

Better macroeconomic and institutional structures means greater stability, more access to international finance, more developed equity and venture capital markets, more R&D, innovative activity and entrepreneurship.

Time for a new approach?

CLERP 9's provisions will be supported by us and should be commended; however, we should recognise that the legislation is not really disturbing the fundamental relationship between shareholders, executives, directors and the auditor.

The Democrats believe that, at its very core, existing company law is inadequate in terms of corporate governance. The board and directors, that central institution to the relationship between shareholders and the company, has not been addressed by the CLERP process.

Directors' duties are very wide on operational and management matters, but poor corporate governance and ethics can create situations where major conflicts of interest, mismanagement, impropriety and even corruption can go unchecked.

Fundamental to our philosophy is a belief that many of the political principles that apply to popular democracies can transfer across to the shareholder democracies.

Well-founded concepts such as the 'separation of powers', 'accountability' and 'democratic process' have as valuable a role to play in the corporate world as they do in political life.

Corporate democracy is the key to corporate governance. At the heart of democracy is the restraint of power—the notion of checks and balances and regular testing of popular support.

So in discussing corporate governance, our political and constitutional language is a helpful tool. Best practice regular elections; compulsory voting; representative bodies; independent institutions and people; appointments on merit; the separation of powers; transparency, accountability and full disclosure.

The Democrats believe that one solution is for the current responsibilities of a board to be split between a main board and a governance board.

The main board would continue to be elected by shareholding and concentrate on strategic, business and operational issues. It would contain executive and

4 'Macroeconomics and Governance', Gordon de Brouwer, Treasury Working Paper, December 2003.

non-executive directors and because of its election method would continue to have a bias towards the dominant or large shareholders.

A small Corporate Governance Board would be composed of non-executive independent directors (perhaps three).

It would have a limited remit and would call and chair shareholder meetings, propose changes to the company constitution, resolve conflicts of interest, determine the remuneration of directors and executive management, appoint auditors and other advisors such as valuers and manage the process of electing directors.

To protect the interests of *all* shareholders, not just the dominant shareholders, voting rights would be determined democratically by numbers rather than by power based on the number of shares held. In other words it would be determined by shareholder not shareholding.

Because of its election method, it would have a bias towards all shareholders rather than just the large shareholders.

This 'separation of powers' seems a difficult concept for the traditional business community to fully appreciate at present. It has worked well in our broader political democracy.

The Democrats do not seek to attempt amendments to create a governance board at this stage. The idea needs to be better understood first.⁵

Chapters 3 and 4: Executive remuneration—remuneration report; and Executive remuneration—full disclosure

Executive and director remuneration is a matter of great public and private interest. It lies at the heart of investor confidence and faith in the credibility of corporations and the share market.

It is a matter of great public interest because the extravagant greed of too many directors and executives has not only caused a justifiable public outcry but has also contributed to major company failures and market shocks.

It is a matter of great private interest because too many shareholders have been robbed by the syphoning off of their funds through board-approved salary and retirement package rackets.

At the heart of the matter is a series of connected failures. Neither board practice nor the law prohibit arrangements where there is a conflict of interest. Those who benefit from devising clever, concealed and costly salary, bonus or option packages—which

5 Dr Shann Turnbull is a well-known thinker on such matters, and his international and domestic essays are well worth reading.

benefit the executive and director mates on the board—are quite often the same people who approve those packages.

They are even sometimes ticked off at the shareholder level by the chairman holding proxies that he exercises at his absolute discretion, a travesty in law if there was ever one. If ever there was a single reason to require institutional investors to exercise a compulsory vote, the corrupt use of 'discretionary' proxies is it.

And the myth that executives do not influence these matters is just that, a myth. One in five directors is an executive.

I think this Chapter lacks some vital commentary, particularly since it is so germane to the parliamentary debate that will follow this Report. This has been a sharp area of disagreement between government and non-government, and catch-up is occurring.

For instance last year, the Democrats and Labor introduced amendments to:

- ensure remuneration packages have to be disclosed at the time of contract;
- require companies to disclose accruing retirement benefits to executives and directors'
- strengthen shareholders' power to veto directors' retirement payouts; and
- force companies to reveal, in graph form, increases in executive salaries compared to share prices.

The Government did not accept those amendments at that time.

Further, you cannot divorce board delinquency in authorising unjustified remuneration packages from some company constitutions and board behaviour that allows or fosters poor director-election processes and the patronage of mates. This cosy world delivers supporting structures of mutual self-interest and aggrandisement.

Therefore the accompaniment to good remuneration practice and good remuneration committees has to be best practice election processes, and maximum independence, and ethical systems to prevent the conflicts of interest and collegiate conspiracy where corporate insiders enrich themselves at the expense of shareholders.

The Democrats have long thought that:

- Disclosure must be full, including all options.
- Disclosure must include a calculation of estimated total cost if the executives were to leave in the next financial year.
- Executive packages should be expensed (see accounting standards debate).

- Executive contracts that require Board approval may not be voted on by executive directors (only non executive).
- Executive contracts must specify risk and performance criteria.

Last year, a report on executive salaries was conducted by Dr John Shields from the University of Sydney for the Labor Council of New South Wales. It stated that it had found evidence that the more a company pays its top executives, the worse it performs.

The report examined share prices, return on equity movements and earnings per share in Australia's largest 100 companies. In all criteria, taking into account the size of the company, there was a significant reduction in shareholder returns where executives were 'over-paid'.

It found that companies perform best when the executives are paid between 17 and 24 times average earnings. If they were paid more, performance began to deteriorate. Even if the executive was paid in share bonuses and share options, the company results suffered.

Over the past decade, executive remuneration has, on average, mushroomed from 22 times average earnings to 74 times average earnings.

Highlighting the importance of remuneration disclosure, the HIH Royal Commission Recommendation No.1 on Corporate Governance says:

I recommend that the disclosure and other requirements of the Corporations Act 2001, the relevant accounting standards and the Australian Stock Exchange Listing Rules that relate to directors' remuneration be reviewed as a matter of priority, to ensure that together they achieve clear and comprehensive disclosure of all remuneration or other benefits paid to directors in whatever form.⁶

The Democrats support the proposal of a remuneration report outlining the remuneration of directors and the 5 most highly paid executives in the company and the consolidated entity, as a first step.

The cut-off at 5 is arbitrary. It may sometimes be the case that it does not pick up some of those whose pay is so high that shareholders may need to be alerted to the fact. For example, it is understood that despite its dreadful recent performance, there are 14 executives at AMP paid over \$1 million a year.

In the interests of transparency and accountability, the Democrats propose to introduce an amendment requiring the annual disclosure of the remuneration of all executives

6 *The Failure of HIH Insurance*, The HIH Royal Commission, Vol 1, Canberra, April 2003, p. 116.

and employees that are paid more than 20 times the full-time adult ordinary time earnings. Based on the December 2003 weekly figure of \$937.70,⁷ this would require reporting of all remuneration packages of over \$975,208.

Amendments to CLERP were released by the ALP at the end of May. Based on the limited information so far provided by the ALP on their executive remuneration amendments, the Democrats support much of their intent. To vote against them, we would need to be persuaded that they are not in the interests of shareholders.

Chapter 5: Executive remuneration—the non-binding vote

This chapter highlights a fundamental problem and is one reason I have proposed a governance board as one solution. Reading Chapter 5, I am struck by the clash between what should be clear principles and the awkward solutions being proposed by CLERP 9.

In our system we all accept that shareholders in listed companies should do two things—they should keep control over most things to do with the board, and they should delegate the rest to the board. This principle is spelt out clearly in paragraph 5.22 of the Committee's report.

Directors are supposed to think and act independently (and with less self-interest) than executives. Ideally, a separation of attitudes as well as powers.

The board is separate (or should be) from the executive—a basic and necessary separation of powers that is designed to protect the shareholders. However we have allowed executives to be members of boards and, partly because most directors are former executives, the executive culture dominates board thinking.

Remember that one in five directors is an executive.

The Committee's report (paragraph 5.27) said:

The AICD argued that 'Good corporate governance requires that boards take sole responsibility for their remuneration decisions. If shareholders are dissatisfied with the board's performance, they have a right to make their views known at the AGM and vote against the re-election of the directors'.⁸
The ASX stated that:

...to extend shareholder entitlements to a retrospective non-binding resolution on decisions regarding specific executive remuneration traverses the traditional line of accountability in respect of a company and its shareholders, in that individual managers, unlike directors, are not directly

7 ABS, Average Weekly Earnings (6302.0)

8 *Submission 35*, p. 23.

accountable to shareholders and do not effectively set their own remuneration.⁹

This 'right' is a Clayton's right in those cases where the company constitution, election methodology, and board membership rigging and stacking (plus non-compulsory voting of shares) prevent full accountability of incumbent directors to shareholders.

With respect to many issues (especially remuneration), my opinion is that boards or their surrogates often argue in their submissions to this Committee from the perspective of the executive, not from the perspective of the board or all (as opposed to dominant) shareholders.

In theory it should be quite simple—if you are on the board, you are subject to the shareholders. If you do not want to be subject to the shareholders, get off the board and appear before the board as an executive when the board needs you to.

Board members' remuneration and retirement packages should be subject to the binding vote of shareholders. That has to be the consequence of the principle that the board is responsible to the shareholders.

We are just starting to see the power of shareholder activism. Earlier this year, News Corporation, the multi-media empire of the Murdoch family, historically voted to deny an option scheme for the non-executive directors, including two of Rupert Murdoch's sons.

Interestingly, the option scheme was not particularly unusual. At most AGMs, executives and directors give themselves a tidy generous option package and it is, almost routinely, approved. The institutions give their proxies to the Chairman and only the small minority shareholdings oppose.

However, recently, another options package at Harvey Norman was also defeated as a result of shareholder activism.

Before anyone congratulates themselves on the outcomes at Harvey Norman and News Corp, they should recognise that the only reason shareholders got to have a say was because it was *options* that were being issued. In corporations law, shareholders get to have a say on options because they directly dilute their shareholdings.

Shareholders at News Corp could vote against Mr Chernin getting his options, worth just over half a million dollars, but they could not vote against his US\$16 million salary!

Possibly, the vote against the options, which are relatively minor in comparison to his salary, was simply a vote of frustration at this amazing salary package.

9 *Submission 48*, p. 6. See also *Submission 20*, p. 13 and *Submission 35*, p. 24.

The Democrats believe that shareholders should get more than simply a non-binding vote on salaries. We believe that shareholders should get a legitimate veto.

If the Board of News Corp believes Mr Chernin is worth US\$16 million, they should at least put forward an explanation and ask the shareholders to approve it.

While as an indicative vote the non-binding vote is not a waste of time, our proposal would give shareholders real power.

We have noted media comment saying that the shareholders at Southcorp probably want a vote on the \$2 million salary going to Keith Lambert after the *negative* 27% return to shareholders last year; or that equally, the shareholders at Aristocrat probably want a say on Des Randall's \$3.65 million package after a *negative* 21% return last year.

For those who say this shareholder power should be confined to directors, nearly every case of excess is by a director who is also an executive.

Our proposal would give the embattled shareholders of organisations like Southcorp, AMP and Aristocrat a real say in executive remuneration packages.

That is why I support a binding vote being required to approve the remuneration and retirement packages of *all* directors whether executive directors or non-executive directors.

If the executives and directors are worth what they are getting, the shareholders will approve the packages.

The *only* variation that should be permitted to that is if an absolute majority of all shareholders (not just those voting) agree that that should not be the case for executive directors, in which case at the same time as that vote, a board remuneration policy should be approved instead.

It should not be forgotten that one in five directors is also an executive. Despite the statements by bodies like the ASX and ASIC urging them not to, because of the clear conflict of interest, these people participate in the construction of their packages and often approve their own packages in a grotesque and breath-taking conflict of interest and mutual acts of aggrandisement.

There is regularly a roar of outrage at executive payouts and packages that has been directed at directors *who were also executives*. The rest of the outrage has been directed at a few directors, particularly chairmen.

Our proposal would give shareholders a binding vote with some practical power, rather than simply an outlet for their anger.

Chapters 6 & 7: Continuous disclosure, infringement notices and penalties

In the evidence before the Committee on infringement notices and penalties, I have observed that witnesses and commentators often fail to distinguish between two streams of law—that which applies to individuals in their private capacity, and that applying to entities and the individuals with authority within those entities.

Customs, the ATO, ASIC, the ACCC, APRA, Transport, Intelligence and other agencies all have powers that are specific to entities and the individuals with authority within those entities, such as the obligation to answer questions, the obligation to produce documents, limited privilege, and in some cases the reverse onus of proof.

All Governments and all parliaments have accepted the distinction between these two streams for decades, and that distinction has got stronger in the last decade, as the corporate veil has been attacked.

The reverse onus of proof in this environment is entirely consistent. Corporate individuals with authority have not and do not have the same protections as those same individuals do in their private capacity.

Having said that, executives and directors must not be deterred from reasonable and calculated risk. A defence of reasonable conduct is appropriate.

The Democrats have seen the amendments proposed by the ALP and support their broad intent. We would need to be convinced that these amendments would not be in the best interests of shareholders.

Chapter 8: Enhancing Shareholder Participation

Section 249D

The Democrats are particularly opposed to any attempt to remove the 100 member rule in section 249D for shareholder meetings. We have listened to the evidence outlining the perceived problem, and agree that limited reform is required.

At present, the threshold for requisitioning a special general meeting under section 249D of the *Corporations Act 2001* is that:

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

The Government tried to reform this provision by setting a minimum of a 5% economic interest before being able to requisition a special general meeting. This

percentage of capital method is common elsewhere—in the United Kingdom 10%; in Canada and New Zealand 5%; in Europe between 5 and 20%—but it is obvious that in companies that have hundreds of millions of shares, this is an impossible threshold for average shareholders.

The Democrats' position is that requiring a 5% economic interest as a threshold for a company to concur in the request for a general meeting under section 249D is setting a requirement which is too onerous. It will deliver power back to the oligarchs.

Even the much touted 'square-root solution' can still create very high thresholds.

Having failed via regulation (disallowed in 2000), there is still a desire to drop section 249D(b). That will not get through the Senate. What will get through the Senate is a reasonable tightening up of section 249D(b).

The requirement for 100 shareholders may indeed be considered too low, but the fact is that it is only possible to point to a few examples where it is possible to say shareholder rights might have been abused. North Limited and the NMRA are two examples of companies that have complained. In NMRA's case they were hit with 12 requisitions over 18 months, which is undoubtedly excessive and expensive.

The Democrats are prepared to amend the Act to ensure that such members hold marketable parcels of shares, which could be defined as a minimum of 100 shares per shareholder at a value of not less than \$500 per parcel.

Institutional voting

It is worth repeating paragraph 8.66 of the Committee's report which says:

The disclosure of voting is one of the central features of the OECD Principles of Corporate Governance which state:

The exercise of ownership rights by all shareholders, including institutional investors should be facilitated.

Institutional investors acting in a fiduciary capacity should disclose their overall corporate governance and voting policies with respect to their investments, including the procedures that they have in place for deciding on the use of their voting rights. The voting record of such investors should also be disclosed to the market on an annual basis.¹⁰

The Democrats believe that the trustees and managers of superannuation funds and managed investment schemes have a fiduciary duty to act in the best interests of their members and beneficiaries. We believe that a trustee can only satisfy their fiduciary obligations by taking an active interest in material corporate governance activities of their equity investments.

10 OECD Principles of Corporate Governance Draft Revised Text, January 2004, p. 7.

Material corporate governance activities would include voting on constitutional issues and decisions on the election and remuneration of directors.

Voting on these three matters should be mandatory.

In the absence of support for our view, the Democrats will support the broader amendments of the ALP to require fund managers, trustees of super funds and life companies to maintain and disclose voting policies and records.

We will amend the legislation to extend the requirement to vote on material corporate governance resolutions to fund managers.

Chapter 9: Management of Conflicts of Interest By Financial Services Licensees

The Democrats have seen the amendments proposed by the ALP and support their intention. To vote against them, we would need to be convinced that these amendments would not be in the best interests of shareholders.

Chapter 10: Political Donations

Sir Gerard Brennan was right in saying:

There are sound reasons of policy for imposing a limitation on directors' powers to donate corporate assets.¹¹

For obvious reasons, as a sub-set of corporate donations, political donations are even more sensitive than other types of donations, and ones in which the community has a particular interest.

I want to commence this section with these tables below. Now what is one to make of this largesse to political parties? And bear in mind that these figures are federal and do not include figures with respect to local government or state government records and entities.

11 This quote has been taken from paragraph 10.5 of Chapter 10 of the Committee's report.

Political donations above \$100,000 in the Building & Construction Industry¹²

Property developers		Builders & constructors	
Company	Amount \$	Company	Amount \$
Croissy Pty Ltd	1,901,000	Multiplex Constructions Pty Ltd	1,710,350
Lend Lease Corporation	1,172,738	Leighton Group of Companies	1,277,817
Mirvac	812,976	Meriton Apartments Pty Ltd	1,018,067
Australand Property Group	695,698	Boulderstone Hornibrook Pty Ltd	747,767
Furama Pty Ltd	588,776	Paynter Dixon Constructions Pty Ltd	319,650
Gandel Group	571,230	Becton Group	302,945
McRoss Developments	535,500	Walter Construction Group	231,500
Terrace Tower Group	410,990	Grocon Pty Ltd	217,050
Westfield Group of Companies	295,636	Stockland Group of Companies	131,855
Randazzo Group of Companies	204,500	St Hilliers Pty Ltd	103,850
Stockland Group of Companies	201,706		
Toga Group of Companies	174,720		
Northgan (Gandel Group)	154,795		
Lewlac Pty Ltd	149,330		
MAB Corporation	110,290		
Total for property developers	\$7,979,884	Total for builders & constructors	\$6,060,851

Combined total donations: \$14,040,735

12 Compiled from on-line AEC returns 1998/1999 to 2002/2003.

Political donations at board discretion reflect poor corporate governance. You would be hard put to find any corporations (or unions) whose donations policy and practice has the specific approval of the shareholders or members.

We would change the law to require such approval. We would also force disclosure of who lay behind donations by clubs, trusts, foundations and fundraisers. Although we would prefer to outlaw donations, at the least we would cap maximum donations

In particular, we would apply a similar provision to Part IVA of the Tax Act with a general anti-corruption provision in electoral law. The Electoral Act and Corporations Act should specifically prohibit political donations that have even any hint or implication of 'strings attached'.

The Australian Shareholders' Association (ASA) released a media statement on 20 May 2004 stating that they have adopted a policy statement opposing political donations by companies. The policy goes on to say that where such donations have been made, there should be discussion of them at the next AGM.

'Decisions about contributions to political entities are the prerogative of shareholders, not directors,' said ASA chairman, Mr John Curry.

Mr Curry said the ASA believed companies should be allowed to lobby political parties but ultimately it should be the shareholders, rather than the boards, who decided whether a gift should be made.

Below is an extract from our Supplementary Remarks to the Joint Standing Committee on Electoral Matters titled—*Report of the inquiry into the 2001 Federal Election and matters related thereto*.¹³

We will be introducing amendments into the Corporations Law as outlined in our minority report that will require shareholders of companies to approve a political donations policy at least once every three years.

EXTRACT:

In most cases, donors appear to make donations to political parties for broadly altruistic purposes, in that the donor supports the party and its policies, and is willing to donate to ensure the party's candidates and policies are represented in parliament. Nevertheless, there is a perception (and probably a reality), that some donors specifically tie large donations to

13 This report can be obtained from the web site for the Joint Standing Committee on Electoral Matters at <http://www.aph.gov.au/house/committee/em/elect01/report.htm>. The extracts are on pp. 15-16 of the Supplementary Remarks chapter in the report. <http://www.aph.gov.au/house/committee/em/elect01/report/Democrats.pdf>.

the pursuit of specific policies they want achieved in their self-interest. This is corruption.¹⁴

RECOMMENDATION 4.6

The Act should specifically prohibit donations that have 'strings attached.'

The practice of companies making political donations without shareholder approval and without disclosing donations in annual reports must end. So must the practice of unions making political donations without member approval. It is neither democratic nor right.

Shareholders of companies and members of registered organisations (or any other organisational body such as mutuals) should be given the right either to approve a political donations policy, to be carried out by the board or management body, or the right to approve political donations proposals at the annual general meeting.

This will require amendments to the relevant acts rather than to the Electoral Act.¹⁵

RECOMMENDATION 4.7

The Corporations, Workplace and other laws be amended so that either:

- (a) Shareholders of companies and members of registered organisations (or any other organisational body such as mutuals) must approve a political donations policy at least once every three years; or in the alternative**
- (b) Shareholders of companies and members of registered organisations (or any other organisational body such as mutuals) must approve political donations proposals at the annual general meeting.**

Under the Registered Organisations schedule of the *Workplace Relations Act* elections are conducted under the auspices of the AEC.

It would seem self evident, in the public interest and for the same reasons - that the same provisions governing disclosure of donations for political organisations should apply to industrial or other organisations for whom the AEC conducts elections.

Controversy sometimes attends union elections. Trade Unions are an important institution in Australian society and union elections have become far more expensive to campaign in today than ever before.

14 <http://www.aph.gov.au/house/committee/em/elect01/report/Democrats.pdf> at pp. 15-16.

15 <http://www.aph.gov.au/house/committee/em/elect01/report/Democrats.pdf> at pp. 15-16.

Many people and organizations contribute to union election campaigns. As for political elections the public and members of those unions in particular should have the right to know the source of any campaign donations above a minimal amount.¹⁶

RECOMMENDATION 4.8

Where the AEC conducts elections for registered and other organisations, the same provisions governing disclosure of donations for political organisations should apply.

Final comment

Those businesses and business men and women who have sullied the reputation and standing of the rest of the business world need to get the message. They need to understand that their greed and extravagance has been unacceptable and has damaged Australia. It has gone on for too long and the Australian shareholders and the public deserve better.

The Democrats are determined to ensure these CLERP 9 amendments are as strong as possible, provide greater power to shareholders and a measure of reassurance to the Australian public that the greedy unscrupulous corporate delinquents are being reined in.

16 <http://www.aph.gov.au/house/committee/em/elect01/report/Democrats.pdf> at pp. 15-16.