Subverting Shareholder Rights: Lessons from News Corp's Migration to Delaware

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1. Introduction

“If there are sufficient basic similarities to make a comparison possible, there are, equally, sufficient differences to make it fruitful.”

L.C.B. Gower¹

Convergence theory and shareholder empowerment represent two major debates in contemporary corporate governance. A pervasive underlying assumption in these debates is that a high level of corporate governance homogeneity exists within the common law world in relation to shareholder rights. This article challenges this assumption, through a detailed case study of the decision by News Corporation (“News Corp”) to move from Australia to Delaware. As events surrounding News Corp’s re-incorporation illustrate, although there are undoubtedly basic similarities between US corporate law and that of other common law jurisdictions, there are also fascinating, but under-appreciated, differences.

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In late 2007, News Corp became the subject of intense media attention when it successfully acquired Dow Jones & Company (“Dow Jones”), publisher of the Wall Street Journal, and brought it under the aegis of News Corp’s $70 billion global media empire. Nonetheless, News Corp’s migration to the US from Australia, which paved the way for this victory – a victory that appears increasingly Pyrrhic in the light of the current financial crisis – was neither smooth nor a fait accompli. Rather, the original 2004 re-incorporation proposal prompted a revolt by a number of institutional investors, on the basis of concern that the move to Delaware would significantly reduce shareholder rights.

The News Corp re-incorporation saga highlights some important differences between current US and Australian corporate law regimes. Specifically, the re-incorporation shows how shareholder rights were effectively subverted as a result of these differences. It offers a valuable counterpoint to the persistent assumption in much contemporary legal theory that a cohesive Anglo-US model of shareholder protection exists, and identifies some crucial corporate governance fault lines within the common law world.


\[3\] See Tim Arango, News Corp. Loss Shows Trouble at Dow Jones, N.Y. TIMES, Feb. 6, 2009, at 1, stating that many media analysts considered that News Corp had paid too much for Dow Jones, when News Corp purchased it for approximately $5 billion. In spite of promises by News Corp, at the time of the acquisition, of increased investment in Dow Jones, in February 2009, the Wall Street Journal announced newsroom layoffs. See Kenneth Li and Andrew Edgecliffe-Johnson, Murdoch Remains Bullish in the Face of News Corp Challenges, FIN. TIMES, Feb. 7, 2009, at 09, Shira Ovide, Corporate News: News Corp. Posts $6.4 Billion Loss After Charges, WALL ST. J., Feb. 6, 2009, at B3.

\[4\] On 5 February 2009, News Corp announced a $6.4 billion loss in its second quarter, and a 50% reduction in the value of Dow Jones. Mr Murdoch forecast that earnings from the News Corp empire would fall by around 30% in 2009, in what he described as the worst economic crisis in News Corp’s fifty year history. See Arango, id; Li and Edgecliffe-Johnson, id.
2. Background Issues in Contemporary Corporate Governance and the Exodus of News Corp

“[W]e are tending toward a managerial, rather than a capitalist society…”

William L. Cary

“Rupert Murdoch is a great Australian, in the sense that Attila was a great Hun”

Geoffrey Robertson QC

Two contemporary corporate governance debates, relating to convergence theory and shareholder empowerment, form the theoretical backdrop to this article’s analysis of the News Corp re-incorporation. The convergence debate reached its zenith at the turn of the last decade. Its central issue was whether international corporate laws would converge, or whether differences between common law and civil law jurisdictions would persist. While convergence theory, and the closely allied “law...
matters” hypothesis, they highlighted stark legal differences between common law and civil law jurisdictions, they obscured or ignored important differences within the common law world itself. Indeed, both sides of the convergence-divergence debate often seem to assume that there exists a unified and stable Anglo-American, or common law, model of corporate governance.

The controversial shareholder empowerment debate is of more recent origin. In contrast to the broad comparative law sweep of convergence theory, the shareholder empowerment debate has been primarily US-focused, with limited acknowledgement

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10 The “law matters” hypothesis emanated from the research of corporate finance scholars, La Porta, Lopez-de-Silanes, Shleifer and Vishny and was highly influential in defining the contours of convergence-divergence debate. These scholars postulated that “law matters”, in the sense that the structure of capital markets is directly linked to a country’s corporate governance regime. Specifically, they predicted that jurisdictions with a high level of minority shareholder protection would develop dispersed ownership structures, such as those existing in the US and UK. See, e.g., Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer and Robert Vishny, Law and Finance, 106 J. POL. ECON. 1113 [1998]; Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, Corporate Ownership Around the World, 54 J. FIN. 471 (1999).

11 A number of commentators have criticized this aspect of convergence theory and the “law matters” hypothesis, arguing that perceived differences between the common law and civil law are often overly generalized and inaccurate. See, e.g., David A. Skeel Jnr, Corporate Anatomy Lessons, 113 YALE L.J. 1519, 1546 (2004); Katharina Pistor, Yoram Keinan, Jan Kleinheisterkamp and Mark D. West, The Evolution of Corporate Law: A Cross-Country Comparison, 23 U. PA J. INT’L ECON. L. 791, 799 note 27 (2002).


13 See, e.g., Jeffrey Gordon and Mark Roe (eds), CONVERGENCE AND PERSISTENCE IN CORPORATE GOVERNANCE (2004), posing the question “Is the Anglo-American model of shareholder capitalism destined to become standard or will sharp differences persist?”

of international corporate law differences.\textsuperscript{15} Instigating the debate, Professor Bebchuk advocated stronger participatory rights for US shareholders in a range of governance scenarios.\textsuperscript{16} The Committee on Capital Markets Regulation ("Paulson Committee") also recommended increasing US shareholder rights.\textsuperscript{17}

Yet, these calls for more shareholder power have been met with strong resistance. Few US commentators seem to doubt that there is “ample room for increasing shareholder power” under US corporate law,\textsuperscript{18} however they have presented a range of arguments as to why Bebchuk’s reform proposals would constitute a dangerous deviation from established corporate law principles.\textsuperscript{19} Some commentators have also

\begin{footnotesize}
\textsuperscript{15} Although proponents of stronger shareholder rights have made the point that US shareholders have more limited rights than shareholders in other jurisdictions, there is little discussion of this fact in critiques opposing shareholder empowerment, which are predominantly US-focused. For pro-shareholder rights commentary recognizing regulatory diversity in this regards, see, e.g., the comments of the Paulson Committee, infra note 15; Lucian A. Bebchuk, \textit{The Case for Increasing Shareholder Power}, 118 HARV. L. REV. 833, 847-850 (2005).


\textsuperscript{19} For criticism of the shareholder empowerment proposals, see generally Lynn A. Stout, \textit{id}; Martin Lipton and William Savitt, \textit{id}; Stephen M. Bainbridge, \textit{Director Primacy and Shareholder Disempowerment}, 119 HARV. L. REV. 1735 (2006); Vice Chancellor Leo E. Strine, \textit{Toward a True Corporate Republic: A Traditionalist Response to Bebchuk’s Solution for Improving Corporate America}, 119 HARV. L. REV. 1759 (2006). For analysis of the central arguments against shareholder empowerment found in the academic literature, see
\end{footnotesize}
criticized the shareholder empowerment proposals from an evolutionary/efficiency perspective, asking why, if shareholder empowerment is a valuable corporate governance attribute, we do not already see it in the marketplace. While this is an intriguing question with respect to US corporate law, it is a less persuasive argument from a comparative corporate governance perspective.

The events surrounding the re-incorporation of News Corp are interesting in the light of both convergence theory and the shareholder empowerment debate. Contrary to the argument of several critics of shareholder empowerment that the dearth of shareholder participatory rights under US corporate law provides evidence that they are neither desired nor valued by investors, background events to News Corp’s exodus from Australia to Delaware present another picture. These events highlight the fact that both shareholder rights, and the extent to which they are valued, differ considerably within the common law world.

The issue of the balance of power between shareholders and the board of directors came to the fore in Australia following an announcement by News Corp in 2004, which signaled its intention to shift domicile from Australia to Delaware, to obtain primary listing on the New York Stock Exchange and to seek inclusion in the Standard & Poor’s 500 Index (“S & P 500”). The re-incorporation proposal, which involved incorporating a new group parent company in the United States, was to be


20 See Bainbridge, *id.* at 1736-1737; Strine, *id.* at 1774; Lipton and Savitt, *id.* at 733, 743-744.

21 Prior to the re-incorporation, the Australian entity was known as The News Corporation Limited.


implemented by schemes of arrangement, which rely on both shareholder consent and court approval under Australian law.

According to News Corp, the move to the US, where most of its operations were based, was prompted by legitimate commercial goals, including the desire to gain greater access to US capital markets and enhance shareholder value. Critics of the proposal argued, however, that the purpose of the re-incorporation was to strengthen managerial power vis-à-vis shareholder power within News Corp. They claimed that Delaware law provided less protection for minority shareholders than Australian corporate law, enabling the Murdoch family to entrench its interests more easily in the US. In contrast to the Paulson Committee’s concern that minimal shareholder rights might deter corporations from entering US public markets, these critics claimed that this feature of Delaware law constituted its main allure for News Corp.

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25 See United States Securities and Exchange Commission, News Corporation, Form 8-K, Item 2.01, Acquisition or Disposition of Assets (Nov. 12, 2004), setting out the structure of the reorganization of the Australian corporation, The News Corporation Limited.


27 Approximately 70% of the group’s revenues and 80% of profits were derived from the US at the time of the re-incorporation proposal. Grant Samuel & Associates, Re-incorporation of The News Corporation Ltd in the United States and Acquisition of Queensland Press Pty Ltd E-3 (Independent Expert’s Report, Sept. 14, 2004).


29 See, e.g., Elizabeth Knight, Murdoch Gymnastics Good for Investors, SYDNEY MORNING HERALD, Oct. 8, 2004, at 25, stating “[w]hat we will never know is the extent to which this move offshore was motivated by the potential re-rating or the deterioration of minorities’ rights and the enhancement of Murdoch family control. Was the latter the prime aim or just a collateral gain?”. See also Ben Power and Neil Chenoweth, Funds Lash News Corp’s US Move, AUST. FIN. REV., Sept. 28, 2004, at 1.

An independent expert’s report, prepared by Grant Samuel & Associates on behalf of News Corp, while finding that the re-incorporation proposal was in the best interests of the company’s shareholders as a whole, acknowledged a possible reduction of minority shareholder rights. The report stated that “the costs, disadvantages and risks are not inconsequential but do not outweigh the advantages”. The Federal Court of Australia, in its subsequent approval of the schemes of arrangement implementing the proposal, noted that these advantages related mainly to the market for News Corp shares, and involved “judgments rather than propositions that can be empirically verified”.

In late July 2004, two institutional investor organizations, the Australian Council of Super Investors Inc (“ACSI”) and Corporate Governance International Pty Ltd (“CGI”) met with News Corp to discuss a range of corporate governance concerns relating to the effect of the re-incorporation proposal on shareholder rights. ACSI and CGI, which had the support of several major international institutional investors, noted that these advantages related mainly to the market for News Corp shares, and involved “judgments rather than propositions that can be empirically verified”.

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31 Although an independent expert’s report is only required where a party to a corporate reconstruction is entitled to at least 30% of the voting shares (see Corporations Regulations, rules 8303 and 8306, Part 3, Schedule 8), the provision of such a report to members in a scheme of arrangement is standard commercial practice in Australia. See generally Tony Damian and Andrew Rich, SCHEMES, TAKEOVERS AND HIMALAYAN PEAKS: THE USE OF SCHEMES OF ARRANGEMENT TO EFFECT CHANGE OF CONTROL TRANSACTIONS 11, 127ff (2004).

32 Where required, an independent expert’s report must state whether, in the expert’s opinion, the proposed scheme is in the best interests of the members and must set out reasons for that opinion: Corporations Regulations, rule 8303, Part 3, Schedule 8.


35 ACSI is a not for profit organization formed in 2001 to provide independent research and education services to superannuation funds (see http://www.acsi.org.au/dsp_about.cfm).


37 See UniSuper Ltd. v. News Corporation, 2005 WL 3529317 (Del. Ch.).
investors, subsequently launched a corporate governance campaign urging News Corp to transplant certain Australian shareholder protection provisions into its prospective Delaware charter.

As part of this campaign, ACSI and CGI drafted a document dealing with corporate governance - the so-called “Governance Article” - which was provided to News Corp, with a request that its contents be included in News Corp’s Delaware charter. The Governance Article included a large number of Australian statutory provisions and “Best Practice” procedures. Its purpose was expressed to be: -

(i) To preserve, in the constitution of this new Delaware incorporated Company and for the benefit of those public investors, key Australian investor protection and empowerment provisions…
(ii) To render inapplicable, for the benefit of those public investors, certain presumptions of Delaware/US law and practice which are contrary to key Australian investor protection and empowerment provisions, and
(iii) To include, in the constitution of this new Delaware incorporated Company and for the benefit of those public investors, other key elements of Australian and international best practice in corporate governance.

Initially, News Corp made no concessions to the institutional investors’ demands. Echoing the arguments of Montesquieu, the acknowledged father of comparative

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38 For example, the Global Institutional Governance Network, comprising institutional investors such as British Hermes in the UK and CalPERS in the US, supported ACSI and CGI. See Stephen Bartholomeusz, Activists Confront News on World Stage, SYDNEY MORNING HERALD, Sept. 28, 2004, at 22; Ben Power and Neil Chenoweth, Funds Lash News Corp’s US Move, AUST. FIN. REV., Sept. 28, 2004, at 1.


40 The Governance Article was sent to News Corp on 20 August 2004. See UniSuper Ltd. v. News Corporation, 2005 WL 3529317, note 8 (Del. Ch.).


law, News Corp claimed that the selective transplantation of Australian governance principles into the constitution of a Delaware-incorporated company would limit access to US institutional investor capital, confuse investors and put the corporation at a competitive disadvantage with regard to its US competitors, such as Viacom and Disney.44

Following News Corp’s refusal to adopt the Governance Article, ACSI issued a critical press release, entitled “News Corporation settles for second best on governance”.45 By late September 2004, Institutional Shareholder Services Inc (“ISS”),46 the largest US proxy adviser, had become involved in the fracas, adding its voice to calls for News Corp to adopt certain Australian corporate governance standards.47 It appears that US institutions held around 21% of ordinary shares, and 35% of preference shares, in News Corp, and that approximately 20-30% of US institutional investors received advice from ISS.48 Rupert Murdoch’s family interests controlled approximately 30% of News Corp’s voting stock.49 News Corp’s public shareholders were in a position to prevent the reorganization by virtue of the fact that Australian law required the schemes of arrangement to be approved by separate class resolutions, with the Murdoch family voting as a separate class.50

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43 Montesquieu, THE SPIRIT OF LAWS (1748). Montesquieu warned against the unpredictability and dangers inherent in transplanting elements of one legal system to another.


46 ISS was acquired by RiskMetrics Group in 2007. See RiskMetrics Group Completes Acquisition of Institutional Shareholder Services, BUS. WIRE, Jan. 11, 2007.


49 Martin Peers, News Corp. Strengthens its Takeover Defenses, WALL. ST. J., Nov. 8, 2004, at A2. For a discussion of some of the distinctive corporate governance problems and challenges associated with family controlled public companies, including News Corp, see Deborah A. DeMott, Guests at the Table?: Independent Directors in Family-Influenced Public Companies, 33 J. CORP. L. 819 (2008).

50 See UniSuper Ltd. v. News Corporation, 2005 WL 3529317 (Del. Ch.). The re-incorporation proposal required approval of schemes of arrangement by News Corp’s ordinary and
3. The News Corp Concessions

“No victory is final and no coalition of support ever solid.”

George E. Reedy

In October 2004, News Corp resiled from its earlier rejection of the institutional investors’ demands and agreed to incorporate some shareholder protection provisions into its Delaware charter. The agreed charter amendments related to five main areas of corporate governance, over which the institutional investors had expressed concern.

First, the Governance Article had included a number of specific investor protection provisions of the Australian Securities Exchange (“ASX”) Listing Rules, which institutional investors sought to incorporate into News Corp’s Delaware charter.

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54 See generally UniSuper Ltd. v. News Corporation, 2005 WL 3529317 (Del. Ch.).

55 At the time of the re-incorporation, these rules were called the Australian Stock Exchange Listing Rules.

56 The institutional investors’ Governance Article deemed certain specified “public investor protection and empowerment provisions” under the ASX Listing Rules to be included within it. The ASX Listing Rules specified were Rules 7.1-7.9 (requiring shareholder approval for
News Corp did not accede to this specific demand. Rather, it agreed to include a provision in the charter stating that News Corp would not request removal of full foreign listing from the ASX without majority shareholder approval. Although, after the re-incorporation, its primary listing was on the New York Stock Exchange, News Corp’s concession that it would retain full foreign listing on the ASX ensured that all the ASX listing rules, and corporate governance guidelines, would continue to apply to the company.

At first blush, this appears to be a major concession. The ASX Listing Rules are relatively stringent by international standards, and employ shareholder consent as a legitimating device in a wide range of circumstances. In particular, the rules impede

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57 Under the charter provision, News Corp cannot request removal of full foreign listing from the ASX without the affirmative vote of a majority of all listed shares in the corporation, rather than simply a majority of shares voted on the resolution. See United States Securities and Exchange Commission, Form 8-K, Amended and Restated Certificate of Incorporation of News Corporation, Inc. Article IV, Section 4(a)(iv)(1), “Issuance of Certain Stock; Listing on ASX” (Nov. 12, 2004).

58 News Corp obtained secondary listing on both the ASX and the London Stock Exchange. See United States Securities and Exchange Commission, News Corporation, Form 8-K, Item 2.01, Acquisition or Disposition of Assets (Nov. 12, 2004).

59 The full foreign listing adopted by News Corp is distinguishable from “foreign exempt listing” under the ASX Listing Rules. Foreign exempt listing requirements are far less onerous than full ASX listing. Companies admitted to ASX foreign exempt listing are required merely to satisfy the ASX that they comply with the listing rules of their home overseas exchange, not with ASX Listing Rules themselves (see ASX Listing Rules 1.11, Condition 3, and 1.11 - 1.15). By way of contrast, the full foreign listing adopted by News Corp prima facie carried an obligation to comply with all ASX Listing Rules.


61 Under the ASX Listing Rules, matters which require shareholder approval include:- the issue of more than 15% of equity securities (Rule 7.1); the issue of securities during a takeover bid (Rule 7.9); the disposal of substantial corporate assets to certain associated persons (Rule 10.1); any increase in fees payable to non-executive directors (Rule 10.17); the conferral of
the use of entrenchment mechanisms, such as dual class stock and poison pills, which are permitted in many other jurisdictions. The ASX Listing Rules are given statutory backing under the Corporations Act 2001 (Cth) (“ Corporations Act”) and, following a failure to comply, are enforceable in court on the application of the Australian Securities and Investments Commission (“ASIC”), the ASX or “a person aggrieved” by the breach. Where the purpose of a listing rule is to protect shareholders, an individual shareholder may have standing to enforce the rule as a person aggrieved.

Nonetheless, there is a crucial difference between the institutional investors’ original demand that News Corp include the substance of specified ASX Listing Rules in its charter, and the concession as finally accepted. This difference relates to the potential for modification of the rules. Although News Corp’s agreement to retain full foreign listing on the ASX meant that the company was prima facie required to comply fully with the ASX Listing Rules, this could be undermined if the ASX exercised its power to waive particular rules on behalf of News Corp. This aspect of the concession was to become relevant immediately following News Corp’s re-incorporation.

Second, the institutional investors tried to ensure that News Corp would not issue super-voting shares without shareholder approval after the Delaware re-incorporation. Australian public listed corporations are prohibited from issuing termination benefits, if the total value of benefits payable to all officers will exceed 5% of equity in the company (Rule 10.19), and the disposal of the main undertaking of the company (Rule 11.2).

62 See ASX Listing Rule 6.9.

63 See ASX Listing Rule 7.1.

64 See Corporations Act 2001 (Cth), §§ 793C(1) and (3), § 1101B and § 1324.


66 As discussed later in the article, in the week during which News Corp’s re-incorporation became fully effective, the ASX waived a number of its listing rules on News Corp’s behalf.

shares with enhanced voting power under the ASX Listing Rules, unless the rules are waived by the ASX.\textsuperscript{68}

There was a history to the institutional investors’ concern in this regard. More than a decade earlier, Rupert Murdoch had announced at News Corp’s 1993 annual shareholder meeting a plan to issue super-voting shares.\textsuperscript{69} News Corp subsequently asked the Australian Stock Exchange to waive the strict “one share, one vote” principle\textsuperscript{70} under the ASX Listing Rules, to enable the company to issue shares with differential voting rights.\textsuperscript{71} The proposal was widely condemned in Australia as an entrenchment and anti-takeover device, which would erode general shareholder rights.\textsuperscript{72} What began as a discrete waiver request by News Corp broadened into a general policy debate about the future of the “one share, one vote” rule for Australian listed companies.\textsuperscript{73} Institutional investor opposition,\textsuperscript{74} governmental intervention\textsuperscript{75}

\textsuperscript{68} See ASX Listing Rule 6.9, which mandates a “one share, one vote” rule in relation to voting on a poll.

\textsuperscript{69} Sue Lecky, Murdoch Seeks ‘Super’ Shares, SYDNEY MORNING HERALD, Oct. 13, 1993, at 27.

\textsuperscript{70} For discussion of the history and economic theory underlying the “one share, one vote” rule, see generally Guido Ferrarini, One Share – One Vote: A European Rule? (ECGI – Law Working Paper No. 58/2006, 2006), available at \url{http://ssrn.com/abstract=875620}.

\textsuperscript{71} News Corp wrote to the ASX seeking approval to make a bonus issue of super-voting shares on a 1-for-10 basis, with each new share carrying 25 votes. \textit{See generally} Saul Fridman, The News Corporation Super Shares Proposal: Crime of the Century or Tempest in a Teapot, 4 \textit{Aust. J. Corp. L.} 184, 184-185 (1994).

\textsuperscript{72} The deputy managing director of AMP Society, one of Australia’s largest institutional investors, stated at the time, “We believe that the only reason for differential voting rights is to allow control to be entrenched in the hands of the minority, perhaps in perpetuity”: Emiliya Mychasuk, Industry Says No to News Share Plan, SYDNEY MORNING HERALD, Nov. 30, 1993, at 33. \textit{Cf} Saul Fridman, \textit{id}.

\textsuperscript{73} See ASX, Discussion Paper on Differential Voting Rights 4-6 (November 1993). \textit{See also} Ivor Ries, ASX Opens Up One-vote Debate, \textit{Aust. Fin. Rev.}, Nov. 11, 1993, at 64, arguing that such a change to Australian law would constitute “perhaps the most dramatic shift in the balance of power in favour of the company management and dominant shareholders and away from minority shareholders in Australian corporate history”.


and public backlash ultimately led News Corp to abandon the plan to issue super-voting shares, leading some prescient commentators at the time to speculate that News Corp might seek to avoid future difficulties of this kind by delisting in Australia or re-incorporating in a jurisdiction such as Delaware.

In its concessions to the 2004 re-incorporation campaign by institutional investors, News Corp agreed to include a provision in its Delaware charter, prohibiting the issue of any super-voting shares in the absence of approval by the majority of all voting shareholders.

Third, the institutional investors raised the issue of the disparity between shareholder rights under Australian law and Delaware law, particularly in the context of shareholder meetings and voting. They were concerned that the re-incorporation proposal would diminish existing shareholder rights, and their Governance Article addressed this by including an extensive list of shareholder protection provisions from the Australian Corporations Act. These provisions related to matters such as the convening of meetings; conduct of shareholder meetings; and removal of directors from office.

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77 See, e.g., Ivor Ries, Super-voter Isn’t Dead Yet, AUST. FIN. REV., Dec. 9, 1993, at 48.
79 Relevant provisions of the Corporations Act relating to the convening of meetings, which appeared in the Governance Article, included:- § 249CA (mandatory rule empowering a single director of a listed company to convene a shareholder meeting); § 249D (provision requiring directors to convene a shareholder meeting on the request of shareholders with at least 5% of votes that may be cast in a general meeting or 100 members); § 249E (liability consequences for directors of failing to comply with a valid shareholder request to convene a shareholder meeting under § 249D); § 249F (power of shareholders with at least 5% of votes that may be cast in a general meeting to convene a shareholder meeting to call and hold a shareholder meeting themselves) and § 249HA (mandatory minimum notice period of 28 days for shareholder meetings of listed public companies).
80 Relevant provisions of the Corporations Act relating to the conduct of meetings, which appeared in the Governance Article, included:- § 249N (power of shareholders with at least 5% of votes that may be cast in a general meeting, or 100 members, to propose resolutions at a shareholder meeting); § 249O (obligation on company to give notice of shareholder resolutions); § 249P (power of shareholders with at least 5% of votes, or 100 members by number, to require the company to distribute a statement about shareholders’ resolutions to shareholders in certain circumstances); § 250R (requiring a non-binding shareholder vote at the annual general meeting on the directors’ remuneration report); § 250RA (requiring the
Several of the Australian provisions included in the Governance Article are worthy of comment. The Governance Article included, for example, § 249D of the Corporations Act, which requires directors to convene a meeting upon requisition by shareholders with 5% of votes or 100 members by number, and s 249F, which permits shareholders with at least 5% of votes to convene a meeting directly. It also contained the recently enacted Australian provision, § 250R of the Corporations Act, requiring shareholders of an Australian listed company to pass a non-binding resolution at their annual meeting approving the directors’ remuneration report.\textsuperscript{82} In the area of removal of directors from office, the Governance Article advocated inclusion of § 203D of the Corporations Act, granting shareholders of public companies an absolute right to remove directors from office, with or without cause, by majority vote.

News Corp made only one concession in this regard. The company agreed to include a provision in its Delaware charter permitting shareholders with 20% or more of Class B common stock to request a special stockholder meeting.\textsuperscript{83} While this charter provision was more generous to shareholders than Delaware law (under which they have no \textit{prima facie} right to convene a special shareholder meeting),\textsuperscript{84} it contained

\textsuperscript{81}Section 203D Corporations Act (mandatory power of public company shareholders to remove a director from office by ordinary resolution). The Governance Article included various other shareholder protection provisions, such as §§ 207-230 (general requirement of shareholder consent for related party transactions).


\textsuperscript{83}See United States Securities and Exchange Commission, Form 8-K, \textit{Amended and Restated Certificate of Incorporation of News Corporation, Inc.} Article VI (Nov. 12, 2004). Perhaps surprisingly, the charter did not include a supermajority provision defending the shareholder rights contained in this provision.

\textsuperscript{84}Under Del. Code Ann., tit. 8, § 211(2)(d) (2008), a special meeting of the stockholders may only be convened by the board or by a person so authorized in the certificate of incorporation or by the bylaws. \textit{Cf} Model Bus. Corp. Act. § 7.02(a)(2) (2008), which \textit{prima facie} permits
significant qualifications, and was far less generous than the Australian approach, which permits shareholders with 5% of votes, or 100 members by number, to requisition a special shareholder meeting.

Fourth, the institutional investors’ Governance Article addressed takeovers. Significant differences exist between the US and other common law countries, including Australia, with respect to the balance of power between shareholders and directors in takeovers. US federal law regulates “tender offers” rather than the concept of “changes of control”, which forms the regulatory fulcrum in jurisdictions such as the UK and Australia. Under US law, assessment of directors’ defensive conduct in takeovers is the province of state law and the courts. Delaware law, in spite of the potential for intense scrutiny of directors’ defensive tactics following the Unocal decision, continues to accord great deference to board decisions under a paradigm in which the board occupies a “gatekeeper” role. Views differ on whether members holding at least 10% of votes to convene a special meeting of stockholders. The articles of incorporation may fix a lower or higher percentage, though not exceeding 25%.

News Corp’s Delaware charter states, for example, that no special meeting of stockholders can be called if written notice by the stockholders is received less than 135 days prior to the first anniversary of the date of the preceding annual meeting of stockholders: see United States Securities and Exchange Commission, Form 8-K, Amended and Restated Certificate of Incorporation of News Corporation, Inc. Article VI (Nov. 12, 2004). The clause also provides that the directors must convene a special shareholders’ meeting not later than 100 days after receipt of the stockholders’ written request, compared to a 21 day deadline for directors under Australian law: see Corporations Act 2001 (Cth), § 249D(5). If the directors fail to convene a meeting within 21 days, a specified proportion of the requisitioning shareholders may convene the meeting themselves and the company may recover meeting expenses from the directors personally (Corporations Act, §§ 249E(1), 249E(5)).

See Corporations Act 2001 (Cth) §§ 249D and 249F.

See also John C. Coffee, The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control, 111 YALE L.J. 1, 18 (2001), noting the existence of different regulatory approaches to takeovers within common law jurisdictions.

See, e.g., §§ 14(d) and 14(e) of the Williams Act, which was enacted in 1968 and amended in 1970. See generally Jesse H. Choper, John C. Coffee and Ronald J. Gilson, CASES AND MATERIALS ON CORPORATIONS 1114ff (6th ed., 2004).


It has been stated that the board acts, not just a gatekeeper, but rather as “the defender of the metaphorical medieval corporate bastion and the protector of the corporation’s shareholders”. See Stephen M. Bainbridge, Unocal at 20: Director Primacy in Corporate Takeovers, 31 DEL....
this gatekeeper paradigm in fact promotes shareholder interests. Nonetheless, the assumption that board access to defensive tactics is a vital antidote to coercive bids continues to have strong traction in US corporate law scholarship.

In the UK, takeover disputes are resolved not by the courts, but by a specialized non-judicial body, the Panel on Takeovers and Mergers (“the UK Panel”), which is responsible for administering the City Code on Takeovers and Mergers (“the City Code”). The operation of the UK Panel reflects a self-regulatory approach to takeovers, and has served as the blue-print for reform in numerous jurisdictions, including Australia, Hong Kong, Ireland and South Africa. The UK approach has, at least to date, been characterized by an extremely low incidence of tactical litigation compared to the US. Some of the contours of UK takeover regulation were altered recently to implement the Directive on Takeover Bids (“the Directive”) under EC law.

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92 See, e.g., Paul Davies and Klaus J. Hopt, Control Transactions, in Reinier Kraakman, Paul Davies, Henry Hansmann, Gérard Hertig, Klaus J. Hopt, Hideki Kanda and Edward B. Rock (eds), THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 157, 172 (2004), arguing that it is difficult to justify the Delaware takeover law model as an efficient regulatory regime for agency problems in the takeover context. Cf Bainbridge, id, arguing that insulation of board authority is a critical factor in promoting efficient corporate decision-making for the benefit of shareholders.

93 See, e.g., Chancellor Leo E. Strine, Toward Common Sense and Common Ground? Reflections on the Shared Interests of Managers and Labor in a More Rational System of Corporate Governance, 33 J. CORP. L. 1, 12 (2007), who states that it would be “crazy from an investor’s perspective for a target board not to have a traditional pill in place to stimulate a value-enhancing auction and to deter structurally coercive bids”.

94 The UK Panel was established in 1968, the same year that the Williams Act was passed in the US. Membership of the UK Panel is drawn from major financial and business institutions. See “Membership of the Panel”, available at http://www.thetakeoverpanel.org.uk/new/.

95 See Emma Armson, Models for Takeover Dispute Resolution: Australia and the UK, 5 J. CORP. L. STUD. 401, 402 (2005).

96 Tunde I. Ogowewo, Tactical Litigation in Takeover Contests, J. BUS. L. 589, 608-611 [2007].

97 Directive on Takeover Bids (2004/25/EC). Thus, for example, the UK Panel has been designated as the supervisory authority for the purposes of the Directive. Whereas previously takeover regulation in the UK had no direct statutory force, the introduction of Part 28 of the UK Companies Act 2006, which implements the Directive on Takeover Bids, now provides a statutory basis for takeover regulation in the UK for the first time. See generally Tunde I. Ogowewo, id. at 590-592. The UK Government expressed concern that the new legal framework created by the Takeovers Directive might potentially increase the level of tactical
In contrast to Delaware’s deference to board discretion, the City Code seriously restricts the ability of the board to engage in defensive tactics and implement entrenching mechanisms. It elevates shareholder decision-making power during a takeover, an approach which also underpins recent EC developments in takeover law. A central feature of the City Code is the “frustrating action” principle, which prohibits directors, in the absence of shareholder approval, from taking any action that may result in frustration of a bona fide offer or in the shareholders being denied the opportunity to decide an offer on its merits. It has been argued that differences in the prevailing paradigms in the UK and US context are attributable to the stronger influence of institutional investors under the UK self-regulatory regime than in the US, where the balance of power is firmly tilted towards management.

Australia’s takeover laws also diverge from the Delaware approach, and have been described as “unique” and “widely regarded as some of the most restrictive among capitalist economies”. They are explicitly based on a policy of equality of opportunity and protection of minority shareholders, embodied in the so-called

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100 Rule 21, City Code on Takeovers and Mergers (UK). Examples of frustrating actions are set out in Rule 21 and include matters such as: issuing new shares; granting options over unissued shares; creating securities that carry rights of conversion into shares; selling or acquiring assets of a material amount, and entering into contracts otherwise than in the ordinary course of business.
“Eggleston principles”. The basic rule under Australian takeover law, which has a historical focus on fairness rather than economic efficiency, is that a bidder cannot acquire control of a parcel of 20% or more of voting shares, except pursuant to a general offer to all shareholders (the “20% threshold rule”). Private control transactions are thus precluded. By requiring that an offer be made to all shareholders before a bidder is permitted to pass the control threshold, Australian takeover law ensures that any control premium is shared equally between majority and minority shareholders. This rule is particularly strict by international standards, including UK law, which permits private control transactions provided that a general offer or “mandatory bid” is then made to all shareholders.

Australian law moved closer to UK law in 2000, when responsibility for the resolution of takeover disputes shifted from the courts to the Australian Takeovers Panel. Although Australian courts traditionally adopted a fiduciary duty analysis to assess directors’ defensive conduct, after 2000 the Australian Takeovers Panel diverged sharply from this approach, by implementing its own frustrating action policy. This frustrating action policy focused on the effect, rather than the purpose,

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103 The Eggleston Principles are embedded in Corporations Act 2001 (Cth), § 602, which outlines the purposes of the Chapter in the Act that governs takeovers. The provision includes a purpose that “as far as practicable” the holders of voting shares “all have a reasonable and equal opportunity to participate in any benefits” accruing from the acquisition of a substantial interest: see § 602(c). See also Mannolini, id. at 337-338.

104 Mannolini, id.

105 See Corporations Act 2001 (Cth), §§ 606(1) and 611.

106 Under Rule 9.1 of the City Code on Takeovers and Mergers (UK), the relevant control threshold is 30% of voting shares.


108 Corporations Act 2001 (Cth), Part 6.10, Division 2 – “The Takeovers Panel”. The policy basis for this change was the perception that there was widespread use of tactical litigation in the Australian context. See Tunde I. Ogowowo, Tactical Litigation in Takeover Contests, J. BUS. L. 589, 602-603 [2007]. Note that the Australian Takeovers Panel has recently been the subject of a High Court constitutional challenge. See generally Emma Armson, Attorney-General (Commonwealth) v Alinta Limited: Will the Takeovers Panel Survive Constitutional Challenge?, 29 SYD. L. REV. 495 (2007). The High Court upheld the constitutional validity of the Takeovers Panel’s powers in a judgment delivered on 13 December 2007. See Takeovers Panel, Attorney-General (Commonwealth) v Alinta Ltd: High Court Appeal Allowed, TP07/105 (13 December 2007).

109 The frustrating action policy arises from the reasonable and equal opportunity principle under Corporations Act, § 602(c). See generally Takeovers Panel, Guidance Note 12: Frustrating
of directors’ conduct in response to a takeover,\textsuperscript{110} and limited permissible action by
the board in the absence of shareholder consent.\textsuperscript{111} It constituted a major shift in the
balance of power between the board and shareholders during a bid under Australian
law.\textsuperscript{112}

There has been increasing recognition of the extent of variation in international
takeover regulation. Academic commentators have explored possible reasons for the
“peculiar divergence” between US and UK takeover rules.\textsuperscript{113} A US court, in the
recent decision \textit{E.On AG v. Acciona, SA and Finanzas Dos, SA},\textsuperscript{114} concerning a 47
billion euro hostile takeover in Madrid, acknowledged this diversity and warned of
the need for caution in applying US takeover principles in cross-border acquisitions,
where the acquirer may be acting in compliance with the laws of the home
jurisdiction.\textsuperscript{115} Takeovers also constituted an important theme in the Paulson
Committee report. The committee compared the “pro-shareholder” approach of the
UK regulatory regime with the “pro-management” approach of the Delaware courts,
and recommended certain reforms to the US system to shift more power to shareholders.\textsuperscript{116}

The institutional investors’ Governance Article addressed the takeover issue by advocating that News Corp’s Delaware charter should include the 20% threshold rule found in Australian takeover law, to ensure that any control premium would be shared between all stockholders. Furthermore, the Governance Article tackled the issue of defensive conduct by the board of directors. Clause 8.1 of the Governance Article contained a general limitation on the board’s power in relation to corporate control transactions.\textsuperscript{117} It also included a provision expressly stating that that “the Board shall not have power to, and shall not, create or implement any device, matter or thing the purpose, nature or effect of which is commonly described as a ‘poison pill’”.\textsuperscript{118}

News Corp made certain concessions in the takeover context. It was agreed, for example, that the Murdoch interests would be subject to restrictions analogous to the Australian 20% threshold rule under a series of voting agreements.\textsuperscript{119} Subject to specified “permitted transfers”, the Murdoch interests were prohibited from acquiring more than an additional 3% of News Corp’s outstanding shares every six months.\textsuperscript{120} News Corp also accepted a restriction on the board’s power to issue poison pills. However, this restriction was contained not in the charter, as the institutional investors


\textsuperscript{117} Clause 8.1 of the Governance Article stated that “[t]he Board shall not have power to, and shall not, restrict, limit or hinder in any way the opportunity and capacity of shareholders to decide whether or not control of the Company should pass under any takeover bid which may be made in compliance with Delaware law and New York Stock Exchange listing requirements. For the avoidance of doubt, this provision applies throughout the life of the Company and whether or not any takeover bid is anticipated or current”. News Corporation Group, \textit{Governance Article for New Delaware Parent Company: Preservation of Australian Public Investor Protection & Empowerment Provisions} Clause 8, “Presumptions of Delaware/US law and practice not to apply” (2004, on file with the author).

\textsuperscript{118} \textit{Id.}


\textsuperscript{120} “Summary of Agreement Between News Corp US and the Murdoch Interests”, \textit{id.} at para (a).
had requested, but rather in a board policy. The ostensible reason for this was logistical constraints.\textsuperscript{121} News Corp issued a press release and letter to shareholders announcing that the board of the new Delaware corporation had “established a policy that if any stockholder rights plan (known as a “poison pill”) is adopted without stockholder approval, it will expire after one year unless it is ratified by stockholders”.\textsuperscript{122}

Finally, the institutional investors’ Governance Article included a number of principles of best practice derived from Australian and international corporate governance.\textsuperscript{123} News Corp did not agree to include these provisions in its Delaware charter. It did, however, agree to establish board committees “to consider” certain corporate governance issues prior to the company’s first annual meeting under Delaware law. These issues included standards of independence for board members, disclosure of the company’s process for determining leadership succession, procedures for assessing reasonable shareholder proposals and elimination of the company’s staggered board structure.\textsuperscript{124}

\textsuperscript{121} During negotiations, News Corp’s General Counsel, Ian Phillip, told the President of ACSI, Michael O’Sullivan, that it would not be possible, in the limited time available before the shareholder vote on the corporate reconstruction, to draft and finalize an appropriate charter restriction on poison pills. See \textit{UniSuper Ltd. v. News Corporation}, 2005 WL 3529317 at *2 (Del. Ch.).


The adoption of these various concessions effectively quelled the corporate governance revolt by institutional investors, and at News Corp’s general meeting in Adelaide in October 2004, shareholders overwhelmingly approved the re-incorporation proposal, with over 90% of votes cast in its favor.

Although News Corp’s concessions were far more limited than the institutional investors’ original demands in the Governance Article, the compromise was generally portrayed in the Australian financial press as a significant victory for the institutional investors. One commentator, for example, described the News Corp concessions as heralding “a major step forward” for shareholder democracy; others however, viewed them as inconsequential and a mirage.

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127 Votes cast in favor of the schemes of arrangement at the various class meetings of News Corp were as follows:-

<table>
<thead>
<tr>
<th>Shareholders</th>
<th>Votes in Favor</th>
<th>Votes Against</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ordinary</td>
<td>91.28%</td>
<td>8.72%</td>
</tr>
<tr>
<td>Preferred</td>
<td>96.23%</td>
<td>3.77%</td>
</tr>
<tr>
<td>Option</td>
<td>99.95%</td>
<td>0.05%</td>
</tr>
</tbody>
</table>

The schemes of arrangement were unanimously approved at the separate class meetings of the Murdoch interests. See News Corporation Ltd. [2004] FCA 1480 at para [3].

128 News Corporation Group, Governance Article for New Delaware Parent Company: Preservation of Australian Public Investor Protection & Empowerment Provisions (2004, on file with the author). See also Malcolm Maiden, Dominant US Interests the Key to Rupert’s Backflip, THE AGE, Oct. 7, 2004, at 1, stating that the agreed changes were “at the top of a much more extensive list” sought by ACSI and CGI.


130 Elizabeth Knight, Murdoch Gymnastics Good for Investors, SYDNEY MORNING HERALD, Oct. 8, 2004, at 25.

4. News Corp’s Poison Pill - Comparative Law Perspectives

“I think he’s the most brilliant financial mind I know … I should think we are all responding to John Malone, dancing to his tune. I still do sometimes”.

Rupert Murdoch\textsuperscript{132}

“Rupert is a great guy but I never found him of compelling generosity”.

John Malone\textsuperscript{133}

“[Murdoch is] a shark, always dangerous, always on the move. By contrast, Malone is a swamp alligator, content to lie secreted in the mud, to let the prey come to him”.

David Elstein\textsuperscript{134}

On 8 November 2004, in the same week that the re-incorporation became fully effective, one problematical aspect of the domicile change\textsuperscript{135} emerged as a reality. News Corp issued a press release announcing that its board of directors had adopted a poison pill.\textsuperscript{136} The poison pill was in the form of a stockholder rights plan,\textsuperscript{137} granting


\textsuperscript{133} Cited in Christian Catalano, *Murdoch Looks Set to Do a Deal with Malone*, SYDNEY MORNING HERALD, Apr. 20, 2005, at 22.


\textsuperscript{137} News Corp’s stockholder rights plan is set out in News Corporation, SEC Form 6-K Filing, Exhibit B, News Corporation, Inc. and Computershare Investor Services, LLC (as Rights
each shareholder a dividend distribution of one right for each voting and non-voting common stock held. These inchoate rights would crystallize, and become exercisable, if an acquirer obtained 15% or more of News Corp’s voting common stock. When triggered, the rights would entitle their holder (with the exception of the acquirer) to purchase News Corp’s voting and non-voting common stock at half price, and, in the event of a merger or acquisition of News Corp, to buy shares in the acquiring company at half price.\footnote{News Corp, News Corporation Announces Stockholder Rights Plan 1 (Press release, Nov. 8, 2004), available at http://www.asx.com.au/asxpdf/20041108/pdf/3nlcbk21xx2rz.pdf. See John Armour and David A. Skeel, \textit{Who Writes the Rules for Hostile Takeovers, and Why? The Peculiar Divergence of U.S. and U.K. Takeover Regulation}, 95 Geo. L.J. 1727, 1734 (2007), describing the technical operation of poison pills.}

The press release expressly referred to News Corp’s recently adopted board policy that any poison pill would expire after one year unless approved by shareholders. However, references to this policy were nebulous and suggested a certain malleability. According to the press release:-

\begin{quote}
[T]he Rights Plan currently provides that the rights will expire in one year. At or prior to such one year anniversary, the Board of Directors will take such action as it deems appropriate in the light of facts and circumstances existing at such time, including, if appropriate, implementing such policy (whether by seeking stockholder ratification or by allowing the rights to expire).\footnote{News Corp, \textit{id.} at 2.}
\end{quote}

The press release also revealed that the poison pill was a direct response to the actions of Liberty Media Corp (“Liberty Media”),\footnote{Id. at 1. News Corp’s press release noted that this action was taken by Liberty Media “without any discussion with, or prior notice to, News Corporation”. \textit{Id.}} the investment vehicle of cable TV magnate John Malone, with whom Murdoch had a longstanding involvement.\footnote{This involvement included Malone’s participation in a News Corp capital raising in the early 1990s, which rescued New Corp from near bankruptcy at the time. At one stage, Murdoch and Malone had also apparently contemplated appointing Malone to the board of News Corp. \textit{See generally} Martin Peers, \textit{Mogul vs. Mogul: Stock Gambit Strains Relations Between Two Media Titans}, WALL ST. J., Mar. 3, 2005, at A1; Neil Chenoweth, \textit{Malone’s Ambitious Plan to Sneak up on Murdoch}, AUS. FIN. REV., Oct. 18, 2005, at A1.}

\begin{footnotesize}
\begin{enumerate}
\item[139] News Corp, \textit{id.} at 2.
\item[140] \textit{Id.} at 1. News Corp’s press release noted that this action was taken by Liberty Media “without any discussion with, or prior notice to, News Corporation”. \textit{Id.}
\end{enumerate}
\end{footnotesize}
days before the pill’s adoption, Liberty Media disclosed that it had entered into a $1.48 billion equity swap for News Corp shares with Merrill Lynch & Co. There have been several recent controversial transactions in Australia, where cash-settled equity swaps were used strategically in a takeover context, and there is growing concern in the US about the regulatory implications of equity swaps. In this instance, the equity swap transaction permitted Liberty Media to raise its voting stake in News Corp from approximately 9% to 17%, only 13 percentage points below the Murdoch family’s voting interests. Thus, whatever rule-based constraints Australian law may impose on management via shareholder rights, it is clear that the market for corporate control in the US was a far more potent force than in Australia, given the fact that News Corp was a potential takeover target virtually upon its arrival in Delaware.

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143 The equity swap for 84.7 million class B News Corp shares was scheduled for completion by April 2005. See Tim Burt, News Corp Channels Energies into Pay-TV, FIN. TIMES, Nov. 4, 2004, at 20; Liberty Media Buys Another Chunk of News Corp, DENV. BUS. J., Nov. 4, 2004, at 3 (cited in Louise McCoach, THE GLENCORE DECISION: A CASE FOR REFORM? (2005, unpublished manuscript, on file with author)).

144 Cash-settled equity swaps were used to obtain a pre-bid acquisition stake or a blocking position in control transactions, such as the 2005 takeover by BHP Billiton of WMC Resources Ltd (see Bryan Frith, BHP King Hit Knocks Rivals out of the Ring, THE AUST., Mar. 9, 2005, at 36). However, the most prominent example was the use of equity swaps by Glencore International AG (“Glencore”) to obtain a blocking position during a 2005 takeover bid by Centennial Coal Co Ltd for Austral Coal Ltd. See, generally, Glencore International AG v. Takeovers Panel (2005) 220 ALR 495; Emma Armson, The Australian Takeovers Panel and Judicial Review of its Decisions, 26 ADEL. L. REV. 327 (2005). Glencore’s equity swap provided a good illustration of the contemporary phenomenon of hidden or “morphable” ownership, and the associated regulatory challenges of such ownership. See Henry T. Hu and Bernard Black, The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership 79 S. CAL. L. REV. 811, 839ff (2006), discussing the attempted use of hidden ownership through equity swaps in the Glencore matter to avoid disclosure under Australia’s takeover rules.


Liberty Media’s equity swap transaction was an opportunistic one, taking advantage of instability in News Corp shares during the domicile change. This instability was due to the fact that many index funds in Australia and Asia were required to sell News Corp shares, in anticipation of its removal from Australian stock indices. Analysts considered that, but for the presence of a poison pill, Liberty Media could have raised its voting stake to 49% of News Corp shares, by swapping its 421.6 million non-voting Class A ordinary shares for Class B voting stock. In contrast, Mr Murdoch was constrained in his ability to purchase any News Corp shares which came onto the market during this period, as a result of the concessions extracted by the institutional investors to the effect that the Murdoch family could not acquire more than an additional 3 percent of News Corp’s outstanding shares every six months.

News Corp’s poison pill specifically exempted existing shareholdings above the 15% threshold (such as the Murdoch interests), and previously disclosed contracts to

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147 See Christian Catalano, Murdoch Looks Set to Do a Deal with Malone, SYDNEY MORNING HERALD, Apr. 20, 2005, at 22. Speculation existed on Wall Street that the equity swap constituted a negotiating strategy to put pressure on News Corp to purchase certain Liberty Media assets. See Martin Peers, Malone Gets a Step on Murdoch, WALL ST. J., Nov. 9, 2004, at C1.


149 Liberty Media owned approximately 17% of News Corp’s non-voting shares. This non-voting stake had been accumulated through deals with News Corp itself and was worth approximately $6 billion. By late 2003, Liberty Media was the largest shareholder in News Corp on a global basis, including voting and non-voting stock. See Sam Matthews, Liberty Looks to Double Voting Stake in News Corporation, BRAND REPUBLIC, Nov. 8, 2004, at 1; Martin Peers, Mogul vs. Mogul: Stock Gambit Strains Relations Between Two Media Titans, WALL ST. J., Mar 3, 2005, at A1.


purchase stock (such as Liberty Media’s equity swap arrangement).\textsuperscript{152} Further acquisitions of more than 1\% by any party could, however, trigger the pill.\textsuperscript{153} The pill therefore ensured that Liberty Media could not raise its voting stake in News Corp beyond 18\%, without experiencing massive dilution.\textsuperscript{154}

Although Chancellor Chandler has suggested that Liberty Media “suddenly appeared” as a hostile acquirer,\textsuperscript{155} it in fact seems that Liberty’s acquisition strategy commenced much earlier. It is now known that Liberty Media lodged an application with the Australian Foreign Investment Review Board (“FIRB”) in 2002. This information only became publicly known due to a 2005 Administrative Appeals Tribunal (“AAT”) decision, \textit{Re Mangan v. The Treasury}.\textsuperscript{156} The AAT decision concerned a Freedom of Information application\textsuperscript{157} which had been made by a Deutsche Bank analyst, Michael Mangan,\textsuperscript{158} to the Australian Treasury, for release of information about whether Liberty Media had lodged a FIRB application seeking clarification of any ownership restrictions on News Corp.\textsuperscript{159} Treasury denied Mr Mangan access to certain documents falling within the scope of his Freedom of Information application, on the basis that their release would adversely affect Liberty Media’s “lawful business,
commercial and financial affairs”. In review proceedings, the AAT upheld Treasury’s decision, refusing disclosure of the documents on a variety of grounds, including that disclosure would reveal Liberty Media’s “strategy for maintaining and increasing its interest” in News Corp, and would disadvantage Liberty Media vis-à-vis its competitors in any acquisition of News Corp shares. The AAT also rejected the applicant’s argument that disclosure was now justified, since News Corp’s adoption of a poison pill had effectively destroyed the commercial value of the relevant documents.

Liberty Media’s 2002 FIRB application is interesting, since it suggests the possibility that Liberty may have contemplated a full takeover bid for News Corp under Australian law at least two years before its controversial equity swap transaction, and provides some support for the theory that the main motivation behind News Corp’s move to Delaware was to adopt a poison pill, which is not permissible under Australian law.

Unlike Delaware, and some other jurisdictions such as Canada, France and Japan, Australia and the UK have not proven to be hospitable terrain for poison

160 Id. at paras [2], [7], [9]. The relevant provisions on exemptions from disclosure are §§ 43 and 45, Freedom of Information Act 1982 (Cth).

161 Id. at para [29]. From a policy perspective, the AAT also considered that an order requiring disclosure would seriously limit the information that Liberty Media would be willing to provide voluntarily to FIRB in any future applications: id. at paras [30], [44]-[47].

162 Id. at paras [32]-[33], [38]-[39].


165 In the post-Enron era, however, shareholder pressure has led to the elimination of poison pills in an increasing number of US companies. In 2005, less than 50% of companies in the S&P 500 had poison pills and this figure fell to 37% in 2006. See ISS, POISON PILLS IN FRANCE, JAPAN, THE U.S. AND CANADA: TAKEOVER BARRIERS RISE IN EUROPE AND JAPAN, BUT FALL IN NORTH AMERICA 10-11 (2007).

166 Note, however, that in Canada the poison pill has evolved in an idiosyncratic way, providing shareholders “with protections that were never intended by the original designers of poison pills”. See Philip Anisman, Poison Pills: The Canadian Experience, in Theodor Baums, Klaus J. Hopt and Norbert Horn (eds), CORPORATIONS, CAPITAL MARKETS AND BUSINESS IN THE LAW: LIBER AMICORUM RICHARD M. BUxbaum 12 (2000).
pills. Poison pills are, for all intents and purposes, non-existent in Australia, though there appears little consensus as to why this is so. There is no general prohibition upon specific defensive measures of this kind, however, at least three areas of Australian corporate law and governance have tended to impede the development of poison pills.

First, a possible explanation for the absence of poison pills in Australia is the general law on fiduciary duties. Directors are subject to a fundamental duty to act bona fide for the benefit of the company and for proper purposes. Defeating a takeover or ensuring that the current target board retains control are prima facie improper purposes. UK and Australian case law contains strong dicta to the effect that it is unconstitutional for directors to allot shares to manipulate control, and that shareholders have a personal right to be protected against dilution of their voting rights by improper board conduct. Any such share issue by the directors would be voidable, unless ratified by the shareholders in general meeting. Since poison pills, if triggered, produce substantial dilution of the bidder’s stake and often

167 Poison pills have only been introduced in Japan and France very recently. See ISS, Poison Pills in France, Japan, the U.S. and Canada: Takeover Barriers Rise in Europe and Japan, But Fall in North America 6-9 (2007).


169 An analogous statutory duty is found in Corporations Act 2001 (Cth), § 181.

170 Hogg v. Cramphorn Ltd. [1967] Ch 254 at 268; Howard Smith Ltd. v. Ampol Petroleum Ltd. [1974] AC 821 at 837. Directors’ conduct may, however, in limited circumstances be characterized as within the proper sphere of managerial discretion, even though the conduct incidentally thwarts a takeover bid. Cf Howard Smith Ltd. v. Ampol Petroleum Ltd., id.; Harlowe’s Nominees Pty Ltd. v. Woodside (Lakes Entrance) Oil Co NL (1968) 121 CLR 483; Teck Corp Ltd. v. Millar (1973) 33 DLR (3d) 288.


172 See, e.g., Residues Treatment and Trading Co Ltd. v. Southern Resources Ltd. (1988) 51 SASR 177 at 202 (per King CJ).


174 Depending on whether the poison pill has a “flip-in” or a “flip-over” feature, the dilution may relate to the equity of either the target company or the hostile bidder. See Tunde I. Ogowewo, Tactical Litigation in Takeover Contests, J. BUS. L. 589, note 2 [2007].
discriminate between shareholders,\(^\text{175}\) in most cases it would be difficult for directors to argue that they have fulfilled their duty to act for a proper purpose in the best interests of the company.\(^\text{176}\) A statutory oppression remedy is also available for conduct which is unfairly prejudicial or discriminatory to a shareholder under Australian law.\(^\text{177}\)

The second inhibiting factor is the approach of the Australian Takeovers Panel to defensive conduct by target boards. The frustrating action policy would seem to preclude the adoption of a poison pill without shareholder consent,\(^\text{178}\) and the Panel has made some specific remarks about poison pills that are consistent with this interpretation.\(^\text{179}\) Further support for this position can be derived from the important decision of the Takeovers Panel concerning a 2003 takeover bid by Centro for the AMP Shopping Centre Trust.\(^\text{180}\) This decision, in the context of managed schemes,

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\(^{175}\) Such discrimination will occur where the bidder is excluded from the invitation to target shareholders to buy two shares for the price of one under the shareholder rights plan. See John Armour and David A. Skeel, *Who Writes the Rules for Hostile Takeovers, and Why? The Peculiar Divergence of U.S. and U.K. Takeover Regulation*, 95 GEO. L.J. 1727, 1734 (2007).


\(^{177}\) Corporations Act 2001 (Cth), § 232(e).


\(^{179}\) The Australian Takeovers Panel has stated, for example, that “[a]greements which the Panel considers are ‘poison pills’ and have not been approved by relevant shareholders may be found to create unacceptable circumstances”: Takeovers Panel, *Guidance Note 12: Frustrating Action* para [12.28]; note 11 (16 June 2003), available at [http://www.takeovers.gov.au/content/120/download/GN12.pdf](http://www.takeovers.gov.au/content/120/download/GN12.pdf). Although Guidance Note 12 stated that the Panel may issue a further guidance note specifically on poison pills in the future if it appeared necessary (para [12.35]), this has not occurred to date.

\(^{180}\) See *Re AMP Shopping Centre Trust (No 1)* (2003) 45 ACSR 496; [2003] ATP 21; BC200302947; *Re AMP Shopping Centre Trust (No 2)* (2003) 45 ACSR 524; [2003] ATP 24; BC200302948, which concerned a managed investment scheme. The Australian Takeovers Panel held, at first instance, that the granting of certain pre-emptive rights to acquire interests in AMP Shopping Centre Trust (ART), exercisable on a change of responsible entity in ART, constituted “unacceptable circumstances”. Unacceptable circumstances existed because: (a) the pre-emptive rights would potentially deter a takeover bid for the target and entrench
demonstrated that the Panel is “willing to scrutinize measures that tend to act as poison pills … to ensure that unitholders are not unfairly deprived of the opportunity for a takeover premium”. The Panel stressed the “principle of ‘non-entrenchment’” as a basis for its finding of unacceptable circumstances. This reasoning also appears to underpin the English Court of Appeal decision in the leading UK case on poison pills, Criterion Properties Plc v. Stratford UK Properties LLC.

The third, and most likely, factor to have curtailed the use of poison pills in Australia is the ASX Listing Rules. It has been argued, for example, that a former ASX Listing Rule, 3G(7), which specifically prohibited certain defensive measures, would have invalidated the use of poison pills. Although this particular Listing Rule is no longer operative, one commentator has argued that the more general wording of Listing Rule 6.1, which affords the ASX discretion to ensure that the terms governing each class of equity securities are “appropriate and equitable”, could also be used to invalidate poison pills.

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185 ASX Listing Rule 3G(7) prohibited a company from “issuing an option which, in the opinion of the stock exchange, was designed to frustrate a takeover bid or frustrate a person from becoming entitled to more than 20 per cent of equity securities in the company, or a person already entitled to more than 20 per cent of equity securities acquiring further equity securities in the company.”


187 Id.
Even if a poison pill is not directly prohibited under the ASX Listing Rules, the rules require shareholder approval for a range of transactions relating to changes of control or alterations to the capital structure of a listed company, and some of these would affect the adoption of a poison pill. Listing Rule 7.1 has particular relevance in this regard.

Listing Rule 7.1 requires shareholder approval for any issue of more than 15% of the company’s share capital, otherwise than on a pro-rata basis. The rule’s policy origin was concern about defensive share placements that might frustrate takeover bids and dilute the interests of existing shareholders. In 2003, only six months before News Corp announced its Delaware re-incorporation plan, the ASX considered reform proposals to Listing Rule 7.1 aimed at providing more discretion to directors in issuing securities. The ASX considered that Listing Rule 7.1 was more restrictive and interventionist than the rules and practices of comparable exchanges, and the reform proposals sought to align it better with international markets. Specific reform proposals included raising the 15% threshold for shareholder consent to 20%, and allowing shareholders to confer a general mandate on management to issue securities. Ultimately, however, no changes were made to Listing Rule 7.1

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188 These ASX Listing Rules include:- Rule 10.1 (acquisition or disposal of a substantial asset to a person in a position of influence); Rule 11.2 (change in the main undertaking of the company); Rule 7.1 (issue of more than 15% of capital currently on issue); Rule 7.6 (issue of shares if 50% of shareholders call a meeting to appoint or remove directors); Rule 7.9 (issue of shares within three months of written notice of a takeover proposal). See generally Takeovers Panel, Guidance Note 12: Frustrating Action paras [12.8]-[12.9] (16 June 2003), available at [http://www.takeovers.gov.au/content/120/download/GN12.pdf](http://www.takeovers.gov.au/content/120/download/GN12.pdf).


190 Id. at paras [7.1]-[7.3].

191 Id. at paras [4.1]-[4.3], [8.3].

192 Id. at para [9.1].

193 It was proposed that such a general mandate would permit management to issue securities without the need for specific shareholder consent for a 13 month period from the date of the mandate. Id. at para [9.2].
and the 15% threshold for shareholder consent to a securities issue remains. The triggering of a poison pill arguably falls within the ambit of Listing Rule 7.1 and would therefore require shareholder approval.

The ASX Listing Rules, therefore, undermine management’s ability to establish entrenching mechanisms, such as poison pills, without shareholder consent. Recent empirical research, suggesting that the presence of entrenching mechanisms may reduce firm value and stockholder returns, supports the approach taken by the listing rules from a policy perspective.\footnote{Lucian A. Bebchuk, Alma Cohen and Allen Ferrell, \textit{What Matters in Corporate Governance?} (Harvard Law School John M. Olin Discussion Paper No. 491, 2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=593423.}

The anti-entrenchment effect of the ASX Listing Rules seems to present a profound dilemma in relation to the News Corp re-incorporation story. This is due to the fact that, in its concessions to the institutional investors, News Corp agreed to retain full foreign listing on the ASX, thereby binding itself to compliance with these listing rules. As such, even after its re-incorporation in Delaware, News Corp should still have been prohibited from issuing a poison pill, as a result of the operation of the ASX Listing Rules.

The answer to this puzzle may lie in the ability of the ASX to waive compliance with its listing rules. In the week that the Delaware re-incorporation became fully effective, the ASX granted an array of waivers to News Corp, exempting the company from compliance with particular listing rules.\footnote{On 2 November 2004, the ASX issued a waiver exempting News Corp from compliance with ASX Listing Rule 6.23. On 4 November 2004, further waivers were issued in favor of News Corp in relation to the following ASX Listing Rules:- LR 1.1 (condition 3); LR 1.1 (condition 8); LR 6.8; LR 6.9; LR 6.22; LR 6.23; LR 7.1; LR 8.10; LR 10.11; LR 14.3; LR 14.4 and LR 15.15. In 2005, further waivers were granted to News Corp regarding LR 3.8A and LR 7.33, and in 2007, a waiver was granted of LR 2.4.} Indeed, many of these waivers were granted on 4 November 2004,\footnote{Id.} only one day after Hely J. had made orders in the Federal Court of Australia approving the News Corp schemes of arrangement.\footnote{See News Corporation Ltd [2004] FCA 1480. In making these orders, Hely J specifically noted the corporate governance concessions adopted by News Corp at the request of the institutional investors. Hely J conceded that, although the concessions did not alter the actual
While some of these waivers involved technical aspects of the re-incorporation, others related to fundamental corporate governance matters. A number of the waivers in fact related to specific listing rules that the institutional investors had included in their Governance Article, and had sought to incorporate into News Corp’s Delaware charter.\(^{198}\) The underlying policy of these listing rules is shareholder protection.\(^{199}\) It is particularly interesting that one of the waivers related to ASX Listing Rule 7.1, the rule that primarily stands in the path of Australian companies issuing a poison pill.

In granting waivers to News Corp at the time of the re-incorporation, the ASX faced an inevitable position of conflict. The ASX had been subject to criticism since its demutualization and listing as a public company,\(^{200}\) on the basis that a conflict of interest existed between its twin goals of regulation and profit maximization.\(^{201}\) This conflict lay particularly close to the surface in its relations with News Corp. There had been consternation in the Australian marketplace that News Corp might delist terms of the schemes of arrangement he was asked to approve, they were relevant to “the overall commercial context” of the corporate reconstruction. \textit{Id.} at [5].

\(^{198}\) ASX waivers were granted to News Corp with respect to the following listing rules, which had been included in the institutional investors’ Governance Article:- LR 7.1 (requiring shareholder approval for new share issues exceeding 15% of capital); LR 10.11 (requiring shareholder approval for issue of securities to a related party); LR 14.3 (requirements regarding nomination of directors); LR 14.4 (requirements regarding election and rotation of directors). \textit{See News Corporation Group, Governance Article for New Delaware Parent Company: Preservation of Australian Public Investor Protection & Empowerment Provisions Clause 7, ‘ASX Listing Rules provisions to apply’} (2004, on file with the author).

\(^{199}\) The waivers granted by the ASX specify the “underlying policy” for each listing rule waived. According to ASX Listing Waiver for LR 7.1 (waiver number WLC040532-007), the underlying policy of LR 7.1 is to “provide greater protection to smaller holders against dilution”. ASX Listing Waiver for LR 10.11 (WLC040532-009) states that, by requiring shareholder approval for an issue of securities to a related party, LR 10.11 is “directed at preventing related party obtaining securities on advantageous terms and increasing their holding proportionate to other holdings”. ASX Listing Waiver for LR 14.3 (WLC040532-010) states that LR 14.3, which provides that an entity must accept nominations for the election of directors up to 35 business days before the date of meeting, “gives reasonable opportunity for candidates to be nominated” and “supports shareholder democracy”. According to ASX Listing Waiver for LR 14.4 (WLC040532-011), LR 14.4, regarding election and rotation of directors, “prevents entrenchment of directors” and “supports shareholder democracy” (waivers on file with the author).

\(^{200}\) The ASX was one of the first stock exchanges in the world to demutualize and to list as a public company on its own market. \textit{See generally} Gwen Robinson, \textit{Australia – Another Milestone Nears}, \textit{FIN. TIMES}, Mar. 24, 1998, at 7; Fleur Leyden, \textit{Best Result for ASX is Humphry's Last}, \textit{THE AGE}, Jul. 29, 2004, at 1.

from the ASX.\footnote{See, e.g., Stephen Bartholomeusz, News Move to NY Not Good for ASX, SYDNEY MORNING HERALD, Apr. 27, 2004, at 18.} News Corp’s decision to retain full secondary listing ensured that the ASX continued to receive revenue from trading of News Corp shares in Australia.

A further entrenchment mechanism, which is closely allied to poison pills, is the staggered board. In the US, the conjunction of poison pill and staggered board will constitute a virtually impregnable takeover defense.\footnote{Lucian A. Bebchuk, John C. Coates and Guhan Subramanian, The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence and Policy, 54 STAN. L. REV. 887 (2002).} Under Delaware law, directors may be elected for a staggered term of up to three years,\footnote{Del. Code Ann., tit. 8, § 141(d) (2008).} and, unless the certificate of incorporation provides otherwise, these directors can only be removed “for cause”.\footnote{Del. Code Ann., tit. 8., § 141(k)(1) (2008). This contrasts with the modern default rule, applying to non-classified boards, that directors may be removed with or without cause. Removal of directors “for cause” is no easy matter, and has been described as a “weapon of last resort”: Charles R.T. O’Kelley and Robert B. Thompson, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS: CASES AND MATERIALS 163 (5th ed., 2006). See also Campbell v. Loew’s, Inc., 134 A.2d 852 (Del. Ch. 1957), the leading case on removal for cause.} This insulates directors from removal and effectively prevents an acquirer from obtaining control of the board in a single election. While it is common for Australian and UK public companies to have staggered election terms for directors, staggered boards cannot operate as an entrenchment and anti-takeover device in these jurisdictions. This is because shareholders possess an absolute right to remove directors with or without cause under Australian and UK law.\footnote{This right cannot be altered in the constitution or by agreement. See Corporations Act 2001 (Cth), § 203D; Companies Act 2006 (UK), § 168.} At the time of News Corp’s re-incorporation, the institutional investors were unsuccessful in their attempt to include an analogous right in the Delaware charter.\footnote{News Corporation Group, Governance Article for New Delaware Parent Company: Preservation of Australian Public Investor Protection & Empowerment Provisions 2 (2004, on file with the author).} Instead, the charter provided for a staggered board,\footnote{See United States Securities and Exchange Commission, Form 8-K, Amended and Restated Certificate of Incorporation of News Corporation, Inc. Article V (Nov. 12, 2004). This was in spite of the fact that there has been a trend recently towards declassification of US boards. In 2006, for the first time in recent years, a majority of S&P 500 companies had annually elected} the directors of which would, according to the Delaware norm, be removable only for cause.\footnote{See United States Securities and Exchange Commission, Form 8-K, Amended and Restated Certificate of Incorporation of News Corporation, Inc. Article V (Nov. 12, 2004). This was in spite of the fact that there has been a trend recently towards declassification of US boards. In 2006, for the first time in recent years, a majority of S&P 500 companies had annually elected}
5. Extension of the Pill and its Aftermath

“It was never a bylaw. It was never a promise. It was never a pledge”.
Rupert Murdoch\textsuperscript{210}

“News Corp thus finds itself in a stew of its own making”.
Chancellor Chandler\textsuperscript{211}

If News Corp’s adoption of a poison pill in 2004 aroused institutional investor concern, its actions the following year produced a furor. In August 2005, News Corp announced that its board had decided to extend the poison pill for two years beyond its expiration date in November 2005 without shareholder approval.\textsuperscript{212} The announcement made no reference either to the board policy on poison pills, or to the reasons for deviation from that policy. The general reaction of the Australian financial press was severe, with one critic describing the announcement as “quite breathtaking” and evidence that News Corp was “mostly run by untrustworthy people”.\textsuperscript{213}

\textsuperscript{209} Del. Code Ann., tit. 8, § 141(k)(1) (2008). Note, however, that News Corp’s charter discards this norm in limited circumstances, stating that “[a]t any time that there shall be three or fewer stockholders of record, directors may be removed with or without cause”. United States Securities and Exchange Commission, Form 8-K, Amended and Restated Certificate of Incorporation of News Corporation, Inc., id.


\textsuperscript{211} UniSuper Ltd. v. News Corporation, 2006 WL 207505 at *1 (Del. Ch.).


In a response to this criticism, John Hartigan, CEO and chairman of News Corp’s wholly-owned Australian subsidiary, News Ltd, justifies the board’s decision as necessary on the basis that changes of control are less stringently regulated under US law than under Australian law. According to Hartigan, the board’s gatekeeper role under US law operates as the functional equivalent of Australian law’s 20% threshold rule, in ensuring that all shareholders are treated fairly and equitably. He said that, but for the reversal of the board’s policy on poison pills, all News Corp shareholders “would now be potentially at risk of a predator who could assume control without paying a premium for it”.

Rupert Murdoch claimed simply that no promise to make the board policy unalterable had ever been made. News Corp’s undertaking concerning the extension of poison pills had appeared, however, not only in its board policy, but also as an attachment to the Australian Federal Court proceedings, which approved the corporate restructuring and re-incorporation. In August 2005, the Australian corporate regulator, ASIC, announced that it intended to carry out an investigation into News Corp’s actions in the context of statements made to the market, but this inquiry was later discontinued on the basis that News Corp was now a US company.

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216 Id.


218 See Kate Askew and Lisa Murray, A Hard Act to Swallow, SYDNEY MORNING HERALD, Aug. 20, 2005, at 43.

219 In the Federal Court proceedings confirming the schemes of arrangement, Hely J made specific reference to the fact that News Corp had agreed to additional corporate governance provisions. See News Corporation Ltd. [2004] FCA 1480 at para [5].


221 In announcing the decision to discontinue the inquiry, ASIC’s head of compliance stated “[o]bviously, it’s a concern when a company makes a statement to shareholders, only to go back on it, so we had a good look at it … But the statement was made by a US company under US law and it would require a very resource-intensive exercise for us to pursue the matter. We have decided we should stay out of it” (cited in Lisa Murray, Poison Pill – There Was No Promise, Says Murdoch, SYDNEY MORNING HERALD, Oct. 13, 2005, at 21).
In October 2005, a group of twelve predominantly Australian and European institutional investors filed legal proceedings against News Corp and its directors in the Delaware Chancery Court. The plaintiffs sought to invalidate News Corp’s extension of the poison pill, and any subsequent extensions, unless authorized by shareholder vote. The plaintiffs’ claim was based on a variety of grounds including: breach of contract, promissory estoppel, fraud, negligent misrepresentation, and breach of fiduciary duty. The defendants, on the other hand, argued that reversal of its earlier board policy did not breach a binding contractual undertaking by News Corp, and that indeed, any such contract between shareholders and the board would be contrary to Delaware law, as an impermissible constraint on centralized managerial authority under Del GCL § 141(a).

In a motion filed by the defendants to dismiss the case, Chancellor Chandler ruled in late 2005 that the plaintiffs’ action for breach of contract and estoppel could proceed. The plaintiffs claimed that an agreement existed, either in the form of an oral contract or a written contract, in which News Corp had consented to subject any

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222 The majority of institutional shareholders were from Australia (six of the plaintiffs being members of ACSI), the Netherlands and the UK. Only two of the plaintiffs were US institutional investors. The plaintiffs to the action were UniSuper Ltd, Public Sector Superannuation Scheme Board, Commonwealth Superannuation Scheme Board, United Super Pty Ltd, Motor Trades Association of Australia Superannuation Fund Pty Ltd, HEST Australia Ltd, CARE Super Pty Ltd, Universities Superannuation Scheme Ltd, Britel Fund Nominees Limited, Stichting Pensioenfonds ABP, Connecticut Retirement Plans and Trust Funds, and the Clinton Township Police and Fire Retirement System. See UniSuper Ltd. v. News Corporation, 2005 WL 3529317 at *3 (Del. Ch.); Keith L. Johnson and Andrew Clearfield, Improving Governance by Joint Shareholder Action; Investors Await Trial to Assert Rights on News Corp. Poison Pill, 34(5) P & I NV. 12 (2006); Stephen Bartholomeusz, Murdoch and the Global Fund Alliance That Bites, SYDNEY MORNING HERALD, Oct. 11, 2005, at 19.

223 UniSuper Ltd. v. News Corporation, 2005 WL 3529317 at *3 (Del. Ch.).

224 News Corp claimed that it had promised to establish a board policy, but had not promised that the policy would be immutable. Id. at note 34.


226 The defendants’ motion to dismiss was successful in relation to the counts of fraud, negligent misrepresentation and equitable fraud, and breach of fiduciary duty. See UniSuper Ltd. v. News Corporation, 2005 WL 3529317 at *1 (Del. Ch.).

227 Id.
extension of the poison pill to a shareholder vote. Although Chancellor Chandler considered that the complaint asserted few facts to support either form of contract, the plaintiffs were entitled to the benefit of all reasonable inferences under their complaint.

Chancellor Chandler raised some problematical aspects of the plaintiffs’ claim. He observed, in reasoning reminiscent of Metropolitan Life Insurance Co v. RJR Nabisco, Inc., that the plaintiffs were sophisticated institutional investors, who clearly could have protected their interests by negotiating an enforceable agreement or changes to the corporate charter, as had indeed occurred in the case of some other concessions. He also noted that interpretational difficulties could arise in the future about ambiguities in the alleged agreement.

In spite of these difficulties, the plaintiffs’ claim withstood the defendants’ motion to dismiss. Chancellor Chandler rejected the defendants’ argument that any agreement between the board and shareholders would be contrary to the general grant of managerial power under Delaware law. Adopting a principal/agent theory of the relationship between shareholders and the board, he viewed shareholders as “the ultimate holders of power”, or “owners” of the company, and saw no impediment to directors entering into such a contract with the shareholders. Although Chancellor Chandler’s theory of the shareholder does not accord with modern UK and

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228 It was argued that the parties entered into a written contract evidenced by News Corp’s Press Release and Letter to Shareholders at the time of its re-incorporation: UniSuper Ltd. v. News Corporation, id. at *4.

229 Id.


231 UniSuper Ltd. v. News Corporation, 2005 WL 3529317 at *4 (Del. Ch.).

232 Id. at *5.

233 Id. at *6.

234 Id. at *6, *8.

235 Id. at *6.

236 Id. at *6.
Australian law, the outcome in the case is consistent with legal principles concerning allocation of power in these jurisdictions. However, it should be remembered that the UniSuper case is a decision of the Delaware Chancery Court, and it is open to doubt whether the Delaware Supreme Court would agree with it.

Policy issues were clearly influential in UniSuper Ltd. v. News Corporation. Chancellor Chandler noted that a “troubling” aspect of the defendants’ view of Delaware law was that, if correct, it would potentially invalidate all of the governance concessions made by News Corp in favor of the institutional investors, not merely the board policy on poison pills. Yet, the judge accepted that without these concessions, News Corp’s re-incorporation would not have occurred. Echoing certain policy concerns of the Paulson Committee, Chancellor Chandler suggested that shareholders of foreign companies would in future be unlikely to vote for re-incorporation in Delaware, if inducements to procure their vote were held to be unenforceable there.

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238 News Corp asked the Court of Chancery to certify the case for immediate appeal, and, although the Court of Chancery did so (see UniSuper Ltd. v. News Corp, 2006 WL 207505 (Del. Ch.)), the Delaware Supreme Court declined to accept an appeal in the case.

239 Indeed, this point was made by a Delaware Supreme Court judge in a hearing. Vice Chancellor Lamb said “UniSuper is a decision by the Court of Chancery. It’s not a Supreme Court decision, and it isn’t necessarily true that the Supreme Court would agree, is it?”: Transcript of Final Hearing at 36, Bebchuk (Civil Action No 2145-N) (cited in Guhan Subramanian, The Emerging Problem of Embedded Defenses: Lessons from Air Line Pilots Ass’n, International v. UAL Corp, 120 HARV. L. REV. 1239, note 35 (2007)).

240 UniSuper Ltd. v. News Corporation, 2005 WL 3529317 (Del. Ch.).


242 Id.


244 UniSuper Ltd. v. News Corporation, 2006 WL 207505 at *1 (Del. Ch.).
On 6 April 2006, less than three weeks before the case was due to go to trial, the parties settled the proceedings and News Corp agreed to allow shareholders to vote on the extension of the poison pill at its October 2006 annual meeting. On 20 October 2006, New Corp shareholders voted to approve the continuance of the poison pill defense. The approval margin was relatively slim, with 57% in favor of, and 43% against, renewal of the pill. Shareholder backlash was also evident in voting to re-elect four directors. The conflict was finally resolved, when Rupert Murdoch and John Malone settled their differences via an $11 billion asset swap, with News Corp agreeing to lift its contentious pill.

Although the UniSuper case was ultimately settled, its implications for the balance of managerial and shareholder power in the US continue to be tested. In June 2006, Bebchuk v. CA, Inc. came before the Delaware Court of Chancery. Like the UniSuper case, Bebchuk v. CA, Inc. concerned poison pills. It involved the validity of a proposed stockholder bylaw, which sought to restrict the authority of the board of directors.

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247 CGI and ISS recommended that that shareholders withhold their votes from the four directors seeking re-election. When the re-election vote took place, 15% of shares voted withheld support from three directors seeking re-election and 13% of shares voted withheld support for News Corp’s President, Peter Chernin. See Sundee Tucker, News Corp Tries to Halt Poison Pill Revolt, FIN. TIMES, Oct. 11, 2005, at 23; Andrew Edgecliffe-Johnson and Aline Van Duyn, Murdoch Weathers Investor Protests, FIN. TIMES, Oct. 22, 2005, at 1; Julia Angwin, News Corp.’s Murdoch Claims Victory in Poison-pill Decision, WALL ST. J., Oct. 22, 2005, at A3.

248 Under the deal with News Corp, Liberty Media agreed to swap its $11.2 billion stake in News Corp for News Corp’s 38.5% stake in DirecTV, $588 million in cash (raised from $550 million under an initial agreement in December 2006) and three local Fox sports channels, valued at approximately $550 million. The deal was generally considered to favor Liberty Media. The elimination of Liberty Media’s News Corp stake increased the voting stake of other News Corp shareholders, including Murdoch family interests, which rose from approximately 31.2% to 38% after the deal. See Julia Angwin and Matthew Karnitschnig, Liberty is Expected to Seek Partner for DirecTV – With News Corp Deal, Set, Investors Look for Tie-up; Murdoch to Drop Poison Pill, WALL ST. J., Dec. 23, 2006, at A3. The asset swap was later overwhelmingly approved by News Corp Class B shareholders. See News Corp. Shareholders Accept Liberty Deal, N.Y. TIMES, Apr. 4, 2007, at 6.

249 902 A.2d 737 (Del. Ch. 2006).
directors to enact any stockholder rights plan in the absence of shareholder consent. The corporation argued that the proposed bylaw could be omitted from its proxy materials, on the basis that its adoption would violate Delaware law by seeking to limit the authority of the board of directors and interfere with managerial power.

In *Bebchuk v. CA, Inc.*, Vice Chancellor Lamb dismissed the request for declaratory relief as “unripe”, noting that the court should be particularly cautious in giving advisory or hypothetical opinions in matters that raise novel and significant issues under Delaware law. Nonetheless, in *obiter dictum* the court stated that the proposed bylaw was not “obviously invalid”. The court, while acknowledging that the power to adopt a rights plan is clearly vested in the board of directors, observed that it was “less clear that the exercise of that power can never be the subject of a bylaw, whether enacted by the board of directors or by the stockholders.” The court relied on the *UniSuper* decision in support of the proposition that a contractual restraint on the board’s power to issue a poison pill is valid under Delaware law.

Therefore, although the conflict between News Corp and its institutional shareholders was settled, the ruling in *UniSuper Ltd. v. News Corporation* - that under Delaware law shareholders may enter into enforceable agreements with the board concerning

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250 Under the proposed amendment to the company’s bylaws, in the absence of shareholder consent, any adoption, or extension, of a stockholder rights plan by the board of directors, would require unanimous consent of directors and would automatically expire one year after its adoption or amendment. *Id.* at 739.

251 The SEC refused to give a “no-action letter” in connection with CA’s proposed omission of the shareholder proposal, since litigation was pending. See SEC, *CA, Inc.: No-Action Letter*, 2006 WL 1547985 (Jun. 5, 2006).

252 902 A.2d 737 (Del. Ch. 2006).

253 According to the court, the action would only become ripe and within its jurisdiction if the bylaw were put to a stockholder vote and adopted. *Id.* at 741.

254 *Id.* at 740.

255 *Id.* at 742.

256 *Id.* at 743.

257 *Id.* at note 34. The court also considered that future factual matters, such as the possibility that the CA board might voluntarily restrict its powers in relation to poison pills as in the *UniSuper* case, could also affect the justiciable issues in the case. *Id.* at 743.

258 2005 WL 3529317 (Del. Ch.).
the allocation of power under corporate governance structures - continues to exert influence. Given the Delaware courts’ traditional legitimization of poison pills without the need for shareholder consent, the UniSuper case has been described as marking “a symbolic shift” in this regard. It has been suggested that the possible weakening of poison pills through the UniSuper case and Bebchuk v. CA, Inc. might lead to the development of alternative forms of takeover defense in the US.

Nonetheless, the potential use of stockholder proposed bylaws to restrict the board’s power to adopt poison pills has been significantly curtailed by a recent decision of the Delaware Supreme Court, CA, Inc. v. AFSCME Employees Pension Plan. While providing some scope for shareholder bylaws restricting the power of the board, the decision nonetheless strongly reaffirms as a “cardinal precept” the board’s freedom to control the management and affairs of the corporation. The court considered that “a proper function of bylaws is not to mandate how the board should decide specific


260 See, e.g., Moran v. Household International, Inc., 500 A.2d 1346 (1984). While basic poison pills, such as that found in Moran’s case, have been upheld by the Delaware courts, they have invalidated some variations, such as “dead hand” and “no hand” poison pills. See, e.g., Carmody v. Toll Brothers, Inc., 723 A.2d 1180 (1998) and Quickturn Design Systems, Inc. v. Shapiro, 721 A.2d 1281 (1998).

261 John Plender, An Acceptable Poison Pill? It’s Not an Oxymoron, FIN. TIMES, Apr. 10, 2006, at 20. See also Stuart M. Grant and Megan D. McIntyre, UniSuper v News Corporation: Affirmation that Shareholders, Not Directors, are the Ultimate Holders of Corporate Power (2006, on file with the author), viewing the decision as a significant victory for shareholder rights.

262 902 A.2d 737 (Del. Ch. 2006).


264 CA, Inc. v. AFSCME Employees Pension Plan, No. 329, 2008 (Del. Jul. 17, 2008) concerned a proposed bylaw, which would have directed CA’s board of directors to cause the corporation in certain circumstances to reimburse stockholders for reasonable proxy expenses, relating to nomination of directors in a contested election.

265 The Delaware Supreme Court stated that the proper scope for bylaws was limited to defining the process and procedures by which managerial decisions are made, and considered that bylaws of this ilk would not constitute an illegitimate intrusion into the board’s management powers under Del. Code Ann. tit. 8, § 141(a) (2008). While holding that the proposed bylaw was indeed procedural in nature, the court nonetheless also found that such a bylaw, if adopted, could cause CA to violate Delaware law, by potentially requiring the directors to reimburse proxy expenses in breach of their fiduciary duties. Id.
and rejected the argument that shareholders and the board possess co-extensive powers to adopt and amend the bylaws. This aspect of the decision stands in clear contrast to the default rules on constitutional allocation of power which apply in Australia and the UK.

6. Conclusion

“We used to joke that the problem with News Corp stock was half of the shareholders are afraid Rupert will die and the other half are afraid that he won’t”.

John Malone

The aim of this article has been to reconsider, through a detailed case study of News Corp’s migration from Australia to Delaware, an embedded assumption in much contemporary corporate governance that a unified common law corporate governance model exists. News Corp’s re-incorporation story is an ambiguous one. While News Corp asserted that the re-incorporation would enhance shareholder value, critics of the proposal claimed that its real purpose was to subvert shareholder rights and strengthen managerial power.

News Corp re-incorporation saga highlights a number of important differences between US and Australian corporate law rules relating to shareholder rights, and provides a valuable counterpoint to convergence theory and the recent US shareholder empowerment debate. It also demonstrates the importance of focusing on specific legal rules, rather than broad generalizations, in comparative corporate governance scholarship.

266 Id. at 12.
268 See, e.g., Elizabeth Knight, Murdoch Gymnastics Good for Investors, SYDNEY MORNING HERALD, Oct. 8, 2004, at 25, stating that the real reason for the move to Delaware may never be known.
An assessment of News Corp’s re-incorporation emphasizes the fact that, although there are many basic similarities between corporate governance in the US and Australia, there are, nonetheless, sufficient differences to make comparative analysis, in the tradition of Professor Gower, both fruitful and interesting.\textsuperscript{269}

\textsuperscript{269} See L.C.B. Gower, \textit{Some Contrasts Between British and American Corporation Law}, 69 Harv. L. Rev. 1369, 1370 (1956), stating “if there are sufficient basic similarities to make a comparison possible, there are, equally, sufficient differences to make it fruitful.”