Companies & Securities Advisory Committee

Shareholder Participation in the Modern Listed Public Company

Final Report

June 2000

Functions of the Advisory Committee

The Companies and Securities Advisory Committee (the Advisory Committee) was established under Part 9 of the Australian Securities and Investments Commission Act 1989 (the ASIC Act). Subsection 148(1) of the ASIC Act sets out its functions:

> *The Advisory Committee's functions are, on its own initiative or when requested by the Minister, to advise the Minister, and to make to the Minister such recommendations as it thinks fit, about any matter connected with:*
>
> *(a) a proposal to make a national scheme law, or to make amendments of a national scheme law;*
> *(b) the operation or administration of a national scheme law;*
> *(c) law reform in relation to a national scheme law;*
> *(d) companies, securities or the futures industry; or*
> *(e) a proposal for improving the efficiency of the securities markets or futures markets.*

The Advisory Committee, under s 154 of the ASIC Act, may inform itself in such manner as it sees fit. The Legal Committee of the Advisory Committee was established for that purpose. Its functions are to provide expert legal analysis, assessment and advice and make recommendations in relation to any matter referred to it by the Advisory Committee.

Membership of the Advisory Committee

The members of the Advisory Committee are selected by the Minister in their personal capacity from throughout Australia on the basis of their knowledge of, or experience in, business, the administration of companies, the financial markets, law, economics or accounting. The members during preparation of this Report were:

Richard St John (Convenor), Corporate General Counsel & Company Secretary - The Broken Hill Proprietary Company Ltd, Melbourne
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Membership of the Legal Committee

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Secretariat

The members of the Secretariat involved in preparing this Report were:

John Kluver - Executive Director
Vincent Jewell - Deputy Director
Thaumani Parrino - Executive Assistant.

International consultation

To assist in comparing Australian law with the law of shareholder meetings in other jurisdictions, the Advisory Committee consulted the following experts:

Professor Dr Theodor Baums, Johann Wolfgang Goethe-Universität, Frankfurt am Main, Germany
Professor Dr Eddy Wymeersch, Universiteit Gent, Belgium.

The Advisory Committee thanks both of them for their very useful contributions to this review. Professor Baums and Professor Wymeersch are joint editors of *Shareholder Voting Rights and Practices in Europe and the United States* (Kluwer Law International, 1999).

Further copies

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Summary of the Report

The purpose of the Report

0.1 This Report deals with a key aspect of corporate governance,[1] namely shareholder participation in listed public companies. This matter is of particular public importance, given the growing number of Australians owning quoted shares, primarily as a result of various recent large-scale demutualisations and privatisations. The Report examines issues arising from current law and practice regarding shareholder general meetings, as set out in Part 2G.2 of the Corporations Law[2] and supported by various stock exchange rules and common law principles. It also considers the impact that technological developments are having and will have on the ways shareholders may be able to vote without having to be physically present at a meeting.

0.2 The Advisory Committee considers that the rules governing shareholder participation should facilitate the efficient determination of the will of the majority of shareholders in defined areas, with proper safeguards to ensure informed decision-making. All shareholders should have a right to all appropriate information and an opportunity to express their views, with voting rights proportionate to their shareholding.[3]

Scope and structure of the Report

0.3 The Advisory Committee published a Discussion Paper in September 1999. The Discussion Paper compared law and practice in Australia and overseas jurisdictions and took into account issues arising from that comparison and the views in various commentaries on Australian and overseas law. The Discussion Paper sought public comment on 30 Issues affecting shareholder participation. A list of respondents to the Discussion Paper is set out in Appendix 1 to this Report.

0.4 The Advisory Committee has developed this Report with the assistance of its expert Legal Committee. It puts forward recommendations on each of the Issues raised in the Discussion Paper, taking into account the submissions received.

0.5 This Report covers each stage of the shareholder participation review. Each topic begins with a statement of the basic issue, followed by a legal analysis of the relevant law (including that found in the Discussion Paper). The Report then sets out the detailed Issue on which submissions were sought, followed by a summary of

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1 At its broadest, corporate governance relates to the internal organisation and decision-making and control structure of a company, including the functioning of the board of directors and management and the interrelationships between the board, management, shareholders and other involved parties, such as creditors and employees.

2 These provisions, which significantly amended the former provisions, were introduced in July 1998 as a result of the work of the Simplification Task Force.

3 Australian listed companies operate under a system of one vote per share (ASX Listing Rule 6.9). Weighted voting is prohibited. The *Report by the Expert Panel of Inquiry into the Desirability of Super Voting Shares for Listed Companies* (March 1994) did not support weighted voting for shares in listed companies. This Advisory Committee Report does not revisit the issue of weighted voting.

responses received on that Issue. The Report then sets out the Advisory Committee's response and its Final Recommendation. The Report contains 30 Recommendations, which are set out in full in Appendix 2.

0.6 This Report deals with shareholder participation in Australian listed public companies. However, some of the issues discussed may be equally relevant to those unlisted public companies that have a broadly based shareholding. Likewise, the principles regulating shareholder meetings of listed public companies are similar to those applying to meetings of members of listed managed investment schemes.

Summary of the Recommendations

0.7 This Report recommends the following amendments to the Corporations Law for listed public companies.

- *Requisitioning a general meeting.* Only shareholders who, collectively, have at least 5% of the votes that may be cast at a general meeting should have the power to requisition a general meeting of a listed public company.

- *Threshold for proposing resolutions.* The right of 100 shareholders to move resolutions at meetings of listed public companies should remain. However, each of those 100 shareholders should be required to hold shares of a meaningful economic value, say, $1000.

- *Notice of next annual general meeting.* Listed public companies should be required to give the relevant Exchange at least three months' notice of the date of their next annual general meeting. This requirement should be in the Corporations Law unless included in the Listing Rules of the relevant Exchanges.

- *Body corporate as a proxy.* Shareholders should be permitted to appoint a body corporate as their proxy.

- *Obligation of board proxy to vote.* Any person put forward by the company board as a proxy should be required to vote the proxies on any poll.

- *Disclosing proxy voting details in the minutes for resolutions decided by poll.* Where a resolution is decided by poll, the minutes of the meeting should only be required to disclose the votes cast for, against and abstaining on the resolution.

- *Access to proxy voting information.* Any shareholders who between them have at least 5% of the issued voting shares should be entitled to inspect proxy documentation for a period of 48 hours after the conclusion of the general meeting of a listed public company.

- *Direct absentee voting.* The directors of a listed public company should have the power (subject to any restriction in the company's constitution) to provide that shareholders may, as an alternative to voting in person or by proxy, cast postal or electronic votes on any matters arising for consideration at a general meeting.

0.8 This Report recommends that each relevant Exchange should consider introducing Listing Rules covering the following matters:

- *receipt of proxy information:* an independent person to receive and collate proxy votes
- *election of directors:* companies to include their procedure for electing directors in the notice of any relevant shareholder meeting and also indicate how these procedures fit within equal opportunity and majority vote principles
- *single simultaneous ballot:* to be a model form for voting on the election of directors.

0.9 The Advisory Committee specifically opposes:

- *non-binding resolutions,* that is, shareholders having the power to pass non-binding resolutions on matters outside their constitutional powers
- *post-meeting voting,* that is, permitting voting within a stipulated period after the end of a general meeting
- *mandatory cumulative voting for the election of directors,* that is, shareholders having a statutory right to vote their shares multiple times, up to the number of vacancies to be filled, for a single candidate.

0.10 This Report also deals with other areas where the Advisory Committee has concluded that current law and practice are satisfactory and that no legislative initiatives are needed. These areas include:

- shareholder access to corporate information
- information to be contained in a notice of meeting
- notice to beneficial shareholders
- proxy solicitations
- irrevocable proxies
- disclosing proxy voting details prior to the meeting
- disclosing proxy voting details prior to debate at the meeting
- disclosing proxy voting details in the minutes of the meeting for resolutions decided by show of hands
- institutional shareholders attending or voting at meetings
- voting by show of hands
- vote counting and scrutineering on a poll

- functions and powers of the chair.

0.11 All the Recommendations in this Report are set out in full in Appendix 2.

Parliamentary Committee Report

0.12 The Parliamentary Joint Statutory Committee on Corporations and Securities (PJSC) considered a number of issues affecting shareholder meetings in its *Report on Matters Arising from the Company Law Review Act 1998* (October 1999). The Advisory Committee has taken relevant Parliamentary Committee recommendations into account in preparing this Report.

Chapter 1. Corporate decision-making

This Chapter discusses the division of responsibility between directors and shareholders in corporate decision-making, and in particular identifies the appropriate functions, rights and powers of shareholders in this process. The Chapter also discusses how technological developments may change the means of shareholder participation and the possible implications of this change for shareholder decision-making.

Division of powers between the board and shareholders

1.1 The board of directors and the shareholders collectively are each involved in corporate decision-making, within their respective fields of responsibility.

Board of directors

1.2 The role of the board of directors is to direct, or supervise the management of, the affairs of the company on an ongoing basis. These powers are granted in the constitution and by legislation.[4] In exercising these powers, the board is not subject to shareholder direction. The rationale for this managerial autonomy is reflected in the *OECD Principles of Corporate Governance* (1999), which observe that:

> "As a practical matter … the corporation cannot be managed by shareholder referendum … Moreover, the corporation's management must be able to take business decisions rapidly. In light of these realities and the complexity of managing the corporation's affairs in fast-moving and ever-changing markets, shareholders are not expected to assume responsibility for managing corporate activities …"

1.3 The board of a large public company cannot manage the company's day-to-day business. Of necessity, this task must be left to the company's full-time management. Instead, "the responsibilities of directors require that they take reasonable steps to place themselves in a position to guide and monitor the management of the company".[5] In essence, the functions of the board are to set the goals for the company, to appoint the company's chief executive, to oversee the plans of managers for attaining the company's goals and to review at reasonable intervals the corporation's progress towards achieving these goals.[6]

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4 At common law, the division of powers between the board and the company in general meeting is determined by the articles of association: *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame* [1906] 2 Ch 34. See now s 198A (a replaceable rule) which provides that the business of a company is to be managed by or under the direction of the directors. A replaceable rule applies only to a company incorporated since July 1998 or any company registered before that time which subsequently repeals its constitution: s 135(1)(a). A company that is subject to a replaceable rule can displace or modify that rule by its constitution: s 135(2).

5 *Daniels v Anderson* (1995) 16 ACSR 607 at 664, 13 ACLC 614 at 662.

6 *AWA Ltd v Daniels* (1992) 10 ACLC 933 at 1013, 7 ACSR 759 at 865-866. IFSA Guidance Note No 2.00 *Corporate Governance: A Guide for Investment Managers and Corporations* (July 1999) Part 3 Guideline 9 sets out guidelines for the respective roles of the board and management.

Shareholders

1.4 The principal method for shareholders to make decisions is by passing resolutions. These resolutions, according to the *OECD Principles of Corporate Governance* (1999):

> "centre on certain fundamental issues, such as the election of board members, or other means of influencing the composition of the board, amendments to the company's organic documents, approval of extraordinary transactions, and other basic issues as specified in company law and internal company statutes."

1.5 The potential scope of these resolutions has been determined both by common law and through legislation. For instance, shareholders by resolution can appoint, and may at any time remove, the directors, thereby ensuring managerial accountability.[7] Also, only the shareholders by resolution can make certain other key decisions affecting their companies.[8] This assures shareholders that the basic terms of their investment cannot be altered without their consent.

1.6 The common law also imposes limits on shareholder power. For instance, shareholders cannot pass resolutions that interfere with the exercise of powers vested in the board.[9] This recognises that companies cannot be run through shareholder plebiscite.

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7 ss 201E, 201G, 203D.
The *UK Report of the Committee on the Financial Aspects of Corporate Governance* (1992) (the *Cadbury Report*) para 6.1 commented that:

> "The formal relationship between the shareholders and the board of directors is that the shareholders elect the directors, the directors report on their stewardship to the shareholders and the shareholders appoint the auditors to provide the external check on the directors' financial statements. Thus the shareholders as owners of the company elect the directors to run the business ... and hold them accountable for its progress."

8 Matters requiring shareholder approval, by either ordinary or special resolution, under the Corporations Law include:

- alterations to a company's constitution (s 136)
- related party transactions (Chapter 2E)
- transactions affecting share capital (Chapter 2J)
- appointment and removal of auditors (ss 327, 329)
- adoption of a scheme of arrangement (Part 5.1).

Matters requiring shareholder approval under the ASX Listing Rules include:

- the issue of securities constituting more than 10% of the securities in the class (r 7.1)
- the issue of securities during a takeover bid (r 7.9)
- disposals of substantial corporate assets to a related party or a subsidiary (r 10.1)
- increases in fees payable to directors (other than the salary of an executive director) (r 10.17)
- granting termination benefits where the total value of the benefits payable to all officers will exceed 5% of the equity interests of the company (r 10.19)
- disposal of the main undertaking of a company (r 11.2).

9 In *Gramophone & Typewriter Ltd v Stanley* [1908] 2 KB 89 at 105, the Court ruled that:

> "even a resolution of a numerical majority at a general meeting of the company cannot impose its will upon the directors where the articles have confided to them the control of the company's affairs. The directors are not servants to obey directions given by the shareholders as individuals; they are not agents appointed by and bound to serve the shareholders as their principals. They are persons who may by the regulations be entrusted

1.7 Under the principles of corporate law developed from the mid-19th Century, the process for shareholders to pass resolutions was through a meeting, to be held in one location. Decisions were to be taken by vote of those physically present at that meeting, whether the shareholders themselves or their appointed proxies or attorneys.

1.8 Shareholder meetings, in particular the annual general meeting, also serve to give shareholders direct and public access to the board. They provide shareholders with an opportunity to receive information about the board's past performance and future plans and otherwise to hold the board accountable through questioning.[10]

1.9 The nature of meetings has changed considerably from that originally envisaged, given the continuing growth in the number of shareholders,[11] their geographical

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> with control of the business, and if so entrusted they can be dispossessed from that control only by the statutory majority which can alter the articles … Any other construction might, I think, be disastrous, because it might lead to an interference by a bare majority [of shareholders] very inimical to the interests of the minority [shareholders] who had come into a company on the footing that the business should be managed by the board of directors."

In *Shaw & Sons (Salford) Ltd v Shaw* [1935] 2 KB 113 at 134, the UK Court of Appeal summarised the position thus:

> "A company is an entity distinct alike from its shareholders and its directors. Some of its powers may, according to its articles, be exercised by directors, certain other powers may be reserved for the shareholders in general meeting. If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of the shareholders can control the exercise of the powers vested by the articles in the directors is by altering their articles, or, if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders."

In *Scott v Scott* [1943] 1 All ER 528, the Court held that resolutions of a general meeting that sought to exercise powers that had been delegated to the directors were nullities. The shareholders in general meeting could not interfere with the exercise of these delegated powers by the directors, unless the powers were taken away by amending the constitution.

At common law, a general meeting may have reserve powers on matters otherwise exclusively vested in the board of directors if for some reason, such as deadlock on the board, or all the directors being disqualified from voting, the board cannot or will not exercise the powers vested in it: Gower's *Principles of Modern Company Law* (6th edition, 1997) at 187. Also, a board of directors may refer a matter to the general meeting for ratification: *Winthrop v Winns* [1975] 2 NSWLR 666.

10 Every Australian public company must hold an annual general meeting at least once in each calendar year and within five months after the end of its financial year: s 250N(2). The company's annual financial report, directors' report and auditor's report must be laid before the annual general meeting: s 317. The business of the annual general meeting may include the consideration of these reports, the election of directors, the appointment of the auditor and the fixing of the auditor's remuneration, even if the notice of meeting does not refer to these matters: s 250R. Shareholders as a whole must be given a reasonable opportunity to ask questions of directors, or make comments, about the management of the company: s 250S. In addition, they are entitled to ask questions of an auditor if present at the meeting: s 250T. However, there is no legal obligation on the directors or the auditor to answer questions put to them. Also, an auditor who chooses to answer questions about the audit report is protected by qualified privilege in answering those questions: s 1289.

11 For instance, recent growth can be seen by comparing the number of shareholders in the Top 10 listed public companies for 1992 and 1999.

dispersion and technological developments in communications. Some attempts have been made to adjust the law of shareholder meetings to reflect these developments, for instance, the provisions to allow the company to hold a meeting at two or more venues using any technology that gives the shareholders as a whole a reasonable opportunity to participate[12] and the provisions permitting the electronic lodgment of proxy appointments.[13] Even so, as a practical matter, the number of shareholders for whom it is convenient to attend a general meeting is usually relatively very small.

Shareholder access to information

1.10 Shareholders can participate in the corporate decision-making process by either requisitioning meetings or seeking to have matters placed on the agenda of meetings, as well as by attending and voting at meetings. The rights to requisition and place matters on the agenda are reviewed in Chapter 2 and Chapter 3 respectively, while the meeting procedure is reviewed in Chapter 4. However, whether and how shareholders exercise their various rights partly depend on their being informed about the company's ongoing activities.

1.11 All listed companies must disclose information under the continuous disclosure regime.[14] They may also choose to disseminate additional information, for instance, through letters to shareholders or by posting information on their website. Also, ASIC is involved in ensuring that current information dissemination practices do not lead to breach of the insider trading rules.[15] Shareholders and others may use this information in determining whether to buy or sell shares or to exercise their participation rights as shareholders. The question is whether any further legislative or other initiatives are warranted to ensure that, as far as is practicable, all shareholders have equal and simultaneous access to material information given by a listed company about its affairs.

Issue 1. *Are any changes to the Corporations Law necessary to ensure that all shareholders, as far as practicable, have equal and simultaneous access to material information given by a listed company about its affairs?*

Submissions on Issue 1

1.12 Respondents generally supported the principle that, as far as practicable, all shareholders should have equal and simultaneous access to material information about

Shareholders of the Top 10 listed public companies

	More than 1,000,000	500,000 to 1,000,000	250,000 to 500,000	100,000 to 250,000	50,000 to 100,000	25,000 to 50,000	Less than 25,000
1992	0	0	0	4	3	2	1
1999	2	0	3	2	0	3	0

Source: *Huntleys' Shareholder: The Handbook of Australian Public Companies* (4th edn, 1992 and 16th edn, 1999).

12 s 249S.

13 ss 250B, 250BA.

14 ss 1001A, 1001C, 1001D, ASX Listing Rule 3.1.

15 Part 7.11 Div 2A.

their companies.[16] Many submissions noted and supported the practice of listed companies publishing on their websites the periodic and continuous disclosure information required by the Listing Rules, at the same time as it is released to the relevant Exchange.

1.13 Respondents differed on whether any change to the Corporations Law was necessary to ensure the goal of equal and simultaneous access to information, given the continuous disclosure regime, the insider trading provisions, the consumer protection powers of ASIC,[17] as also reflected in the ASIC Paper *Heard it on the Grapevine* (November 1999), and the Australian Stock Exchange (ASX) "Open Briefing" initiative. However, all the submissions on this Issue predated the ASX decision to make all continuous disclosure and other announcements by listed entities to the ASX available on the ASX website free of charge to anyone with Internet access after a 20 minute delay.

Advisory Committee view

1.14 The Advisory Committee considers that no change to the Corporations Law is necessary to ensure that, as far as practicable, all shareholders have equal and simultaneous rights of access to material information given by a listed company about its affairs. The Committee notes that, in addition to existing statutory disclosure procedures, and ASIC and ASX initiatives, listed public companies are increasingly releasing information immediately on their websites, thereby giving investors access without delay.[18]

1.15 The Advisory Committee encourages ASIC and all relevant Exchanges to continue to monitor the procedures for disseminating information to ensure that, as technology further develops, shareholders continue, as far as practicable, to have equal and simultaneous access to material information about their company's affairs.

Recommendation 1: Equal access to information

No legislative amendment is needed to assist shareholders to have equal and simultaneous access to material information given by listed public companies about their affairs.

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16 Australian Accounting Research Foundation (AARF), AMP, Australian Shareholders' Association, Australian Stock Exchange (ASX), Chartered Institute of Company Secretaries (Coles Myer and Rio Tinto supported this submission in its entirety), Commercial Law Association of Australia, Commonwealth Bank, Investment and Financial Services Association (IFSA), G Long, Law Council of Australia (Law Council), QBE, Queensland Investment Corporation, Telstra, The Broken Hill Proprietary Company Limited (BHP), Jack Tilburn, Jon Webster, Western Australian Joint Legislation Review Committee.

17 Australian Securities and Investments Commission Act 1989 Part 2 Div 2.

18 See the empirical analysis by E Boros, "Disclosure of Information on Company Websites" (1999) 17 *Company and Securities Law Journal* 522.

Real and virtual shareholder meetings

1.16 The Australian corporate law principles governing meetings are still based on the premise of shareholders being physically present at a meeting or appointing a proxy or attorney to attend in their absence. However, as a practical matter, many shareholders cannot attend a meeting, even if it is held in more than one location.

1.17 The concept of shareholder participation only through physical meetings is now being overtaken by technology. The means may become available in the near future for some shareholders to participate in physical meetings through purely electronic means. For instance, shareholders may be able to use electronic means to receive information from the company and communicate with their fellow shareholders prior to the meeting, as well as participate in the meeting and vote on resolutions during the course of the meeting. In this way, some shareholders could be involved in decision-making solely through this "virtual meetings" technology.

1.18 Professor Elizabeth Boros has written a Discussion Paper, *The Online Corporation: Electronic Corporate Communications* (December 1999). That Paper investigates the impact of developments in electronic communications on various aspects of corporate administration and regulation, including electronic voting at shareholder meetings and whether electronic meetings could substitute for physical meetings. Chapter 4 of this Report deals with some issues involving electronic participation in shareholder meetings. However, it does not seek to cover all the issues raised by Professor Boros.

Chapter 2. Calling a meeting

The principal issue in this Chapter is the appropriate prerequisites for permitting shareholders to requisition an extraordinary general meeting, given the need to balance the rights of shareholders to participate in corporate decision-making through meetings against the costs and implications for corporate management of having to hold them. The Chapter also discusses what information should be included in any notice of meeting and the provision of information to shareholders who hold shares through nominees.

Requisitioning a general meeting

The issue

2.1 Australia and many other jurisdictions allow a group of shareholders to requisition a general meeting of shareholders, independently of an annual general meeting. The thresholds at which one or more shareholders can exercise this requisition right in the various jurisdictions are generally based on a percentage of the company's issued share capital (issued share capital test). However, in Australia alone, there is also a right for a number of shareholders to requisition a meeting (shareholder numerical test) regardless of how much share capital they hold collectively. The issue is whether any shareholder numerical test should remain.

Australian law

2.2 Prior to July 1998, directors of a company were required to convene a general meeting on the requisition of either:

- 100 shareholders holding shares with an average paid-up sum per shareholder of at least $200, or
- shareholders entitled to at least 5% of the total voting rights in the company.[19]

2.3 The Simplification Task Force initially proposed that the 100 shareholder test be abolished and that only the 5% of issued share capital test remain.[20] Critics of that approach argued that, in consequence, only institutional investors would be able to requisition a general meeting of a large public company. Subsequently, the Task Force in its Second Corporate Law Simplification Bill (1995) proposed a 200 shareholder test as an alternative to the 5% of issued share capital test. The requirement that those 200 shareholders have an average minimum paid-up capital on their shares was omitted "because this is not consistent with the abolition of par value".[21] The 200 shareholder proposal was not adopted. Instead, under amendments introduced from July 1998, the following two prerequisites applied:

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19 s 246(1) (now repealed).

20 Simplification Task Force, *Company meetings: Proposal for simplification* (December 1994).

21 Simplification Task Force *Second Corporate Law Simplification Bill: Exposure Draft* Vol 2 Commentary (June 1995) p 20.

- 100 shareholders entitled to vote at the general meeting, with no average capital requirement
- shareholders entitled to at least 5% of the votes that may be cast at a general meeting.[22]

2.4 By regulation introduced in April 2000 pursuant to s 249D(1A), a new shareholder numerical test, namely, 5% of shareholders by number, was substituted for the 100 shareholder test.[23] The alternative issued share capital test remains. The Explanatory Statement to the regulation indicated that the 5% numerical test was only intended as a temporary response to the concerns raised by the 100 shareholder test, pending this Report.

2.5 The company bears the cost of calling a properly requisitioned meeting.[24]

2.6 A 100 shareholder numerical test can result in a group of small shareholders, who between them hold shares representing only a minuscule proportion of the issued share capital, validly requisitioning general meetings.[25] Also, 100 requisitioning

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22 s 249D(1).

23 Corporations Regulations reg 2G.2.01.

24 ss 249D(1) (by implication, given that the company must call and hold the general meeting), 249E(4).

25 This point can be demonstrated by comparing figures in the most recent annual reports of a sample of 14 companies taken from the top, middle and bottom of the Top 150 listed public companies, as set out in the following table.

Number of shareholders who hold between 1 and 1000 shares (small shareholders) (to closest 100)	Percentage of total shareholders represented by small shareholders	Total percentage of issued share capital held by small shareholders
933,000	66	15.6
274,900	66	13.8
194,000	62	3.7
151,000	60	4.4
68,000	45	2.2
58,700	60	2.54
30,500	29	0.52
27,100	69	1.9
23,800	57	2.6
16,400	49	0.75
6,000	26	0.4
5,400	31	0.5
3,200	40	1.38
900 (actual figure 902)	11	0.2

The figures for the top two companies indicate that the small shareholders collectively hold significantly more than 5% of the issued share capital. However, the number of small shareholders for those two companies is very high (933,000 and 274,900, respectively). One hundred small shareholders would represent only a tiny fraction of the total number of small shareholders (that is, 0.01% and 0.04%, respectively) and consequently may collectively hold only a minuscule proportion of the company's issued share capital. The figures for the remaining companies demonstrate that the small shareholders collectively hold less than 5% (in most cases

shareholders may represent only a tiny proportion of the total number of shareholders.[26] The costs of calling and conducting a general meeting, including printing and distribution costs, can be considerable, particularly for companies with a large number of shareholders. A small number of shareholders could also use their right to requisition a meeting to give them undue leverage in negotiating with the company.

2.7 Directors have only limited common law and statutory powers to refuse to convene a meeting requisitioned by shareholders. At common law, they may in exceptional circumstances refuse to comply with a requisition if its purpose is to harass a company and its directors.[27] They may also refuse to convene a meeting sought other than for a "proper purpose".[28] However, the grounds for refusal under the proper purpose exception are limited[29] and can be circumvented by appropriately drafting the requisition.[30] Also, companies may be reluctant to refuse to convene a meeting on these grounds, given the possibility of adverse publicity and litigation. In addition, directors who do not comply with a proper requisition to call a general meeting face potential personal liability for the requisitioners' costs of calling the meeting.[31]

Overseas law

2.8 All comparable overseas jurisdictions employ only an issued share capital test. In the UK, one or more shareholders holding not less than 10% of the paid-up voting share capital of a publicly listed company may requisition a general meeting.[32] A

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much less than 3%) of the companies' issued share capital. A group of 100 small shareholders may collectively own only a small fraction of 1% of that issued share capital.

26 The average number of shareholders of the Top 20 listed public companies in 1999 was approximately 250,000. The average number of shareholders of a sample of 20 companies in the middle of the Top 150 companies was approximately 55,000. The average number of shareholders of companies in the bottom 20 of those Top 150 companies was approximately 5,000. Source: *Huntleys' Shareholder: The Handbook of Australian Public Companies* (16th edn, 1999).

27 *Humes Ltd v Unity APA Ltd* (1987) 11 ACLR 641, 5 ACLC 15, *Australian Innovation Ltd v Petrovsky* (1996) 21 ACSR 218, 14 ACLC 1257.

28 s 249Q.

29 Section 249Q only appears to permit directors to refuse to call a meeting if its purpose is to consider matters which are outside the competence of the company in general meeting (under the Corporations Law, the ASX Listing Rules or the company's constitution). For instance, the directors can refuse to convene a meeting if its sole object would be to determine the criminal liability of a director or to consider a matter which lies within the exclusive managerial discretion of the directors: *Turner v Berner* (1978) 3 ACLR 272, *NRMA Ltd v Parker* (1986) 11 ACLR 1, 4 ACLC 609, *Queensland Press Ltd v Academy Investments (No 3) Pty Ltd* (1987) 11 ACLR 419, 5 ACLC 175. The directors may also refuse to convene a meeting where the agenda items predominantly relate to matters outside the competence of the company in general meeting: cf *Windsor v The National Mutual Life Association of Australasia* (1992) 10 ACLC 509, 17 ACSR 210, *Totally and Permanently Incapacitated Veterans' Association of NSW Ltd v Gadd* (1998) 28 ACSR 549.

30 For instance, shareholders pursuing a particular social agenda could requisition a meeting to remove one or more directors or to alter the articles of association to require directors to take into account particular social policies. The powers to alter the constitution or remove directors are given to the shareholders in general meeting: ss 136, 203D.

31 s 249E(5).

32 UK Companies Act 1985 ss 368(2), 370(3).

recent UK Consultation Paper supported retaining the 10% threshold for requisitioning a meeting.[33] In other European countries, the shareholder thresholds range from 5% to 20% of voting capital.[34]

2.9 In New Zealand and Canada, shareholders holding at least 5% of a corporation's issued voting shares may requisition a meeting.[35]

2.10 The United States Revised Model Business Corporation Act, which is a model for the companies statutes of the various States, applies a 10% of capital threshold.[36] However, the Delaware General Corporation Law, under which approximately half of US public corporations are incorporated, only gives the board of directors statutory power to convene an extraordinary meeting.[37] Whether shareholders may also requisition a meeting and the threshold for exercise of that power are left to the constitutions of particular companies.[38]

2.11 In all these overseas jurisdictions, the company bears the cost of calling a requisitioned meeting.

Issue 2. *Should the Corporations Law provide that only shareholders who collectively have a certain percentage of a company's issued voting share capital may requisition a meeting of shareholders? If so, should that percentage of issued share capital be 5% or some other percentage, and for what reasons?*

Submissions on Issue 2

Support a shareholder numerical test

2.12 Some respondents supported a 100 shareholder test, either by itself[39] or subject to an additional requirement that each requisitioning shareholder have shares of a minimum value or hold a minimum marketable parcel.[40] Other respondents supported

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33 Consultation Document from the Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: Developing the Framework* (March 2000), para 4.58.

34 In Austria, Germany, Greece, Portugal and Spain, shareholders owning 5% or more of the company's share capital may require the convening of a general meeting. In Denmark, Finland, France, Ireland, Italy and Sweden, the threshold is 10% of the company's share capital. The Netherlands has a 10% threshold, but also requires prior court approval. In Belgium and Luxembourg, the threshold is 20% of the company's share capital.

35 New Zealand Companies Act 1993 s 121(b), Canada Business Corporations Act s 143(1).

36 Revised Model Business Corporation Act §7.02.

37 Delaware General Corporation Law §211 (1996).

38 Each company can specify the necessary percentage of issued share capital. In practice, that percentage ranges from 10% to 50%.

39 Claire Grose.

40 AARF (which suggested $500), Australian Shareholders' Association, G Long (who suggested $500 or perhaps $1000, with some account being taken of companies that have done very badly, for instance, $1 shares having a value of 1 cent). AARF acknowledged that any minimum marketable parcel requirement may have arbitrary effects, depending on the market value of the particular company's shares. However, it would ensure that requisitioners held a minimum economic interest in the company.

the threshold being, say, 500 shareholders[41] or 5% of the total number of shareholders.[42]

2.13 The respondents who supported a numerical test argued that it was intrinsically appealing when considered in the light of the policy of encouraging widespread share ownership amongst the Australian community. It may also encourage greater participation by small shareholders, who have at their disposal a powerful means of airing their views without having to wait for the next annual general meeting. By contrast, repeal of the shareholder numerical test would preclude small shareholders from banding together to air legitimate views at meetings of many listed public companies, even if the issued share capital test were to be lowered to 1%.[43]

2.14 Some respondents, as an alternative to abolishing a shareholder numerical test, raised the possibility of strengthening the proper purpose test to permit directors to refuse to convene a meeting in a wider range of circumstances than under the current law.[44]

Support an issued share capital test only

2.15 Most respondents favoured there being only an issued share capital test for calling a general meeting.[45] They argued that a shareholder test makes it too easy for a very small group of shareholders to put a company to the considerable time and expense of holding a general meeting. Frequent shareholder meetings may also distract management from its core task of conducting company business and may have adverse consequences for shareholder and customer confidence in a company.

2.16 An issued share capital test ensures that the cost of convening an extraordinary general meeting is only incurred when it is requisitioned by shareholders who collectively have a material economic interest in the company. Also, while it is important to ensure that shareholders have appropriate rights to call general meetings to ensure accountability of the board of directors, requisitioning company meetings is only one avenue available to shareholders to obtain information or express views on board performance.

2.17 Most of these respondents favoured 5% of the issued share capital as the relevant percentage, for the following reasons.[46]

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41 Jack Tilburn.

42 Western Australian Joint Legislation Review Committee.

43 The Australian Shareholders' Association pointed out that, in the case of the largest company in the table reproduced in footnote 22 of this Report, requisitioning a meeting would require the support of approximately 300,000 small shareholders.

44 Computershare Registry Services, IFSA (though IFSA did not support this option, given the considerable potential for litigation). Jon Webster also opposed a proper purpose test.

45 AMP, ASX, Australian Credit Forum, Australian Institute of Company Directors, BHP, Blake Dawson Waldron, Chartered Institute of Company Secretaries, Commercial Law Association of Australia, Commonwealth Bank, Computershare Registry Services, IFSA, Law Council, NRMA, QBE, Queensland Investment Corporation, Telstra, Jon Webster.
Two of these respondents (ASX, Law Council) said that, for companies limited by guarantee, the threshold would need to be determined by reference to voting rights rather than shares.

46 AMP, Australian Credit Forum, Australian Institute of Company Directors, BHP, Blake Dawson Waldron, Chartered Institute of Company Secretaries, Commercial Law Association of Australia,

- It is similar to tests adopted in overseas jurisdictions.
- The inability of requisitioners to satisfy a 5% shareholding threshold would call into serious question the prospects of their proposed resolution succeeding.
- This threshold requirement achieves the necessary balance between the interests of minority and majority shareholders.
- The requirement ensures that the cost of convening meetings is only incurred when there is a legitimate concern by a substantial number of shareholders who have an economic interest in the company. It would be unreasonable for a listed entity and its non-requisitioning shareholders to have to bear these costs unless a reasonable proportion of its shareholders requisitioned the meeting.

2.18 One respondent, in addition to favouring a sole 5% threshold criterion, considered that there should be relevance controls on any matter on which shareholders seek to convene a general meeting, as well as on resolutions to be put to scheduled meetings.[47]

Advisory Committee view

2.19 The appropriate threshold test for calling a general meeting of a listed public company is a significant matter of corporate governance. The Advisory Committee considers that it is necessary to achieve a balance between legitimate shareholders' rights and the potential abuse of those rights at what could be a substantial cost to the company. Requiring companies to hold extraordinary general meetings at the direction of a small number of shareholders could entail undue costs and distract management from its principal task of conducting the company's affairs, with possible adverse consequences for shareholders generally and customer confidence. Shareholders should therefore have to satisfy a significant threshold test to justify the time and expense of holding an extraordinary general meeting, rather than having matters of concern dealt with at the next annual general meeting. Any threshold test for requisitioning an extraordinary general meeting should be substantial and apply uniformly to all listed public companies.

2.20 The Advisory Committee notes that the PJSC in its October 1999 Report also acknowledged that the 100 shareholder test was unsatisfactory.[48] It could result in a group of shareholders with an insignificant economic stake in the company putting the company and other shareholders to the expense and inconvenience of a meeting. However, the PJSC members were divided between those who supported an increased numerical and/or shareholding threshold test (for instance, each requisitioning

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Commonwealth Bank, Computershare Registry Services, IFSA, Law Council, NRMA, QBE, Telstra, Jon Webster. Queensland Investment Corporation did not have a fixed view on the absolute percentage of shares but considered that 5-10% was consistent with overseas requirements.

47 BHP.

48 Parliamentary Joint Statutory Committee on Corporations and Securities, *Report on matters arising from the Company Law Review Act 1998* (October 1999).

shareholder holding, say, a marketable parcel of the company's shares) and those who supported a 5% of issued share capital test only.

2.21 The Advisory Committee has considered, but rejected, the following possible alternative or modified shareholder numerical tests.

- *Impose a numerical test somewhere between 100 shareholders and 5% of shareholders.* The Advisory Committee considers that this would not ensure that only shareholders who collectively have some material economic interest in a company can put the company to the expense of conducting a meeting. There is no necessary correlation between a particular number of shareholders and the economic interest in the company that they collectively represent. Also, any numerical test could be circumvented by sufficient individual shareholders splitting their parcels among various additional persons.

- *Require the requisitioning shareholders to post a bond.* The bond would cover all or part of the company's estimated costs and would be forfeited if the resolutions put to the meeting by the requisitioners do not achieve a threshold level of support.

  The Advisory Committee considers that this option could be unworkable or burdensome given the possible size of the bond required, even if agreement could be reached about the "estimated costs" of a company calling a meeting.

- *Require that the requisitioning shareholders have held their shares for a minimum time, say, one year.* This would help ensure that requisitioners had some ongoing involvement in the company. It would stop people buying shares merely for the purpose of immediately calling meetings for some extraneous purpose. It would also give new companies or companies that have just completed an initial public offering a 12 month settling-in period without the prospect of shareholders calling meetings.

  However, a time requirement as an addition to a 100 shareholder test would not deal with the problem of a very small number of long-term shareholders having the ability to requisition company meetings.

- *Give the directors some overriding discretion in calling meetings over and above their current common law and statutory powers.* For instance, the Canadian legislation permits directors to refuse to convene a meeting if the requisitioners:

  - have called the meeting primarily for the purpose of enforcing a personal claim or redressing a personal grievance against the corporation or its directors, officers or security holders or primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes
  - seek the review of questions that have been submitted to and disposed of by the shareholders within the previous two years, or

- are abusing the requisition power to secure publicity.[49]

The requisitioning shareholders may appeal to the court against the directors' decision.

The Advisory Committee sees the potential for considerable divisive disputation between directors and particular shareholders and even litigation on whether to call a meeting. In some instances, the cost of litigation may well exceed the cost of calling the meeting.

- *Impose a minimum economic requirement on the requisitioning shareholders.* For instance, the requisitioning shareholders might be required to hold shares with an average market value of a minimum value (say, $1,000) at the time of the requisition. This would seek to ensure that requisitioning shareholders in combination have some significant economic interest in the company.

  The Advisory Committee agrees that requisitioning shareholders, collectively, should have some minimum economic interest in the company. However, it considers that this is more directly and uniformly achieved through an issued share capital test.

2.22 The Advisory Committee considers that any shareholder numerical test is unsatisfactory. It has no counterpart in any other comparable jurisdiction. Instead, for the reasons given in para 2.17, the threshold for requisitioning any general meeting of a listed public company should be a proportion of the company's issued share capital. Only shareholders who collectively hold at least 5% of the issued voting share capital should be entitled to exercise this requisition power.

2.23 The Committee notes that a 5% shareholding threshold is still amongst the most liberal in the world. It would not disadvantage investors in Australian companies compared with those in overseas companies, or discourage overseas investors from taking up equity in Australia.

2.24 A 5% test would not preclude shareholders who do not satisfy that test from exercising other rights, such as to place matters on the agenda of the next meeting of shareholders (refer to paras 3.4-3.27 and Recommendation 5) or to ask questions at the meeting.

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[49] Canada Business Corporations Act ss 137(5), 143(3). Canadian litigation on these sections has focused primarily on distinguishing between matters that are specific to the company and those that relate merely to general economic, political or social causes. Italian corporate law also permits directors to refuse to convene a requisitioned meeting if their refusal is in the interest of the company in view of the matters raised in the requisition.

Recommendation 2: Requisitioning a general meeting

The Corporations Law should provide that only shareholders who, collectively, have at least 5% of the votes that may be cast at a general meeting should have the power to requisition a general meeting of a listed public company.

Information in a notice of meeting

The issue

2.25 There are some statutory requirements concerning the information to be included in a notice of meeting. The question is whether these requirements are sufficient, taking into account relevant common law principles.

Australian law

2.26 The Corporations Law requires that any notice of meeting must be sent to all shareholders (as well as to directors and the auditor) and must:

- set out the place, date and time for the meeting (and the technology to be used if the meeting is to be held in two or more places)
- state the general nature of the meeting's business
- if a special resolution is to be proposed at the meeting - indicate that fact and state the resolution
- provide information concerning proxy appointment rights.[50]

2.27 On one view, these requirements may not be broad enough to ensure that all relevant information is disclosed. For instance, the New Zealand legislation requires that the notice of meeting must state "the nature of the business to be transacted at the meeting in sufficient detail to enable a shareholder to form a reasoned judgment in relation to it".[51]

2.28 The contrary view is that directors currently have a general common law duty to properly inform shareholders about what is proposed for consideration at a meeting and to do so in a manner that is not misleading. Any notice to shareholders should contain sufficient information concerning the purpose of any proposed resolution for shareholders to be able to make reasonably informed judgments about whether to attend. It must also disclose any benefits that directors will obtain as a result of the passing of any resolution. Also, notices should be intelligible to shareholders who are not versed in business matters.[52] Given these common law obligations, further statutory requirements appear to be unnecessary.

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50 ss 249J, 249K, 249L.

51 New Zealand Companies Act 1993 First Schedule cl 2(2)(a).

52 These common law principles are discussed in J Farrar & B Hannigan, *Farrar's Company Law* (4th edition, Butterworths, 1998) at 313-314, HAJ Ford, RP Austin & IM Ramsay, *Ford's*

Issue 3. *Should the Corporations Law prescribe in more detail the information to be contained in a notice of meeting? If so, in what manner?*

Submissions on Issue 3

Support greater prescription

2.29 Some respondents favoured greater prescription,[53] arguing that:

- the current obligations of directors to include information in notices of meetings would be clearer if specifically stated in the Corporations Law
- the information provided in support of resolutions in many notices of meeting (particularly those issued by small listed companies) can be misleading or inadequate.

These submissions favoured the requirement in the New Zealand *Companies Act 1993* that the notice of meeting must state "the nature of the business to be transacted at the meeting in sufficient detail to enable a shareholder to form a reasoned judgment in relation to it".

Oppose greater prescription

2.30 Most respondents opposed any greater statutory prescription,[54] arguing that the current Corporations Law and common law requirements are sufficient, in particular the requirement to state the text of any special resolution,[55] the common law duties of directors to inform shareholders properly about issues to be considered at a meeting and the opportunities shareholders have at general meetings to ask questions generally and in relation to specific resolutions before they are voted upon.

2.31 However, one of these respondents favoured ASIC issuing a Practice Note setting out the relevant common law principles, given the importance of the issue for a company, its advisers and its shareholders.[56]

Principles of Corporations Law (loose leaf, Butterworths) at [7.460], *Australian Corporations and Securities Law Reporter* (loose leaf CCH) at ¶63-700 and *Australian Corporation Law: Principles and Practice* (loose leaf, Butterworths) at [3.3.0060].

53 AARF, Australian Shareholders' Association, G Long, Jack Tilburn.

54 AMP, Australian Credit Forum, BHP, Chartered Institute of Company Secretaries, Commercial Law Association of Australia, Commonwealth Bank, Computershare Registry Services, IFSA, Law Council, QBE, Queensland Investment Corporation, Telstra, Jon Webster, Western Australian Joint Legislation Review Committee.

55 s 249L(c). In *Re Mirvac Ltd* (1999) 32 ACSR 107, Austin J ruled that "it is not necessary to add to the burden of paper by distributing the full text [of the proposed resolution]", where the notice of meeting makes it clear that the full text can be inspected at a specified place and would be sent to any shareholder who asked for it. Instead, the company may circulate a summary of the resolution, though those preparing the summary must be "scrupulously careful" to produce information which is "accurate and complete in all material respects".

56 Commercial Law Association of Australia.

Advisory Committee view

2.32 The Advisory Committee considers that the current common law principles are sufficiently clear, and that no statutory initiative is required.

Recommendation 3: Information in a notice of meeting

There should be no legislative prescription of the information to be contained in a notice of meeting of a listed public company.

Notice to shareholders holding shares through nominees

The issue

2.33 It is not uncommon for some persons to hold shares through nominees. The question is whether the Corporations Law should have specific procedures to ensure that those persons receive all shareholder information currently sent by a company to the nominees.

Australian law

2.34 Australian corporate law does not permit bearer shares, which permit shareholders to remain anonymous.[57] Nevertheless, some investors may choose to hold their shares through nominees for this purpose or for reasons of convenience. For instance, it is standard practice for nominees to hold legal title to the shares of medium or large superannuation schemes, with the scheme being the beneficial owner of the shares. Only the nominee is entered in the share register.[58] Currently, companies are only required to send shareholder information to the nominee.[59]

Overseas law

2.35 Many investors in US companies have their shareholdings registered in the name of a broker or other financial institution to facilitate easy transfer. US securities laws have procedures for companies to communicate directly with these beneficial owners. Under these provisions, a US corporation must send "search cards" to the nominee prior to the annual general meeting. These require the nominee to notify the corporation how many beneficial owners it represents. The corporation must then send to the nominee the necessary number of proxy cards, proxy statements and annual reports for forwarding to those beneficial owners. The nominees must forward that information within 5 business days, with the corporation bearing the costs of distribution.[60]

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57 s 254F.

58 s 1091C(10).

59 The procedures under which superannuation funds and other institutional investors enter into arrangements with nominees or custodians to hold legal title to the scheme's investments are further explained in G Stapledon, S Easterbrook, P Bennett and I Ramsay, *Proxy Voting in Australia's Largest Companies* (Centre for Corporate Law and Securities Regulation and Corporate Governance International, 2000) at 3-4.

60 17 Consolidated Federal Regulations §§ 240.14a, 14b.

2.36 A UK regulator issued a Consultation Paper on how companies might best communicate with all their beneficial shareholders for corporate governance, marketing or other reasons.[61] The Consultation Paper pointed out that, under current law, a person who holds shares through a nominee must rely on that nominee to receive relevant company information and pass it on. That Paper considered a number of options, including:

- to require the nominee to disclose to the shareholder what services, if any, the nominee provides to ensure that company information is passed on to the shareholder, or
- to oblige the company and the nominee to enter into suitable arrangements to ensure that this information is passed on, either in all instances or where the shareholder opts to receive such information.

2.37 The Consultation Paper also discussed whether any obligation to circulate shareholder information, and the costs involved, should be placed on the company or the nominee, but did not express a settled view. A more recent UK Report pointed to some difficulties encountered by beneficial holders of shares in exercising their voting rights.[62]

Issue 4. *Should the Corporations Law have a procedure for companies to communicate directly with the beneficial owners of shares held by nominees? If so, what form should it take?*

Submissions on Issue 4

Support procedure

2.38 Some respondents favoured a statutory procedure of this nature,[63] for the following reasons.

- It would otherwise be too easy for companies to take no action.
- The current law presents difficulties for institutional shareholders in voting their shares.[64]

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61 UK Department of Trade and Industry Consultative Document, *Private Shareholders: Corporate Governance Rights* (November 1996).

62 Committee of Inquiry into UK Vote Execution, *Report* (National Association of Pension Funds, London, 1999) paras 1.7, 1.8, 2.1-2.13.

63 Boardroom Partners, G Long, Institutional Analysis.

64 Institutional Analysis. This respondent said that, where institutional investors invest in equities, they commonly engage custodians, which are the shareholders entered in the company's register of shareholders. Sections 249J and 250E and companies' constitutions require general meeting documents to be sent to, and confer the right to vote on, shareholders. In practice, the right to determine how to vote shares held in a custodian's name normally rests not with the custodian (the shareholder) but elsewhere, often with a fund manager. Meeting documents, proxy forms and votes must therefore pass through the custodian.

2.39 One of these respondents proposed that the law should provide for shareholders to nominate, at the time of purchasing their shares, to whom the proxy form should be sent.[65]

2.40 Another respondent proposed that companies be permitted to adopt a system for recognising "designated owners" in their constitutions.[66] This would allow beneficial owners to receive information directly from companies. A similar arrangement has been proposed for the UK[67] and Australia.[68]

Oppose procedure

2.41 Most respondents opposed any statutory procedure of this nature,[69] arguing that:

- beneficial owners of interests in shares can make their own contractual arrangements with nominees regarding the dissemination of information provided to nominees by listed entities
- it would create substantial additional administrative costs to companies without commensurate benefits to shareholders.

2.42 Some respondents supported the development of industry best practice in this area, for instance to ensure that all relevant corporate information is easily available to investors through means such as a company's website.[70] Another respondent said that nominees should be encouraged to communicate better with beneficial owners, particularly in relation to the harvesting of votes (but not at the company's expense).[71]

Advisory Committee view

2.43 The Advisory Committee does not see the need to introduce provisions in Australia for companies to communicate directly with the beneficial owners of shares held by nominees. Persons have the choice of being registered as shareholders and thereby receiving information directly from the company or holding their shares through nominees. If they choose the latter approach, they can make their own arrangements with the nominee concerning the receipt of that information.[72] Also,

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65 Boardroom Partners.

66 Institutional Analysis.

67 G Stapledon and J Bates, "Reconceptualising the Nature of Modern Shareholding (and Making Voting Easier)" (2000) 18 *Company and Securities Law Journal* 155 recommend that UK law introduce an "opt-in" regime whereby a "designated person" could receive corporate information.

68 G Stapledon, S Easterbrook, P Bennett and I Ramsay, *Proxy Voting in Australia's Largest Companies* (Centre for Corporate Law and Securities Regulation and Corporate Governance International, 2000) at 4.

69 AMP, Australian Credit Forum, Australian Shareholders' Association, Chartered Institute of Company Secretaries, Commercial Law Association of Australia, Commonwealth Bank, Computershare Registry Services, IFSA (which acknowledged that holding shares through nominees or custodians can impede the fund manager or trustee receiving notices in a timely fashion), Law Council, QBE, Queensland Investment Corporation, Telstra, Jack Tilburn, Jon Webster, Western Australian Joint Legislation Review Committee.

70 IFSA, Telstra, Thomson Financial.

71 Computershare Registry Services.

72 G Stapledon, S Easterbrook, P Bennett and I Ramsay, *Proxy Voting in Australia's Largest Companies* (Centre for Corporate Law and Securities Regulation and Corporate Governance

many shareholders holding their shares through nominees would be sophisticated investors, who do not need specific legislative protection. In addition, compliance with any mandatory notification requirements could impose too great an administrative burden on companies.

Recommendation 4: Notice to beneficial shareholders

There should be no legislative procedure for listed public companies to communicate directly with the beneficial owners of shares held by nominees.

International, 2000) at 4 refer to arrangements between managed investment schemes and nominees requiring the latter to forward notices of meetings to the investment manager and to complete proxy forms as instructed by the investment manager.

Chapter 3. Settling the agenda

The principal issue in this Chapter is the right of shareholders to have particular matters considered at a company meeting. The Corporations Law permits a certain proportion of shareholders to require the company to circulate their proposed resolutions or statements, for consideration at a subsequent general meeting. Shareholders therefore have an opportunity to bring a matter to the attention of other shareholders and seek their support. The Chapter examines whether there should be further controls over this process, both to prevent abuse of the power and to ensure that shareholders have adequate opportunities to have their resolutions considered at the next general meeting. The Chapter also examines the desirability of permitting non-binding shareholder resolutions.

Shareholders' resolutions and statements

The issues

3.1 One of the essential elements of the corporate governance process is for shareholders to be able to communicate both with corporate management and with each other. One means of achieving this is through the shareholder proposal process. This is reflected in the *OECD Principles of Corporate Governance* (1999), which state that shareholders should have proper opportunities to place items on the agenda at general meetings, subject to reasonable limitations.

3.2 Corporate law has long provided that a certain proportion of shareholders can require the company to circulate their proposed resolutions or statements. This gives them the opportunity to bring a matter to the attention of other shareholders and seek their support before they decide whether to attend the meeting or how to complete their proxies.[73] This shareholder right may also act as a counterbalance to the right of the directors to circulate their views to shareholders at the company's expense.[74]

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73 The Canadian Dickerson Report (1971) at paras 274, 276 commented that the purpose of permitting shareholders to propose resolutions was:

> "to provide a shareholder with machinery enabling him, at the expense of the corporation, to communicate with his fellow shareholders on matters of common concern. At common law, the management of a corporation is under no obligation to make any reference in any of the documents sent out by it to any non-management view of the matters discussed … nor to include in a notice of meeting any proposals other than its own … This places shareholders wishing to have a matter discussed at a meeting at a severe disadvantage because the meeting cannot effectively do anything not fairly comprehended by the notice of meeting.
>
> [The legislation] … is based upon the proposition that shareholders are entitled to have an opportunity to discuss corporate affairs in general meeting, and that this is a right and not a privilege to be accorded at the pleasure of management."

74 The common law duty of directors to inform shareholders of proposals to be considered at the meeting gives the board an opportunity to put forward its point of view. At common law, directors who honestly believe that the policy they are promoting is in the best interests of the company may use company funds to circulate relevant information to shareholders, except for information that supports or opposes in a partisan way particular candidates for election as directors. In consequence, "the ability [of directors] to use the machinery and money of the company to make their views known to the members places the directors in a strong position compared to that of members who are critical of the board's policy": J Farrar & B Hannigan,

3.3 This raises three issues:

- the shareholding threshold for requiring a resolution or statement to be considered at a company meeting
- the timing requirements for these resolutions or statements
- the consequences of failing to present a resolution at a meeting.

Shareholding threshold for proposing resolutions

Australian law

3.4 Under the Corporations Law, a company must distribute to all shareholders, at its own cost, any notice of resolution or any shareholder statement received within the requisite period from at least 100 shareholders or shareholders representing 5% of the total votes, unless the resolution or statement is more than 1,000 words long or defamatory.[75] It may be difficult for directors to properly reject a resolution on the grounds of defamation. Their reasonable belief that the information is defamatory may not suffice, given that this is an objective test.[76]

3.5 The 100 shareholder threshold may be altered by regulation for a particular company or a particular class of company.[77] However, it is likely that this regulation-making power would only be exercised sparingly.

3.6 There is no equivalent in this context of the statutory "proper purpose" prerequisite for calling a meeting of shareholders.[78] However, at common law, directors may refuse to distribute a proposed resolution if its object cannot be lawfully achieved at the meeting, for instance, if it deals with a matter of management exclusively vested in the directors.[79] However, shareholders can circumvent this right of refusal by appropriately drafting the resolution.[80]

Farrar's Company Law (4th edition, Butterworths, 1998) at 314. See also HAJ Ford, RP Austin & IM Ramsay, *Ford's Principles of Corporations Law* (loose leaf, Butterworths) at [7.460].

75 ss 249N(1), 249O(5)(a), 249P(2), (9)(a). In *Re Harbour Lighterage Ltd & the Companies Act* (1968) 1 NSWR 439, the Court held that a statement from a shareholder was defamatory and the company was therefore entitled not to distribute it to other shareholders.
The obligation to notify all shareholders reflects the prohibition in Australia on bearer shares: s 254F. By contrast, those overseas jurisdictions, particularly in continental Europe, that permit bearer shares usually provide for notification through media advertisement and lodgment of notices with banks and shareholders' associations that act as depositories for bearer shares.

76 This contrasts with the New Zealand law which permits directors to exclude information if they consider it to be defamatory, frivolous or vexatious: New Zealand Companies Act 1993 First Schedule cl 9(6).

77 ss 249N(1A), 249P(2A).

78 See further para 2.7, supra.

79 *Isle of Wight Railway Co v Tahourdin* (1883) 25 Ch D 320, *Scott v Scott* [1943] 1 All ER 582, *NRMA Ltd v Parker* (1986) 11 ACLR 1, 4 ACLC 609, *Stanham v The National Trust of Australia* (1989) 7 ACLC 628, 15 ACLR 87.

80 For instance, the resolution could propose the removal of one or more directors who oppose a particular social agenda or the alteration of the constitution to require directors to take into account particular social policies. The powers to alter the constitution or remove directors are given to the shareholders in general meeting: ss 136, 203D.

3.7 The existing rules in Australia, in particular the right of 100 shareholders to propose resolutions to be circulated at the company's expense, may enable shareholders who represent only a very small economic interest to have a considerable influence over the agenda and therefore the business to be conducted at the meeting.

Overseas law

3.8 In the UK, shareholders representing not less than 5% of the total voting rights, or 100 shareholders holding shares on which there is an average paid-up capital of not less than £100, may require that their resolutions or statements be circulated for consideration at the next general meeting.[81] A recent Consultation Paper has proposed that the monetary threshold for those 100 shareholders be increased to an average of £500 market value.[82] However, unless the company in general meeting resolves otherwise, the costs of circulating these documents are borne by the requisitioners, who may be required to deposit in advance a sum to reasonably cover those expenses.[83] Subject to that requirement, the directors must circulate a resolution or statement unless "on the application either of the company or of any other person who claims to be aggrieved, the court is satisfied that the rights conferred by that section are being abused to secure needless publicity for defamatory matter".[84] The cost requirement has been described as a significant barrier to shareholders exercising their right to put forward resolutions, thereby deterring shareholders from expressing their views and discouraging debate within the company.[85]

3.9 Various other European countries also permit shareholders to initiate the equivalent of a shareholders' resolution by adding items to the agenda of a general meeting. The thresholds in the various jurisdictions generally range from 5% to 20% of a company's share capital, though a few countries permit any shareholder to add items to the agenda.[86]

3.10 In Canada, any shareholder, regardless of the size of that person's shareholding, can submit a proposal for discussion at an annual general meeting, together with a supporting statement of up to 200 words.[87] This information must be circulated to all shareholders at the company's expense, unless the directors exercise any right to

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81 UK Companies Act 1985 s 376.

82 Consultation Document from the Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: Developing the Framework* (March 2000), para 4.52.

83 UK Companies Act 1985 s 377(1).

84 UK Companies Act 1985 s 377(3). The court may order that the company's costs on such an application be met by the requisitioners, even if they are not parties to the application.

85 The UK House of Commons Select Committee *Report on Remuneration of Directors and Chief Executives of the Privatised Utilities* (June 1995) recommended that the UK legislation be amended to require shareholders' resolutions, where they are supported by a sufficient number of shareholders and are limited in length, to be circulated by the company to all shareholders without cost to the shareholder proposing the resolution.

86 Austria, France, Germany and Portugal have a 5% of share capital threshold. The threshold in Switzerland is 10% or shares representing one million Swiss Francs in par value. In Belgium, the threshold is 20%. The Netherlands has no statutory threshold, but leaves it to each company's constitution. In Denmark and Sweden, any shareholder can require an item to be added to the agenda of a meeting.

87 Canada Business Corporations Act s 137.

refuse circulation. The grounds for refusal are the same as those for refusing to convene a meeting requisitioned by shareholders (see para 2.21).[88] A corporation that has refused to circulate this information must notify the proposing shareholder, who may apply to the court for a direction for circulation.[89] It appears that the corporation has the onus of justifying the rejection of any shareholder proposal.[90]

3.11 In the US, the Securities and Exchange Commission (SEC) has promulgated a rule which attempts to strike a balance between the right of shareholders to put forward proposed resolutions and supporting statements and the need to avoid spending time and money circulating, and having the shareholders subsequently consider, proposals that lack any substantial nexus to the company.[91] Under this rule, any eligible shareholder (that is, a person who has held at least 1% or $2,000 in market value of a company's shares for at least one year before the proposal is submitted) may submit one proposal (and an accompanying statement not exceeding 500 words) to be circulated by the company, at its expense, for consideration at the next available shareholders' meeting, unless the directors refuse on any of the various stipulated grounds.[92] A company that wishes to omit a proposal must notify the

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88 Canada Business Corporations Act s 137(5).

89 Canada Business Corporations Act s 137(7), (8), (9).

90 D Peterson, *Shareholder Remedies in Canada* (Butterworths, loose leaf) at §14.10. This result is implicit in the Canada Business Corporations Act s 137(7), which provides that a corporation must provide reasons for omitting a proposal.

91 Rule 14a-8 (the shareholder proposal rule).

92 The SEC Exchange Act Release No 40018, 21 May 1998 *CCH Federal Securities Law Reporter* Transfer Binder 1998 at ¶86018 sets out the various grounds for exclusion, including:

- *management functions: ordinary business.* A shareholder proposal may be excluded if it deals with a matter relating to the company's "ordinary business operations". This exclusion is based on the principle that management is responsible for the conduct of a company's day-to-day activities. It is considered inappropriate for shareholders to have the power to "micro-manage" the company
- *no implementation power.* This exclusion applies if the company would lack the power or authority to implement the proposal, for instance where the proposal depends on some action by an independent third party. However, the exclusion does not apply if the proposal merely requires the company to request the co-operation of a third party
- *relevance.* This exclusion applies if the proposal relates to operations that account for less than 5% of the company's total assets at the end of its most recent financial year, and for less than 5% of its net earnings and gross sales for its most recent financial year, and is not otherwise significantly related to the company's business
- *duplication.* A proposal may be excluded if it substantially duplicates a previously submitted proposal that will be included in the company's proxy material for the same meeting
- *violation of law.* A proposal is excluded if it would cause the company to violate any relevant law
- *violation of proxy rules.* A proposal will be excluded if it is contrary to any of the SEC's proxy rules, including Rule 14a-9, which prohibits materially false or misleading statements in any proxy solicitation materials
- *personal grievance: special interest.* A proposal may be excluded if it relates to a personal claim or grievance against the company or any other person, or if it is designed to benefit the proponent, or to further a personal interest that is not shared by the other shareholders at large. In practice, this ground for exclusion has proved difficult for the SEC to apply, because it can require some determination of the motivation of the proponent in submitting the proposal
- *direct conflict with company proposal.* A company can exclude a proposal that directly conflicts with one of the company's own proposals to be submitted to shareholders at the

relevant shareholder and submit its reasons to the SEC. The company has the burden of showing that it is entitled to exclude a proposal. The SEC may issue a "no action" letter if it supports the exclusion. Either party may appeal to the court from the SEC's decision.

3.12 The New Zealand legislation requires the company to circulate any shareholder resolution or related statement unless "the directors consider it to be defamatory, frivolous or vexatious".[93]

Issue 5. *Should the current rules regarding shareholder resolutions or statements be amended?*

If so, which of the following policy options should be adopted:

(a) codify the common law by providing that directors may refuse to circulate a shareholder resolution if its consideration would not be a proper purpose of the meeting

(b) change the prerequisite shareholding tests for requiring the company to distribute proposed resolutions and shareholders' statements in line with any amendments to the rules for requisitioning general meetings

(c) retain the existing threshold, but introduce relevance restrictions similar to those either in New Zealand or in Canadian and US corporate law

(d) rely on the proposed power to make regulations to alter the 100 shareholder threshold for a particular company or a particular class of company

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same meeting. The SEC has interpreted the word directly as not requiring that the proposals must be identical in scope or focus for the exclusion to be available

- *substantial implementation.* A proposal may be excluded if the company has already substantially implemented it
- *re-submission.* The company may exclude any proposal that covers substantially the same subject matter as any other proposal that has failed within the last three to five years.

In practice, the greatest problems have arisen with the "ordinary business" exclusion. Its purpose is to exclude shareholder proposals dealing with the minutiae of day-to-day operations of a company's business. However, problems have arisen where a proposal raises a matter that is within the normal ambit of management (and therefore should be excluded), but also involves social policy questions (for instance, employment decisions in the context of equal opportunity or similar social legislation). From 1992 to 1998, the SEC took the position that all employment-related shareholder proposals would be excluded under the "ordinary business" exclusion, even where they also raised social policy issues. The SEC changed its approach in May 1998 and now deals with each matter on a case-by-case basis, notwithstanding the lack of any "bright line" test for determining when an employment-related shareholder proposal raises social issues that fall outside the "ordinary business" exclusion. The argument put forward in the SEC Release for reducing the ambit of the "ordinary business" exclusion is that "shareholder proposals on social issues may improve investor confidence in the securities markets by providing investors with a sense that as shareholders they have a means to express their views to the management of the companies in which they invest".

93 New Zealand Companies Act 1993 First Schedule cl 9(6).

(e) some other approach?

Submissions on Issue 5

Option (a) (codify the common law by providing that directors may refuse to circulate a shareholder resolution if its consideration would not be a proper purpose of the meeting)

3.13 Some respondents considered that this common law right should be codified.[94] This would be consistent with the statutory proper purpose requirement for convening a meeting[95] and would avoid any suggestion that the common law rights of directors in this respect have been impliedly abrogated.

3.14 Other respondents opposed codification, arguing that the current law is sufficient.[96]

Option (b) (change the prerequisite shareholding tests for requiring the company to distribute proposed resolutions and shareholders' statements in line with any amendments to the rules for requisitioning general meetings)

3.15 *Support a higher threshold.* Some respondents supported abolishing the 100 shareholder criterion and retaining only the 5% of voting shares threshold for proposing a resolution,[97] arguing that:

- because a general meeting has very limited power, the only relevant types of resolutions proposed by shareholders that are usually acceptable are those seeking to amend the constitution (which requires a special resolution) or to remove directors (which requires an ordinary resolution). The inability of requisitioners to satisfy a 5% shareholding threshold would call into serious question the prospects of their proposed resolution succeeding

- listed entities with large numbers of shareholders incur considerable additional costs in putting forward a shareholder resolution at the next scheduled general meeting, even if it only involves a single additional page. There are additional administrative and printing costs, as well as legal costs in reviewing statements and resolutions to ensure that they are not defamatory and that any resolution is for a purpose that can be lawfully achieved at the meeting

- tightening the threshold for shareholders to propose resolutions could reduce the number of resolutions to be considered at a meeting and, therefore, the sometimes unreasonable length of meetings

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94 Blake Dawson Waldron, Commercial Law Association of Australia, Law Council, Telstra.

95 s 249Q.

96 Computershare Registry Services, Jon Webster (who saw no need to codify the common law position, though he had no real objection to it), Western Australian Joint Legislation Review Committee.

97 AMP, Commercial Law Association of Australia (the Association also favoured option (a)), QBE, Telstra (this respondent also supported option (a)).

- the right of shareholders to be heard is protected by their ability to make statements, and question the board, at the meeting itself.

3.16 *Oppose a higher threshold.* Some respondents favoured distinguishing between the threshold for requisitioning meetings and that for proposing a resolution for a scheduled meeting.[98] They considered that the current tests for proposing a resolution should be retained, with no new relevance requirements, arguing that:

- the tests promote shareholder participation and help protect the right of minority shareholders to be heard
- the tests would provide a balance if the threshold for requisitioning meetings were tightened
- the cost of placing a resolution on the agenda of a scheduled meeting is insignificant compared to that of requisitioning a meeting.

Option (c) (retain the existing threshold, but introduce relevance restrictions similar to those either in New Zealand or in Canadian and US corporate law)

3.17 Some respondents favoured the current 100 shareholder and 5% by value tests for placing matters on the agenda, but with additional relevance controls to provide some safeguard against improper resolutions.[99] These controls need to strike an appropriate balance between the right of shareholders to put forward resolutions and statements and the undue time and expense involved if the subject matter is not appropriate for consideration by shareholders in general meeting.

3.18 Another respondent favoured relevance controls as an alternative to its preferred position of lifting the threshold to 100 shareholders, each holding $500 worth of shares (see option (e)).[100]

3.19 Some respondents[101] opposed detailed relevance controls. They considered that relevance controls of the type used in the United States or Canada appear to be overly prescriptive and could lead to substantial administrative and legal costs in determining whether resolutions or statements fall within the relevance criteria. They also have the

98 AARF, Australian Credit Forum, ASX, IFSA, Law Council (this respondent also supported option (a)), Jack Tilburn, Jon Webster, Western Australian Joint Legislation Review Committee. ASX, Law Council and the Western Australian Joint Legislation Review Committee stated that their support for raising the threshold for requisitioning meetings (Issue 2) depended on there being no change to the shareholder threshold for proposing a resolution for a scheduled meeting. IFSA also placed a similar condition on its support for Issue 2, though it considered that a proper purpose test may be appropriate to provide some safeguard against vexatious or frivolous resolutions.

99 BHP, Chartered Institute of Company Secretaries, Commonwealth Bank, Queensland Investment Corporation. BHP indicated that its support for raising the threshold for requisitioning meetings (Issue 2) depended on there being no change to the numerical threshold for proposing resolutions.

100 Australian Shareholders' Association.

101 AMP, ASX, Computershare Registry Services, Law Council, Jon Webster.

potential to create considerable disruptive dispute, or even litigation, between the directors and various shareholders.[102]

Option (d) (rely on the proposed power to make regulations to alter the 100 shareholder threshold for a particular company or a particular class of company)

3.20 One respondent favoured Option (d).[103]

Option (e) (some other approach)

3.21 One respondent considered that the threshold could be lifted, but still be lower than that for requisitioning a meeting. For instance, each of the 100 shareholders might be required to hold $500 worth of shares.[104]

3.22 Another respondent[105] made the following proposal:

- allow a shareholder (with a marketable parcel) to add a proposed resolution for an annual general meeting on condition that the resolution passes a New Zealand style "proper purpose" test

- impose a higher threshold for proposing a resolution at any other general meeting (for instance, 100 shareholders with a marketable parcel, or one or more shareholders who collectively hold at least 5% of the company's issued capital). Furthermore, the requisitioning shareholders should be required to pay 20% of the associated costs in the form of a bond to be refunded upon the motion being put to the meeting.

Advisory Committee view

3.23 The Corporations Law should differentiate between the threshold for shareholders to requisition a general meeting and the threshold for shareholders to propose a resolution at the next scheduled general meeting. The threshold should be much higher in the former than in the latter situation, given that the costs and administrative burdens for a company in holding extraordinary general meetings are much higher than those incurred by the company in adding items to the agenda and distributing additional draft resolutions and accompanying statements for meetings that have already been scheduled.

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102 The Western Australian Joint Legislation Review Committee considered that two of the exclusion grounds under US law would not be suitable for application in Australia:
- *operational matters that do not amount to 5% of the company's total assets or sales.* There may well be issues of conduct or process which do not satisfy this test but which are worthy of consideration
- *submissions that have failed within the last 3 to 5 years.* This ground should not extend to the statutory right to remove directors under s 203D as per *Humes Ltd v Unity APA Ltd (No1)* [1987] VR 467, (1986) 5 ACLC 15, (1986) 11 ACLR 641.

103 G Long.

104 Australian Shareholders' Association.

105 Computershare Registry Services.

3.24 The Advisory Committee supports retaining the 100 shareholder test, in addition to the 5% of total issued shares test, for placing shareholder resolutions on the agenda of the next shareholder meeting. However, this very significant right for 100 shareholders should only be available to those shareholders who have some minimum material financial commitment to the company. This approach is also found in overseas jurisdictions. Lack of a minimum economic threshold for each requisitioning shareholder could also create the possibility of abuse, for instance, one or more shareholders transferring very small numbers of their shares to other persons to satisfy the 100 shareholder test.

3.25 There are various possibilities for the minimum economic threshold. One respondent has suggested that each of the 100 requisitioning shareholders should be required to have at least $500 worth of shares (para 3.18). In the Committee's view, this would represent a very low economic threshold. A more meaningful threshold could be the ASX "minimum spread" requirement for any entity seeking admission to the Official List. That entity must have at least 500 holders, each with a parcel of the main class of securities with a value of at least $2,000.[106] This $2,000 figure for each of the 100 requisitioning shareholders would be a more substantial minimum test, though it would still represent only a very small proportion of the issued share capital of most listed public companies. A middle position might be, say, a $1,000 requirement for each of the requisitioning shareholders.

3.26 The Advisory Committee wishes to ensure that an economic threshold does not disadvantage shareholders of failing companies. A monetary threshold which is otherwise appropriate may become more difficult to satisfy if the value of a company's shares falls significantly through poor management or performance. This is a situation where shareholders may be very keen to put forward resolutions to remove the directors or otherwise deal with the company's decline. The Advisory Committee considers that this problem could be overcome by requiring the economic threshold to be satisfied on the basis of the highest market value of each proposing shareholder's current shareholding during the 12 months prior to giving the company notice of the resolution, whether or not the shareholder has held those share for that period.

3.27 A minimum economic threshold would be in lieu of adopting statutory relevance or other like restrictions on shareholder resolutions, in addition to existing common law principles. Additional controls of this nature could generate considerable legal complexity and uncertainty, as well as avenues for disputation between the directors and shareholders.

Recommendation 5: Threshold for proposing resolutions

The current Corporations Law prerequisites for shareholders to move resolutions at meetings of listed public companies, namely at least 5% of the votes that may be cast on the resolution or 100 shareholders who are entitled to vote at a general meeting (s 249N(1)), should remain. However, each of the 100 shareholders should be required to hold shares of a meaningful economic

106 ASX Listing Rule 1.1 Condition 7.

value, say, $1,000 (as measured by the highest market value in the 12 months prior to giving the company the notice of the resolution).

Timing requirements

3.28 The *OECD Principles of Corporate Governance* (1999) provide that shareholders should be given sufficient and timely information concerning the date and agenda of general meetings, as well as full and timely information regarding the issues to be decided at the meeting.

Australian law

3.29 Shareholders who requisition a general meeting can require that their proposed resolutions, and any accompanying statements, be circulated with the notice of that meeting.[107]

3.30 Shareholders may have difficulty in having their proposed resolutions considered at the next general meeting if the directors convene that meeting. Directors may call an annual general meeting or extraordinary general meeting of a listed public company on a minimum 28 days' notice,[108] though they must also comply with relevant Listing Rules.[109] If less than two months' notice is given, shareholders are effectively precluded from having any proposed resolution in response to that notice considered at the same meeting, rather than at a subsequent meeting.[110] Also, shareholders who wish to distribute statements in response to any matter raised in the previously circulated notice of the meeting called by the directors must bear the costs of circulating the statements, unless the meeting resolves otherwise.[111]

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107 ss 249D(2)(b), 249P.

108 ss 249CA, 249HA.

109 ASX Listing Rule 14.3 requires that a listed entity must accept nominations for the election of directors up to 30 business days before the date of a general meeting at which directors may be elected. Also, ASX Listing Rule 4.3 and Appendix 4B require that the preliminary final report provide details of the place, date and time of the next annual general meeting.

110 The effect of s 249O(1) is that any draft resolution prepared by shareholders can only be considered at the next general meeting that occurs *more than two months* after the notice of that resolution is given. An important exception is s 203D(2), which permits shareholders to pass a resolution to remove a director where the company calls a meeting after notice of the resolution is given to the company, even though the meeting is held less than two months after the notice of resolution is lodged.

111 Under s 249P(8), shareholders seeking distribution of their statements are "jointly and individually liable for the expenses reasonably incurred by the company in making the distribution if the company does not receive the statement in time to send it out with the notice of meeting. At a general meeting, the company may resolve to meet the expenses itself." The company is not obliged to circulate any statement received after notice of the meeting has been sent unless the relevant shareholders first provide the funds: s 249P(9)(b).

Policy options

3.31 An annual general meeting must be held at least once in each calendar year and within five months after the end of the financial year, unless ASIC grants an extension.[112]

3.32 One possibility is to require each listed company at its annual general meeting to fix the date for its next annual general meeting.[113] Shareholders could therefore lodge their proposed resolutions with the company sufficiently in advance of that date to ensure that they are considered at that meeting.

3.33 An alternative approach would be to require listed companies to give the relevant Exchange at least three months' notice of the date of the next annual general meeting. Currently, companies must include this date in their preliminary final report,[114] to be lodged within a stipulated period after the end of the financial year. However, directors are not precluded from calling the annual general meeting either before or shortly after they lodge that report.

3.34 A third approach would be to require that all documents that must be considered at an annual general meeting[115] be circulated sufficiently in advance of the scheduled meeting date to give shareholders a reasonable opportunity to lodge with, and have circulated by, the company any resolution or statements in response to those documents, for consideration at the annual general meeting.[116]

3.35 Some arguments that could be raised against introducing any further statutory controls over the timing of an annual general meeting are:

- the annual general meetings of particular companies are generally held at the same time each year
- shareholders can ensure that they give sufficient notice of a resolution by giving the notice toward the end of the company's financial year, given the requirement for companies to hold an annual general meeting within 5 months after the end of their financial year
- companies need adequate notice of a shareholder resolution to permit them to print and circulate the necessary material.

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112 ss 250N, 250P.

113 Belgian corporate law achieves the same result by requiring that the company's constitution identify the location, date and time of each annual general meeting.

114 ASX Listing Rule 4.3 and Appendix 4B.

115 These documents are the annual financial report, directors' report and auditor's report: s 250R.

116 For instance, the UK Pensions Investment Research Consultants have suggested that:
- the annual report and accounts be published at least eight weeks in advance of the fixed date of the next annual general meeting, and
- shareholders be given a period of, say, two weeks to forward draft resolutions or statements to the company, to be included in a mailing to all shareholders some four weeks before the fixed date of that annual general meeting. The cost of circulating these draft resolutions and statements should be borne by the company.

Issue 6. *Should the timing requirements in the Corporations Law regarding the calling of an annual general meeting and/or the distribution of documents for consideration at that meeting be amended to facilitate shareholders having their resolutions considered at the meeting? If so, in what manner?*

Submissions on Issue 6

Support amending the timing requirements

3.36 Some respondents favoured amending the timing requirements,[117] giving the following reasons.

- It may encourage shareholder participation.
- The increasing globalisation of equity investment requires greater notice of annual general meetings. Many investing institutions are required by their home governments or by their clients to vote on all proxies and the voting processes in each jurisdiction have varying degrees of difficulty. The present notice period tends to disenfranchise foreign shareholders, whereas a three month notice period would allow each vote to be timetabled in advance.
- Shareholders may be unaware of when the meeting is to be held and thus uncertain of the closing date for lodging resolutions.
- It may be possible for smaller companies to advance the meeting to a date within two months of the receipt of the shareholders' resolution, thus forcing the resolution to be deferred until the next meeting (possibly a year away). Although this may be improper conduct,[118] it is nevertheless difficult, time-consuming and expensive for the shareholders to prove their case.

3.37 In relation to the particular timing requirement, some of these respondents specifically opposed requiring listed public companies to fix the date of their next annual general meeting 12 months in advance, as it would be too inflexible for reasons such as problems with venue hire or the preparation of the annual report. Instead, various respondents specifically supported a requirement that listed companies give the relevant Exchange three months' notice of the next annual general meeting.

Oppose amending the timing requirements

3.38 Some respondents opposed any amendments to the timing requirements.[119] They argued that the current legislative requirements, including the requirement to hold a meeting within five months of the end of a company's financial year, and the

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117 Australian Credit Forum, Australian Shareholders' Association, BHP, Commonwealth Bank, Computershare Registry Services, G Long, Queensland Investment Corporation, Telstra, Jack Tilburn, Western Australian Joint Legislation Review Committee.

118 *Cannon v Trask* (1875) LR20Eq 669.

119 AMP, Chartered Institute of Company Secretaries, Commercial Law Association of Australia, IFSA, Law Council, QBE.

practical procedures adopted by most listed companies (for instance, holding the annual general meeting at approximately the same time each year) suffice.

3.39 One of the respondents that opposed any change to the law[120] said that, if a three months' notice period was nevertheless introduced, it should deal with the following matters.

- A company should be permitted to reschedule its annual general meeting to a date later than that stated in an announcement if it notifies the relevant Exchange within a reasonable period, notwithstanding that it does not give three months' notice of the revised date.

- ASIC should have a power to shorten the three months' notice period, to overcome any unforeseen practical difficulties arising from the amendment.

Advisory Committee view

3.40 Companies may choose at one annual general meeting to fix the date of their next annual general meeting. However, this should not be mandatory for listed public companies. Instead, all these companies should give the relevant Exchange at least three months' notice of the date of the next annual general meeting. This requirement would ensure that shareholders have sufficient time to lodge proposed resolutions for consideration at that meeting.

3.41 This requirement could be implemented in the Corporations Law, unless adopted in the Listing Rules of the relevant Exchanges, with discretionary powers to vary the requirements in appropriate circumstances.

Recommendation 6: Notice of next annual general meeting

All listed public companies should be required to give the relevant Exchange at least three months' notice of the date of their next annual general meeting. This requirement should be in the Corporations Law unless implemented through the Listing Rules of the relevant Exchanges. There should be discretionary powers to permit companies to reschedule their meetings or shorten the notice period in appropriate circumstances.

Presenting the shareholder resolution

3.42 In the United States, the SEC rules require that at least one of the shareholders proposing the resolution, or the shareholder's representative, must attend the meeting to present the proposal. If a proposing shareholder or representative fails to attend without good cause, the company is permitted to exclude all proposals from the proposing shareholders for any meetings held in the following two calendar years.[121]

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120 Law Council.

121 SEC Exchange Act Release No 40018, 21 May 1998 *CCH Federal Securities Law Reporter* Transfer Binder 1998 at ¶86018 p 80,556.

Issue 7. *Should companies be entitled to exclude proposals by persons who have previously proposed a resolution but failed to present it at the relevant meeting either personally or through a representative? If so, for how long?*

Submissions on Issue 7

Support an exclusion power

3.43 Some respondents favoured a statutory exclusion power,[122] for the following reasons.

- Requisitioners, having put the company to the expense of putting a resolution, should be required to present that resolution.
- It would discourage disruptive shareholders.

3.44 Some of those respondents supported the US law, namely that if the shareholders proposing the resolution or their representatives fail to attend without good cause, the company may exclude all proposals from the proposing shareholders for any meetings held in the following two calendar years.

Oppose an exclusion power

3.45 Some respondents opposed any statutory exclusion power for companies,[123] for the following reasons.

- There is no evidence that requisitioners have failed to present resolutions at meetings.
- Even if there were such evidence, any rules that might be drawn could be readily circumvented.
- The tightening of the threshold for requisitioning a meeting (Issue 2) would diminish the need for any change of this nature.

3.46 Another respondent said that any exclusion power "smacks of dictatorship over democracy".[124]

3.47 One of these respondents considered that at least one shareholder (or a representative) should, as a matter of best practice, attend the general meeting to present the proposal and respond to any questions or issues raised, as shareholders should have the right to question those proposing the resolution to decide whether to vote for or against it.[125]

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122 Australian Shareholders' Association, BHP, Chartered Institute of Company Secretaries, Commonwealth Bank, Computershare Registry Services, G Long, Queensland Investment Corporation.

123 AMP, AARF, Commercial Law Association of Australia, IFSA, Law Council, QBE, Telstra, Jack Tilburn, Western Australian Joint Legislation Review Committee.

124 Jack Tilburn.

125 AMP.

3.48 Another of these respondents argued that, under the current law, a company would be permitted to exclude consideration of a resolution or statement at a particular meeting if the proposing shareholders are not present.[126] However, there should be no timing penalty where the proposer does not attend.[127]

Advisory Committee view

3.49 The Advisory Committee does not support companies having any power to exclude proposals by certain persons who have previously put forward resolutions. There is currently no identified problem in this area. Also, in Australia, unlike the US where a single shareholder can propose a resolution, at least 100 shareholders, or shareholders representing 5% of the issued voting share capital, must propose a resolution. All these shareholders would be prevented from putting forward any further resolution for the relevant period.

Recommendation 7: Exclusion of persons who have failed to present a resolution

There should be no legislative restriction on persons who have failed to present a resolution in presenting subsequent resolutions.

Non-binding shareholder resolutions

The issue

3.50 Shareholders at a general meeting may lawfully pass resolutions on any matter within the power of that meeting. The question is whether they should also be permitted to pass non-binding resolutions on matters outside their power.

Australian law

3.51 Currently, shareholders may only pass resolutions on matters within their power under the Corporations Law, the Listing Rules of the relevant Exchange or the company's constitution.[128] They have no power to pass valid resolutions on any other matters, particularly those within the exclusive jurisdiction of the board of directors.

Overseas law

3.52 The general principle in most jurisdictions is that shareholders cannot pass advisory resolutions on matters outside their power. However, there are some exceptions. For instance, Canadian legislation provides for advisory proposals, which are designed to ascertain the level of shareholder support for a matter, even though it

126 AARF.
127 AARF, Australian Credit Forum.
128 See footnote 5.

is within the discretion of directors.[129] These advisory proposals cannot bind the directors, but can nevertheless influence their decisions.

3.53 Since 1994, the New Zealand legislation has permitted shareholders at any general meeting to pass non-binding resolutions concerning any aspect of corporate management, including matters beyond the power of shareholders under the legislation or the company's constitution.[130] The provision gives shareholders a broad-ranging general right to formalise their views, through recorded resolutions, on the actions of the board, without being able to interfere directly with the board's management powers.

Issue 8. *Should the Corporations Law permit shareholders to pass non-binding resolutions concerning corporate management?*

Submissions on Issue 8

Support non-binding resolutions

3.54 One respondent argued that non-binding resolutions could increase shareholder interest and participation in corporate governance, given that shareholders could debate and pass resolutions on any aspect of a company's activities.[131]

Oppose non-binding resolutions

3.55 Most respondents opposed permitting non-binding resolutions.[132] They argued that the boundaries in corporate governance between the role of directors and that of the shareholders in general meeting should not become confused. Shareholders are not responsible for the day-to-day management of the company, which should be left to the directors. Directors may feel obliged to take non-binding resolutions into account, notwithstanding that the shareholders bear no legal responsibility in relation to them. Conversely, some directors may treat a non-binding resolution as authorising or prospectively ratifying any actions they might take which are consistent with that resolution, without their having to consider whether those actions are in the interests of the company. The annual general meeting already provides sufficient opportunity for shareholders to make statements on any aspect of the company's management.[133]

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129 The right to submit advisory proposals is derived from the Canada Business Corporations Act s 137. See further D Peterson, *Shareholder Remedies in Canada* (Butterworths, loose leaf) at §14.34-14.36.

130 New Zealand Companies Act 1993 s 109 provides:

> "(2) Notwithstanding anything in this Act or the constitution of the company, but subject to subsection (3) of this section, a meeting of shareholders may pass a resolution under this section relating to the management of the company.
>
> (3) Unless the constitution provides that the resolution is binding, a resolution passed pursuant to subsection (2) of this section is not binding on the board.".

131 G Long.

132 AARF, AMP, Australian Credit Forum, Australian Shareholders' Association, BHP, Blake Dawson Waldron, Boardroom Partners, Chartered Institute of Company Secretaries, Commercial Law Association of Australia, Commonwealth Bank, Computershare Registry Services, IFSA, Law Council, QBE, Queensland Investment Corporation, Telstra, Jack Tilburn, Jon Webster, Western Australian Joint Legislation Review Committee.

133 s 250S.

Similarly, if shareholders fundamentally disagree with the actions of directors, they can propose a resolution to remove any or all of them.

Advisory Committee view

3.56 The Advisory Committee does not support permitting non-binding resolutions. To give shareholders this power could:

- blur the fundamental distinction between the role of the board of directors and that of the general meeting. Company boards may feel obliged to take non-binding resolutions into account, notwithstanding that the shareholders bear no legal responsibility for them
- diminish director accountability by enabling directors to avoid responsibility for their decisions on the basis that a non-binding resolution authorised their actions
- put pressure on directors to disclose confidential commercial information to shareholders who propose such resolutions
- be contrary to the OECD observation that a company cannot be effectively run through shareholder plebiscite or other forms of shareholder micro-management
- broaden the scope of what courts may consider to be a proper purpose of a company meeting.

3.57 The Advisory Committee has noted the argument that non-binding resolutions may assist shareholders to participate in the company's affairs by allowing them to pass resolutions on a wider range of matters, and thereby enhance their influence over a company's decisions. It would provide shareholders with an opportunity to express their opinions formally on any aspect of the company's operations and, to this extent, reinforce the notion of managerial responsibility to shareholders. However, the annual general meeting already provides an opportunity for shareholders as a whole to express their views in the form of comments or questions on any aspect of the company's management.[134]

3.58 The Advisory Committee also notes that shareholders who have sufficient voting power to pass a non-binding resolution could equally promote their point of view by replacing the current directors with their own appointees, given that directors can be removed at any time by ordinary resolution.[135]

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134 s 250S.

135 s 203D.

Recommendation 8: Non-binding resolutions

There should be no legislative provision permitting shareholders to pass non-binding resolutions on matters outside their constitutional powers.

Chapter 4. Conducting the meeting

This Chapter discusses key issues involving the conduct of, and voting at, shareholder meetings. These include proxy issues, such as proxy solicitations, whether bodies corporate can be proxies and disclosing proxy voting details prior to or at the meeting or in the minutes of the meeting. The Chapter also covers other issues affecting the meeting process, such as permitting electronic or postal voting, whether scheme managers or institutional shareholders should be required to attend or vote at company meetings, whether voting by show of hands should be abolished, whether voting should be permitted after a meeting, the role and functions of the chair of a meeting and the election of directors.

Proxy voting

Introduction

4.1 Shareholders may wish to exercise their participation rights in circumstances where they do not want to attend a shareholder meeting themselves. The traditional method by which these shareholders may participate is by appointing a proxy (or attorney) to attend the meeting and vote on their behalf. This is more commonplace than shareholders attending and voting at the meeting themselves.[136]

4.2 All public companies listed in Australia must include a proxy form in any notice of meeting.[137] In general, a proxy has the same right as a shareholder to speak and vote at a meeting.[138]

4.3 The first section of this Chapter discusses a number of issues involving the proxy process. A subsequent section (**Direct voting by absentee shareholders**, paras 4.118 ff) raises the question of whether an additional or alternative method to proxy voting should be recognised and regulated.

Proxy solicitation

The issue

4.4 Proxy voting has long been recognised as a key element in shareholder decision-making, given that many shareholders do not attend general meetings.[139] It

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136 G Stapledon, S Easterbrook, P Bennett and I Ramsay, *Proxy Voting in Australia's Largest Companies* (Centre for Corporate Law and Securities Regulation and Corporate Governance International, 2000) state at 28 that: "Relatively few public shareholders actually attend the general meetings of the listed companies in which they hold shares. Of those shareholders who do participate in shareholder decision-making, the vast majority, by choice or necessity, participate by sending in their proxy vote."

137 ASX Listing Rule 14.2.

138 s 249Y.

139 For instance, as early as 1934, in *Re Dorman Long & Co Ltd* [1934] Ch 635 at 657, the Court noted that, in larger companies, the outcome of voting was usually settled through proxies before the meeting: "It is perhaps not unfair to say that in nearly every big case not more than 5% of the interests involved are present in person at the meeting".

has been commonplace for directors of companies, or other interested individuals, to seek support from shareholders by requesting them to appoint a particular person as their proxy, either generally or in relation to particular proposals. This process of proxy solicitation has not been closely regulated, except in North American jurisdictions. The question is whether more controls are needed in Australia.

Australian law

4.5 Shareholders must receive some information concerning the proxy process.[140] However, the Corporations Law does not specifically regulate proxy solicitations. At common law, the directors are generally entitled to solicit proxies at the expense of the company, provided that they act in good faith and in what they consider to be the best interests of the company as a whole.[141] However, the ASX Listing Rules place some controls over the content of proxy forms sent out with notices convening general meetings. These forms must enable shareholders to vote for or against each resolution, rather than only giving them the option of leaving the decision to the proxy.[142] They must also permit shareholders to appoint proxies of their own choice, but may specify who is to be appointed as proxy if a shareholder does not so choose.[143]

In *Amalgamated Clothing and Textile Workers Union v Wal-Mart Stores Inc* 821 F Supp 877 at 881 (1993), the Court pointed out that "proxies have become an indispensable part of corporate governance because the realities of modern corporate life have all but gutted the myth that shareholders in large publicly held companies personally attend annual meetings".

140 Any notice of company meeting must inform shareholders, inter alia, of their right to appoint a proxy: s 249L(d).

141 J Farrar & B Hannigan, *Farrar's Company Law* (4th edition, Butterworths, 1998) at 314, HAJ Ford, RP Austin & IM Ramsay, *Ford's Principles of Corporations Law* (loose leaf, Butterworths) at [7.460].

In *Advance Bank of Australia v FAI Insurances* (1987) 12 ACLR 118, 5 ACLC 725, the New South Wales Court of Appeal ruled that there was no fundamental principle of company law precluding directors from using corporate funds for proxy solicitations. However, the Court imposed significant restraints on the use of this power:

> "Whilst there is no special rule governing the authority of directors in connection with elections or proxy solicitation, the heightened risk of a confusion between private interest and the best interests of the corporation (or corporate purposes) requires scrupulous conduct on the part of directors. It necessitates particular care where that conduct has the effect of influencing the outcome of an election in favour of themselves or their colleague. …
>
> Even if it be determined that the directors have acted bona fide and for the purposes of the company, their conduct may still exceed their authority if, in the performance of those purposes, they exceed or abuse their powers.
>
> In election and proxy solicitation cases, such an excess or abuse of powers may occur where the directors: (a) expend an unreasonable sum of the company's moneys; (b) expend moneys of the corporation on material relevant only to a question of personality and not relevant to corporate policy; or (c) otherwise act in a manner which is excessive or unfair in the circumstances, having regard to the corporate purpose to be attained" (ACLR at 136-137).

142 ASX Listing Rule 14.2.1. In addition, a code of best practice issued by some industry groups recommends that proxy forms distributed to shareholders should encourage them to specify the direction of their vote, either for or against a proposed resolution: Australian Institute of Company Directors and the Australian Shareholders' Association, *The Conduct of Annual General Meetings: Code of Best Practice*, para 26.

143 ASX Listing Rule 14.2.2. The usual practice in notices sent out by the company is to specify the chair of the meeting as the proxy where the shareholder does not nominate another person. A similar approach is taken in best practice guidelines: IFSA Guidance Note No 2.00 *Corporate*

Overseas law

4.6 In the UK, the stock exchange rules require that all listed companies circulate proxy forms with notices of meetings and that all proxy forms be "two way proxies" giving shareholders an equal opportunity to vote for or against any resolution.[144] Subject to that requirement, company directors, provided they act bona fide, may use company funds to circulate proxy forms that invite shareholders to appoint one of the directors as the proxy.[145]

4.7 In Ireland, directors may solicit proxies at the company's expense, but only if the solicitation is sent to all shareholders entitled to vote at the meeting. In addition, shareholders may solicit other shareholders to grant them their proxies. They may obtain details of other shareholders through their right of access to the share register. However, the soliciting shareholder rather than the company must bear the cost of the solicitation.

4.8 Most other European countries have no specific rules concerning proxy solicitation. However, one jurisdiction prohibits companies paying for solicitations, except with shareholder approval.[146]

4.9 In the US, proxy solicitation is widely practised in public companies, particularly for the election of directors. It is commonplace for the board, when sending out notices of a shareholders' meeting, to include a proxy form soliciting shareholders' signatures, with all printing and postage costs paid by the company. In addition, US law permits any shareholder who satisfies a minimum shareholding threshold test to obtain a mailing list of all shareholders for the purpose of soliciting proxies.[147] However, in general, soliciting shareholders only have their costs covered if the company in general meeting votes to reimburse them.[148] It remains a controversial question whether this difference in approach to costs is justifiable.[149]

Governance: A Guide for Investment Managers and Corporations (July 1999) Part 3 Guideline 11 para 12.12.2 and Appendix B (Model Proxy Form).

144 J Farrar & B Hannigan, *Farrar's Company Law* (4th edition, Butterworths, 1998) at 315-316.

145 Id at 316. In *Peel v London and North Western Railway Company* [1907] 1 Ch 5 at 19, the Court said: "The company may legitimately do and may defray out of its assets the reasonable expenses of doing all such acts as are reasonably necessary for calling the meeting and obtaining the best expression of the corporators' views on the questions to be brought before it".

146 Italy prohibits directors soliciting proxies at the company's expense. A similar prohibition is being considered by Sweden.

147 To be eligible, a shareholder must have held for at least one year no less than 1% or US$2,000 worth (market value) of the securities of the company which carry voting rights.

148 The Delaware General Corporation Law has a slightly different effect. It provides, in effect, that a shareholder is entitled to reimbursement if the proposal put by the shareholder is passed by the general meeting. By contrast, the proponents of unsuccessful resolutions are not entitled to reimbursement.

149 "Although the challengers of management in a proxy contest may have their reasonable proxy contest expenses reimbursed on a majority shareholder vote, this does not provide much incentive to act, especially in light of the incumbent [directors'] ability to reimburse themselves even if they are unseated. But full reimbursement of challengers' expenses irrespective of their success would, in the minds of several commentators, prove overly costly and burdensome to the corporation": Cox, Hazen, O'Neal, *Corporations* (loose leaf, Little, Brown and Company) at §13.25, p 13.59.

4.10 The SEC has promulgated extensive requirements regarding the disclosures that must be made in connection with proxy solicitations, by the directors or any shareholder, directed at more than 10 shareholders.[150] All solicitations must be filed with the SEC prior to their distribution to shareholders.[151] They must contain sufficient information about the matters on which a proxy is sought to ensure that shareholders know what they are authorising by granting that proxy. Also, shareholders must be given an opportunity to limit their authorisation and specify whether their proxies shall be voted for or against each proposal submitted. In addition, the US proxy rules prohibit a group of related proposals being bundled into a single resolution.[152] The SEC, or an aggrieved individual shareholder, may seek a court remedy if any proxy solicitation contains a material omission or misstatement of fact. An omission or fact is material "if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote".[153]

4.11 In Canada, the directors (at the company's expense) or the shareholders (at their own expense) may solicit proxies from other shareholders. Any proxy solicitation must be accompanied by a proxy circular containing detailed prescribed information.[154]

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150 Under the SEC rules, the definition of "solicitation" applies to any communication which could be viewed as being reasonably calculated to influence a shareholder to give, deny or revoke a proxy. This definition is potentially wide enough to cover, for instance, newspaper articles, public speeches, oral commentary via the media, and even private conversations among a group of shareholders. The SEC has sought to deal with this problem by excluding from the proxy solicitation rules any statements made in press releases, speeches, public forums, published or broadcast opinions or advertisements. Also, the proxy solicitation requirements do not apply to persons who simply state publicly how they intend to vote: SEC Regulation of Communications among Shareholders, Exchange Act Release No 31,326 [1992 Transfer Binder] *CCH Federal Securities Law Reporter* P 85051 (October 1992), B Roth, "Proactive corporate-shareholder relations: filling the communications void" 48 *Catholic University Law Review* (1998) 101 at 116-118.

151 Prior to 1992, all proxy solicitations had to be approved by the SEC before they could be circulated.

152 Cox, Hazen, O'Neal, *Corporations* (loose leaf, Little, Brown and Company) at §§13.26-13.27.

153 Quoted in Cox, Hazen, O'Neal, id, at §13.29 at p 13.73.

154 Canada Business Corporations Act s 150(1).
Canada Business Corporations Regulations s 35 (contents of a management proxy circular) and ss 38-41 (contents of a dissident's proxy circular: "dissident" means "any person other than the management of the corporation and its affiliates and associates, by or on behalf of whom a solicitation is made": Canada Business Corporations Regulations s 37).
Details that the management proxy circular must contain include:
- the shareholder's right to revoke the proxy
- details of the solicitation (including who bears the cost)
- any management action that will be opposed by an identified director
- substantial shareholding details
- details of any directors to be elected
- material interests of directors, proposed directors, officers or their associates in any matter to be acted on at the meeting, other than the election of directors or the appointment of an auditor
- a statement of the shareholder's right to dissent from any matter and the procedure that the shareholder can follow to do so (Canada Business Corporations Regulations s 35).

Details that the dissident's proxy circular must contain include:
- the name of the corporation to which the solicitation relates
- the shareholder's right to revoke the proxy
- details of the solicitation (including who bears the cost)

Issue 9. *Should the Corporations Law regulate proxy solicitations directed at more than a minimum number of shareholders? If so, what should that minimum number be? Also, should the Corporations Law require that any proxy solicitations be first filed with the company, ASIC and the relevant Exchange for a minimum period before they are sent? Alternatively, should proxy solicitations be regulated in some other way?*

Submissions on Issue 9

Support mandatory filing

4.12 Some respondents favoured greater regulation of proxy solicitations.[155] These solicitations will probably become more common as electronic developments reduce the cost of communication. It is important that shareholders be given the opportunity to be fully and accurately informed before deciding whether or how to cast their vote. A mechanism such as mandatory filing with the relevant Exchange and/or ASIC may promote transparency and help to guard against shareholders receiving false or misleading information in proxy solicitations.

Oppose mandatory filing

4.13 Some respondents opposed any statutory regulation of this area,[156] arguing that:

- the current law (including the common law and the ASX Listing Rules) is operating well in practice. Proxy solicitations are better left to general law safeguards
- s 995 is sufficient to prevent any misleading or deceptive conduct in relation to proxy solicitation documents
- it is less common in Australia than in the US for the directors of a company or other third parties to solicit shareholders' votes. Any reform should only be considered if specific concerns become apparent or the proxy solicitation process becomes more widespread in Australia

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- the identity and background of the dissident
- details of any material interest of the dissident
- if directors are to be elected, details of nominees to be proposed by the dissident and any arrangement with those nominees
- material transactions and material interests of the dissident and his or her associates, including any arrangements regarding future employment or transactions involving the corporation (Canada Business Corporations Regulations s 38).

Information that is not known to a dissident and that cannot be ascertained on reasonable enquiry may be omitted from the dissident's proxy circular, but the circumstances that render the information unavailable must be disclosed: Canada Business Corporations Regulations s 40.

155 Australian Shareholders' Association, BHP, Commercial Law Association of Australia, Commonwealth Bank, Computershare Registry Services, G Long, Queensland Investment Corporation, Telstra, Western Australian Joint Legislation Review Committee.

156 AMP, Australian Credit Forum, Australian Institute of Company Directors, IFSA, Law Council, QBE. The Chartered Institute of Company Secretaries considered that mandating the formal filing of any third party solicitation letter was premature at this stage, but noted the growing activities of certain groups (such as ISS in Australia and PIRC in the UK) in proxy solicitation through the preparation of reports to their clients on matters to be dealt with at meetings.

- it is for shareholders to decide whether to accept or reject any solicitation.

4.14 These respondents also considered that lodgment with ASIC or the relevant Exchange may be futile and could even lead to a document gaining unwarranted credibility, as neither ASIC nor the relevant Exchange could closely vet lodged documents before they were sent to shareholders.

Advisory Committee view

4.15 The Advisory Committee notes that, if Australian companies follow the trend in some overseas jurisdictions, proxy solicitations may become increasingly significant for shareholder decision-making.

4.16 The September 1999 Discussion Paper raised the question of whether anyone who proposes to circulate information soliciting votes should first file it with the company, ASIC and/or the relevant exchange. A proxy solicitation register would ensure equal access by shareholders to information that has been disseminated. Also, the process of public filing may assist in guarding against shareholders receiving false or misleading information in proxy solicitation documents.[157]

4.17 However, the Advisory Committee recognises the practical difficulties that would arise in introducing any proxy solicitation register. The filing requirements would need to distinguish between proxy solicitations and mere private communications between shareholders and only apply where a shareholder is making a reasonably general solicitation. In addition, there may need to be a minimum delay period following the filing to give interested parties time to review the filed solicitation before its public dissemination.

4.18 Any proxy solicitation lodgment requirement could also have unsatisfactory consequences. For instance, it may lead to a solicitation gaining unwarranted credibility, as neither ASIC nor the relevant Exchange would usually be in a position to review the solicitations filed prior to their dissemination.

4.19 The Advisory Committee considers that, while proxy solicitations may become more important in the future, there is no current evidence of abuse that would justify introducing a proxy register at this time. However, this matter may need further consideration if proxy solicitation conflicts become commonplace.

Recommendation 9: Proxy solicitations

There should be no statutory regulation of proxy solicitations.

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157 For instance, ASIC could, where appropriate, act pursuant to its consumer protection powers in Part 2 Div 2 of the Australian Securities and Investments Commission Act. Also, the company or other interested party could seek an injunction to stop the circulation of a materially false or misleading proxy solicitation.

Proxy notification

The issue

4.20 The question is whether electronic developments could eliminate the need for shareholders to notify the company of proxy appointments in advance of a meeting.

Australian law

4.21 For the appointment of a proxy for a meeting to be valid, the company must receive various documents, either electronically or otherwise, prior to the meeting.[158] The maximum prior lodgment time which any company can require is 48 hours.[159] Some listed public companies have a lesser period, such as 24 hours.[160] Appointments notified later are not valid.

Policy option

4.22 One possible alternative to any advance notification of proxies would be to require all listed companies to issue bar-coded entry cards with the notice of meeting. The person attending the meeting, whether the shareholder in person or the shareholder's proxy, would only need to present the card to gain admission to the meeting. There would be no need for any proxy details to be lodged before the meeting.

Issue 10. *Should all listed public companies be required to issue bar-coded entry cards with the notice of meeting, as an alternative to any advance notification of proxies?*

Submissions on Issue 10

4.23 Respondents did not support mandatory bar-coded admission cards in lieu of proxy notifications.[161] They raised concerns about how to verify the eligibility of the person presenting the card.

Advisory Committee view

4.24 The Advisory Committee agrees with the verification concerns raised by respondents. A mandatory bar-code system could be costly and could undermine the integrity of a meeting if it became a form of "trafficable commodity", given that there may be no method for independently verifying who held that card. However, companies may choose to adopt a bar-code system if they consider it satisfactory.

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158 ss 250B, 250BA.

159 s 250B(1). Subsection 250B(5) permits companies to reduce the 48 hour notice requirement.

160 G Stapledon, S Easterbrook, P Bennett and I Ramsay, *Proxy Voting in Australia's Largest Companies* (Centre for Corporate Law and Securities Regulation and Corporate Governance International, 2000) at 29.

161 Commercial Law Association of Australia, Computershare Registry Services.

Recommendation 10: Proxy notification

There should be no statutory obligation on listed public companies to issue bar-coded entry cards as an alternative to notification of proxies.

Irrevocable proxies

The issue

4.25 Some overseas jurisdictions specifically recognise irrevocable proxies in their corporate legislation. Such proxies are irrevocable while the proxy holder has a specific interest in the shares. This form of proxy, for instance, enables creditors of shareholders to protect their interests by having the irrevocable right to vote the relevant shares while their debt remains outstanding. The question is whether the Corporations Law should have a similar provision.

Australian law

4.26 Currently, the Corporations Law recognises standing proxies.[162] However, it makes no provision for irrevocable proxies. In fact, some provisions seem to be inconsistent with the notion of an irrevocable proxy.[163]

Overseas law

4.27 Corporate legislation in the United States and some EU Member States specifically recognises the notion of an irrevocable proxy.[164]

Issue 11. *Should the Corporations Law specifically recognise irrevocable proxies?*

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162 s 250A(1).

163 ss 249Y(3) (a proxy's right to speak and vote at a meeting is suspended while the shareholder is present at the meeting), 250A(7) (a later proxy appointment automatically revokes an earlier proxy appointment if both appointments could not be validly exercised at the meeting).

164 The Revised Model Business Corporation Act (RMBCA) §7.22(d) provides that:

> "An appointment of a proxy is revocable by the shareholder unless the appointment form conspicuously states that it is irrevocable and the appointment is coupled with an interest. Appointments coupled with an interest include the appointment of:
>
> (1) a pledgee;
> (2) a person who purchased or agreed to purchase the shares;
> (3) a creditor of the corporation who extended it credit under terms requiring the appointment;
> (4) an employee of the corporation whose employment contract requires the appointment; or
> (5) a party to a voting agreement".

Under the RMBCA §7.22(f), an appointment made irrevocable is revoked when the interest with which it is coupled is extinguished.

Netherlands law also recognises the concept of irrevocable proxies.

Submissions on Issue 11

Support

4.28 No respondents supported the Corporations Law specifically recognising irrevocable proxies.

Oppose

4.29 All respondents who commented on this Issue opposed the legislative recognition of irrevocable proxies.[165] Whether proxies are revocable or irrevocable and how any restrictions are enforced should be a private contractual matter between relevant parties (for instance, between persons who have agreed to purchase shares and their respective vendors or between parties to voting agreements). Listed entities should not be required to investigate those private contractual arrangements.

Advisory Committee view

4.30 The Advisory Committee does not support the Corporations Law specifically recognising irrevocable proxies. The existing law is based on the premise that companies treat all proxies as revocable. Parties may by private arrangement place conditions or restrictions on the use of that proxy power. Companies should not become involved in that private contractual arrangement by being required to recognise irrevocable proxies.

Recommendation 11: Irrevocable proxies

There should be no legislative provision for irrevocable proxies.

Body corporate as a proxy

The issue

4.31 The question is whether a shareholder should have the option of appointing a body corporate, rather than a natural person, as its proxy.

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165 AMP, Australian Credit Forum, Australian Shareholders' Association, Chartered Institute of Company Secretaries, Commercial Law Association of Australia, Commonwealth Bank, Computershare Registry Services, IFSA, Law Council, QBE, Queensland Investment Corporation, Telstra, Thomson Financial, Jack Tilburn, Western Australian Joint Legislation Review Committee.

Australian law

4.32 The predominant view is that, since a proxy is a person appointed to attend a meeting, only a natural person can be so appointed.[166] Likewise, a body corporate may only appoint a natural person as its representative.[167] There is no express provision permitting a shareholder to appoint a body corporate as a proxy.

Issue 12. *Should a shareholder have the option of appointing a body corporate as its proxy?*

Submissions on Issue 12

Support

4.33 Some respondents considered that shareholders should have this option,[168] arguing that:

- this may encourage shareholders to vote. For instance, individual shareholders may wish to appoint a shareholder representative organisation to exercise their vote
- it would remove technicalities in shareholder voting
- a similar result can be achieved by appointing a body corporate as an attorney rather than a proxy.

Oppose

4.34 Some respondents considered that shareholders should not have this option,[169] for the following reasons.

- Only individuals or natural persons should be appointed as proxies.

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166 HAJ Ford, RP Austin & IM Ramsay, *Ford's Principles of Corporations Law* (loose leaf, Butterworths) at para [7.560] (first paragraph).

167 Under s 250D(1), a body corporate can appoint "an individual" as its representative. "Individual" is defined in s 9 as a natural person. However, a body corporate may appoint a representative by reference to a position or office held by a natural person, rather than a particular individual. That appointment may be a standing one. This overcomes some uncertainties in the previous case law: HAJ Ford, RP Austin & IM Ramsay, *Ford's Principles of Corporations Law* (loose leaf, Butterworths) at [7.505].

168 AARF, AMP, Australian Shareholders' Association, Commercial Law Association of Australia, G Long, QBE, Thomson Financial, Telstra. The Commercial Law Association of Australia considered that the current law already permits the appointment of a body corporate as proxy, contrary to the interpretation in HAJ Ford, RP Austin & IM Ramsay, *Ford's Principles of Corporations Law* (loose leaf, Butterworths) at para [7.560]. That respondent pointed out that s 249X(1) (relating to appointment of proxies) refers to "a person" (which could therefore include a body corporate). This contrasts with s 250D (relating to appointment of body corporate representatives) which refers to "an individual", thereby being specifically limited to natural persons.

169 Australian Credit Forum, Chartered Institute of Company Secretaries, Commonwealth Bank, Computershare Registry Services, Law Council, Queensland Investment Corporation, Jack Tilburn, Western Australian Joint Legislation Review Committee.

- A proxy must ultimately be exercised through an individual. For this purpose, a body corporate would still be required to present a form of appointment of its corporate representative at the time of registration.

Advisory Committee view

4.35 The Advisory Committee supports shareholders having the option of appointing a body corporate as their proxy. The body corporate could advise the company of who will represent it at the meeting, being either a nominated individual or whatever natural person holds a nominated position within the body corporate.

4.36 The Committee notes that the Parliamentary Committee Report also recommended that bodies corporate as well as natural persons should be capable of being appointed as proxies.[170]

Recommendation 12: Body corporate as a proxy

There should be legislative provision for shareholders to appoint a body corporate as a proxy.

Obligation of board proxy to vote on a poll

The issue

4.37 Usually, proxy forms circulated by the board of directors will nominate the chair of a meeting as the proxy where the shareholder does not appoint someone else.[171] The chair must vote those proxies as directed on any poll. The question is whether the same statutory obligation to vote on any poll should apply to any other person put forward by the board as a proxy.

Australian law

4.38 The chair is obliged to vote on a poll all proxies given to him or her according to their terms.[172] Other proxies are not obliged to vote on a poll, though, if they do so, they must follow the instructions in the proxy instrument.[173]

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170 Parliamentary Joint Statutory Committee on Corporations and Securities, *Report on matters arising from the Company Law Review Act 1998* (October 1999), para 13.26.

171 There are best practice guidelines to this effect: IFSA Guidance Note No 2.00 *Corporate Governance: A Guide for Investment Managers and Corporations* (July 1999) Appendix B (Model Proxy Form).

172 s 250A(4)(c). This provision reflects the common law. In *Second Consolidated Trust Limited v Ceylon Amalgamated Tea and Rubber Estates Ltd* [1943] 2 All ER 567 at 570, the Court said that the chair of a meeting is "under a duty in law to exercise all the proxies which he held as chairman in accordance with the instructions which they contained". In that case, the Court held that the chair was obliged to vote the proxies. A chair retains a discretion with open-ended proxies: A Lumsden, *Managing Proxies and the Role of the Chairman* (Australian Institute of Company Directors, 1998) at 12.

173 s 250A(4)(d).

4.39 The obligation of the chair to vote on a poll overcomes the possibility of that person intentionally abstaining from voting the proxies given to him or her where a majority of those proxies direct a vote which is contrary to the result preferred by the chair. However, this problem may still arise if the proxy form circulated by the board stipulates a person other than the chair as the proxy.[174] The Corporations Law does not oblige that proxy to vote the shares on a poll, and it is uncertain whether a proxy put forward by the board, other than possibly a director, would be under any fiduciary duty to do so.[175]

Issue 13. *Should the Corporations Law stipulate that any person put forward by the company board as a proxy must vote the proxies on a poll at the meeting?*

Submissions on Issue 13

Support

4.40 Most respondents favoured this change,[176] arguing that any person put forward by the listed entity as a proxy should be required to vote the proxies on a poll.

Oppose

4.41 Some respondents opposed any statutory requirement to this effect,[177] arguing that it would be too confusing if categories other than "the chair of the meeting" were required to vote on a poll. Also, there is no evidence that company board proxies have not voted on a poll.

4.42 One of these respondents suggested that it may be more appropriate to let shareholders know that any proxy (other than the chair) appointed by them may simply decide not to vote.[178]

Advisory Committee view

4.43 The Corporations Law should stipulate that any person put forward by the company board as a proxy must vote the proxies on a poll at the meeting. This would overcome the possibility of shareholders being disenfranchised by a person, other than the chair, who is put forward by the board as a proxy deliberately failing to vote that proxy in accordance with the shareholder's instructions.

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174 ASX Listing Rule 14.2.2 permits a proxy form to specify who is to be appointed as proxy if the shareholder does not choose a proxy. The person specified need not be the chair of the meeting.

175 A Lumsden, *Managing Proxies and the Role of the Chairman* (Australian Institute of Company Directors, 1998) at 12 takes the view that a chair's obligations to vote a proxy apply equally to any directors who hold proxies.

176 AMP, Australian Credit Forum, Australian Shareholders' Association, Blake Dawson Waldron, Commonwealth Bank, Computershare Registry Services, IFSA, G Long, QBE, Queensland Investment Corporation, Telstra, Thomson Financial, Jack Tilburn, Western Australian Joint Legislation Review Committee.

177 Chartered Institute of Company Secretaries, Commercial Law Association of Australia, Law Council.

178 Law Council.

Recommendation 13: Obligation of board proxy to vote on a poll

There should be a legislative requirement for any person put forward by the company board as a proxy to vote the proxies on any poll according to their terms.

Disclosing proxy information prior to the meeting

The issue

4.44 The Corporations Law only regulates the process of lodging proxies.[179] It does not regulate who should have access to the lodged proxies or information about the overall trend of proxy voting before a meeting. The question is whether the Corporations Law should specify the access that directors of a company, or any other persons, should have to lodged proxies prior to a shareholder meeting, or whether information about lodged proxies should otherwise be available for publication prior to the meeting.

Australian law

4.45 Most of the larger listed public companies use specialist registry managers to maintain their share registry, including the processing of proxy forms received on resolutions to be voted at general meetings. However, as part of their general common law right of access to company records for management purposes, directors are entitled to inspect lodged proxies to ensure their effectiveness, provided that they act in good faith.[180] There is no statutory prohibition on their employing this inspection right to monitor the trend of proxy voting prior to the meeting.[181]

4.46 Shareholders have no equivalent right of access to lodged proxies prior to the meeting. In limited circumstances, individual shareholders may seek a court order to obtain access where they are acting in good faith and the inspection is sought for a proper purpose, such as for the purpose of litigation.[182] The court may limit the use that a shareholder may make of the information obtained.[183]

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179 ss 250B, 250BA.

180 A director has a common law right to inspect proxy instruments that have been lodged, as they may be relevant to whether the individual rights of shareholders are being properly observed: *Armstrong v Landmark Corporation Ltd* [1967] 1 NSWR 13.

181 G Stapledon, S Easterbrook, P Bennett and I Ramsay, *Proxy Voting in Australia's Largest Companies* (Centre for Corporate Law and Securities Regulation and Corporate Governance International, 2000) at 29 point out that modern computer technology is used to produce for company management a number of reports on proxies lodged. These reports can range from the aggregate number of voting instructions in four possible categories ("For", "Against", "Abstain" and "Discretionary") to details of how individual shareholders have instructed their proxy to vote.

182 s 247A.

183 s 247B.

Policy options

Restricting access

4.47 One policy option would be for the Corporations Law to require that a person independent of the board of directors be responsible for receiving and collating proxy votes, solely for the purpose of checking and tallying them prior to the meeting and giving the chair a report for use at the meeting. This would reflect best practice.[184] Otherwise, proxy details should remain confidential prior to the meeting. The independent person could also be required to retain the proxy voting forms following the meeting for a period to be stipulated in the legislation.

4.48 This policy option would eliminate the current access that directors, but not shareholders generally, have to information concerning proxy voting by shareholders. On one view, this information is not directly related to the function of managing the company, given that it concerns matters within the powers of the shareholders, not the directors. In some instances, the directors could use their current powers to obtain proxy voting information that is not publicly available to solicit votes[185] or otherwise to try to influence the outcome of shareholder resolutions by publishing a progressive tally of proxy voting directions.

Expanding access

4.49 An alternative policy approach would be to give any shareholder a right to inspect the lodged proxy documents prior to the meeting. Shareholders might wish to exercise that inspection right, particularly for contested issues, where the directors have chosen not to disclose the information publicly.

4.50 This alternative policy option might encourage transparency and equal access to proxy information. However, it could also increase administrative costs and permit shareholders to ascertain how individuals, prior to the meeting, have directed their proxies to vote, thereby raising privacy issues, given that some shareholders consider that voting on company issues should be by secret ballot. It may result in many shareholders not putting in their proxies until the last moment. These problems might be reduced if directors and shareholders were limited to a summary of proxy voting, rather than having access to the original lodged proxies, though some observers could still deduce from the timing or size of any summary disclosure how particular large shareholders had instructed their proxy to vote.

Issue 14. *Should the Corporations Law regulate the disclosure of proxy voting details prior to the meeting? If so, should access to these details be restricted or expanded, or should some other policy option be adopted?*

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184 Best practice suggests that the company's secretary or auditors should be the recipients of proxies and that the counting of proxies prior to the meeting be conducted by the company's auditors or another independent person: A Lumsden, *Managing Proxies and the Role of the Chairman* (Australian Institute of Company Directors, 1998) at 5.

185 For instance, directors could approach particular shareholders who have already submitted their proxies to persuade them to change their voting directions. They could also approach particular remaining shareholders to persuade them to lodge favourable proxies.

Submissions on Issue 14

Who should be responsible for receiving and collating proxy votes

4.51 There was general support among respondents for an independent person, such as the company's independent share registrar or auditor, being responsible for receiving, collating, checking, recording and tallying proxy votes.[186]

Who should have access to proxy voting information prior to the meeting

4.52 *The directors, for proper purposes, but not shareholders (existing law).* Some respondents supported no change to the existing law.[187] Some of these respondents pointed out that the requirement that directors may use their right of access to company records only for proper purposes and in good faith is sufficient to prevent them from misusing proxy voting information.

4.53 *The person responsible for receiving and collating the proxies only.* Some respondents considered that, at least as a matter of good corporate governance, an independent person should be responsible for receiving, collating, checking, recording and tallying proxy votes prior to the meeting. That person should inform the chair of the proxy details on each resolution immediately prior to the meeting. No other person should have access to that information in advance of the meeting.[188] These respondents argued that:

- any general disclosure ahead of the meeting may be misleading, as proxies lodged ahead of a meeting are merely an expression of intent and may be changed or revised ahead of or during the meeting
- pre-meeting general disclosures may lead to proxy battles, with professional call centres lobbying shareholders to vote or, having lodged proxies, to change their vote.

4.54 *The shareholders as well as the directors.* Some respondents argued that, under the principle of equality, shareholders as well as directors should have access to proxy lodgment details. This could be achieved, for instance, by the company progressively publishing a summary of overall voting trends on its website or through the relevant Exchange.[189]

4.55 Various respondents expressly opposed this extension.[190] It was argued that access to progressive tallying of proxy votes prior to a meeting could result in undesirable consequences, including the public dissemination of misleading

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186 AARF, Australian Shareholders' Association, BHP, Boardroom Partners, Computershare Registry Services, Queensland Investment Corporation, Western Australian Joint Legislation Review Committee.

187 AMP, BHP, Chartered Institute of Company Secretaries, Commercial Law Association of Australia, Commonwealth Bank, IFSA, Law Council, QBE.

188 AARF, Australian Credit Forum, Australian Shareholders' Association, Computershare Registry Services.

189 Queensland Investment Corporation, Telstra.

190 Chartered Institute of Company Secretaries, Commercial Law Association of Australia, IFSA, QBE.

information (given that proxies could change their votes prior to the meeting), public proxy battles or other improper attempts to influence the voting intentions of shareholders.

Advisory Committee view

4.56 The Advisory Committee considers that, as a matter of good corporate governance, rather than by statutory requirement, a person independent of the directors, preferably the auditor, should receive and collate proxy votes. This would avoid the possibility, or perception, of directors carefully reviewing the validity only of those proxies that oppose their position. Each relevant Exchange might introduce this requirement into its Listing Rules if it considered it necessary or appropriate.

4.57 Companies may currently choose to disclose proxy voting information prior to a meeting. In addition, directors are subject to fiduciary duties in exercising their current access right. No compelling case has been made for changing these principles. Also, as pointed out by various respondents, some undesirable consequences may follow from automatically making that information publicly available prior to a meeting.

Recommendation 14: Disclosing proxy information prior to the meeting

There should be no legislative regulation dealing with access to or disclosure of proxy voting details prior to a meeting. However, each relevant Exchange might consider introducing into its Listing Rules a requirement that an independent person receive and collate proxy votes.

Disclosing proxy information prior to debate at the meeting

The issue

4.58 The timing of the disclosure of proxy voting details at a meeting can have significant implications for the course of any debate on particular resolutions. The question is whether any proxy voting details should be permitted, or required, to be disclosed in advance of the debate at the meeting.

Australian law

4.59 The Corporations Law makes no reference to whether proxy voting details can or should be disclosed prior to commencement of debate on the relevant matter at a shareholder meeting. This is a matter of discretion for the chair.

Policy options

4.60 There are various policy options:

(a) *prohibit disclosure of the proxy figures in advance of the debate.* This would overcome the objection that prior disclosure of the proxy figures would tend to foreclose any debate. Any disclosure may also be misleading, given that

shareholders who have appointed a proxy may nevertheless attend and vote in person, even contrary to the instructions originally given to their proxies.[191] Also, proxies, other than the chair, may decide to abstain from voting.[192] The contrary view is that a prohibition on disclosure could result in the meeting giving undue time to a matter which had already been clearly decided by the proxy votes (even allowing for some abstentions by proxies or change of voting intentions)

(b) *require disclosure of the proxy figures in advance of the debate.* This could expedite the meeting by overcoming unnecessarily prolonged debate where the outcome is already clearly settled by the lodged proxies. A contrary view is that various proxies might decide to abstain from voting on a poll in light of the debate, thereby rendering the figures inaccurate. In some instances, therefore, the debate itself could affect the outcome of the resolution. Foreclosing the debate may also prevent directors from hearing shareholders' views

(c) *leave it to the meeting to determine whether to disclose the proxy position in advance of the debate.* This would allow shareholders to decide what importance to place on having a debate

(d) *continue to leave it to the discretion of the chair whether to disclose the proxy voting details prior to debate on a particular matter.*

Issue 15. *Should there be controls on disclosing proxy voting details prior to debate at the meeting? If so, should the legislation:*

(a) prohibit disclosure of the proxy figures in advance of the debate

(b) require disclosure of the proxy figures in advance of the debate

(c) leave it to the meeting to determine whether to disclose the proxy position in advance of the debate

(d) leave it to the discretion of the chair whether to disclose the proxy voting details prior to the debate

(e) adopt some other approach?

Submissions on Issue 15

Policy option (a) - prohibit disclosure of the proxy figures in advance of the debate

4.61 Some respondents[193] argued that a prohibition would overcome the objection that prior disclosure of the proxy figures would tend to foreclose any debate. Any prior disclosure may also be misleading, given that shareholders who have appointed

191 s 249Y(3).

192 s 250A(4)(d).

193 Australian Credit Forum, Australian Shareholders' Association, Boardroom Partners, Commercial Law Association of Australia, G Long, Jack Tilburn.

a proxy may nevertheless attend and vote in person, even contrary to the instructions originally given to their proxies. Also, proxies, other than the chair, may decide to abstain from voting. A debate could therefore affect the outcome of a resolution in some instances. Foreclosing the debate may also prevent directors from hearing shareholders' views.

4.62 One of those respondents said that there may be merit in announcing the proxy figures after the debate but immediately before inviting a show of hands, to avoid the unnecessary calling of a poll, which might otherwise occur when the outcome of the show of hands is announced.[194]

4.63 Another of those respondents[195] proposed, as a second best option, that the Corporations Law prohibit disclosure of proxy figures prior to the debate other than:

- the number of valid proxy forms lodged
- the number of shares represented by those proxy forms
- the number of proxy forms in which the chair is the proxy appointed and the shares that those proxies represent
- the percentage of those shares where the chair is not directed how to vote (with no disclosure being allowed of the directed proxies of "for", "against" or "abstain").

This information would give some indication of what proportion of a company's shares had already, in effect, been voted on a particular matter through lodgment of proxies prior to the debate.

Policy option (b) - require disclosure of the proxy figures in advance of the debate

4.64 Some respondents argued that mandatory disclosure could expedite a shareholder meeting by overcoming unnecessarily prolonged debate where the outcome is already clearly settled by the lodged proxies (even allowing for some abstentions by proxies or change of voting intentions).[196]

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194 Australian Shareholders' Association.

195 Commercial Law Association of Australia.

196 AMP, IFSA, QBE, Queensland Investment Corporation, Thomson Financial. Telstra favoured option (b) if its preferred option (d) was not adopted.
AMP considered that only summaries of proxy voting, rather than the original lodged proxies, should be made public, for privacy reasons. However, directors who have a bona fide query about the effectiveness of the proxies and shareholders who have obtained a court order for access in good faith and for a proper purpose (as currently required under s 247A) should have access to the original proxies.
AMP pointed out that it currently takes about an hour to verify and calculate proxies received at the meeting and reconcile them with proxies received prior to the meeting. It is therefore necessary to announce to the meeting the results of proxies received prior to the meeting, not the precise figures calculated at the meeting itself (although AMP has found in practice that these figures do not vary greatly). AMP considered that it would be good practice for the chair to state that there may be some inherent unreliability in the proxy results displayed at the commencement of the debate on a particular resolution. However, this statement should not be mandatory.

4.65 However, disclosing proxy results before a debate should not necessarily discourage discussion. The chair should ensure that disclosure of the proxy result does not affect the opportunity for shareholders to comment on each resolution and question the directors on particular issues.

Policy option (c) - leave it to the meeting to determine whether to disclose the proxy position in advance of the debate

4.66 Some respondents took the view that shareholders should have the right to decide whether the proxy information is disclosed and, in consequence, the time to be given to the debate.[197]

Policy option (d) - leave it to the discretion of the chair whether to disclose the proxy voting details prior to the debate

4.67 Some respondents argued that the chair is best placed to determine whether disclosure of lodged proxy votes prior to a debate would be helpful or counterproductive to the conduct of the meeting.[198] Even if the chair discloses proxy details, the chair remains under a common law obligation to allow reasonable debate on any motion, notwithstanding that the result might appear to have been decided by lodged proxies. This would overcome the criticism that early disclosure of the proxies would unduly stifle subsequent debate or the opportunity for comment.

4.68 One respondent argued, however, that giving the chair a discretion might leave the chair open to criticism from shareholders who held the possibly misconceived view that debate can be stifled by the timing of the announcement of the proxy results in advance of the debate.[199]

Advisory Committee view

4.69 It would be undesirable to attempt to prescribe by legislation whether proxy voting figures should be disclosed in advance of the debate. In some instances, disclosure could be desirable to assist in working through the meeting agenda; in other instances, it might unduly prejudice the opportunity for discussion. The better course would be to leave this to the discretion of the chair, who may be best placed to decide when to disclose proxy voting details on each resolution.

Recommendation 15: Disclosing proxy information prior to debate at the meeting

There should be no legislative provision dealing with the disclosure of proxy voting details prior to the debate at a meeting. This should remain a matter of discretion for the chair.

197 AARF, AMP. AMP favoured option (c) if option (b) was not adopted.

198 BHP, Chartered Institute of Company Secretaries, Computershare Registry Services, Law Council, Telstra.

199 AMP.

Disclosing proxy information in the minutes of the meeting

The issue

4.70 The issue is whether the current statutory requirement to disclose proxy voting information, for resolutions decided by show of hands or poll, should be amended.

Australian law

4.71 At a meeting of any company that is subject to replaceable rules and does not provide to the contrary in its constitution, the chair must disclose, before any vote is taken, whether any proxy votes have been received and how they are to be cast.[200] It is unclear whether this requirement applies only to a vote by show of hands or also to a vote by poll. However, for any vote on a show of hands, "neither the chair nor the minutes need to state the number or proportion of the votes recorded in favour or against" a resolution.[201]

4.72 Independently of the above provision, all Australian listed public companies must record in their minutes of meeting details of voting on any resolutions decided by a show of hands or on a poll.[202] That information must include proxy voting details. The minutes are available to shareholders.[203] The apparent intent of the provision is to record details of the level of shareholder voting participation in company meetings. However, the workability and usefulness of the provision have become a matter of debate.

Show of hands

4.73 Where a resolution is decided on a show of hands, the minutes must record the total number of proxy votes and the way in which those votes would have been exercised under the terms of the proxy appointment if a poll had been called.[204] On one view, this proxy information is irrelevant where a vote has been decided by show of hands.

Poll

4.74 Where a vote is conducted by poll, similar proxy disclosure requirements apply, in addition to requirements for disclosure of information on the actual voting on the resolution.[205] Including the stipulated proxy information in the minutes, in addition to the votes cast on the poll, is repetitious and may also be misleading. For instance, voting directions in proxy forms lodged with the company may be overridden, for

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200 s 250J(1A). This is a replaceable rule, which applies only to a company incorporated since July 1998 or any company registered before that time which subsequently repeals its constitution: s 135(1)(a). A company that is subject to a replaceable rule can displace or modify that rule by its constitution: s 135(2).

201 s 250J(2).

202 s 251AA.

203 s 251B.

204 s 251AA(1)(a).

205 Under s 251AA(1)(b), if a resolution is decided on a poll, the proxy information in s 251AA(1)(a) must be disclosed, in addition to the total number of votes cast on the poll in favour of, against or abstaining on the resolution.

instance, by the appointor validly changing the instructions to the proxy after the proxy form is lodged with the company or voting in person at the meeting in lieu of the proxy. Also, a proxy who is not the chair of the meeting may abstain from voting on a poll, notwithstanding any instruction by the appointor to vote.[206] Furthermore, shareholders that are corporations may appoint a representative rather than a proxy.[207] Details of corporate representative voting need not be separately disclosed in the minutes.[208]

Overseas law

4.75 In the US, SEC regulations require that listed public companies disclose proxy voting results on a quarterly basis. In the UK, the Financial Services Authority Listing Rules recommend that listed UK companies should count all proxy votes and indicate the level of proxies lodged on each resolution and the balance for and against a resolution decided by show of hands.[209]

Issue 16. *Should the current provision regarding the disclosure of proxy information in the minutes of the meeting be amended? If so, in what manner?*

Submissions on Issue 16

Minutes to record only the outcome of show of hands or poll

4.76 Various respondents supported amending s 251AA to record only the outcome of the show of hands or poll.[210] Votes cast on any poll include the proxy votes and it is therefore superfluous for the minutes to include separate information on the earlier proxy voting directions. Proxy voting directions are similarly irrelevant when the vote is decided by a show of hands.

4.77 Another respondent questioned whether s 251AA creates major problems in implementation, but said that the value of the information required by that section, compared with the trouble and cost of preparing it, is questionable.[211]

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206 s 250A(4)(d).

207 s 250D.

208 All that is required to be disclosed, in addition to proxy voting details, is the total number of votes cast on a poll in favour of, against and abstaining on the resolution: s 251AA(1)(b).

209 The US and UK provisions are summarised in G Stapledon, S Easterbrook, P Bennett and I Ramsay, *Proxy Voting in Australia's Largest Companies* (Centre for Corporate Law and Securities Regulation and Corporate Governance International, 2000) at 25-26.

210 Australian Shareholders' Association, BHP, Chartered Institute of Company Secretaries, Commercial Law Association of Australia, Commonwealth Bank, Computershare Registry Services, Law Council, QBE, Queensland Investment Corporation, Western Australian Joint Legislation Review Committee.
The Government members in the Parliamentary Joint Statutory Committee on Corporations and Securities, *Report on matters arising from the Company Law Review Act 1998* (October 1999) at para 8.47 also recommended this amendment to s 251AA.

211 Blake Dawson Waldron.

No amendment to s 251AA(1)(a) - show of hands

4.78 Some submissions supported retaining this provision in its current form, albeit that the information provided in the minutes may not be fully accurate.[212] One of those respondents[213] argued that disclosure of proxy information for resolutions decided by show of hands nevertheless assists institutional investors to fulfil their monitoring role and to report back to clients on the outcomes of the proxy voting activity. This disclosure also assists transparency, is consistent with international best practice and permits shareholders to assess:

- the extent of shareholder participation in voting on resolutions
- the relative importance of their own vote
- general voting patterns of others, including whether proxies have influenced the ultimate decision on a resolution, and
- the potential relevance of this information for their voting on future resolutions.

4.79 The Centre for Corporate Law and Securities Regulation at the University of Melbourne has published a Research Report, *Proxy Voting in Australia's Largest Companies* (the Research Report),[214] which utilises information given by listed companies to the ASX under s 251AA(1)(a).

4.80 The Research Report recommends that s 251AA(1)(a) be retained. That Report points out that the overwhelming majority of resolutions in the surveyed sample of listed public companies were decided by show of hands rather than by poll. To amend s 251AA(1)(a) to record only the vote on the show of hands would give no realistic indication of how many votes were cast by shareholders overall on each resolution so decided. By contrast, disclosure of proxy instructions (albeit that they were not used in the show of hands vote):

- ensures that shareholders have confidence in the conduct of a meeting by enabling them to monitor whether the chair has fulfilled his or her duty in not calling for a poll

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212 AMP, Australian Credit Forum, IFSA, G Long, Thomson Financial, Jack Tilburn. AMP pointed out the difficulty of reconciling the precise details of the proxy voting at the meeting with the proxy details received 48 hours before the meeting, without potentially misleading shareholders. Also, proxy statistics do not cover the votes of those appointed as company representatives. In consequence, the proxy information disclosed under s 251AA may not fully represent the true voting position. AMP supported s 251AA, subject to its being amended to include the votes of corporate representatives.
The Labor and Australian Democrat members in the Parliamentary Joint Statutory Committee on Corporations and Securities, *Report on matters arising from the Company Law Review Act 1998* (October 1999) at 171, 181 supported retaining s 251AA(1)(a) in its current form.

213 IFSA.

214 G Stapledon, S Easterbrook, P Bennett and I Ramsay, *Proxy Voting in Australia's Largest Companies* (Centre for Corporate Law and Securities Regulation and Corporate Governance International, 2000).

- enables shareholders to assess how their voting intentions compare with those of shareholders who have lodged proxies

- assists those investment managers who lodge proxy votes to report back to their clients on the exercise of their voting rights, compared with overall voting trends, and

- is consistent with international guidelines that shareholder voting at general meetings be as transparent as possible.[215]

4.81 The Research Report notes the argument that a shareholder which is a corporation may vote by sending a representative to the meeting, rather than by appointing a proxy, and that s 251AA(1)(a) does not cover these votes. It points out that, while this is true, the empirical evidence shows that institutions almost invariably use the proxy mechanism rather than a corporate representative. It therefore argues that this "gap" in s 251AA(1)(a) is relatively immaterial.

4.82 The Research Report likewise notes the argument that a shareholder who appoints a proxy may nevertheless negate the proxy's voting power by attending the meeting and voting personally. It argues that this point, while technically valid, lacks practical force where institutional investors are concerned. The empirical evidence is that it is very rare for an institutional investor to attend a meeting after previously appointing a proxy to vote on its behalf at that meeting.

s 251AA(1)(b) - poll

4.83 A number of respondents sought amendments to this provision to confine disclosure to the actual result of the vote taken on a poll, without the additional proxy directions information.[216] Two of those respondents also argued that, in the case of a poll, only the votes cast for and against a resolution, not abstentions, should be disclosed.[217]

Advisory Committee view

4.84 The Advisory Committee notes the shortcomings in the existing requirements regarding disclosure of proxy voting details, and the argument put forward by various respondents that, if the minutes are to be strictly accurate, they should record only the outcome of the show of hands or the poll, not the additional information required by the current provision. However, for the reasons set out below, the Committee supports retaining s 251AA, with only limited amendments.

4.85 *Show of hands.* Notwithstanding the limitations of s 251AA(1)(a), the Advisory Committee recognises its benefits in making publicly available proxy voting information for resolutions decided by show of hands. It is difficult to argue that the public interest is served by denying shareholders that information. Repeal of that provision could also be seen as contrary to the fundamental corporate governance principle that the processes of shareholder decision-making should be as transparent

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215 Id at 8-9.

216 BHP, Chartered Institute of Company Secretaries, Computershare Registry Services.

217 BHP, Computershare Registry Services.

as possible. The Committee also relies on the finding in the Research Report that the level of inaccuracy in the information provided under s 251AA(1)(a) is very low. Given all this, the Advisory Committee considers that the provision should be retained, and be extended to include direct absentee votes, if introduced (see Recommendation 20, post).

4.86 *Poll.* The Advisory Committee questions the purpose of requiring companies to include in the minutes for resolutions decided by poll all the proxy voting information in s 251AA(1)(a). The goal of ensuring transparent shareholder decision-making is adequately satisfied by requiring the minutes to specify only the votes cast for and against a resolution decided by poll, as well as all votes directing an abstention, given that these details would include all proxy votes so cast. The inclusion of abstentions in the minutes provides more complete information on shareholder voting patterns. In some cases, abstentions are deliberate decisions not to support or oppose a resolution.[218] In other cases, abstentions simply reflect a failure to vote.[219] The Advisory Committee considers that abstention information might be useful for shareholders in some circumstances, though they could not determine from the minutes the reasons why shareholders cast an abstention.

Additional issue: access to proxy voting information after the meeting

4.87 One respondent favoured a statutory right, exercisable only for 48 hours *after* the conclusion of the general meeting, for shareholders who between them have 5% of the issued voting shares to inspect the proxy forms, the proxy register and the poll papers in relation to a general meeting. This right would allow any potential challenger to the already completed vote to gather evidence of any incorrect rulings on proxies or the validity of votes cast at the general meeting.[220]

Advisory Committee view

4.88 The Advisory Committee agrees that any one or more shareholders who between them have 5% of the issued voting shares should be entitled to inspect the proxy forms, the proxy register and the poll papers in relation to a general meeting for

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218 G Stapledon, S Easterbrook, P Bennett and I Ramsay, *Proxy Voting in Australia's Largest Companies* (Centre for Corporate Law and Securities Regulation and Corporate Governance International, 2000) at 14-15 argue that: "Technically, an 'Abstain' instruction is an instruction not to vote. The 'Abstain' instruction is, however, sometimes used deliberately by institutional shareholders when they wish to register a protest or warning vote stopping short of a vote 'Against'. In that sense, it is influential and is counted as a voting instruction for the purpose of this Report."

219 For instance, assume that a nominee shareholder holds 500,000 shares on behalf of various beneficial owners, on terms that the voting rights attached to those shares are only to be exercised at the express direction of the beneficial owners. That nominee receives, say, directions to vote "For" a particular resolution from the beneficial owners of 100,000 shares, directions to vote "Against" that resolution from the beneficial owners of 50,000 shares and no directions at all from the beneficial owners of the remaining 350,000 shares. The nominee, in giving its proxy for its 500,000 shares, say, to the chair, may expressly place those 350,000 shares in the "Abstention" box, to ensure that they are not available to be exercised at the chair's discretion (given that the chair would not have notice of the terms of the voting arrangements between the nominee shareholder and the beneficial owners).

220 Commercial Law Association of Australia.

48 hours after the conclusion of that meeting. Other shareholders can already obtain access to this information with the leave of the court.[221]

Recommendation 16: Disclosing proxy information in the minutes of the meeting and subsequent access to this information

The current requirement in s 251AA(1)(a) for disclosure of proxy voting information where resolutions have been decided by show of hands should be retained, and extended to include direct absentee votes, if introduced. However, s 251AA(1)(b) should be amended to exclude the information in s 251AA(1)(a).

Any one or more shareholders who between them have at least 5% of the issued voting shares should have a legislative right to inspect proxy documentation for 48 hours after the conclusion of the general meeting of a listed public company.

Voting at the meeting

Obligation to attend or vote at company meetings

The issue

4.89 The question is whether the interests of those who buy shares in institutional shareholders (that is, companies that invest in other companies) or invest in managed investment schemes need to be protected by requiring institutional shareholders or scheme managers to exercise the rights attached to shares in their portfolios, either by attending general meetings and/or voting their shares.

Australian law

4.90 There is no Corporations Law obligation on scheme managers or institutional shareholders to either attend meetings or vote their shares. The degree of active involvement necessary in each case to protect their investment is left to their commercial judgment. Industry guidelines recommend that scheme managers vote on all material issues at all Australian company meetings where they have the voting authority and responsibility to do so.[222] Also, scheme managers, and their officers, have a statutory duty to exercise reasonable care and diligence.[223] Any failure to develop or apply a policy to consider whether or when to vote could breach this duty if that failure seriously jeopardises the value of an investment portfolio. Also, scheme managers who operate unit trusts have a duty to act in the interests of the trust

221 s 247A.

222 IFSA Guidance Note No 2.00 *Corporate Governance: A Guide for Investment Managers and Corporations* (July 1999) Part 2 Guidelines 2 and 3.

223 ss 601FC(1)(b) (duty of a responsible entity to exercise the degree of care and diligence that a reasonable person in the responsible entity's position would exercise), 601FD(1)(b) (similar duty of care and diligence for officers of a responsible entity).

beneficiaries. Scheme managers who totally disregard exercising their voting rights might breach that duty.[224]

Overseas law

4.91 In the United States, scheme managers or institutional shareholders have no obligation to attend company meetings. However, some scheme managers are obliged to vote. The United States Department of Labor has ruled that pension plan managers whose activities are governed by the Employee Retirement Income Security Act (ERISA) are obliged to exercise the voting rights attached to shares in their portfolio "on issues that may affect the value of the plan's investments".[225] The Department has also argued that the right to vote is an asset of the fund and "that it would be a dereliction of duty if managers of plan assets did not vote or voted without paying close attention to the implications of their vote for the ultimate value of the plan's holdings".[226]

4.92 In the United Kingdom, there is no move to oblige institutional shareholders or scheme managers to attend company meetings. However, there has been considerable debate about whether they should exercise the voting rights attached to shares that they hold as part of their portfolio. Several commentaries have encouraged the development of voting policies, as a matter of either best practice or fiduciary responsibility.[227]

4.93 Other European countries also do not require institutional shareholders or scheme managers to attend meetings. However, a small number of these countries

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224 The governing principle is that trustees must "conduct the business of the trust in the same manner as an ordinary prudent man of business would conduct his own": *Bartlett v Barclays Bank Trust Co Ltd (No 1)* [1980] 1 Ch 515 at 531. It may be difficult to conclude from this general principle that a scheme manager must vote on every matter coming before a general meeting of a company. However, given that the right to vote is a potentially valuable part of the right attached to shares, it may be possible that a court in the future could use the *Bartlett* case as a basis for determining that scheme managers must at least develop a policy for determining when their voting rights should be exercised.
A similar view is taken by Lord Nicholls of Birkenhead in "Trustees and their Broader Community: Where Duty, Morality and Ethics Converge" (1996) 70 *Australian Law Journal* 205, who argues that trustees must positively consider how to exercise their voting rights as trustees and not simply leave corporate governance to others.
See also G Stapledon, S Easterbrook, P Bennett and I Ramsay, *Proxy Voting in Australia's Largest Companies* (Centre for Corporate Law and Securities Regulation and Corporate Governance International, 2000) at 6.

225 US Department of Labor Policy Statement (1994).

226 *ISS Proxy Voting Manual* 1993 pp 1.15-16, 29 Consolidated Federal Regulations §2509.94-2 (1998).

227 The UK Institutional Shareholders' Committee (ISC) has said that institutional shareholders "should register their votes wherever possible on a regular basis": ISC, *The Responsibilities of Institutional Shareholders* (1991) at 2. This approach was endorsed by the Cadbury Committee, which also recommended that institutional shareholders' voting policies be disclosed: *The Financial Aspects of Corporate Governance* (1992) paras 6.11 and 6.12. The Hampel Committee strongly recommended the same approach, and also recommended that scheme managers disclose their voting records to their clients on request: *Final Report of the Committee on Corporate Governance* (1998) paras 5.7 and 5.9. The Committee of Inquiry into UK Vote Execution, *Report* (National Association of Pension Funds, London, 1999) at 7 also argued that regular considered voting by institutional investors should be regarded as a fiduciary responsibility.

have statutory provisions that require some scheme managers to exercise voting rights.[228] The remaining European jurisdictions do not deal with the voting issue by legislation, but by applying the principle that scheme managers may breach their fiduciary duties of care to their investors if they do not consider how they will exercise the voting rights attached to the shares they hold, or at least develop a policy for voting.

4.94 The International Corporate Governance Network, a global representative body of major institutional investors and industry associations, considers that institutional investors have a responsibility to vote.[229]

Issue 17. *Should the Corporations Law require scheme managers or institutional shareholders:*

- *to attend company meetings*
- *to vote their shares either in person or by proxy?*

Submissions on Issue 17

Support

4.95 One respondent considered that scheme managers and institutional shareholders should be obliged to vote. Otherwise, they may not properly represent the interests of their own investors.[230]

Oppose

4.96 Most respondents opposed any statutory requirement for scheme managers or institutional shareholders to either attend company meetings or vote their shares either in person or by proxy.[231] Scheme managers currently have fiduciary duties to their investors to at least consider how they will exercise valuable voting rights attached to the shares they hold. Subject to this duty, the level and nature of involvement by scheme managers and institutional shareholders should be left to their commercial judgment. Also, compulsory attendance or voting requirements would be unenforceable.

4.97 These submissions generally supported the principle of continually developing and monitoring best practice guidelines regarding participation in company meetings by scheme managers and institutional shareholders.

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228 Legislation in Austria requires that managers of portfolio management companies exercise their voting rights. The French legislature passed legislation in 1997 obliging pension funds to exercise their voting rights. However, this provision has not yet been proclaimed.

229 *Statement on Global Corporate Governance Principles* (1999) Principle 3.

230 G Long.

231 AARF, AMP, Australian Credit Forum, Australian Shareholders' Association, Boardroom Partners, Chartered Institute of Company Secretaries, Commercial Law Association of Australia, Commonwealth Bank, IFSA, Law Council, QBE, Queensland Investment Corporation, Telstra, Thomson Financial, Jack Tilburn, Jon Webster, Western Australian Joint Legislation Review Committee.

Advisory Committee view

4.98 The Advisory Committee supports the goal of encouraging shareholders to attend and vote at company meetings. It is in the interests of scheme managers and institutional shareholders to develop and articulate a policy on this matter. This would be consistent with the standards of careful and conscientious management, and assist their competitive position in the market for investors. Industry best practice guidelines for scheme managers also support this approach.

4.99 The Committee notes recent empirical research indicating a lower level of proxy voting in Australia compared with some overseas jurisdictions.[232] However, the Committee does not support any statutory requirement for scheme managers or institutional shareholders to attend company meetings or vote their shares. Any such obligation would be difficult to apply (for instance, in distinguishing between institutional and non-institutional shareholders) and could be largely ineffective.[233]

4.100 The better approach is to continually develop and monitor best practice guidelines regarding participation in company meetings by scheme managers or institutional shareholders, supported by existing statutory and common law principles. These guidelines and principles would complement market pressures on scheme managers and institutional shareholders to produce the best returns for their investors, which would in turn influence the level of active involvement in the affairs of the companies in which they invest. However, the level and nature of their involvement in particular companies should be left to their commercial judgment.

Recommendation 17: Obligation of scheme managers or institutional shareholders to attend or vote

There should be no statutory obligation for scheme managers or institutional shareholders to attend or vote at general meetings of listed public companies.

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232 G Stapledon, S Easterbrook, P Bennett and I Ramsay, *Proxy Voting in Australia's Largest Companies* (Centre for Corporate Law and Securities Regulation and Corporate Governance International, 2000). This Report concludes (at vii-viii) that the Australian proxy voting averages (35-41%) compare poorly with those for the UK (50%), the US (80%) and Germany (73%) (though the Report acknowledges (at 24) that there are special factors, not found in Australia or the UK, that go a considerable way towards explaining why the US level is so high). The Report comments (at 7) that: "The relatively low aggregate voting figures revealed in this Report indicate that on many occasions investment managers do not exercise their delegated voting power. This in turn begs the question whether they are meeting their obligation to consider whether to vote. From the perspective of superannuation fund trustees, the fact that they owe a duty to monitor their investment managers' exercise of voting discretion means that, for their own protection, trustees should take a close interest in the proxy voting performance of their investment managers."

233 G Stapledon in "Should Institutional Shareholders be Required to Exercise their Voting Rights?" (1999) 17 *Company and Securities Law Journal* 332 cites evidence that some US pension plans that are required to vote their shares merely go through the motions of voting without necessarily giving close consideration to the matters being voted on. The author also points out that any obligation to vote is difficult to enforce, particularly if it seeks to look at the substance, rather than merely the process, of voting. In addition, the author refers to the view of some fund managers that not all motions are equally important and that their votes have greater impact if used only on motions that are contentious or of major significance.

Voting by poll or show of hands

The issue

4.101 A show of hands has long been recognised as a method of voting at company meetings. It is informal and expeditious. However, it may not represent the true voting position of a company's shareholders, given that it ignores the number of shares held by each voting shareholder or proxy. The question is whether this form of voting should be limited or abolished.

Australian law

4.102 Currently, any resolution put to the vote at a meeting of the shareholders of a company that is subject to replaceable rules must be decided by a show of hands, unless a poll is demanded.[234] A company could by its constitution prohibit voting by show of hands and require that all voting be by poll.[235]

4.103 Each person has one vote on a show of hands, regardless of the size of that person's shareholding.[236] Proxies can vote on a show of hands, unless forbidden to do so by a company's constitution.[237] However, a poll may be demanded on most resolutions either by the chair or by at least five shareholders or their proxies entitled to vote on those resolutions.[238] Voting on a poll is conducted by a written ballot. A recent empirical study indicates that most resolutions are still decided by show of hands, without calling for a poll.[239]

Relevant considerations

4.104 On one view, voting by show of hands should be discontinued, given that it does not accurately reflect the total votes of shareholders. It is also argued that voting by poll only would best ensure full transparency of voting and effective enfranchisement of all shareholders, including those who have lodged proxies.[240] A contrary view is that voting by show of hands is very useful for expeditiously

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234 s 250J(1). This is a replaceable rule, which applies only to a company incorporated since July 1998 or any company registered before that time which subsequently repeals its constitution: s 135(1)(a).

235 A company that is subject to a replaceable rule can displace or modify that rule by its constitution: s 135(2).

236 Corporations Law s 250E(1)(a) (a replaceable rule), ASX Listing Rule 6.8.

237 s 249Y(2).

238 ss 250K, 250L. See also s 249Y(1)(c). A poll may also be demanded by shareholders having at least 5% of the votes that may be cast on the resolution. However, s 250K(2) provides that a company may provide in its constitution that a poll cannot be demanded on any resolution concerning the election of a chair of a meeting or the adjournment of a meeting. Also, a company's constitution may permit fewer than 5 shareholders or shareholders with less than 5% of the votes to demand a poll (s 250L(2)).

239 G Stapledon, S Easterbrook, P Bennett and I Ramsay, *Proxy Voting in Australia's Largest Companies* (Centre for Corporate Law and Securities Regulation and Corporate Governance International, 2000) at 16. For instance, only 12% of the sample companies had a poll for director-election resolutions. Also, only 14% of the sample companies that had at least one controversial resolution decided those resolutions on a poll.

240 IFSA Guidance Note No 2.00 *Corporate Governance: A Guide for Investment Managers and Corporations* (July 1999) Part 3 Guideline 11 paras 12.12.4, 12.12.5.

disposing of non-contentious matters. If there is any doubt or dispute about the result of the vote, the chair or any five shareholders can require a poll.

4.105 Another factor is whether, in the absence of sufficient shareholders to demand a poll, a chair who holds sufficient proxies contrary to the decision on the show of hands is obliged to demand a poll. At common law, a chair is required to do so.[241] In consequence of this requirement and the obligation of a chair to vote all proxies on a poll, the current rules on voting by show of hands do not disenfranchise persons who have lodged their proxies with the chair.

Issue 18. *Should voting by show of hands be discontinued in some or all circumstances?*

Submissions on Issue 18

Support abolition of voting by show of hands

4.106 Some respondents supported all voting being only by poll.[242] They argued that voting by show of hands should be discontinued, particularly on any contentious matter, given that it is uncertain whether it represents the true view of shareholders. Voting by poll only would best ensure full transparency of voting and guarantee enfranchisement of all shareholders who have lodged proxies.

Oppose abolition of voting by show of hands

4.107 Most respondents took the view that voting by show of hands is very useful for expeditiously disposing of non-contentious matters.[243] It enables most of the available time at meetings to be used for debating and voting on more contentious resolutions. If there is any doubt or dispute about the result of the vote, the chair or any five shareholders can require a poll. Respondents also pointed out that, at common law, a chair who holds sufficient proxies contrary to the decision on the show of hands must demand a poll. One of those respondents suggested that this common law obligation be codified.[244]

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241 In *Second Consolidated Trust Limited v Ceylon Amalgamated Tea and Rubber Estates Ltd* [1943] 2 All ER 567 at 570, the Court said that the chair of a meeting is "under a duty in law to exercise all the proxies which he held as chairman in accordance with the instructions which they contained". In that case, the Court held that the chair was obliged to vote the proxies.

242 Boardroom Partners, G Long, IFSA. IFSA stated that institutions' holdings are often registered through domestic and international custodians. In those cases, institutions have to vote via the custodian. A custodian often cannot vote on a show of hands because of the number of institutional investors whose instructions the custodian represents, and the different voting instructions of those institutions. In those cases, the institutional investors and their clients are effectively disenfranchised from voting on a show of hands. At the very least, voting on material or contentious issues should be conducted by a poll to ensure that all proxy votes are counted in determining the resolution.

243 AARF, AMP, Australian Credit Forum, Australian Shareholders' Association, Blake Dawson Waldron, Chartered Institute of Company Secretaries, Commercial Law Association of Australia, Commonwealth Bank, Computershare Registry Services, Law Council, QBE, Queensland Investment Corporation, Telstra, Jack Tilburn, Jon Webster, Western Australian Joint Legislation Review Committee.

244 Western Australian Joint Legislation Review Committee.

Advisory Committee view

4.108 The Advisory Committee supports retaining voting by show of hands as a method of dealing with non-contentious matters expeditiously and inexpensively. The Committee notes that a recent UK Report has also taken this view.[245] Any company could choose to exclude voting by show of hands by amending its constitution to permit only voting by poll.

4.109 The Advisory Committee does not support codifying the common law duty of the chair to demand a poll where the chair holds proxies or direct absentee votes (see Recommendation 20) which may overturn the decision on the show of hands. Any chair who fails to demand a poll in those circumstances would clearly breach the common law duty to so act.

Recommendation 18: Voting by show of hands

There should be no legislative prohibition on voting by show of hands. Also, there should be no legislative requirement that the chair demand a poll where the chair holds proxies which may overturn the decision on the show of hands.

Vote counting and scrutineering on a poll

The issue

4.110 Shareholder decision-making in listed public companies operates through the system of formal voting on resolutions. The integrity of that system is crucial in ascertaining the true will of the shareholders. The *OECD Principles of Corporate Governance* (1999) state that, to ensure transparency, meeting procedures should ensure that votes are properly counted and recorded. Any practices running counter to this goal could thwart shareholder participation. The question is whether there is any need for the Corporations Law to more closely regulate the process of collating votes.

Australian law

4.111 There are no statutory controls over vote counting and scrutineering on a poll. Companies may include procedures for appointing a returning officer and scrutineering in their constitution. Any rights given under these provisions are enforceable by shareholders.[246] In addition, there is some support at common law for the right of the proposer of a resolution to appoint scrutineers of the poll.[247] Furthermore, the ASX may require a listed entity to appoint the entity's auditor, or another person approved by the ASX, as scrutineer to decide the validity of votes cast at a general meeting.[248]

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245 Consultation Document from the Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: Developing the Framework* (March 2000), para 4.48.

246 *Ryan v South Sydney Junior Rugby League Club Ltd* (1974) 3 ACLR 486.

247 *Industrial Equity v New Redhead Coal Company Limited* [1969] 1 NSWR 565.

248 ASX Listing Rule 14.8. The person appointed is usually the entity's auditor.

Overseas law

4.112 US and Canadian corporate law do not specifically regulate vote counting. In practice, however, most large public companies use inspectors to tally and certify the votes. Corporate constitutions usually confer the power to appoint such inspectors on the chair of the meeting, the board of directors or the shareholders themselves. The inspectors usually have authority to decide all questions concerning the eligibility of voters, the validity of proxies and the process of voting. The inspectors have the authority to count the votes and determine and report the results. US cases have held that there is no appeal to the meeting at large from the decision of inspectors, though the courts can review the election of directors and any questions arising therefrom. If inspectors are not appointed, the chair of the meeting has the authority to determine any matters dealing with voting.[249]

Issue 19. *Should the Corporations Law regulate vote counting and scrutineering on a poll? If so, in what manner?*

Submissions on Issue 19

Support

4.113 One submission supported a requirement that a company's auditor or other independent person count the votes and a right for any shareholder who proposes a resolution to appoint a scrutineer at the shareholder's own expense.[250]

4.114 Another submission suggested that it be mandatory for the auditor to count the votes, or alternatively that the meeting have the power to elect a scrutineer if the auditor is not present.[251]

Oppose

4.115 Most respondents opposed any statutory regulation of vote counting and scrutineering on a poll,[252] for the following reasons.

- Best corporate practice already requires large listed entities to appoint an independent person to count votes and scrutineer on a poll.
- The right to appoint a scrutineer should be left to the general law. It is not commonly sought and when sought is usually granted by the chair, who should retain that discretion.
- If the relevant Exchange has any concerns, it may require a listed entity to appoint its auditor (or another person approved by that Exchange) to decide the validity of votes cast at a general meeting.[253]

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249 Cox, Hazen, O'Neal, *Corporations* (loose leaf, Little, Brown and Company) §13.17 at p 13.38.

250 Telstra.

251 Western Australian Joint Legislation Review Committee.

252 AARF, AMP, Australian Credit Forum, Australian Shareholders' Association, Chartered Institute of Company Secretaries, Commercial Law Association of Australia, Commonwealth Bank, Law Council (though some members favoured statutory regulation), QBE, Jack Tilburn.

4.116 One respondent considered that, from a best practice standpoint, vote counting and scrutineering should be undertaken by trusted third party organisations.[254] Another respondent suggested that share registries may be in the best position to conduct polls.[255]

Advisory Committee view

4.117 The Advisory Committee considers that best practice requires that a company use its auditors or other independent persons to collate votes. Likewise, best practice would permit any shareholder who proposes a resolution to appoint a scrutineer, at the shareholder's expense, in addition to any person appointed by the board or at the direction of the relevant exchange. However, given the absence of any identified instances of abuse or failure to recognise these rights, there is no presently discernible need for legislation to regulate these processes.

Recommendation 19: Vote counting and scrutineering

There should be no legislative regulation of vote counting and scrutineering on a poll.

Direct voting by absentee shareholders

The issues

4.118 The *OECD Principles of Corporate Governance* (1999) state that shareholders should have the opportunity to participate effectively and vote in shareholder general meetings through the use of modern technology. They should be able to vote in person or in absentia, and equal effect should be given to both types of vote.

4.119 This Report has so far raised various issues concerning the process of voting at a meeting either in person or by proxy. Another possibility not yet specifically recognised in the Corporations Law is to permit shareholders who do not attend a physical meeting to vote directly rather than by proxy, either electronically or by post. These additional methods of voting may further encourage shareholders to be involved in corporate governance without having to attend meetings.

4.120 The issues are:

- should the Corporations Law provide expressly for electronic and postal voting (direct absentee voting)?
- if so, should direct absentee voting operate as an additional form of voting at a meeting or in substitution for holding a meeting?

253 ASX Listing Rule 14.8.
254 Thomson Financial.
255 Law Council.

Australian law

4.121 The Corporations Law expressly permits postal voting in only very limited circumstances.[256] In other instances, it is unclear whether postal voting is permitted.[257] In comparison, postal voting is expressly adopted in some other Australian legislation. For instance, co-operatives legislation provides for postal ballots based on circulated disclosure statements.[258]

4.122 The Corporations Law also makes no reference to electronic voting, except for permitting the lodgment of proxies by electronic means.[259] On one view, electronic voting is permissible if provided for in a company's constitution, given that the Corporations Law does not expressly prohibit this form of voting.[260]

Overseas law and practice

4.123 Some United States companies use direct electronic voting that avoids the need to appoint proxies. For instance, telephonic voting gives shareholders the ability to vote using an "electronic signature" or personal identification number, printed on the proxy cards sent to them. This automated system records the shareholder's vote in a computerised tabulation system. Likewise, technology is developing whereby a shareholder could vote on a corporation's Internet website.[261]

4.124 Only a minority of European jurisdictions expressly permit postal voting. In each instance, it is treated as an additional form of voting, to be counted at the meeting.[262] However, most European countries are concerned about the uncertainties connected with the identification of shareholders under postal voting, given that most of the shares held in public companies of European countries are bearer shares.

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256 Subsection 201C(11) refers to a postal ballot for the election of one or more directors of a company limited by guarantee where at least one of the candidates has attained the age of 72 years. Also, s 648D(1)(c)(ii) refers to a postal ballot in the context of a proportional takeover scheme.

257 There is one early decision to the effect that postal voting is permissible if specifically provided for in the company's constitution: *McMillan v Le Roi Mining Co* [1906] 1 Ch 338.

258 For instance, Co-operatives Act 1992 (NSW) ss 193, 194.

259 ss 250B, 250BA.

260 E Boros, *The Online Corporation: Electronic Corporate Communications* (December 1999), paras 3.19-3.20.

261 Ibid.

262 In Belgium, postal voting is expressly permitted if provided for in a company's constitution. Relatively few companies permit postal voting, mainly because of the identification problems that arise with bearer shares. In France, shareholders may vote by mail. They may also vote by fax, provided they subsequently mail the completed ballot to the company. Since 1998, Italy has permitted postal voting for all public listed companies if provided for in a company's constitution.

Postal voting is expressly prohibited in Austria, Denmark, Finland, Germany, the Netherlands and Sweden. In addition, Austria, Germany, the Netherlands and Sweden expressly prohibit any form of electronic voting, such as by fax. The remaining European jurisdictions make no provision for either electronic or postal voting. See T Baums, "Shareholder Representation and Proxy Voting in the European Union: A Comparative Study" in K Hopt et al, *Comparative Corporate Governance* (Oxford, 1998) at 551.

4.125 The New Zealand legislation expressly recognises postal voting as an additional form of voting at a meeting, rather than as an alternative to a meeting.[263] It permits postal voting, subject to any contrary provision in a company's constitution. A shareholder may cast a postal vote on all or any of the matters to be voted on at a general meeting by sending a notice at least 48 hours before the start of the meeting to the person authorised by the company to receive and count postal votes. If a vote by show of hands is taken at a meeting on any resolution on which postal votes have been cast, the chair of the meeting must call for a poll if those votes could change the outcome of the vote. All postal votes must be counted on a vote by poll.

Policy options

4.126 The traditional argument for requiring a physical meeting of shareholders and for voting to be done by those present, either the shareholders themselves or their proxies, is that it provides an opportunity for shareholders to discuss, as well as vote on, proposed resolutions. The contrary argument is that, where a shareholder has lodged a directed proxy (and has therefore already decided on the matter), the identity of the person appointed as proxy to attend the meeting is irrelevant. In these circumstances, a person should have the option of lodging an absentee vote, without the need to nominate any person as proxy.

4.127 A system of direct absentee voting can avoid some of the practical difficulties with proxy voting. For instance, the effectiveness of a vote would not depend on whether the person appointed as proxy is present at the meeting and, if present, chooses to exercise that proxy.[264] The contrary argument is that the same result can be achieved under proxy voting by shareholders appointing the chair as proxy and directing him or her how to vote.[265]

4.128 One policy option would be for the Corporations Law to provide expressly for electronic and postal voting as an additional form of voting at a meeting of a public listed company. The New Zealand provisions might be an appropriate model, both for the method of lodging postal votes and for ensuring that they are properly taken into account in any vote on a show of hands.

4.129 An alternative policy option would be to retain the annual general meeting for its current purposes, including to provide shareholders as a whole with an opportunity to question management,[266] but otherwise expressly permit companies to introduce electronic and postal voting *in lieu of* holding any other general meeting. This raises the question of whether there are any matters, other than those covered at an annual general meeting, which should be dealt with only through a physical meeting of

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263 New Zealand Companies Act 1993 First Schedule cl 7.

264 Under s 250A(4)(d), "if the proxy is not the chair - the proxy need not vote on a poll, but if the proxy does so, the proxy must vote [the way specified]".

265 s 250A(4)(c).

266 ss 250R, 250S, 250T. The statutory right under s 250S to question management is consistent with the *OECD Principles of Corporate Governance* (1999) that shareholders should have the opportunity to question the board. Also, in *Re South British Insurance Co Ltd* [1981] 1 NZCLC 95-004 at 98,064, the Court observed that "an annual meeting of the shareholders is an important event. … It is the one occasion in the year when the shareholders have a right to meet the directors or their representatives and to question them on the company's accounts, the directors' report and the company's position and prospects.

shareholders, rather than through direct absentee voting. For instance, on one view, only a general meeting should appoint or remove directors.

Issue 20. *Should the Corporations Law expressly permit direct absentee voting at a meeting?*

Submissions on Issue 20

Support direct absentee voting

4.130 Most respondents supported postal and electronic absentee voting, arguing that its directness and simplicity would encourage or assist shareholder voting participation.[267] However, respondents differed on whether shareholders should automatically have that right or whether it should lie within the discretion of the company. Some respondents also referred to unresolved technical difficulties in authenticating the identity of persons using electronic voting.

Oppose direct absentee voting

4.131 Some respondents opposed direct absentee voting, arguing that it may detract from the significance of a physical meeting as a forum for discussion and debate by shareholders.[268]

Advisory Committee view

4.132 The Advisory Committee favours any form of voting that would assist shareholder participation in corporate decision-making. Postal or electronic voting may be more attractive to some shareholders than proxy voting.

4.133 The Corporations Law should give directors the choice to provide for direct absentee voting, subject to any restriction in the company's constitution. This discretion would allow companies to introduce electronic voting if and when the board is satisfied that there is adequate technology for vote verification.

4.134 The Committee notes the issue raised in a recent UK Consultation Paper of how to deal with attempts by shareholders to change their absentee votes, for instance, by seeking to override a postal vote by a subsequent contrary electronic vote which is received first by the company.[269]

4.135 The Advisory Committee considers that the first absentee vote recorded by the person collating the absentee votes should be the valid vote, with no option for the shareholder to change that vote. This pragmatic solution, which treats proxy voting and direct absentee voting differently in this respect, would overcome the difficulty of

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267 AARF, AMP, Australian Credit Forum, Australian Institute of Company Directors, Australian Shareholders' Association, BHP, Boardroom Partners, Commercial Law Association of Australia, Computershare Registry Services, IFSA, Law Council, G Long, Telstra, Thomson Financial, Jon Webster, Western Australian Joint Legislation Review Committee.

268 Chartered Institute of Company Secretaries, Commonwealth Bank, QBE, Jack Tilburn.

269 Consultation Document from the Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: Developing the Framework* (March 2000), para 4.59.

companies otherwise having to deal with absentee vote changes, which could unduly complicate direct absentee voting and discourage its use by companies.

4.136 The Advisory Committee has considered a related issue of how to deal with amendments put forward at a meeting. Under current law, a person appointed as a proxy can vote on an amendment to a proposal either if the terms of the proxy expressly or by necessary implication cover that amendment or if the amendment is consistent with the substance of the original proxy direction. With absentee votes, the chair would have to apply the same principles.

Recommendation 20: Direct absentee voting

The Corporations Law should permit the directors of a listed public company to provide for direct absentee voting, subject to any restriction in the company's constitution. Where direct absentee voting is used, the first vote recorded by the company should be the valid vote.

Issue 21. *Should the Corporations Law regulate the disclosure of direct absentee voting details prior to the meeting? If so, in what manner?*

Submissions on Issue 21

4.137 All respondents that commented on this Issue took the same approach to disclosure of direct absentee voting details prior to the meeting as they took to the disclosure of proxy voting details prior to the meeting.[270] Whatever policy applies to disclosure of proxy votes should apply equally to disclosure of absentee votes (see further paras 4.44 ff and Recommendation 14).

Advisory Committee view

4.138 The same pre-meeting disclosure principles should apply to direct absentee voting as to proxy voting.

Recommendation 21: Disclosing absentee voting prior to the meeting

There should be no legislative regulation dealing with access to or disclosure of direct absentee voting details prior to a meeting. However, the relevant Exchange might consider introducing into its Listing Rules a requirement that an independent person receive and collate absentee votes.

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270 AARF, AMP, Australian Credit Forum, Australian Shareholders' Association, Chartered Institute of Company Secretaries, Commercial Law Association of Australia, Computershare Registry Services, Law Council, G Long, QBE, Telstra, Thomson Financial.

Issue 22. *Should there be controls on disclosing direct absentee voting details prior to debate at the meeting? If so, what should those controls be?*

Submissions on Issue 22

4.139 All respondents that commented on this Issue took the same approach to disclosing direct absentee voting details as they took to disclosing proxy voting details.[271] Whatever policy applies to disclosure of proxy votes prior to debate at a meeting should apply equally to disclosure of absentee votes (see further paras 4.58 ff and Recommendation 15).

Advisory Committee view

4.140 The same disclosure principles should apply to direct absentee voting as to proxy voting.

Recommendation 22: Disclosing absentee voting prior to debate at the meeting

There should be no legislative provision dealing with the disclosure of direct absentee voting details prior to the debate at a meeting. This should remain a matter of discretion for the chair.

Issue 23. *In what, if any, circumstances should direct absentee voting be permitted to substitute for holding a meeting?*

Submissions on Issue 23

Support direct absentee voting in lieu of a physical meeting

4.141 Some respondents favoured permitting companies to determine shareholder resolutions through postal and electronic absentee voting instead of holding a meeting, other than the annual general meeting, given the cost savings and convenience of this procedure.[272] However, some of these respondents considered that shareholders holding 5% or more of a company's voting share capital should still have the right to requisition a physical meeting, either on their own initiative or as an alternative to an electronic meeting of which they have received notice.[273] One of these respondents[274] commented that, in the latter case, a substantial threshold is necessary to justify the additional expense that would be involved in sending out a second notice substituting a physical meeting for the electronic meeting.

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271 AMP, Australian Credit Forum, Australian Shareholders' Association, Chartered Institute of Company Secretaries, Commercial Law Association of Australia, Computershare Registry Services, G Long, QBE, Western Australian Joint Legislation Review Committee.

272 AMP, Australian Institute of Company Directors, BHP, Blake Dawson Waldron, G Long, Telstra, Thomson Financial.

273 Australian Institute of Company Directors, Telstra.

274 Australian Institute of Company Directors.

Support retaining physical meetings

4.142 Some respondents opposed direct absentee voting substituting for holding a physical meeting in any circumstances.[275] They argued that a physical meeting provides an opportunity for shareholders to speak directly with the company's management. It is also a more accessible forum for debate on company resolutions (albeit that the debate at general meetings usually does not affect the outcome of a vote decided on a poll, which, in most cases, is pre-determined by the lodged proxies).

Advisory Committee view

4.143 The Advisory Committee considers that annual general meetings should continue to be held in a physical location. It also considers that it would be impractical to abolish other physical meetings. Shareholders should be entitled to call a physical meeting, which provides them with an opportunity to speak directly with corporate management. Given this, the Committee questions the workability of any proposal to permit a company to hold an absentee vote in lieu of a physical meeting, subject to shareholders holding sufficient shares subsequently requisitioning a physical meeting. The Committee notes that this proposal could result in companies incurring the cost of two notices of meeting. It could also create major procedural problems, including the time period for permitting the shareholders who have received notice of an absentee resolution to require a physical meeting. The more workable solution is to permit companies to allow absentee votes (Recommendation 20), which would be counted on resolutions at a physical meeting.

Recommendation 23: Direct absentee voting in lieu of physical meeting

Listed public companies should not be permitted to pass resolutions by direct absentee voting without holding a physical meeting.

Voting after the meeting

The issue

4.144 Currently, all voting must be done at a meeting. An alternative approach is to treat meetings as an informational precursor to a final vote. The issue is whether shareholders should be permitted to vote on resolutions within a stipulated time after the close of the meeting, with the outcome of the vote being determined at the end of that period.

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275 AARF, Australian Credit Forum, Australian Shareholders' Association, Commercial Law Association of Australia, Commonwealth Bank, Computershare Registry Services, IFSA, QBE, Jack Tilburn.

Australian law

4.145 The Corporations Law works on the assumption that all voting, either in person or by proxy, will be conducted at a physical meeting. There is no provision for votes to be cast after the close of the meeting.

Policy options

4.146 One possible approach would be to give shareholders the choice either to vote at the meeting on particular resolutions or to vote by postal or electronic means within a set time (say, two weeks) after the close of the meeting (postponed voting). The purpose of permitting postponed voting would be to give shareholders a further opportunity to consider all information, including that provided at the meeting, before casting their vote.

4.147 An alternative approach would be to confine the business of the annual general meeting to considering financial and other reports and providing shareholders with an opportunity to ask questions about matters relevant to the company's management. Voting on issues dealt with at an annual general meeting, including the election of directors, could take place within a stipulated time after the close of the meeting by means of postal or electronic voting.

Issue 24. *Should the Corporations Law permit shareholders to cast their votes within a stipulated period after the close of a meeting? If so, should that be an additional form of permissible voting or the only form of permissible voting?*

Submissions on Issue 24

Support post-meeting voting

4.148 One respondent[276] favoured permitting shareholder voting after a meeting, arguing that:

- contentious issues cannot always be resolved at meetings. It is more important to achieve the right result eventually rather than a lesser quality result by the conclusion of the meeting
- the best time to vote is when shareholders have been fully briefed after they have received the annual report and the annual general meeting has provided an opportunity for verbal communication between directors and shareholders.

Oppose post-meeting voting

4.149 Most respondents opposed permitting shareholder voting after the close of a meeting,[277] for the following reasons.

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276 Boardroom Partners.

277 AMP, Australian Credit Forum, Australian Shareholders' Association, BHP, Blake Dawson Waldron, Commercial Law Association of Australia, Commonwealth Bank, Computershare Registry Services, IFSA, Law Council, G Long, QBE, Queensland Investment Corporation,

- Given the statutory requirements for adequate notice of meetings, there is no reason why voting should not occur prior to or at the meeting.
- Directors or shareholders could put considerable pressure on those shareholders who have not yet cast their vote, in an attempt to overturn a vote that had gone against them at the meeting.
- There is a need for finality of outcome at general meetings rather than delay in announcing the results of resolutions to the market.
- The periods for holding meetings to raise capital or deal with other issues requiring shareholder approval under the Corporations Law or Listing Rules are already lengthy and should not be extended.

Advisory Committee view

4.150 The Advisory Committee opposes postponed voting. It is important that meetings achieve a final outcome, without further delay. To permit postponed voting may also mean that shareholders must rely on a follow-up announcement to determine what matters have been resolved. The Committee notes that a recent UK Consultation Paper does not support postponed voting.[278]

Recommendation 24: Postponed voting

There should be no legislative provision permitting post-meeting voting.

Chair of the meeting

Statement of general functions and duties

The issue

4.151 The chair of a shareholder meeting has a very broad discretion about how to perform the role. The issue is whether the Corporations Law or, alternatively, some code of best practice should set out a statement of the functions and duties of the chair.

Australian law

4.152 The Corporations Law contains some references to the general powers and obligations of the chair, for instance:

- to vote proxies according to their terms[279]

Telstra, Jack Tilburn, Jon Webster, Western Australian Joint Legislation Review Committee. The Chartered Institute of Company Secretaries raised the issue of absentee voting following information meetings, but said that this issue requires further consideration.

278 Consultation Document from the Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: Developing the Framework* (March 2000), para 4.49.

279 s 250A(4)(c).

- to determine objections to a person's right to vote[280]
- to declare the results of a vote on a show of hands[281]
- to determine when and how to conduct a poll[282]
- to allow a reasonable opportunity for the shareholders as a whole to ask questions about or make comments on the management of the company,[283] or to question the auditor[284]
- to adjourn the meeting in appropriate circumstances.[285]

4.153 In addition, at common law, the duty of the chair "is to ascertain the sense of a meeting on any resolution properly coming before the meeting",[286] including by demanding a poll where necessary for that purpose.[287]

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280 s 250G (a replaceable rule). A replaceable rule applies only to a company incorporated since July 1998 or any company registered before that time which subsequently repeals its constitution: s 135(1)(a). A company that is subject to a replaceable rule can displace or modify that rule by its constitution: s 135(2).

The courts may overrule a chair's ruling. In *Link Agricultural Pty Ltd v Shanahan* (1998) 16 ACLC 1,462, 28 ACSR 498, the Victorian Court of Appeal ruled that the purpose of the powers conferred on the chair with respect to the conduct of a poll is to facilitate the voting and the counting of votes in order that the will of the majority of shareholders should be reliably ascertained. A chair's ruling to disallow particular proxies would be invalid if made in bad faith or for an ulterior or impermissible purpose or if the irregularity relied on by the chair was so minor that it could not justify excluding the votes. This decision could be seen as a significant precedent for courts being prepared to set aside attempts to disallow proxies on purely technical, rather than substantive, grounds. Cf *Industrial Equity v New Redhead Coal Company Limited* [1969] 1 NSWR 565.

281 s 250J(2) (a replaceable rule).

282 s 250M(1) (a replaceable rule).

283 s 250S. The Explanatory Memorandum to the Company Law Review Act 1998 (para 10.78) stated that the use of the words "as a whole" is intended to confirm that each individual shareholder does not have a right to ask a question. Rather, the chair of the meeting must determine whether there has been a reasonable opportunity for questions and comments, which will depend on the circumstances of the meeting.

284 s 250T.

285 At common law, the power to dissolve or adjourn meetings rests with the shareholders. In addition, s 249U(4) (a replaceable rule) provides that the chair must adjourn a meeting of the company's shareholders if the shareholders present with a majority of the votes at the meeting agree or direct that the chair must do so. However, the chair also has power to adjourn the meeting where it is impractical for the shareholders to pass a resolution, for instance, where unruly conduct prevents the continuation of business or the venue is not large enough for all those entitled to attend to take part in the debate and to vote. In exercising that power, a chair must act in good faith and reasonably in light of the purposes for which the power exists. See *John v Rees* [1970] Ch 345, *Byng v London Life Association Limited* [1989] 1 All ER 560. See also J Farrar & B Hannigan, *Farrar's Company Law* (4th edition, Butterworths, 1998) at 319.

286 In *Re Bomac Batten Ltd & Pozhke* [1984] 1 DLR (4d) 435, a Canadian Court held that the chair was obliged to hear both sides of any debate or argument before reaching any conclusion or ruling. In *Wishart v Henneberry* [1962] 3 DLR 171 at 173, the Court said: "The chairman of a meeting of a particular body, however, is bound by the rules of that body and cannot refuse to put motions which are in order under those rules. It is his duty to put those motions in order to ascertain the sense of the meeting."

287 The chair is entitled to demand a poll: s 250L(1)(c). In *Second Consolidated Trust Limited v Ceylon Amalgamated Tea and Rubber Estates Limited* [1943] 2 All ER 567, the chair held proxies which would have defeated a resolution. The chairman decided not to demand a poll, with the result that the resolution was passed by a show of hands. It was held that the chairman had a legal duty to demand a poll and use the proxies, as this was part of his duty to ascertain the sense of the meeting.

Policy options

4.154 One option for ensuring greater consistency and giving general guidance would be to include in the Corporations Law a general formulation along the following lines:

> "It is the duty of the chair of a meeting of a company's shareholders to facilitate the business of that meeting and to ensure that an expression of the true will of the shareholders present and represented is obtained on all the matters to be decided by the meeting. The chair should administer the meeting fairly to ensure that the persons present have a reasonable opportunity to debate those matters in a manner calculated to allow the meeting to proceed efficiently. While the chair has a duty to maintain order, it is no part of his or her function to allow procedures and formalities to prejudice the attainment of the meeting's objects. Substance must prevail over form."

4.155 An alternative approach would be to include a general formulation in an ASIC Practice Note or an industry-based code of best practice. A non-legislative approach would be more flexible and would avoid the prospect of litigation on its interpretation, though it would lack the force of law.

Issue 25. *Should there be a general formulation of the functions and duties of the chair of a meeting? If so, what should its content be? Should any such formulation be included in the Corporations Law or, alternatively, set out in a non-legislative document, such as an ASIC Practice Note or an industry-based code of best practice?*

Submissions on Issue 25

Support statutory formulation

4.156 One respondent favoured a statutory formulation of the functions and duties of the chair of a meeting.[288] The current discretion of the chair should be limited by increasing the standing of the shareholders, while leaving the chair sufficient power to deal with disruption, for instance by limiting the time for shareholder questions and comments.

Oppose statutory formulation

4.157 Most respondents opposed any formulation appearing in the Corporations Law,[289] for the following reasons.

- The current law is operating well in practice. Also, a chair would risk considerable adverse publicity if he or she were to conduct a meeting in a

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288 G Long.

289 AMP, Australian Institute of Company Directors, BHP, Chartered Institute of Company Secretaries, Commercial Law Association of Australia, Commonwealth Bank, IFSA, Law Council, QBE, Queensland Investment Corporation, Telstra, Jon Webster, Western Australian Joint Legislation Review Committee.

manner which could in any way be said to prejudice the rights of minority shareholders or which was procedurally unfair.

- The varying size and nature of listed entities and the different characteristics of individual listed entities' meetings mean that any further legislative requirements would be overly prescriptive and could lead to inflexible outcomes. Alternatively, the necessarily broad language of any formulation could make it unsuitable for legislation and create considerable difficulties or uncertainties in its interpretation.

- The way the chair conducts the meeting will often depend on the nature and mood of the meeting and the personality of the chair. These are not matters that can be legislated.

4.158 Some respondents said that it may be beneficial to set out the role of the chair in greater detail in a non-binding document, in the form of an industry best practice statement or an ASIC Practice Note.[290]

Advisory Committee view

4.159 The Advisory Committee does not support a statutory formulation of the functions and duties of the chair of a meeting. Its necessarily broad language would make it unsuitable for legislation or could create considerable difficulties or uncertainties in its interpretation. Rather, the Committee considers that the statement in para 4.154 of this Report could provide a good corporate governance model, for adoption in industry best practice guidelines. The Committee also notes that a recent UK Consultation Paper questioned whether codification would provide sufficient guidance to be of real assistance on the practical issues likely to arise at a meeting.[291]

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290 AMP, Australian Institute of Company Directors (which pointed out that it had published its own guidelines dealing with some of these matters), BHP, Computershare Registry Services, Telstra. The Commercial Law Association of Australia and the Australian Shareholders' Association favoured an ASIC Practice Note, rather than an industry-based code of best practice. The Commercial Law Association of Australia argued that it should not be left to any industry-based code of best practice as the various bodies represent particular viewpoints which, in some cases, cannot be reconciled. ASIC represents an even-handed approach to any such formulation. Jack Tilburn said that an industry-based code of practice would not have as much "clout" as an ASIC Practice Note.
The current AICD/ASA Code of Best Practice on the Conduct of Annual General Meetings already gives some guidance on the role of the chair:
- "A fundamental duty of a Chair is to ensure the preservation of the right of minorities to ventilate their views during a debate."
- "A Chair's rulings regarding procedure and the general conduct of a meeting should not be disputed."
- "All persons present need to appreciate that the business of a meeting is expedited by their personal observance of the rules of debate and their support of the Chair in his or her decision, rulings and maintenance of order".
- "The guidelines are not intended to be overly prescriptive but rather to alert members and directors to their rights and responsibilities, relying on the good sense of all concerned to ensure that AGMs are conducted in a manner conducive to accountability."

291 Consultation Document from the Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: Developing the Framework* (March 2000), para 4.62-4.63.

Recommendation 25: Functions and duties of the chair

There should be no statutory formulation of the functions and duties of the chair of a meeting of a listed public company.

Moving motions

The issue

4.160 There is some legal uncertainty about the ability of the chair of a meeting to move motions. The question is whether the Corporations Law needs to clarify that role or change the procedures for moving motions.

Australian law

4.161 There is some case law to the effect that a chair cannot lawfully move motions. Any resolution so passed is invalid and the court may lack the jurisdiction to set aside that irregularity.[292]

4.162 A broader question is the possibility of dispensing with the formalities of moving and seconding motions at company meetings. The Corporations Law could provide, for instance, that any decision, if supported by the requisite votes, is valid provided the chair indicates in advance, through any reasonable means, that a vote is to be taken.[293]

Issue 26. *Should the Corporations Law dispense with the formalities of moving motions by providing, for instance, that any decision, if supported by the requisite votes, is valid provided the chair indicates in advance, through any reasonable means, that a vote is to be taken?*

Submissions on Issue 26

Dispensing with the formalities of moving motions

4.163 *Support.* Various respondents supported removing these formalities, provided that it is clear to shareholders when votes are to be taken. This would increase the speed and efficiency of meetings.[294]

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292 In *Re Vector Capital Limited* (1997) 15 ACLC 421, 23 ACSR 182, Young J of the New South Wales Supreme Court held that "it is not appropriate an impartial chairman should move motions; and, secondly, more importantly [the chairman] was not qualified to do so because he was not a shareholder. If a motion is invalidly moved, in my view, it cannot be passed".

293 Compare the Local Government Act 1993 (NSW) s 371 which deals with what constitutes a decision of a local council. It provides: "A decision supported by a majority of the votes at a meeting of the council at which a quorum is present is a decision of the council."

294 AMP, Commercial Law Association of Australia, Commonwealth Bank, IFSA, Queensland Investment Corporation, Telstra, Western Australian Joint Legislation Review Committee.

4.164 *Oppose.* Some respondents opposed any change in this area, arguing that the common law is adequate.[295] One of those respondents argued that the formalities are not legally essential.[296]

4.165 *Advisory Committee view.* The Advisory Committee does not support the Corporations Law specifically dispensing with the formalities of moving motions. It considers that this is only a minor administrative procedure and does not create a material procedural obstacle to the conduct of meetings.

Permitting the chair to move motions

4.166 *Support codification.* Some respondents considered that the current law was uncertain and that the Corporations Law should specifically permit the chair to move motions.[297]

4.167 *Oppose codification.* Some other respondents considered that a motion moved by the chair would not necessarily be invalid under the existing law and that law reform in this regard is unnecessary.[298]

4.168 *Advisory Committee view.* The Advisory Committee does not accept that, if the question of the chair's right to move motions arose again, the single adverse judgment would be followed or that a resolution resulting from a motion moved by the chair would, for that reason, be held invalid. An amendment to the Corporations Law is therefore unnecessary. The Committee also notes that the court has a discretion under s 1322 to validate any resolution suffering from procedural irregularity.

Recommendation 26: Formalities of moving motions

There should be no statutory provision dispensing with the formalities of moving motions. Also, there is no need for a statutory provision to permit the chair to move motions.

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295 Australian Credit Forum, Australian Shareholders' Association, Computershare Registry Services, Chartered Institute of Company Secretaries, QBE.

296 The Chartered Institute of Company Secretaries argued that: "The generally accepted purpose of moving a motion is to formally allow debate to proceed. It demonstrates at least minimum support. ... Likewise there is no legal requirement for a seconder, other than to demonstrate sufficient support for the debate to be continued. Both of these matters have been adequately dealt with in *Re Horbury Bridge Coal, Iron & Wagon Company* (1879) 11 ChD 109. ... The moving and seconding of the motion is recorded in the minutes of the meeting as matters of formality – their absence does not invalidate any resolution."

297 AMP, Law Council.

298 Commercial Law Association of Australia, Jon Webster, Western Australian Joint Legislation Review Committee. One of those respondents pointed to another and apparently inconsistent decision of Young J in *Re Adams International Food Traders Pty Ltd* (1998) 13 NSWLR 282. See also the comments by R Barrett in "Can a Chairman Move a Motion from the Chair?" (1997) 15 *Company and Securities Law Journal* 229.

Motions of dissent from a chair's rulings

The issue

4.169 Shareholders at a meeting may seek to move a motion of dissent from a chair's ruling. However, the Corporations Law does not identify the type or range of matters on which shareholders may legitimately move a motion of dissent. The question is whether it should.

Australian law

4.170 At common law, a meeting cannot overturn a chair's ruling to disallow a motion that is outside the competence of the meeting. Therefore, a chair can also lawfully rule invalid any motion of dissent from that ruling. For instance, a meeting could not lawfully pass a motion of dissent from a chair's ruling that:

- a director, auditor or other company officer not be required to answer questions[299]
- particular resolutions are invalid as they involve matters of management that the company's constitution lawfully and exclusively vests in the directors,[300] or
- no poll be held on a resolution that the meeting be adjourned (if the company's constitution so provides).[301]

Policy options

4.171 The general policy issue is whether the Corporations Law should stipulate what, if any, rulings by the chair can be overturned by a meeting.

4.172 One policy option would be for the Corporations Law to expressly stipulate that shareholders may only move motions of dissent on matters about which the meeting may make lawful decisions.

4.173 A contrary policy option would be for the legislation to provide that any ruling by the chair could only be challenged in court, not at the meeting itself through a motion of dissent. This would avoid a company's meeting being unduly prolonged through such motions.

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299 Sections 250S and 250T require the chair to permit shareholders to ask questions of company management or the company auditor. However, there is no legal obligation on these persons to answer those questions.

300 *NRMA v Parker* (1986) 11 ACLR 1, 4 ACLC 609.

301 Under s 250K(2), a company's constitution may provide that a poll cannot be demanded on any resolution concerning the adjournment of a meeting.

Issue 27. *Should the Corporations Law regulate the process of moving motions of dissent from a chair's ruling? If so, should the Corporations Law:*

(a) state that shareholders may only move motions of dissent on matters about which the meeting may make lawful decisions, or

(b) state that any ruling by the chair could only be challenged in court, not at the meeting itself through a motion of dissent, or

(c) stipulate some other approach?

Submissions on Issue 27

Corporations Law to regulate the process of moving dissent motions

4.174 *Support.* One respondent favoured legislative regulation of this area as a method of increasing shareholder rights, but with safeguards against disruption.[302]

4.175 *Oppose.* Most respondents opposed the Corporations Law regulating the process of moving motions of dissent.[303] They argued that formalising such matters in legislation would inhibit the chair in conducting the meeting in an effective manner for the benefit of the meeting as a whole.

4.176 *Advisory Committee view.* The Advisory Committee agrees that the moving of motions of dissent should not be regulated by statute. The chair should have the flexibility to conduct the meeting in a manner which most effectively deals with motions of dissent.

Shareholders to move motions of dissent only on matters on which the meeting can make lawful decisions

4.177 *Support.* One respondent supported the Corporations Law providing that shareholders may only move motions of dissent on matters about which the meeting may make lawful decisions.[304]

4.178 *Oppose.* Two submissions opposed the Corporations Law prescribing the type of matters on which shareholders may move a motion of dissent, arguing that this would create unnecessary complexity without any greater certainty than the current position.[305]

4.179 *Advisory Committee view.* The Advisory Committee considers that attempts to legislate for the type of matters on which shareholders may move a motion of dissent could increase uncertainty rather than assist in the proper conduct of meetings.

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302 G Long.

303 AMP, Australian Credit Forum, Chartered Institute of Company Secretaries, Commonwealth Bank, Computershare Registry Services, IFSA, Law Council, QBE, Queensland Investment Corporation, Telstra, Jack Tilburn, Western Australian Joint Legislation Review Committee.

304 Australian Shareholders' Association.

305 AMP, Western Australian Joint Legislation Review Committee.

Challenges to a chair's ruling only in court

4.180 *Support.* One respondent[306] favoured a statutory statement that any ruling by the chair can only be challenged in court, not at the meeting itself through a motion of dissent, for the following reasons.

- The uncertainty of the general law in this area, particularly on the question of whether the chair should stand aside when there is a debate on a motion of dissent from a ruling of the chair, can be very disruptive to a general meeting.

- A dissent from a ruling of the chair cuts across the task of the chair to facilitate the business of the meeting and ascertain the sense of the meeting. The chair's ruling should be final, subject only to any court challenge.

4.181 *Oppose.* Other respondents considered that the current common law is adequate and that the Corporations Law should not regulate this process.[307]

4.182 *Advisory Committee view.* The Advisory Committee considers that the common law appears to be adequate and that no law reform in this area is required.

Recommendation 27: Motions of dissent from the chair's ruling

There should be no statutory regulation of the process of moving motions of dissent from a chair's ruling.

Election of directors

Principles for election of directors

The importance of the election process

4.183 The right of shareholders to elect, as well as remove, directors is fundamental to ensuring managerial accountability. Through the exercise of these election and removal rights, shareholders determine the composition of the board and in this manner influence board decisions and corporate policies. The integrity of the election process is essential for good corporate governance.[308]

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306 Commercial Law Association of Australia.

307 AMP, IFSA.

308 G Stapledon, S Easterbrook, P Bennett and I Ramsay, *Proxy Voting in Australia's Largest Companies* (Centre for Corporate Law and Securities Regulation and Corporate Governance International, 2000) at 13 point out that no shareholder is excluded from voting on resolutions to elect directors. This contrasts with certain other shareholder approval issues where some interested shareholders are excluded from voting by the Corporations Law (for instance, related party transactions) or the ASX Listing Rules.

The issue

4.184 Companies have a wide discretion to determine the procedure for the election of their directors. Some companies might use procedures which appear inequitable. For instance, shareholders might be asked to elect directors sequentially, so that they vote on each candidate in the order chosen by the company's directors, until all positions have been filled. Where there are more candidates than available positions, this could result in the election being completed before some candidates placed lower in the order have been reached. It may be necessary to more closely regulate the process for electing directors, to ensure that all candidates are treated equally.

Australian law

4.185 All Australian listed companies must hold an election for directors each year, with no director having a term in excess of three years without standing for re-election.[309] These elections are conducted by separate resolution of shareholders on each candidate for director, unless otherwise agreed without dissent at the meeting.[310] The board may fill casual vacancies, but persons so appointed must submit themselves for election at the next annual general meeting.[311] The shareholders, by ordinary resolution, may also remove a director at any time.[312]

4.186 The Corporations Law does not prescribe any standardised method of election. This matter appears not to have been dealt with in any current codes of best practice.

Governing principles

4.187 The Advisory Committee proposed in the September 1999 Discussion Paper that any procedure for electing directors of listed public companies should satisfy the following two principles.

> ***Equal opportunity principle:*** *all candidates in an election where there are more candidates than vacancies should have an equal opportunity to be elected.*
>
> This principle may not be satisfied under a sequential voting system whereby some candidates can be elected as directors, and fill all the available board positions, before shareholders have voted on other candidates.[313]

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309 ASX Listing Rules 14.4-14.5.

310 s 201E.

311 s 201H.

312 s 203D. Directors may also be removed by procedures set out in a company's constitution: *Dick v Convergent Telecommunications Ltd* (2000) 34 ACSR 86.

313 In *Brettingham-Moore v Christie* (Supreme Court of Tasmania, 21 November 1969, per Neasey J), there were five candidates for three board positions. A sequential system of election was adopted, whereby the first three candidates were placed before the meeting one by one, and each was elected by separate majority vote. The chairman then declared that the election was complete, given that all board positions had been filled, notwithstanding that the meeting had not voted on the remaining two candidates. Subsequently at the meeting, the chairman accepted a motion that the election of the first three candidates be declared null and void and that a ballot be taken. That motion was put to a vote and lost. Neasey J held that in these circumstances the first three candidates had been validly elected. However, the Court's ruling depended on the effect of the vote on the motion. According to His Honour: "I think the *result of the motion* must be

Majority vote principle: *a candidate in any election, whether or not there are more candidates than vacancies, should only be elected if that person receives more votes for than against him or her.*

This principle requires that shareholders have a clear right to elect as many or as few of the candidates as they choose, though no more than the number of available board positions. However, they should not be compelled to fill all available board positions. They must be free to choose to leave any or all of the board positions vacant, by being able to vote against particular candidates. The right of shareholders to decide that not every vacancy should be filled differs, for instance, from Parliamentary elections where all seats are filled.

Issue 28. *Should listed public companies be required to adopt procedures for the election of directors that meet the equal opportunity and majority vote principles? If so, should the requirement be set out in the Corporations Law or, alternatively, in the Listing Rules of the relevant exchange?*

Submissions on Issue 28

Support principles

4.188 Most respondents favoured procedures for the election of directors that meet the equal opportunity and majority vote principles.[314] Some of them favoured these principles being included in the Corporations Law, while others supported their being in the Listing Rules, to provide greater flexibility.

Oppose prescription

4.189 Some respondents argued that listed companies should be encouraged to incorporate the principles in their corporate governance policies and procedures. However, these principles should not become a prescriptive requirement in either the Corporations Law or the Listing Rules.[315]

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accepted as a decision by a majority of the meeting in favour of those three persons being declared as directors, to the exclusion of the other two" (italics added). Neasey J therefore interpreted the final motion as a decision by the meeting on the last two candidates who had not been earlier considered by the meeting.

This case does not support a sequential system of electing directors whereby certain candidates are not considered at all for election, because all board positions have been filled before they are reached. Rather, the case supports the proposition that if there are more candidates than vacancies, a system must be employed which ensures that all candidates come before the meeting for determination so that the true will of the majority can be ascertained in respect of the field of candidates as a whole.

314 AARF, AMP, Australian Credit Forum, Australian Institute of Company Directors, Australian Shareholders' Association, ASX, BHP, Blake Dawson Waldron, Boardroom Partners, Commercial Law Association of Australia, Commonwealth Bank, Computershare Registry Services, IFSA, Law Council, G Long, Telstra, Western Australian Joint Legislation Review Committee.

315 Chartered Institute of Company Secretaries, QBE, Queensland Investment Corporation, Jack Tilburn.

Advisory Committee view

4.190 The Advisory Committee considers that the procedures for the election of directors should be fully transparent. This goal might be best achieved through Exchange Listing Rules requiring companies to describe their procedures in the information accompanying the notice of any meeting at which directors are to be elected.

4.191 The Committee regards the equal opportunity and majority vote principles as underpinning best practice in electing directors. Each relevant Exchange might consider referring to these principles in its Listing Rules and requiring companies to indicate, in their notice of meeting, how their procedures fit within these principles. This approach would allow the equal opportunity and majority vote principles to be developed in a less prescriptive and more flexible form than a statutory provision would require.

Recommendation 28: Election of directors

Each relevant Exchange might consider introducing a Listing Rule to require companies to include their procedures for electing directors in the notice of any shareholder meeting at which such an election is to be conducted.

Each relevant Exchange might also consider introducing a Listing Rule which refers to equal opportunity and majority vote principles and requires companies to indicate how their director election procedures fit within these principles.

Single simultaneous ballot

The issue

4.192 One possible way to achieve the equal opportunity and majority vote principles is through a single simultaneous ballot for all candidates which permits multiple positive voting limited to the number of available board positions and negative voting against as many candidates as one wishes.[316] Without this form of negative voting, a

316 *Elections where there are more candidates than vacancies.* A single simultaneous ballot for these elections which satisfies these principles could take the following form.

> "[X] candidates are seeking election for [Y, where Y is less than X] vacancies on the board. Next to the name of each candidate is a 'for' and an 'against' box.
>
> You may vote all your shares more than once, but for no more than [Y] candidates. You may do this by placing a mark in the 'for' box of up to [Y] candidates. Note: if you mark more than [Y] 'for' boxes, your vote will be invalid.
>
> Regardless of whether you have voted in the 'for' box of one or more candidates, you may vote all your shares against any number of candidates, including more than [Y] candidates. You may do this by placing a mark in the 'against' box of those candidates."

Under this system, more candidates may receive an excess of positive over negative votes than the number of board positions to be filled. Those candidates could be ranked according to the number of positive votes that they have received (in effect, disregarding their negative votes at this stage). The candidates would then be elected from the top down until all the board positions were filled.

majority of shareholders could be denied the right to leave any or all of the board positions vacant. Also, without negative voting, a director installed by only a minority of votes could be voted out of office by the majority of shareholders subsequently passing a resolution for that person's removal.[317] Negative voting would avoid this two step process.

Issue 29. *Should a single simultaneous ballot for all candidates, which permits positive and negative voting, be introduced as a model for all listed public companies?*

Submissions on Issue 29

Support

4.193 Some respondents favoured all directors being elected through a single simultaneous ballot.[318] One respondent argued that the single simultaneous ballot approach is sufficiently generic to suit all listed public companies, regardless of their size or shareholding spread. To allow alternatives not only is unnecessary, but also has the potential to reduce shareholders' familiarity with the basic approach.[319]

4.194 Some respondents favoured including the requirement in the Listing Rules.[320]

Oppose

4.195 Some other respondents opposed any statutory requirement for a single simultaneous ballot, arguing that it may not be appropriate in all cases.[321] A single

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Elections where there are not more candidates than vacancies. A single simultaneous ballot for these elections which satisfies these principles could take the following form.

> "[X] candidates are seeking election for [Y, where Y is equal to or greater than X] vacancies on the board. Next to the name of each candidate is a 'for' and an 'against' box.
> You may vote all your shares more than once, including for all [X] candidates. You may do this by placing a mark in the 'for' box of up to [X] candidates.
> Regardless of whether you have voted in the 'for' box of one or more candidates, you may vote all your shares against any number of candidates. You may do this by placing a mark in the 'against' box of those candidates."

Only those candidates who receive more positive votes than negative votes would be elected. In consequence, not all the board positions would necessarily be filled.

The above model voting instructions could also be given to persons acting as nominees, subject to those nominees being permitted to use that voting system on behalf of each of the shareholders they represent. In effect, a nominee would not be treated as one shareholder, but would vote as the representative of each nominator.

The Chartered Institute of Company Secretaries has suggested that in the event of a voting tie, the candidate with the fewest votes against him or her should be elected.

317 Section 203D provides for removal of directors of a public company by ordinary resolution.

318 ASX, Australian Institute of Company Directors, Australian Shareholders' Association, Commercial Law Association of Australia, Law Council, G Long, Telstra, Western Australian Joint Legislation Review Committee.

319 Law Council.

320 Commercial Law Association of Australia, G Long (this respondent would also be satisfied if the requirement was stipulated in an ASIC Practice Note).

321 AMP, BHP, Chartered Institute of Company Secretaries, Commonwealth Bank, IFSA, QBE, Queensland Investment Corporation, Jack Tilburn.

simultaneous ballot was only one of a number of voting systems which may be appropriate for public companies.

Advisory Committee view

4.196 The Advisory Committee considers that the single simultaneous ballot would be an effective and practical method to ensure the proper election of directors of listed public companies. However, the Committee notes the views of some respondents that other voting systems may also be appropriate. It therefore does not recommend that this type of ballot be mandatory. Instead, the Committee encourages each relevant Exchange to consider including the single simultaneous ballot in its Listing Rules as a model form for voting on the election of directors. Some amendment may be required to s 201E to accommodate single simultaneous ballots.

Recommendation 29: Single simultaneous ballot

Each relevant Exchange might consider whether to include the single simultaneous ballot in its Listing Rules as a model form for voting on the election of directors.

Cumulative voting

The nature of cumulative voting

4.197 Under cumulative voting, shareholders may vote their shares multiple times, up to the number of vacancies to be filled. They can cast all their multiple votes for a single candidate or apportion them among different candidates in any manner.

4.198 The rationale of cumulative voting is to assist minority shareholders to secure some representation on the board of directors. The greater the number of vacancies, the higher the possibility of minority shareholders securing some representation by focusing their multiple votes on the same one or few candidates.[322] By contrast, under non-cumulative voting, a majority shareholder, or a majority group of shareholders, could determine all positions on the board.

The issue

4.199 The issue is whether cumulative voting should be mandatory for elections of directors in Australian listed companies.

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322 US commentators on cumulative voting have developed formulae to determine the minimum number of shares needed to elect a director if those shares are cumulated in one candidate: RC Clark, *Corporate Law* (Little Brown & Company, 1986) at 363. The critical percentage for election as a director depends on the number of directors to be elected at a meeting. The higher the number of directors, the lower the percentage shareholding required. Conversely, the lower the number of directors, the higher the percentage shareholding required.

Australian law

4.200 Australian corporate law does not refer to cumulative voting. A Parliamentary Report noted that (provided that the Listing Rules of the relevant Exchange permit cumulative voting[323]):

> "Any corporation could provide for cumulative voting merely by amending its constitution. However, the practice is not popular with those that control companies. It is considered that it would provide a means for pressure groups to obtain blocks of shares with a view to influencing company policy."[324]

Overseas law

4.201 Cumulative voting is mandatory for public companies in some jurisdictions in the United States.[325] It is permissible in most other US jurisdictions, if authorised by the constitution of the company.[326] There is a continuing debate in the United States about whether cumulative voting should be mandatory for public companies.[327] Cumulative voting is permissible in Canada.[328]

Issue 30. *Should the Corporations Law require cumulative voting for the election of directors in listed public companies?*

Submissions on Issue 30

Support

4.202 One respondent tentatively supported cumulative voting, while recognising the need to avoid warring boards.[329] Another respondent considered that the issues involved were not easy to resolve, though cumulative voting could be made optional, which may require amendment to the Listing Rules.[330]

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323 ASX Listing Rule 6.9 provides that, on a poll, each shareholder shall have one vote per share. An amendment or waiver of this Listing Rule would be required to permit cumulative voting.

324 Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs *Corporate Practices and the Rights of Shareholders* (November 1991), para 5.5.14.

325 For instance, California.

326 For instance, Delaware, New York. Cox, Hazen, O'Neal, *Corporations* (loose leaf, Little, Brown and Company) at §13.21, p 13.48.

327 Cox, Hazen, O'Neal, ibid, comment: "It has been suggested that majority shareholders should not have the power to withdraw the privilege of cumulative voting by amendment of the [constitution of the company] or otherwise. If the privilege of cumulative voting is to be granted at all for protection of the minority, it should be made mandatory, not merely permissible at the option of the incorporators or the majority group."
The US SEC has considered making cumulative voting mandatory, but has not done so.

328 Canada Business Corporations Act s 107.

329 G Long.

330 Western Australian Joint Legislation Review Committee.

Oppose

4.203 Most respondents opposed mandatory cumulative voting.[331] Some of those respondents argued that companies already have the option of introducing this form of voting.

4.204 One of these respondents expressed reservations about even permitting cumulative voting for the election of directors. It argued that the "one-vote-one-share" principle is fundamental to the Australian capital market and should not be eroded by a change to voting rights for the election of directors which would require a complete rethink by listed entities and investors of the way in which their financial structures are arranged.[332]

Parliamentary Joint Statutory Committee

4.205 The PJSC Report[333] raised the issue of proportional voting for directors. Most respondents to the PJSC opposed proportional voting, arguing that it would prejudice essential board unity and may promote factions or disharmony. Some respondents to that Committee, however, argued that proportional representation or cumulative voting would be fairer for minority interests.

4.206 The PJSC concluded that it would not be appropriate to require companies to introduce proportional or cumulative voting. Shareholders of particular companies may choose to adopt any form of proportional representation, including cumulative voting. However, this should not be mandatory. Proportional representation has the potential to affect the essential unity and cohesion of a board, with the possibility of factions and dissidents. Proportional representation would also be contrary to the principle of election by an absolute majority of shareholders who vote.

Advisory Committee view

4.207 The Advisory Committee notes that cumulative voting is not prohibited under the Corporations Law, but may require Exchange approval, given the current ASX rule of one vote per share.[334] However, the Committee does not support any legislative provision for cumulative voting.

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331 AMP, ASX, Australian Shareholders' Association, Australian Credit Forum, Australian Institute of Company Directors, BHP, Blake Dawson Waldron, Commercial Law Association of Australia, Commonwealth Bank, Computershare Registry Services, Chartered Institute of Company Secretaries, IFSA, Law Council, QBE, Queensland Investment Corporation, Telstra, Jack Tilburn.

332 AMP. This respondent argued that: "We would not like to see the erosion of the '1 vote - 1 share' principle, which has been firmly enshrined in the Australian market in the aftermath of the important November 1993 ASX Discussion Paper entitled 'Differential Voting Rights'. At that time, the market firmly rejected a move away from that principle. One of the most important ASX Listing Rules continues to be Listing Rule 6.9. The importance of the rule is underlined by the unique practice that ASX does not waive the '1 vote – 1 share' rule unless it gives Treasury the opportunity to disallow the waiver. ASX rarely waives this rule."

333 Parliamentary Joint Statutory Committee on Corporations and Securities, *Report on matters arising from the Company Law Review Act 1998* (October 1999), Chapter 2.

334 ASX Listing Rule 6.9.

Recommendation 30: Cumulative voting

There should be no legislative provision for cumulative voting.

Appendix 1

List of Respondents

AMP Limited

Australian Accounting Research Foundation

Australian Credit Forum

Australian Institute of Company Directors

Australian Shareholders' Association

Australian Stock Exchange

Blake Dawson Waldron

Boardroom Partners

Chartered Institute of Company Secretaries

Coles Myer Ltd

Commercial Law Association of Australia

Commonwealth Bank of Australia

Computershare Registry Services

Claire Grose

Institutional Analysis

Investment and Financial Services Association

Law Council of Australia

Geoffrey Long

NRMA

QBE Insurance Group Limited

Queensland Investment Corporation

Rio Tinto Limited

Telstra Corporation Ltd

The Broken Hill Proprietary Company Limited

Thomson Financial

Jack Tilburn

Jon Webster

Western Australian Joint Legislation Review Committee (representing the Chartered Institute of Company Secretaries in Australia, the Australian Society of CPAs and the Institute of Chartered Accountants Australia)

Appendix 2

List of Recommendations

Chapter 1. Corporate decision-making

Recommendation 1: Equal access to information

No legislative amendment is needed to assist shareholders to have equal and simultaneous access to material information given by listed public companies about their affairs.

Chapter 2. Calling a meeting

Recommendation 2: Requisitioning a general meeting

The Corporations Law should provide that only shareholders who, collectively, have at least 5% of the votes that may be cast at a general meeting should have the power to requisition a general meeting of a listed public company.

Recommendation 3: Information in a notice of meeting

There should be no legislative prescription of the information to be contained in a notice of meeting of a listed public company.

Recommendation 4: Notice to beneficial shareholders

There should be no legislative procedure for listed public companies to communicate directly with the beneficial owners of shares held by nominees.

Chapter 3. Settling the agenda

Recommendation 5: Threshold for proposing resolutions

The current Corporations Law prerequisites for shareholders to move resolutions at meetings of listed public companies, namely at least 5% of the votes that may be cast on the resolution or 100 shareholders who are entitled to vote at a general meeting (s 249N(1)), should remain. However, each of the 100 shareholders should be required to hold shares of a meaningful economic value, say, $1,000 (as measured by the highest market value in the 12 months prior to giving the company the notice of the resolution).

Recommendation 6: Notice of next annual general meeting

All listed public companies should be required to give the relevant Exchange at least three months' notice of the date of their next annual general meeting. This requirement should be in the Corporations Law unless implemented through the Listing Rules of the relevant Exchanges. There should be discretionary powers to

permit companies to reschedule their meetings or shorten the notice period in appropriate circumstances.

Recommendation 7: Exclusion of persons who have failed to present a resolution

There should be no legislative restriction on persons who have failed to present a resolution in presenting subsequent resolutions.

Recommendation 8: Non-binding resolutions

There should be no legislative provision permitting shareholders to pass non-binding resolutions on matters outside their constitutional powers.

Chapter 4. Conducting the meeting

Recommendation 9: Proxy solicitations

There should be no statutory regulation of proxy solicitations.

Recommendation 10: Proxy notification

There should be no statutory obligation on listed public companies to issue bar-coded entry cards as an alternative to notification of proxies.

Recommendation 11: Irrevocable proxies

There should be no legislative provision for irrevocable proxies.

Recommendation 12: Body corporate as a proxy

There should be legislative provision for shareholders to appoint a body corporate as a proxy.

Recommendation 13: Obligation of board proxy to vote on a poll

There should be a legislative requirement for any person put forward by the company board as a proxy to vote the proxies on any poll according to their terms.

Recommendation 14: Disclosing proxy information prior to the meeting

There should be no legislative regulation dealing with access to or disclosure of proxy voting details prior to a meeting. However, each relevant Exchange might consider introducing into its Listing Rules a requirement that an independent person receive and collate proxy votes.

Recommendation 15: Disclosing proxy information prior to debate at the meeting

There should be no legislative provision dealing with the disclosure of proxy voting details prior to the debate at a meeting. This should remain a matter of discretion for the chair.

Recommendation 16: Disclosing proxy information in the minutes of the meeting and subsequent access to this information

The current requirement in s 251AA(1)(a) for disclosure of proxy voting information where resolutions have been decided by show of hands should be retained, and extended to include direct absentee votes, if introduced. However, s 251AA(1)(b) should be amended to exclude the information in s 251AA(1)(a).

Any one or more shareholders who between them have at least 5% of the issued voting shares should have a legislative right to inspect proxy documentation for 48 hours after the conclusion of the general meeting of a listed public company.

Recommendation 17: Obligation of scheme managers or institutional shareholders to attend or vote

There should be no statutory obligation for scheme managers or institutional shareholders to attend or vote at general meetings of listed public companies.

Recommendation 18: Voting by show of hands

There should be no legislative prohibition on voting by show of hands. Also, there should be no legislative requirement that the chair demand a poll where the chair holds proxies which may overturn the decision on the show of hands.

Recommendation 19: Vote counting and scrutineering

There should be no legislative regulation of vote counting and scrutineering on a poll.

Recommendation 20: Direct absentee voting

The Corporations Law should permit the directors of a listed public company to provide for direct absentee voting, subject to any restriction in the company's constitution. Where direct absentee voting is used, the first vote recorded by the company should be the valid vote.

Recommendation 21: Disclosing absentee voting prior to the meeting

There should be no legislative regulation dealing with access to or disclosure of direct absentee voting details prior to a meeting. However, the relevant Exchange might consider introducing into its Listing Rules a requirement that an independent person receive and collate absentee votes.

Recommendation 22: Disclosing absentee voting prior to debate at the meeting

There should be no legislative provision dealing with the disclosure of direct absentee voting details prior to the debate at a meeting. This should remain a matter of discretion for the chair.

Recommendation 23: Direct absentee voting in lieu of physical meeting

Listed public companies should not be permitted to pass resolutions by direct absentee voting without holding a physical meeting.

Recommendation 24: Postponed voting

There should be no legislative provision permitting post-meeting voting.

Recommendation 25: Functions and duties of the chair

There should be no statutory formulation of the functions and duties of the chair of a meeting of a listed public company.

Recommendation 26: Formalities of moving motions

There should be no statutory provision dispensing with the formalities of moving motions. Also, there is no need for a statutory provision to permit the chair to move motions.

Recommendation 27: Motions of dissent from the chair's ruling

There should be no statutory regulation of the process of moving motions of dissent from a chair's ruling.

Recommendation 28: Election of directors

Each relevant Exchange might consider introducing a Listing Rule to require companies to include their procedures for electing directors in the notice of any shareholder meeting at which such an election is to be conducted.

Each relevant Exchange might also consider introducing a Listing Rule which refers to equal opportunity and majority vote principles and requires companies to indicate how their director election procedures fit within these principles.

Recommendation 29: Single simultaneous ballot

Each relevant Exchange might consider whether to include the single simultaneous ballot in its Listing Rules as a model form for voting on the election of directors.

Recommendation 30: Cumulative voting

There should be no legislative provision for cumulative voting.