

# Submission to the Corporations and Markets Advisory Committee

## The AGM and Shareholder Engagement Discussion Paper

By the UWS Law of Associations Group

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### Introduction

This submission addresses the release of the CAMAC's discussion paper on the *AGM and Shareholder Engagement* (September 2012). The UWS Law of Associations Group wishes to provide an informed debate on the critical issues raised by the discussion paper. Some of the suggestions that have been provided in this submission are of a policy nature and consider how to improve shareholders' engagement at AGMs.

If any of the responses require further explanation please contact Dr Marina Nehme at the UWS School of Law at [m.nehme@uws.edu.au](mailto:m.nehme@uws.edu.au).

## Members involved in producing this response

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## General Observations:

The Discussion paper, *The AGM and Shareholder Engagement*, considers the future of AGMs in Australia and discusses the introduction of strategies that may improve shareholders' engagement at AGMs. The observations of the UWS Law of Associations Group can be summarised in the following manner:

- Corporate briefing content should be available to retail shareholders;
- The '100 member rule' should be abolished. In its place, s 249D should provide that 5% of the shareholders in the company may request a meeting from the directors;
- Reforms need to be made to the reporting requirements. Changes to the reporting system need to be accompanied with a safe-harbor to directors (see [4.3]);
- The statutory time frame for AGMs need to be extended;
- Any member should be able to place items on the agenda of an AGM to encourage shareholders involvement;
- Direct voting prior and during the meeting should be introduced;
- Greater use of technology is needed to enhance different aspects of AGMs such as notices, the meetings themselves, the reporting requirements...
- The AGM should not be abolished but its format should be changed. AGMs should take the form of hybrid physical-online meetings. This should be compulsory for listed public companies and a replaceable rule for unlisted public companies.

## Consideration Chapter 3

### [3.1] The role of the board collectively as it relates to engagement with institutional/retail shareholders throughout the year, including leading up to the AGM

We do not support the introduction of legislation in this area. We believe that, under the current system, there is enough guidance for companies and directors regarding this matter. Consequently, the implementation of initiatives to engage shareholder should be left in the hand of the board of directors.

### [3.2] The role of particular board members, such as the board chair or the chairs of board committees, in relation to engagement with institutional/retail shareholders

We do not support the introduction of legislation in this area. It should be up to each company to decide on the manner in which they engage their shareholders. Consequently, this matter should be left to the discretion of each company.

### [3.3] The role of institutional shareholders throughout the year, including leading up to the AGM. In this context:

– is there a problem with having a peak AGM season and, if so, how might this matter be resolved

The problem that arises from having a peak AGM season is highlighted in Chapter 5 of the CAMAC discussion paper. This problem may be resolved by extending the AGM period. See [5.1] of this submission for further discussion on this point.

– should at least some institutional shareholders be required or encouraged to report on the nature and level of their engagement with the companies in which they invest, in the manner provided for in the UK Stewardship Code or otherwise

We do not support the introduction of a Stewardship Code equivalent in Australia because institutional shareholders partake in a broad cross-section of the Australian corporate market and the imposition of reporting requirements would pose an undue burden. This burden would arise on two fronts. First, the requirement that institutional investors detail the nature and extent of their investments would be difficult to monitor and maintain. Second, the requirement would incur costs (which are likely to be substantial, given the diversity and scope of most institutional shareholders' investments). We contend that this requirement is untenable.

### [3.4] Corporate briefings

We agree with the statement made in the Parliamentary Joint Committee's *Better Shareholders - Better Company Report* that limited shareholders' engagement is the result of 'company or shareholder inertia or apathy, or companies' cultural resistance to acknowledging the views of investors.'<sup>1</sup> It is therefore necessary for companies to actively

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<sup>1</sup> Parliamentary Joint Committee on Corporations and Financial Services, *Better Shareholders – Better Company: Shareholder Engagement and Participation in Australia*, June 2008.

encourage and facilitate shareholder participation through corporate briefings.

We contend that ensuring equality of access to corporate briefing information, by way of advance notice to shareholders and employment of technological alternatives (such as making recordings, transcripts, or summaries available), is fundamental to facilitating optimal pre and post-briefing shareholder engagement. Moreover, the corporate briefings should be made publically accessible in circumstances where they contain material information which could impact on the share price of the company. Failure to make these briefings public may result in the breach of the continuous disclosure obligations by the company and, if any person acted in accordance with the information obtained in the course of the briefing, the conduct could constitute insider trading.

[3.5] The role of proxy advisers, including:

– standards for investors using proxy advisers, including the extent to which these investors should be entitled to rely on the advice of proxy advisers in making voting decisions, or, alternatively, whether those investors should have some obligation to bring an independent mind to bear on these matters.

Even though there may be blind reliance by investors on the recommendations of proxy advisers, no regulation is required or recommended to address this issue. It is the right of investors to decide how to use the information they have acquired. They must be able to decide whether or not to follow the information conveyed. Ultimately, it is the investor's choice. Further, the implementation of any regulation may be costly and difficult to enforce.

– standards for proxy advisers

The introduction of a disclosure obligation is necessary to regulate any conflicts of interest that may arise. Accordingly, we recommend that a statutory obligation be imposed requiring proxy advisers to disclose any material interests to their shareholders, irrespective of whether the motions they have been party to and/or have participated in pass or fail.

[3.6] Any other aspect of shareholder engagement?

No comment regarding this matter.

[3.7] Could greater use be made of technology to promote shareholder engagement outside the AGM and, if so, how?

Yes, greater use of technology can be made to maximise shareholder engagement outside the AGM. We recommend that:

- Proxies could be voted electronically.
- The conduct of corporate briefings and AGMs could be supplemented by alternative means of communication including telephone, video conferencing, Skype calls.
- Records, transcripts and summaries of meetings and corporate briefings should be made available by each company on their website and to shareholders by email after the minutes are approved by the chair.

[3.8] Should there be an amendment to the right of 100 members to call a general meeting of a company?

The proposal to repeal or amend the ‘100 member rule’ isn’t a novel one. It has been raised and discussed at length in the past decade.<sup>2</sup> The most compelling reasons for which this issue is raised time and time again are:

- There is no ‘degree of parity between five per cent of votes and 100 members.’<sup>3</sup> The arbitrariness of the 100 member rule was highlighted by Windeyer J in *NRMA v Snodgrass*<sup>4</sup> when his Honour noted that it is ‘extraordinary that in a company... with about 2 million members a general meeting can be summoned by requisition of 100 members, namely one in every 20,000 or 0.005 percent.’
- The repeal of the 100 member rule will bring s 249D in line with s 249F and thereby ensure consistency in the *Corporations Act 2001* (Cth).
- The cost of complying with requests made by a small proportion of shareholders is substantial.

Most compelling counter-arguments include the assertion that:

- The *Corporations Act 2001* (Cth) imposes the satisfaction of the requirements that the call for a general meeting be made for a ‘proper purpose.’<sup>5</sup> This requirement acts as a countermeasure against any potential abuse by shareholders of the 100 member rule;
- The 100 member rule encourages shareholders engagement;<sup>6</sup> and
- The expense to shareholders under s 249F would operate as a deterrent to any vexatious shareholders. Consequently, the 100 member rule is not appropriate in that context.

Ultimately, it is our position that amendment to the right of 100 members to call a general meeting should be made. In the continuum of proprietary and listed/unlisted public companies, the 100 member rule is arbitrary as it is unlikely to be relied on in the case of a proprietary company (see membership requirements under s 113(1) of the *Corporations Act*

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<sup>2</sup> Parliamentary Joint Statutory Committee on Corporations and Securities, *Report on Matters arising from the Company Law Review Act 1998*, 1999 noted that the 100 shareholder threshold was “administratively complex and uncertain”; the Companies and Securities Advisory Committee, *Shareholder participation in the Modern Listed Public Company: Final Report*, June 2000, 9 recommended that the 5% of share capital be the sole criterion for member initiated general meetings; the *Corporations Amendment Regulation 2000* altered the 100 member rule to 5% of shareholders but was repealed by the Senate in June 2000 and further, unsuccessful amendment attempts were made by virtue of the *Corporations Amendment Bill (No. 4) 2002* (Cth) and the *Corporations Amendment Bill (No. 2) 2006* (Cth).

<sup>3</sup> New South Wales Young Lawyers, *Response to the Exposure Draft Bill for Consultation – Corporations Amendment Bill (No. 2) 2006*, 2006, 4.

<sup>4</sup> [2001] NSWSC 76, [10].

<sup>5</sup> *Corporations Act 2001* (Cth) s 249Q.

<sup>6</sup> See for example, Michael Rawling, ‘Australia Trade Unions as Shareholder Activists: The Rocky Path Towards Corporate Democracy’ (2006) 28 *Sydney Law Review* 227.

2001 (Cth)) or it may be misused by a bare minority (in the case of a public company that has millions of shareholders). In our view, this further illustrates the need to amend the 100 member rule in favour of 5% of shareholders requirement. This requirement will still support minority shareholders engagement.

#### Consideration Chapter 4

##### [4.1] Do the current reporting requirements produce any unnecessary information ('clutter') in annual reports and, if so, how might this be reduced

An annual report should provide an organisation with an 'effective method of managing external expectation.'<sup>7</sup> However, this outcome has not always been achieved in practice. For instance, the PJC's *Better Shareholders – Better Company* indicated clearly that retail shareholders are finding it difficult to access the information needed to make decisions.<sup>8</sup> Additionally, the Australian Shareholder's Association (ASA) found that shareholders just 'look at them [reports] but give up before reading them'<sup>9</sup> because the reports are 'too voluminous' for shareholders to even read or consider.<sup>10</sup> Further, the Financial Reporting Council noted the 'clutter' of immaterial information present in the annual report.

This reality is problematic as 'the annual report is the primary source of information regarding a company's activities and strategies.'<sup>11</sup> Consequently, it is important for all shareholders – both retail and institutional – to read the reports to be able to make informed decisions about their investments. Currently, the clutter of information provided by the reporting requirements defeat the purpose of the actual report.

Consequently, we propose the introduction of a new reporting regime that makes information regarding the company more accessible to all shareholders. The company may issue two reports:

- The annual report (the information that needs to be in the report would be consistent with our proposal found in 4.2); and
- A short form report which contains the main information or a summary of the information present in the annual report.

The short form report is to be sent to all shareholders. If shareholders would like to receive more information, then they can ask for the annual report to be sent to them. Such an approach provides the shareholders with the necessary information they need to make their

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<sup>7</sup> D. Neu, H. Warsame and K. Pedwell, 'Managing Public Impressions: Environmental Disclosures in Annual Reports' (1998) 23(3) *Accounting, Organizations and Society* 265, 269.

<sup>8</sup> Parliamentary Joint Committee on Corporations and Financial Services, *Better Shareholders – Better Company: Shareholder Engagement and Participation in Australia* (2008) 11.

<sup>9</sup> Commonwealth of Australia, *Parliamentary Debates*, Joint Committee on Corporations and Financial Services, 16 April 2006, 21 (Claire Doherty).

<sup>10</sup> *Ibid.*

<sup>11</sup> Allens Linklaters, *Allens Listed Client Survey CAMAC Review of Annual General Meetings* (2012), 10.

decision. Further, it will still allow the company to rely on the annual report as an effective marketing tool to send a certain corporate image or message to investors.<sup>12</sup>

[4.2] Should the reporting requirements be redesigned in any respect, including along any of the lines adopted, or under consideration, in overseas jurisdictions, such as having a strategic report and an annual directors' statement

Reporting requirements should be reviewed and redesigned to ensure that the shareholders are provided with clear and precise information. We believe that the annual report should consist of three parts:

- The first being a strategic report which will be similar to that of the UK's version, however adapted to Australian conditions;
- The second report should be the annual directors' statement which will also be similar to that of the UK's version, however adapted to Australian conditions; and
- The third report called the Shareholder's Report will be purely based on what the shareholders of the company think or acknowledge would be the appropriate information for them. During the AGM, the shareholders would be asked to vote on what information they would like next year's report to include. Voting regarding this matter will be conducted by show of hands (not by poll) to give a voice to retail shareholders. This model may promote shareholder's engagement as they will have a say in what additional information may appear in the report.

[4.3] What, if any, issues of liability might arise in the event of changes to the reporting requirements, particularly in relation to forward-looking statements, and how might this matter be dealt with

Introducing any new reporting system needs to be accompanied with clear guidelines and rules. Anything less may lead to the current problem of complex reporting. Company directors have an increased aversion to risk especially in existing litigious business environment. Consequently, when they are unsure if a matter should be reported on, they would disclose it to escape any potential liability.<sup>13</sup> This uncertainty creates the clutter referred to previously in this submission.<sup>14</sup> Unclear guidelines regarding a new reporting regime will lead to the same clutter of information that is currently present in the annual report.

Further, forward-looking statements of belief or judgement may raise additional liability on directors. It is important to note that this is currently the case as Australian companies do include forward-looking statements in their annual reports.<sup>15</sup> A study conducted by Kent and

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<sup>12</sup> Madonna O'Sullivan, Majella Percy and Jenny Stewart, 'Australian Evidence on Corporate Governance Attributes and their Association with Forward-Looking Information in the Annual Report' (2008) 12(1) *Journal of Management and Governance* 5, 6.

<sup>13</sup> Financial Reporting Council, *Managing Complexity in Financial Reporting* (2012) 6.

<sup>14</sup> See for example, [4.2].

<sup>15</sup> *Corporations Act 2001* (Cth), 299.

Ung further indicated that larger companies with less volatile earnings are more likely to provide prospective information than smaller companies with relatively volatile earnings.<sup>16</sup>

While directors may be liable for information in the annual report, they do not have a safe-harbour available to them. The FRC proposed the introduction of such a safe-harbour or a business judgement provision. We do believe that a safe-harbour should be available to directors. However, we do not believe it should be in the form of a business judgement rule akin to the one present under s 180(2) of the *Corporations Act 2001* (Cth). The reason behind this is that the business judgement rule is problematic and needs to be amended.<sup>17</sup> The safe-harbour we propose should be akin to the one present in s 731 of the *Corporations Act 2001* (Cth). Consequently, the safe-harbour would be available if the directors:

- Made all inquiries that were reasonable in the circumstances; and
- Based on these inquiries, the directors believed on reasonable grounds that the statement was not misleading and that there was no omission in the annual report.

This safe-harbour may protect directors from liability when annual reports are issued.

#### [4.4] How might technology best be employed to increase the accessibility of annual reports

Technology can be best employed through two different methods:

- Firstly, the annual reports should be published online in a pdf format. This will allow members to quickly access the information they need;
- Secondly, a quick summary of the report should be available online with key information. This report has to meet the users' needs by providing interactive information to members. It will further allow the users not only to filter the specific information they require but also to access the level of detail that best suits them. This approach is best implemented with the use of graphical and animated media to express to shareholders who lack financial or business knowledge the desired information in a simple visual display. An example of this can be found in the Barclays Annual Report 2011.<sup>18</sup> Such a report allows interested parties to quickly click on the desired part of the report without contending with the pages ahead.

In addition to this, an offline soft copy version of the report should also be provided. This will help shareholders who lack the resources to access the internet. This can be done by providing the WebPages of the report in an offline format, which can be easily done, as WebPages can be created in an offline format. This type of copy should be distributed through either a Compact Disc or a USB flash drive.

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<sup>16</sup> Pamela Kent and Karen Ung, 'Voluntary Disclosure of Forward-Looking Earnings Information in Australia' (2003) 28(3) *Australian Journal of Management* 273.

<sup>17</sup> UWS Corporate Law Academics, *Submission to the Commonwealth Treasury, Review of Sanctions in Corporate Law Consultation Paper*, 31 May 2007.

<sup>18</sup> Barclays, *Barclays Annual Report 2011*,  
<<http://reports.barclays.com/ar11/strategicreport/leadership/barclaysataglance.html?cat=m>>.

[4.5] What, if any, initiatives might be introduced to cater for future innovations in reporting (for instance, would it be beneficial to establish the equivalent of a Financial Reporting Laboratory)?

If companies adopt the reporting approach proposed at [4.2], there will not be a need to establish a Financial Reporting Laboratory. The existence of a Shareholder's Report will act like a Financial Reporting Laboratory since shareholders can constantly change the third report to better suit their dynamic needs.

## Consideration Chapter 5

[5.1] Should there be any change to the statutory time frame for holding an AGM?

The majority of public companies hold their AGM between November and December due to the statutory time requirement imposed by the *Corporations Act 2001* (Cth). This has led to a 'congestion' of AGM in a short period of time.

Allens has issued the results of its client's survey regarding this question. The majority of the respondents were opposed to any changes to the statutory time frame for holding an AGM.<sup>19</sup> Similarly, the ASA did not support an increase in the window for the holding of the AGM as such an extension may not necessarily lead to a better quality of shareholders' engagement. The ASA has noted that companies who have held their AGM outside the two months period – because they received an extension from ASIC regarding this matter – do not necessarily have a better engagement or participation from shareholders.<sup>20</sup>

Even though this may be the case, the extension of the statutory time frame to three months instead of two months may:

- Provide more time for shareholders to consider each motion. Accordingly, this proposal may actually allow the AGM to facilitate shareholders' engagement.
- Allow directors to have greater access to institutional shareholders during peak members' meeting season. They currently do not have such access due to the fact that institutional shareholders are focused on lodging their voting;<sup>21</sup>
- Will add to the flexibility in managing the timing of AGMs; and
- Will not add any extra costs for the corporations.

Consequently, in view of the fact that changing the statutory time frame for holding an AGM is cost neutral, may lead to greater flexibility and more shareholders' engagement, we support the extension of the period in which an AGM has to be held.

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<sup>19</sup> Allens, *Allens Listed Client Survey: CAMAC Review of Annual General Meetings* (2012), 13.

<sup>20</sup> Australian Shareholders Association, *ASA Submission: Rethinking the AGM* (2008) 2.

<sup>21</sup> Australian Institute of Company Directors, *Institutional Share Voting and Engagement: Exploring the Links between Directors, Institutional Shareholders and Proxy Advisers* (2011) 4.

[5.2] In what respects, if any, might the requirements for information to be included in the notice of meeting for an AGM be supplemented or modified?

The existing system already requires the AGM meeting's notice to contain full and timely details of company meetings. Further, according to s 249L(3) of the *Corporations Act 2001* (Cth) the information included in the notice must be stated in a 'clear, concise and effective manner.'

Consequently, the information required under the statute and the common law is enough to allow shareholders to make an informed decision about the meeting. Further, the requirements are in accordance with the recommendations of the OECD *Principles of Corporate Governance*. As a result, we do not believe that any change needs to be made in this area.

How might technology be used to make this notice more useful to shareholders?

A provision similar to the one present under s 300 of the *Companies Act 2006* (UK) may be introduced. Such a provision requires companies to post the notice of a meeting on its website. The notice will be available on the website throughout the period beginning with the date of that notification and ending with the conclusion of the meeting. Additionally, information regarding the meeting may be texted or emailed to members if the shareholders opted for this.

Might any other documents usefully be sent with the notice of meeting, and, if so, what?

It would be beneficial for the company to make available to shareholders any private briefing issued by the company to institutional shareholders regarding the matters discussed in the meeting. This will ensure that all shareholders have access to the same information.

[5.3] Should there be provisions for companies to send information about an AGM directly to the beneficial owners of shares held by nominees and, if so, what type of information?

Such a requirement is unnecessary for the reasons highlighted by the *CASAC Report*.<sup>22</sup>

Should there be any provision for beneficial owners of shares in a company to participate in the AGM of that company and, if so, how?

No, there should not be any provision for beneficial owners of shares in a company to participate in the AGM of a company. It is up to these beneficial owners to decide the level of their engagement with the company.

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<sup>22</sup> Companies and Securities Advisory Committee, *Shareholder Participation in the Modern Listed Public Company Final Report* (2000) [2.43].

[5.4] Should there be any change to the threshold tests for shareholders placing matters on the agenda of an AGM?

Different countries have different requirements regarding this matter. For example, in the United Kingdom, shareholders may place a matter on the agenda of an AGM if:<sup>23</sup>

- members representing at least 5% of the total voting rights of all the members who have a relevant right to vote (excluding any voting rights attached to any shares in the company held as treasury shares), or
- at least 100 members who have a relevant right to vote and hold shares in the company on which there has been paid up an average sum, per member, of at least £100.

In Sweden, on the other hand, the situation is very different. In Sweden, every shareholder (irrespective of the amount of shares they have) may place a matter on the agenda of the AGM.<sup>24</sup> The latest model encourages shareholder engagement as it promotes the freedom to be heard and the right to receive answers to questions that retail shareholders may have. This method may be one way to boost attendance at meetings as retail shareholders have a say in the shaping of the agenda as long as their motion is for proper purpose (in accordance with s 249D). Consequently, we support this proposal.

[5.5] Should there be any change to the timing requirements for the calling of an AGM, including for shareholders to place matters on the agenda of an AGM, to seek the circulation of statements concerning any resolution, or to nominate persons for the position of director? Should companies be required to publish a pre-agenda notice and, if so, what should be the contents and timing of that notice?

No comment regarding these matters.

[5.6] Does the current law concerning excluded material either create undue difficulties for shareholders who wish to criticise directors or, conversely, unduly restrict directors in vetting out information to be circulated to shareholders at the company's expense?

The current regime regarding excluded material is fair and reasonable. Consequently, we do not propose any changes to the current regime.

[5.7] Should there be any rule regarding the failure to present a resolution at an AGM?

We recommend that the regime remain as is.

[5.8] Should shareholders have greater scope for passing non-binding resolutions at AGMs?

Shareholders should not have a greater scope in passing non-binding resolutions at AGM's as such a proposal may transfer the powers of the board of directors to the members. The reasons behind this are the following:

- Shareholders, unlike directors, have no common law, equitable or statutory duties imposed on them. As a consequence, their actions can be self-motivated and not

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<sup>23</sup> *Companies Act 2006* (UK), s 314.

<sup>24</sup> *Companies Act 2005* (Sweden), Chapter 7, s 16.

necessarily for the best interest of the members as a whole. Accordingly, shareholders should not micro-manage the affairs of the company;

- Giving greater scope of power to members may diminish the accountability of directors; and
- It would be contrary to the OECD recommendation.

[5.9] What, if any, additional legislative or best practice procedures should be adopted for companies to seek the views of shareholders on issues they would like discussed at the AGM, or to invite shareholders to submit questions prior to the AGM?

We believe that the proposal outlined in the Business Council of Australia Discussion Paper, *Company and Shareholder Dialogue: Fresh approaches to communication between companies and their shareholders* (2004), should be adopted. Hence, the AGM would have two parts:

- Formal business of the meeting: this will allow shareholders to continue voting on the formal business of the meeting, as usual; and
- Specific issues raised by the shareholders on which they cannot vote on.

Should there be some obligation on the auditor (or the representative of the auditor) to speak at the AGM?

We support the current position. Auditors should continue to have a right to speak or answer questions at the AGM. This position also ensures that we are following the OECD standards of good corporate governance.

What, if any, obligations should a company or a company auditor have to answer questions from shareholders?

No comment regarding this matter.

[5.10] Should any matter be excluded from or, alternatively, added to the business of the AGM?

No comment regarding this matter.

[5.11] What, if any, changes are needed to the current position concerning:  
• the general functions and duties of the chair

We do not recommend a change to these functions.

- the chair ensuring attendance of particular persons at the AGM

The procedure in the United Kingdom Corporate Governance Code regarding this matter<sup>25</sup> should be adopted in Australia. This means that the chair should arrange for audit,

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<sup>25</sup> UK Corporate Governance Code, s E2.3.

remuneration and nomination committees to be present and able to answer questions at the AGM. This proposal will enhance the accountability regime embedded within the AGM.

- the chair moving motions

We do not recommend any changes to the law regarding this matter.

- motions of dissent from a chair's rulings?

We do not recommend any changes to the law regarding this matter.

Should a chair be obliged to provide shareholders with a reasonable opportunity to discuss a resolution before it is put to the vote?

No comment regarding this matter.

Should a chair have the power to impose any time, or other, limits on an individual shareholder speaking at the AGM?

No comment regarding this matter.

[5.12] What changes, if any, should be made to the current requirements concerning:

- informing shareholders of their right to appoint a proxy
- the proxy form
- pre-completed proxies
- notifying the company of the proxy appointment
- providing an audit trail for lodged proxy votes
- the record date and the proxy appointment date
- irrevocable proxies
- directed and undirected proxies
- renting shares
- proxy speaking and voting at the AGM, or
- any other aspect of proxy voting.

No comment regarding this matter.

[5.13] Should direct voting before the meeting be provided for by legislative or other means, and if so what matters should be covered in any regulatory structure?

Direct voting prior and during the AGM should be provided for by legislation. The regulatory structure needs to cover:

- the form of voting to be implemented;
- the time limits for lodging the direct votes;
- what should happen if there is a change in voting intention from the time that a direct vote is lodged prior to a meeting to the time of the meeting.

[5.14] In what circumstances, if any, should access to pre-meeting voting information be permitted?

Pre-meeting voting information should be restricted and not accessible to anyone other than an independent third party. This person is independent from the board and will be in charge of receiving, collating and checking proxy votes prior to the meeting. He/she will have a duty not to disclose any information about the votes received. Accordingly, pre-meeting voting should remain strictly confidential and off-limits to both directors and shareholders.

This would eliminate the current possibility of directors using their powers to obtain pre-meeting voting information that is not publicly available to solicit votes or to influence the result of resolutions by publishing a progressive tally of pre-meeting voting directions.<sup>26</sup> Additionally, as pre-meeting voting information is not directly related to the function of managing the company, it may be argued that director's access to this information is irrelevant given that it concerns matters within the control of the shareholders, not the directors.<sup>27</sup>

Lastly, disclosing pre-meeting voting information at a meeting may have significant implications when debating a particular resolution.

[5.15] In what manner if any, should access to pre-meeting voting information be regulated before discussion on a proposed resolution?

Before discussion on a proposed resolution is completed, only the independent person who is in charge of collating the votes should be able to access to pre-meeting voting information. The reasons behind this are stated in [5.14].

[5.16] In what manner, if any, should the current requirements concerning the disclosure of pre-meeting votes before voting on a resolution be amended?

The current requirements concerning the disclosure of pre-meeting votes before voting on a resolution should be amended to only allow an independent person receiving and collating the pre-meeting votes to access this information.

[5.17] Should there be legislative or other recognition of online voting during the course of an AGM and, if so, in what respects should this form of voting be regulated?

Whilst it has been argued that it is sufficient for companies to allow for online voting in their constitutions,<sup>28</sup> Australian companies are nevertheless cautious in embracing online voting with the absence of legislative support.<sup>29</sup> With no legislative support, various challenges may arise concerning the validity of the voting obtained through online voting. This may

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<sup>26</sup> Companies and Securities Advisory Committee, *Shareholder Participation in the Modern Listed Public Company*, Final Report (2000) 52, <[http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2000/\\$file/Shareholder\\_final\\_reportJun00.pdf](http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2000/$file/Shareholder_final_reportJun00.pdf)>.

<sup>27</sup> Ibid, 48.

<sup>28</sup> Bob Austin and Michelle Milligan, 'Online participation in shareholder meetings- how could it work?' (Minter Ellison Lawyers, 12 September 2011).

<sup>29</sup> Corporations and Markets Advisory Committee, *The AGM and shareholder engagement*, Discussion Paper (2012), [5.11].

consequently discourage the utilisation of online voting. Accordingly, we propose the introduction of specific legislation dealing with online voting as it has a number of advantages.

Online voting during the course of the AGM has the potential to increase shareholder engagement as it would provide shareholders unable to attend a physical meeting with the opportunity to take part in the meeting from their home or offices. Further, it will allow them to vote on a matter after hearing the discussion that has taken place about the topic. Consequently, it is time for Australia to implement such online voting. This will put Australia in line with other countries that have introduced online voting.<sup>30</sup> It will further make Australia more competitive in this area. Consequently, we support the introduction of legislation that officially recognises online voting.

The use of direct voting will require some legislative reform. An expansion of the meaning of ‘meeting’ from a traditional physical understanding to an understanding that regards the online attendant as ‘present’ in the meeting is essential. The online attendants shouldn’t be considered as absentees as they are taking part in the meeting.

[5.18] Do any issues arise concerning voting exclusions on resolutions that must, or may, be considered at an AGM and, if so, how might those issues best be resolved?

No comment regarding this matter.

[5.19] Should any changes be made to the current provisions regarding voting by show of hands?

Whilst the current method of voting by a show of hands has been criticised as being undemocratic in the sense that it does not represent the true voting position of a company’s shareholders, we nevertheless believe that no changes should be made to the provisions regarding this method of voting. The reason behind this is because the section dealing with show of hands (s 250J) is a replaceable rule. Consequently, the company should be the one who decides if it would like to have such a voting system in place.

Further, whilst resolutions passed on a show of hands are said to disenfranchise institutional shareholders who cannot attend meetings and result in low transparency,<sup>31</sup> the method nevertheless allows non-contentious matters to be dealt with inexpensively and fast.

However, we note that a potential issue may arise if online voting during the course of the AGM is introduced. This issue can easily be remedied by a change in the provisions that identify an electronic equivalent to a show of hands.<sup>32</sup>

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<sup>30</sup> Elizabeth Boros, ‘The online Corporation: Electronic corporate communications’ (Discussion Paper, Centre for Corporate Law & Securities Regulation, December 1999), [3.11]; see for example Delaware *General Corporations Law*, s211.

<sup>31</sup> Dean Paatsch and Simon Connal ‘The dark side of proxy voting’, *Business Spectator* (online), 1 November 2012 <<http://www.businessspectator.com.au/bs.nsf/Article/proxy-voting-Australia-custodian-shareholders-pd20121024-ZD4E6?opendocument&src=rss>>.

<sup>32</sup> Boros, above n 30.

[5.20] What legislative, or other, verification initiatives, if any, should be introduced concerning voting by poll at an AGM? Should one or more verification requirements apply in all instances or only if, say, a threshold number of shareholders require it?

No comment regarding these matters.

[5.21] Should any steps be taken to promote more consistency in the disclosure to the market of voting results?

Policy initiatives that promote consistency in the disclosure to the market of voting results would be beneficial. It would provide a formal method for companies and markets to analyse the voting behaviour of shareholders, including the degree to which they are likely to engage their voting rights.<sup>33</sup> Disclosure of voting results to the market is a requirement in many other countries around the world, and has been dubbed as a vital element to an analysis of an engagement strategy.<sup>34</sup> As such we believe that introducing a regime that promotes consistent disclosure of voting results would be helpful in determining the effectiveness of other policy initiatives aimed at increasing shareholder engagement.

[5.22] Following the AGM, what, if any, rights of access should shareholders generally, or the person proposing a resolution, have to voting documents?

No comment regarding this matter.

[5.23] What, if any, changes should be made to the requirements concerning the recording of details of voting in the minutes of the AGM?

If amendments are made to recognise direct votes, the legislation should require details on direct voting during the meeting to be minuted. Other than this, we believe that no changes should be made to the requirements concerning the recording of details of voting in the minutes of the AGM.

[5.24] Should there be a statutory minimum period for retention of records of voting on resolutions at an AGM and, if so, for what period?

We propose the introduction of a seven year statutory period for retention of records on voting on resolution at an AGM. This will not be onerous as the information can be kept online.

[5.25] Should there be any legislative initiatives in regard to the election of directors, including in relation to:

- the frequency with which directors should stand for re-election
- the right of shareholders to question candidates (and receive answers)
- the voting procedure?

No comment regarding this matter.

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<sup>33</sup> Paul Hewitt, 'The Exercise of Shareholder Rights: Country Comparison of Turnout and Dissent' (Working paper No 3, OECD Corporate Governance, August 2011).

<sup>34</sup> Ibid.

[5.26] Are there any matters concerning dual-listing that should be taken into account in the regulation of AGMs?

No comment regarding this matter.

[5.27] Are there any problems in the voting or other aspects of AGMs for overseas holders of shareholding interests in Australian regulated companies?

No comment regarding this matter.

## **Consideration Chapter 6**

For some or all public companies, should the functions of the AGM be changed in some manner, or the obligation to hold an AGM be abolished? In this context, what technological developments might be taken into account in considering the possible functions of the AGM? For some or all public companies, and if the AGM is retained in some manner, what legislative or other initiatives, if any, should there be in regard to the possible formats of the AGM? In this context, what technological developments might be taken into account in considering possible formats for the AGM?

The AGM is an essential mode of communication between shareholders and management as it is an instrument of corporate governance that allows shareholders – retail and institutional – to question the board about the performance of the company.<sup>35</sup> It consequently provides shareholders with an unmediated opportunity to call management to account for their actions. As a result, AGMs should not be abolished. Efforts need to be made to ensure greater engagement in the process by all the shareholders.

One way this can be achieved is by changing the format of the AGM. We propose that AGMs take the form of a hybrid physical–online meeting. Such a format will allow all shareholders – irrespective of where they reside – to take part in the meeting, ask questions and vote even though they are not physically at the meeting. The legislation may make the format of such meetings compulsory to listed public companies and a replaceable rule to unlisted public companies. Such flexibility is essential as one size does not fit all.

UWS Law of Associations Group

14 December 2012

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<sup>35</sup> Bino Catusus and Gustav Johed, ‘Annual General Meetings – Rituals of Closure or Ideal Speech Situations? A Dual Analysis’ (2007) 23 *Scandinavian Journal of Management* 168, 169.