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Centre for Corporate Law & Securities Regulation

# **The Online Corporation: Electronic corporate communications**

**Discussion paper**

**Written by:**

**Dr Elizabeth Boros**

**December 1999**

## **Your comments**

**Your response is invited to the enclosed questionnaire.**

**Responses are due by Friday 18 February 2000 and should be sent to:**

**Dr Elizabeth Boros  
The Online Corporation project  
Centre for Corporate Law & Securities Regulation  
The University of Melbourne  
Parkville Vic 3010  
Facsimile: (03) 9417 5452  
Email: e.boros@law.unimelb.edu.au**

**You can also contact the Centre for Corporate Law & Securities Regulation on 03 9344 5281 for information and assistance.**

**Your response (and your name) will be made available to ASIC.**

**Subject to legal limitations, your response will be kept confidential by both Dr Elizabeth Boros and ASIC. If at any stage you wish to withdraw your response, you are free to do so.**

**If you have any complaints or concerns about the conduct of this project, you can contact the Administrator of the Centre for Corporate Law & Securities Regulation, Ms Ann Graham, on 03 9344 5281.**

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**Contents**

**1. INTRODUCTION .....4**  
    Summary .....4  
    Background to this Paper .....5  
    Structure of this Paper .....8  
    Terminology .....8

**2. ELECTRONIC DELIVERY .....10**  
    Background .....10  
    Issues for consideration .....11

**3. ELECTRONIC VOTING AND COMPANY MEETINGS .18**  
    Background .....18  
    Issues for consideration .....19

**4. ELECTRONIC LODGMENT .....26**  
    Background .....26  
    Issues for consideration .....26

**Questionnaire .....32**

# 1. INTRODUCTION\*

## Summary

1.1 This Discussion Paper and the associated questionnaire form part of a collaborative research project between the Centre for Corporate Law & Securities Regulation at The University of Melbourne (the Centre) and the Australian Securities and Investments Commission (ASIC). The project is investigating the impacts for the administration of corporate and securities law in Australia of developments in electronic communications. This paper examines the following issues:

- electronic delivery of documents such as annual reports, notices of meeting and prospectuses;
- electronic voting and company meetings; and
- electronic lodgment of documents with ASIC.

1.2 The Centre is publishing this paper<sup>1</sup> to contribute to debate on the important issues raised by developments in electronic communications. In particular, it seeks to place the issues arising in Australia in the context of developments occurring in some key overseas jurisdictions. The paper seeks responses on specific issues listed in the enclosed questionnaire.

1.3 The project is also examining the possibility of including multimedia material in prospectuses and other offer documents. An Issues Paper entitled “Multimedia Prospectuses” will shortly be published jointly by ASIC and the Centre for Corporate Law & Securities Regulation on this aspect of the project.

1.4 Developments in electronic communications offer the possibility of lower cost, more timely and more comprehensive dissemination of corporate information. However, facilitating these developments poses difficult legislative choices. If legislation is too prescriptive, it risks being out of date very quickly and may hamper rather than assist the uptake of e-commerce. However, if it is too general, it may not give users of the legislation sufficient certainty that their actions will be held to be valid (if they are ever the subject of litigation). Recent Australian legislation designed to promote e-commerce is broadly facultative rather than prescriptive in approach. This gives users of the legislation considerable flexibility, but also places on them the cost of determining how to adapt their actions for the electronic environment. Moreover, in the interests of furthering the policy of the legislation, there may be an interest in stimulating debate about best practice. This Paper identifies areas of possible uncertainty in the law and areas that raise consumer protection or other policy

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<sup>1</sup> The views expressed in this Paper are those of the author.

concerns, and seeks input on how best to address them. Possibilities for doing so include:

- general guidelines (for example relating to electronic signatures), which would apply beyond the merely corporate field, but would also address uncertainties in that context;
- guidelines specific to the corporate area, for example in the form of a practice note or guidance by ASIC;
- alterations to the issuer's constitution;
- law reform.

These approaches are not mutually exclusive.

1.5 This Paper and the associated questionnaire are part of the broader collaborative project with ASIC. As part of the project, all responses to the questionnaire will be made available to ASIC. To the extent that responses raise issues of law reform or other matters, submissions will be made to the appropriate bodies.

## **Background to this Paper**

### ***Increased access to the Internet by investors***

1.6 Australians are accessing the Internet in ever-increasing numbers. For example, the Australian Bureau of Statistics reported<sup>2</sup> that in May 1999, 1.5 million households (just over 22% of all households) had access to the Internet from home. When other sources of access to the Internet were considered, the report estimated that in the 12 months to May 1999, 5.5 million adults (40% of Australia's total adult population) accessed the Internet. Significantly, this compared with 3.6 million adults (26% of adults) in the 12 months to May 1998.

### ***Increased use of the Internet by issuers***

1.7 The corporate sector is undergoing a complementary revolution. In June 1999, 97 of the top 100 companies listed on ASX had an Internet home page. Most of these issuers were using the Internet not only as an advertising tool, but also to communicate with their investors. For example, 78 made their annual report available from their home page and 76 distributed at least some of their press releases via this medium. A much smaller (but nevertheless significant) proportion (27) made available the content of the presentations they gave to analysts or the media, although only 2 included a transcript of impromptu questions and answers.<sup>3</sup> Some issuers have

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<sup>2</sup> Australian Bureau of Statistics Catalogue No 8147.0 – Use of the Internet by Householders, Australia, May 1999.

<sup>3</sup> For the full results and methodology, see: Elizabeth Boros "Disclosure of Information on Company Websites" (1999) 17 *Company & Securities Law Journal* 522.

taken the further step of using their home pages to offer their securities for subscription (or invite subscriptions for their securities).<sup>4</sup>

### **Legislative responses**

1.8 Some significant steps have been taken by the legislature in recent times to facilitate electronic communications with and by issuers. The Company Law Review Act 1998 expanded the opportunities for electronic lodgment of documents with ASIC.<sup>5</sup> It also made substantial amendments to the provisions of the Corporations Law dealing with meetings. Thus, there is specific provision for notices of meeting to be served electronically by facsimile or to an electronic address, as alternatives to personal or postal service,<sup>6</sup> and for issuers to conduct their meetings using technology that enables participants to be located at more than one physical site.<sup>7</sup> The Corporate Law Economic Reform Program (CLERP) has as one of its core goals facilitating the more widespread use of electronic commerce.<sup>8</sup> The CLERP Act made amendments that will facilitate fundraising by electronic means.<sup>9</sup> In its document, *Corporate Law Economic Reform Program: Policy Reforms*, the Department of Treasury has identified a number of additional e-commerce reforms. These include amending the current fee collection structure to ensure that the means and timing of fee collection accommodate the use of communications technology.<sup>10</sup>

### **Implications of these developments**

1.9 These developments have implications for many facets of corporate and securities regulation. Electronic dissemination of information enables more timely and comprehensive communication between issuers and investors than is possible in a purely print environment. It also has the potential to lower the costs of raising capital and keeping investors informed. These changes may reduce the differentials that currently exist between the information available to small investors by comparison with large and institutional investors.<sup>11</sup> They also create opportunities for greater use of electronic communications between issuers and ASIC. At a more fundamental level, more widespread, equitable and cost-efficient dissemination of information will

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<sup>4</sup> See the forthcoming Issues Paper, *Multimedia Prospectuses and Other Offer Documents*, that forms part of this project.

<sup>5</sup> Under s 352 of the Corporations Law.

<sup>6</sup> Ss 248C, 249J and 252G of the Corporations Law.

<sup>7</sup> S 249S of the Corporations Law.

<sup>8</sup> For example, one of the CLERP papers: Paper No 5, *Electronic Commerce: Cutting cybertape - building business*, was dedicated to these issues.

<sup>9</sup> For example, see ASIC's policy proposal paper released in July 1999 for public comment on implementing the CLERP Act entitled "Fundraising: disclosure document lodgement". The policy proposal paper considers, among other things, the electronic lodgement of disclosure documents.

<sup>10</sup> Reform No 48. See generally reforms 46-51.

<sup>11</sup> At least for those small investors with access to the necessary technology. As noted above, access to the Internet is not yet universal. It should also be noted that regional, female and older participation rates are lower than average.

benefit not only the issuers and individual investors concerned, but also the overall efficiency of the securities markets.<sup>12</sup>

### **Potential obstacles**

1.10 There are, however, some potential obstacles to fully realising the opportunities for improved communication that are presented by electronic media. Some obstacles stem from possible uncertainties about how best to implement in practice a clear legislative intention to facilitate e-commerce in communications among issuers, investors and regulators.

1.11 Another potential obstacle to fully realising the opportunities offered by electronic communications is public concern about the privacy of personal information.<sup>13</sup> Unless investors are confident about the security of their information in the Internet environment, they may not embrace the new technology. Building public confidence in the use of the Internet for communications may be hampered by incidents such as the reported temporary closure of Microsoft's Hotmail service after hackers infiltrated it and obtained access to users' email accounts.<sup>14</sup> Investors may also have concerns about email address lists being sold without their consent.

1.12 Further, like any new development, advances in the accessibility and use of electronic media create new avenues for fraudulent practices. Illegitimate information can be disseminated electronically just as readily as genuine information, and can reach a broader audience much more cheaply than in the print environment. To some degree, these new avenues for fraudulent activity can be dealt with by building a policy framework that facilitates consumer confidence in, as well as industry adoption of, electronic communications. ASIC has produced a number of policies designed to achieve this effect, most recently dealing with offers of securities on the Internet.<sup>15</sup> But ASIC, in common with regulators all over the world,<sup>16</sup> has also had to allocate resources to combating Internet fraud. In acknowledgement of the growing need for focus on electronic enforcement, ASIC established its Electronic Enforcement Unit

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<sup>12</sup> See SEC Release No 33-7233; 34-36345; IC 21399; *Use of Electronic Media for Delivery Purposes – Interpretation*, 6 October 1995 <<http://www.sec.gov/rules/concept/33-7233.txt>>.

<sup>13</sup> See further regarding Internet privacy issues the Australian Privacy Commissioner's website at <<http://www.privacy.gov.au>>. A number of privacy issues would be addressed if business adopted the National Principles for the Fair Handling of Personal Information issued by the Office of the Privacy Commissioner in February 1998 and revised in January 1999.

<sup>14</sup> See Lyall Johnson, "Password Glitch Cold Comfort for Hotmail" *The Age*, 1 September 1999 p 3 and Helen Meredith and Wire Services, "Hackers Shut Down Hotmail" *The Australian Financial Review*, 1 September 1999 p 3.

<sup>15</sup> ASIC Policy Statements 107 *Electronic Prospectuses*, 118 *Investment Advisory Services: Media, Computer Software and Internet Advice* and 141 *Offers of securities on the Internet*.

<sup>16</sup> An example of regulatory action taken overseas is a recent nationwide Internet sweep by the SEC that resulted in 14 enforcement actions against 26 individuals and companies for committing fraud over the Internet (SEC News release, 12 May 1999, <<http://www.sec.gov/news/press/99-49.txt>>). In some of these actions, SEC Internet surveillance detected the alleged bogus investment offerings before the perpetrators could make any sales, stopping the alleged frauds before potential investors lost money.

(EEU) in 1999. EEU aims to increase ASIC's ability to take swift and effective action against unlawful behaviour on the Internet and focus on building expertise in the electronic environment, and has had some early successes.<sup>17</sup> EEU is establishing a nationally-consistent approach to electronic enforcement and a framework that confirms consumer and investor protections in a rapidly developing Internet-based financial services sector, characterised by innovative products.

### ***The impact of globalisation***

1.13 The impact of globalisation is such that consideration of electronic communications in the context of the Australian securities regulatory regime cannot be done in isolation. This paper canvasses key overseas developments on the issues discussed below.

## **Structure of this Paper**

1.14 This Paper is divided into four chapters. This chapter provides some background and an overview of the Paper. The remaining chapters explore the challenges to Australia's system of corporations and securities regulation that are posed by electronic communications in the following four key areas and identify issues on which comment is sought:

- chapter 2 - electronic delivery;
- chapter 3 - electronic voting and company meetings;
- chapter 4 - electronic lodgment.

## **Terminology**

1.15 Unless otherwise indicated, the following expressions when used in this Paper have the meanings set out below:

“ASCOT” is ASIC’s national corporate database. It also provides access to DOCIMAGE;

“ASX” means The Australian Stock Exchange Limited;

“CLERP Act” means the Corporate Law Economic Reform Program Act 1999 (Cth). Apart from the provisions dealing with accounting standards, the amendments which it makes to the Corporations Law will come into force on 13 March 2000;

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<sup>17</sup> For example, in February 1999, ASIC obtained injunctive relief against Stephen Matthews, the publisher of an Internet site called The Chimes Index, to prevent investment advice being provided in breach of the Corporations Law: *ASIC v Matthews* (1999) 17 ACLC 528. In July 1999 the Supreme Court of NSW affirmed the Federal Court orders which had been made and were later rendered ineffective as a result of a High Court decision: *ASIC v Matthews* (1999) 32 ACSR 519.



“DOCIMAGE” is ASIC’s document image system and stores digitised copies of all documents lodged with ASIC since 1 January 1991;

“electronic communication” includes media such as audiotapes, videotapes, facsimiles, CD-ROM, email, bulletin boards, Internet websites and computer networks;

“issuer” includes both corporations (public and, where appropriate, proprietary) and registered managed investment schemes;

“investor” means a potential investor as well as a current holder of securities;

“replaceable rules” are provisions of the Corporations Law, identified in the Law as such, that govern the internal management of the companies to which they apply. They can be displaced or modified by the company’s constitution, if it has one;

“SEC” means the United States Securities and Exchange Commission.

## 2. ELECTRONIC DELIVERY

### Background

2.1 Paper is still the primary means by which issuers currently communicate with their members and directors. However, electronic communications offer potential benefits in terms of:<sup>18</sup>

- reducing the cost of communication between issuers and investors, and therefore increasing the overall efficiency and competitiveness of the Australian securities markets; and
- enhancing the quality of information available to investors and its timeliness.

2.2 A number of recent developments suggest that electronic provision of documents that have traditionally been provided either personally or by post will become more commonplace.

2.3 First, there has been a rapid and widespread increase in access to the Internet within the general community and in the number of companies that have Internet home pages.<sup>19</sup>

2.4 In addition, a number of legislative changes have been made to the Corporations Law in recent years to facilitate electronic communications. For example, the definitions of terms, such as “document”, “writing” and “record” in section 9 of the Corporations Law were widened in the early 1990s to encompass many types of electronic communication.<sup>20</sup> More recently, the Company Law Review Act 1998 introduced reforms in order to facilitate electronic service of notice of members’ and directors’ meetings. Amendments made by the CLERP Act are intended to further facilitate e-commerce.

2.5 There are also some terms that are not specifically defined to encompass electronic communications, but that arguably are sufficiently wide to accommodate them. These include the terms: “issue”, “report”, “notify”, “send”, “distribute” and “give” (and their derivatives).

2.6 The recent reforms (and the decision not to define terms that are regarded as capable of being construed to extend to electronic communications) reflect a philosophy that the fast pace of change in this area requires a legislative response that is facultative, rather than prescribing permissible means to translate existing concepts to an electronic context. As such, the provisions offer issuers a considerable degree of flexibility to take advantage of the new opportunities offered by electronic communications as they arise. Conversely, the provisions offer limited guidance to issuers as to the means they might adopt to ensure that the delivery will perform all the functions of paper delivery. This may be one reason why although many issuers now post their annual reports on their Internet home pages, they have

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<sup>18</sup> In May 1996, the ASC (as it then was) released a concept paper containing a draft statement of principles on *Electronic Communications Between Issuers and Investors Under the Corporations Law*, identifying these benefits and setting out working principles for electronic communications between issuers and investors.

<sup>19</sup> See above, ¶¶ 1.6-1.7.

<sup>20</sup> However, because the definition of “writing” refers to representation in visible form, it would not include audio material.

not yet sought to substitute electronic delivery for paper delivery. Another factor may be the cost of setting up new systems of delivery, particularly at a time when electronic communications are not universally available, and are not embraced by all of those who have access to them.

2.7 This chapter of the Paper identifies matters that need to be considered in the transition from paper to electronic delivery to protect both issuers and investors and seeks comment on how these matters might be addressed.

## Issues for consideration

### *Requirements for signing*

2.8 Many provisions of the Corporations Law, particularly those relating to requesting meetings and appointing proxies, require a document to be signed by the relevant member or members. Directors must also sign a consent to act, and documents such as the annual report.

### Legislation recognising electronic signatures

2.9 Depending on the form it takes, legislation regarding recognition of electronic signatures is likely to remove potential uncertainty as to the legal effectiveness of electronic transmission of documents that require a signature. If legislation is enacted along the lines of the Electronic Transactions Bill 1999,<sup>21</sup> an electronic signature will be recognised as equivalent to a handwritten one provided certain conditions are met. In most cases, these conditions are that the electronic signature identifies the person, indicates the person's approval of the information communicated and was as reliable as was appropriate for the purposes for which the information was communicated, at the time the method was used.<sup>22</sup> Some examples of the means that have been adopted in North America to provide an electronic equivalent of a signature on a proxy appointment are described in chapter 3, *Electronic Voting and Company Meetings*.<sup>23</sup>

### Other functions of a signature<sup>24</sup>

2.10 The Electronic Transactions Bill 1999 deals not only with signature requirements, but also with production and retention of documents and provision of information in writing. In addition, it sets out rules, which would apply in the absence of any contrary agreement, to determine the time and place of dispatch and receipt of electronic communications and the attribution of electronic communications. In relation to signature requirements, it addresses

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<sup>21</sup> The Electronic Transactions Bill 1999 (Cth) was introduced into Parliament on 30 June 1999. This is a Commonwealth Bill, and so will not affect State legislation (including State Corporations Laws). However, it is intended that State legislation will be enacted to mirror the Commonwealth Act.

<sup>22</sup> Clause 10 of the Bill is based on Article 7 of the UNCITRAL Model Law on Electronic Commerce. Article 7 provides that a requirement for a signature can be met by a data message if a method is used to identify the person and indicate their approval of the information contained in the data message, and the method was as reliable as was appropriate for the purposes for which the data message was communicated.

<sup>23</sup> See below, ¶¶ 3.29-3.31.

<sup>24</sup> See further regarding electronic signatures and the functions of signature requirements: Mark Sneddon, "Legislating to Facilitate Electronic Signatures and Records: Exceptions, Standards and the Impact on the Statute Book" (1998) 21 *University of New South Wales Law Journal* 334.

two important purposes of requiring a document to be signed: identifying the signatory and indicating the signatory's assent to the contents of the communication. However, a signature requirement may also be important in cautioning the signatory as to the legal significance of that assent before it is given. Requirements that a member sign a proxy appointment,<sup>25</sup> that the chair sign minutes of meeting,<sup>26</sup> or that a director sign a declaration about the financial statements and notes<sup>27</sup> might fall into this category.

2.11 In April 1998, the National Advisory Council on Consumer Affairs, published a document entitled: *Consumer Protection in Electronic Commerce: Principles and Key Issues*.<sup>28</sup> In the context of ensuring that sellers receive confirmed meaningful consent from consumers for a purchase of goods and/or services, it stated that consumers should be provided with a triple confirmation process in relation to the key steps in the transaction.<sup>29</sup> This would require online consumers to "click" (via a computer mouse or keystroke) through a three-step process that specifically requires them to confirm their intent to purchase at each step.<sup>30</sup>

2.12 Paragraphs 2.8 to 2.11 raise issues about whether any signature requirements in the Corporations Law perform a cautionary function and whether, in these cases, some special form of acknowledgement would be useful to ensure that a person using an electronic signature understands the legal significance of their communication. **Questions 1 to 4 in the attached questionnaire seek views on these issues.**

### ***Requirements for personal or postal delivery***

2.13 Amendments introduced by the Company Law Review Act 1998 changed the notice provisions for members' meetings, so that they now expressly contemplate electronic delivery.<sup>31</sup> Thus, sections 249J(3)(c) and 252G(3)(c) (which deal with service of notice of members' meetings) permit electronic service if the individual has nominated a fax number or electronic address.<sup>32</sup> However, these delivery arrangements do not apply to all types of meetings. For example, regulation 5.6.12(1A) deals with service of notice of meetings in a

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<sup>25</sup> Ss 250A and 252Y of the Corporations Law.

<sup>26</sup> Ss 251A and 253M of the Corporations Law.

<sup>27</sup> S 295 of the Corporations Law.

<sup>28</sup> Available at <<http://www.dist.gov.au/consumer/eleccomm/princip.html>>.

<sup>29</sup> Principle No 5.

<sup>30</sup> The Government has recently established the National Electronic Authentication Council (NEAC) to oversee the development of a national framework for electronic authentication of online activity. Among other things, NEAC will provide information and advice to industry and consumers on authentication issues such as a broad "map" of authentication technology types and best practice relating to electronic authentication, which Australian organisations and companies will be encouraged to follow: Media Releases, Department of Communications, Information Technology and the Arts: *Boosting confidence in electronic commerce*, 23 June 1999 and *New e-commerce authentication council members announced*, 17 September 1999.

<sup>31</sup> S 248D of the Corporations Law makes even more expansive provision regarding directors' meetings, permitting them to be called using any technology consented to by all the directors.

<sup>32</sup> Section 260KA(3) of the CLERP Act makes similar arrangements in respect of meetings of debenture holders.

winding up, and provides specifically for fax and document exchange delivery as well as personal and postal delivery, but not delivery to an electronic address.

2.14 In addition, there are other provisions of the Corporations Law (unrelated to meetings) that require certain documents to be delivered by post (or in some cases by personal delivery as an alternative).<sup>33</sup> For example, section 254P requires a notice of a call on a share in a no-liability company to be sent by post and regulation 5.1.02 requires a compulsory acquisition notice under section 414(2) or (9) of the Corporations Law to be given to a person either by personal delivery or prepaid post.

2.15 References to postal or personal delivery may be taken to imply that the document be in paper form. An argument in favour of this view would be the fact that sections 249J and 252G specifically differentiate service by electronic means from service made personally or by post. It is therefore arguable that, as a matter of statutory interpretation, references in other parts of the Corporations Law to delivery being made personally or by post would be interpreted to exclude electronic delivery.

2.16 Paragraphs 2.13 to 2.15 raise issues about whether electronic delivery should be available in all cases where an intended recipient has nominated a fax number or electronic address or only where electronic delivery is expressly provided for in the relevant statutory provision. **Question 5 in the attached questionnaire seeks views on this issue.**

### ***Requirements for individual delivery***

2.17 Provisions such as sections 248C, 249J and 252G expressly contemplate electronic notification<sup>34</sup> if the intended recipient has nominated an electronic address or, in the case of directors' meetings, consented to the use of technology. These provisions require that the relevant notice be given to each member or each director *individually*. Arguably, this obligation will be satisfied if the issuer sends the communication to the address that has been nominated, even if other people such as family members or employers will have access to the nominated email address.

2.18 Paragraph 2.17 raises issues about whether the sender or the recipient should bear the responsibility for satisfying a requirement for individual delivery once a potential recipient has chosen to nominate an electronic address. **Question 6 in the attached questionnaire seeks views on this issue.**

### ***Disincentives to nominate an electronic address – privacy considerations***

2.19 As noted in paragraph 2.17, it may be that people other than the intended recipient, such as other family members or employers, will be able to read messages sent to the nominated email address. The same possibility exists with paper-based communications if a letter is sent to a shared postal address. However, there may be a greater likelihood of the

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<sup>33</sup> Even in the absence of an express reference to personal delivery, this would be likely to be regarded as an acceptable alternative to delivery by post: *George Hudson Holdings Ltd v Rudder* (1973) 128 CLR 387.

<sup>34</sup> Cf. s 192(2) of the CLERP Act, which simply uses the terminology of notice given “individually in writing”.

message being opened by a person other than the intended recipient in the electronic environment. This may deter people from nominating an electronic address.

2.20 Another potential disincentive to nominating an electronic address is the possibility of this address being disclosed to third parties. Section 168 of the Corporations Law requires each company or registered scheme to set up and maintain a register of members. Section 169 of the Corporations Law requires that the register include each member's name and address. Under section 173 of the Corporations Law a company or registered scheme must allow anyone to inspect this register and to obtain a copy of it, provided they pay any fee (up to the prescribed amount) required by the company or scheme.

2.21 If a member nominates an electronic address for the purpose of receiving communications from an issuer, it may well be that it is this address that is recorded in the register of members. At one level there is no greater intrusion on the member's privacy by virtue of their electronic address being provided to persons inspecting the register than if their postal address were provided. In either case, section 177 of the Corporations Law restricts the use that may be made of contact details obtained from a register. It must be relevant to the holding of the interests recorded in the register or the exercise of the rights attaching to them or approved by the issuer. However, the lower costs of electronic dissemination may increase the likelihood of the member receiving unsolicited communications if they nominate an electronic address, and this might operate as a disincentive to their doing so.

2.22 Paragraphs 2.19 to 2.21 raise a number of privacy considerations regarding access to electronic communications and to email address lists. **Questions 7 to 9 in the attached questionnaire seek views on these issues.**

### ***Deemed receipt of electronically-delivered documents***

2.23 The sections referred to above that provide for electronic delivery of notices of members' meetings also provide default rules for deeming when a message sent by these methods is taken to be received: section 249J(4) contains a replaceable rule to the effect that a notice of meeting sent by fax or other electronic means is taken to be given on the business day after it is sent; and section 252G(4) makes similar provision regarding a scheme's constitution. These default rules are capable of being displaced by the issuer.<sup>35</sup> However, because of the way the replaceable rule provisions operate, even in cases where the replaceable rule in section 249J(4) has not been expressly displaced, it will not apply to companies registered before 1 July 1998, unless they repeal their existing constitutions in their entirety.<sup>36</sup>

2.24 A more general question arises as to whether deemed delivery is appropriate in all cases. The answer to this question will be particularly relevant to issuers in deciding whether to displace a deeming provision.

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<sup>35</sup> It is assumed, but not clear from the drafting, that the deeming provision in section 252G(4) regarding notices sent by electronic means is intended to be subject to contrary provision in the scheme's constitution.

<sup>36</sup> S 135(1)(a)(ii) of the Corporations Law.

2.25 In the United States for example, the SEC requires<sup>37</sup> that issuers have a reasonable basis for assuming that delivery by electronic means has taken place. Several examples are given and include: obtaining an informed consent to receipt by electronic means (and ensuring the recipient has appropriate notice and access, as outlined below in paragraph 2.28); actual confirmation of delivery (for example, return confirmation by email, or confirmation of access, downloading and printing); and completion and return of forms only available by accessing the relevant communication.

2.26 Paragraphs 2.23 to 2.25 raise issues about the need for and operation of provisions deeming electronically delivered documents to have been received. **Questions 10 to 18 in the attached questionnaire seek views on these issues.**

### ***Notice of, access to and consent to electronic delivery***

2.27 Sections 249J and 252G refer to delivery to an electronic address nominated by the member. This suggests that it would not be sufficient if, for example, an issuer posted the information to its website. However, if this possibility were allowed, it would raise questions as to the additional notice, if any, that should be given to members to alert them to the posting. In all cases of electronic delivery, questions also arise as to how accessible the information will be to the recipient. Having nominated an electronic address, does the member have any say in the format of any electronic communications sent to that address? Sections 249J and 252G do not prescribe (nor are there any specific guidelines regarding) a consent procedure to be adopted when a member nominates an electronic address. This can be contrasted with the approach taken by regulators in North America.

### **United States**

2.28 The SEC has identified<sup>38</sup> three criteria for determining whether statutory delivery requirements have been satisfied by electronic delivery:<sup>39</sup>

**Notice:** Investors must receive “timely and adequate” notice that information is available to them. In the case of physical delivery of electronic media such as computer disks, CD-ROM and email, notice is provided by the electronic document itself. In other cases, such as placing a document on an issuer’s website, a separate notice is usually required in the absence of other evidence of delivery.

**Access:** The SEC states that “the use of a particular medium should not be so burdensome that intended recipients cannot effectively access the information provided”. In addition, the SEC requires that a recipient be able to retain the

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<sup>37</sup> See discussion below in ¶ 2.28.

<sup>38</sup> SEC Release No 33-7234, 34-36346, IC-21400, *Use of Electronic Media for Delivery Purposes - Proposed Rules*, 6 October 1995, <<http://www.sec.gov/rules/proposed/33-7234.txt>>; SEC Release No 33-7233; 34-36345; IC-21399, *Use of Electronic Media for Delivery Purposes - Interpretation*, 6 October 1995, <<http://www.sec.gov/rules/concept/33-7233.txt>>; and SEC Release No 33-7289, 34-37183, IC-21946, *Use of Electronic Media for Delivery Purposes - Final Rules*, 9 May 1996, <<http://www.sec.gov/rules/final/33-7289.txt>>.

<sup>39</sup> The SEC rules also address matters of formatting, multimedia material, and the availability of filings for inspection on the SEC’s website.

information (for example, by downloading) or have continuing access. A document posted on an issuer's website should be made available for the relevant notice period. Issuers must also retain the ability to make paper versions of the documents available.

**Consent:** In order to give their informed consent to receipt via an electronic medium, investors should know: the specific electronic medium; the potential costs to them (such as the cost of online time); and the period and documents for which the consent will be effective. Consent to receive documents electronically should be revocable.

## Canada

2.29 In December 1998, the Canadian Securities Administrators published proposed National Policy 11-201 entitled *Delivery of Documents by Electronic Means*, stating their views on how the obligations imposed under Canadian Securities legislation to deliver documents can be satisfied by electronic means. In relation to delivery, the Canadian Securities Administrators identified four preconditions for electronic delivery to be effective:

- notice to the recipient that the document will be sent electronically;
- evidence that the document has been delivered;
- easy access to the document by the recipient; and
- document integrity, i.e. that the document received by the recipient is not different from the document delivered or made available by the deliverer.

2.30 The proposed policy states that a deliverer generally may satisfy the notice, evidence and access components by obtaining the informed consent of an intended recipient and then delivering the document in accordance with that consent. In order to ensure that the consent is fully informed and adequate, the proposed policy recommends that it deal with the following matters:

- a list of the documents that are electronically deliverable;
- a detailed explanation of the electronic delivery process, including whether separate notice will be provided and, if so, how and when that notice will be provided;
- technical requirements for proper electronic retrieval of a document;
- software requirements for proper viewing of a document;
- notice of the availability at no cost of a paper version of a document upon request to the deliverer, together with information about how to make this request;
- information about the length of time that a document will be available for electronic delivery;
- details of the process for revoking consent to electronic delivery.

## United Kingdom

2.31 Clause 8 of the Electronic Communications Bill, as introduced into the House of Commons on 18 November 1999, proposes to give power to the appropriate Minister to modify the provisions of any act or subordinate legislation to authorise or facilitate the use of electronic communications or electronic storage (rather than other forms of communication or storage) for a number of specified purposes. The Explanatory Notes to the Bill prepared by



the Department of Trade and Industry<sup>40</sup> give as one example of the use of this power modification of the Companies Act 1985 to facilitate electronic dissemination of documents that a company is required to send to members.

2.32 This was foreshadowed by the announcement by the Minister of State in July 1999,<sup>41</sup> that he would seek to use such a power to:

- enable any document (subject to EC constraints) which the Act requires a company to transmit to members to be sent, where the member has so agreed, to a fax number or electronic address nominated by the member; and
- enable a company to place any company communication required by the Act on a website or other electronic site accessible to those entitled to receive the relevant information; and, where the member has so agreed, to send only a notice of availability to an address nominated by the member, in substitution for sending the communication to them.

2.33 Paragraphs 2.27 to 2.32 raise issues about the circumstances in which statutory communication requirements can be satisfied by electronic delivery, and an appropriate consent procedure for nominating an electronic address. **Questions 19 to 27 in the attached questionnaire seek views on these issues.**

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<sup>40</sup> Available at: <http://www.publications.parliament.uk/pa/cm199900/cmbills/004/en/00004x--.htm>.

<sup>41</sup> This announcement was made following responses received to a letter on the subject *Electronic Communication: Change to the Companies Act 1985*, which was distributed by the Department of Trade and Industry on 5 March 1999. This letter followed the publication by the Company Law Review Steering Group in February 1999 of a consultation document: *Modern Company Law for a Competitive Economy – The Strategic Framework*. That document suggested a number of reforms designed to facilitate electronic communications in this area. See also: *Modern Company Law for a Competitive Economy – Company General Meetings and Shareholder Communication*, a consultation document from the Company Law Review Steering Group, October 1999, para 60.

### 3. ELECTRONIC VOTING AND COMPANY MEETINGS

#### Background

3.1 Electronic communications offer the potential for rapid and less costly dissemination of notices of meeting and associated documentation. They also create a range of possibilities for greater member participation in company meetings. In addition, electronic proxy submission may make it easier for nominee shareholders to communicate more effectively with the beneficial owners of the shares.<sup>42</sup>

3.2 This chapter of the Paper examines the potential for electronic communications in the following contexts: calling meetings; holding meetings; voting at meetings; proxies; and resolutions and minutes.

3.3 In September 1999, the Companies and Securities Advisory Committee (CASAC) published a discussion paper entitled *Shareholder Participation in the Modern Listed Public Company*. Unlike the present paper, CASAC has not focussed specifically on e-commerce issues, although it does mention electronic communication between a corporation and its shareholders in some contexts. The CASAC discussion paper raises a series of issues for listed public companies, including:

- whether 100 shareholders should be entitled to requisition a general meeting;
- whether proxy solicitations should be regulated;
- whether absentee shareholders should be entitled to cast electronic or postal votes;
- whether companies could conduct ballots without holding a meeting; and
- whether the procedures for electing directors should be based on the principles of equal opportunity and majority voting.

3.4 In the discussion of the third of these areas,<sup>43</sup> CASAC canvasses a number of questions regarding direct voting by absentee shareholders by electronic and other means. This Paper addresses several additional questions regarding electronic voting under the heading of “voting at meetings”.<sup>44</sup>

3.5 Reference was made in chapter 2 on *Electronic Delivery* to the reforms that have been made in recent years to facilitate electronic delivery of documents. In the context of company meetings, the Company Law Review Act 1998 made express provision for electronic notice and holding of company meetings and electronic submission of proxies. These reforms reflect the same facultative rather than prescriptive approach to regulating this area. A few companies have offered the possibility of electronic proxy submission. However, in the main, little use has been made to date of the greater opportunities for electronic communications in the context of voting and company meetings. Thus, the purpose of this chapter of the Paper is to describe the effect of the reforms, to identify some possible reasons for reserve in adopting them, and to

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<sup>42</sup> See Company Law Review Steering Group, *Modern Company Law for a Competitive Economy – The Strategic Framework*, February 1999, UK, para 5.7.18.

<sup>43</sup> Paragraphs 4.64-4.77 and issues 20-23.

<sup>44</sup> See below, ¶¶ 3.18-3.21.

seek comment on the significance of these factors to users of the legislation and how they might be addressed.

## Issues for consideration

### *Calling meetings*

3.6 The reforms introduced by the Company Law Review Act 1998, in the context of calling members' meetings permit notice of a meeting to be given to a member by sending it to the fax number or electronic address (if any) nominated by the member,<sup>45</sup> and provide default rules for deeming when a message sent by these methods is taken to be received.<sup>46</sup> These default rules are capable of being displaced by the issuer.<sup>47</sup> Even more expansive provision is made regarding directors' meetings, which may be called (or held) using any technology consented to by all the directors.<sup>48</sup>

3.7 These provisions raise a number of issues that are not specific to the meeting context, but apply more generally to electronic delivery of documents to members. These issues include such matters as the deemed time of delivery of notice; translation of the concept of "individual" notice to the electronic context; and the matters to be addressed in a consent procedure for receiving notices electronically. These issues are addressed in this wider context in chapter 2 of this Paper, *Electronic Delivery*.

### *Holding meetings*

#### Recent reforms

3.8 The Company Law Review Act 1998 introduced amendments designed to clarify that a directors' meeting may be held using any technology consented to by all the directors, and the ability of companies to take advantage of technology in holding members' meetings at different venues, as long as the members as a whole have a reasonable opportunity to participate in the meeting.<sup>49</sup> With reference to members' meetings, the Explanatory Memorandum states that:<sup>50</sup>

"This does not require that each individual member have an opportunity to participate. For most companies, a reasonable opportunity to participate would mean that each member is able to communicate with the chairman and be heard by other members attending the meeting, including those at the other venues. However, whether there has been a 'reasonable opportunity' will depend upon the circumstances of the meeting."

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<sup>45</sup> See s 249J(3)(c) regarding meetings of a company's members and s 252G(3)(c) regarding meetings of a registered scheme's members.

<sup>46</sup> Section 249J(4) contains a replaceable rule to this effect. Section 252G(4) makes similar provision regarding a scheme's constitution.

<sup>47</sup> It is assumed, but not clear from the drafting, that the deeming provision in section 252G(4) regarding notices sent by electronic means is intended to be subject to contrary provision in the scheme's constitution.

<sup>48</sup> S 248D of the Corporations Law.

<sup>49</sup> S 249S of the Corporations Law.

<sup>50</sup> Explanatory Memorandum to the Company Law Review Bill, para 10.43.

### Directors' meetings

3.9 These reforms build on the more recent case law which, in general terms,<sup>51</sup> has recognised the effectiveness of a directors' meeting conducted by telephone conference, where each participant is able to hear and speak to other participants, and all the information available to one is available to the others, even though there is no physical gathering.<sup>52</sup>

### Members' meetings

3.10 As a practical matter, the number of members of many issuers would operate as a limitation on holding members' meetings by telephone conference.<sup>53</sup> The reforms may, however, be of greater use in facilitating meetings being held in a limited number of locations using video-conference facilities. A more far-reaching possibility raised by the reforms is the possibility of holding meetings online.

### Online meetings

3.11 A few Australian issuers have offered real-time, audio-visual broadcasts of their annual general meetings to locations other than those where the meeting is being held, but not on a two-way basis. By contrast with the United States and Canada, no major Australian issuer has yet held an online meeting (involving two-way communication between remote participants and the main meeting room). Online meetings pose a challenge in providing a means by which all members are able to participate. If full audio-visual communication can be arranged, there would be no problem. However, current limitations on the speed of electronic communications via telephone networks may mean that only two-way audio communication or one-way audio-visual communication is possible.

3.12 Another feature of having a reasonable opportunity to participate is the ability to vote, which is discussed in greater detail below.

3.13 Questions arise as to where the online meeting is being held and whether remote participants are personally present. The implication from section 249S of the Corporations Law is that the meeting is being held at all the venues at which members are physically located. Assuming they have a reasonable opportunity to participate, it would seem likely that the remote participants in this situation would be regarded as personally present. As the law currently stands, determining whether remote participants are personally present is important since by the time of the meeting, it may be too late for the investor to appoint a proxy.<sup>54</sup>

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<sup>51</sup> It is difficult to generalise the effect of the case law because the outcome of a case may depend upon interpretation of the relevant provision of an issuer's constitution.

<sup>52</sup> See *Bell v Burton* (1993) 12 ACSR 325, 328-9; *Wagner v International Health Promotions* (1994) 15 ACSR 419, 421-2, *Re Giga Investments Pty Ltd* (1995) 13 ACLC 1047, 1050-1; and *Pax Holdings Pty Ltd v Bamboo Creek Holdings Ltd* (1989) 6 SR (WA) 131, 149-50.

<sup>53</sup> It would also be necessary to ensure that all members have access to the same material, including visual material. This might be able to be addressed by providing a hard copy of any presentation to a remote telephone participant in advance of the meeting.

<sup>54</sup> S 250B of the Corporations Law requires that the company receive proxy documents at least 48 hours before the meeting, although the company's constitution or the notice of meeting may reduce this period. S 252Z of the Corporations Law makes similar provision in relation to registered schemes. Cf.: CASAC's Discussion Paper, *Shareholder Participation in the Modern Listed Public Company* (paras 4.16-4.19 and Issue 10) which

3.14 At a practical level, experimentation with online meetings would require an issuer to be very confident of the reliability of the chosen technology, since if it were to fail, this might deprive some remote participants of a reasonable opportunity to participate, and necessitate the expensive exercise of reconvening the meeting.

#### *United States and Canada*

3.15 Online meetings held in North America have adopted a system that enabled investors to hear the proceedings in real time through the company's website, and to interact via email, with all questions submitted by email being read aloud by the chairman and answered.<sup>55</sup> This approach addresses concerns about the ability of remote participants to participate, but poses the risk of a very lengthy meeting.

#### *United Kingdom*

3.16 The Company Law Review Steering Group in the United Kingdom has recently issued a consultation document on company general meetings.<sup>56</sup> The paper canvasses various possibilities for holding meetings in geographically-separated locations connected by real-time two-way communications.<sup>57</sup> More radically, it raises the possibility of an interactive "virtual meeting" held in no location, with the directors' presentations posted on an electronic company bulletin board and shareholders' interventions and the directors' responses being posted on the bulletin board.<sup>58</sup>

3.17 Paragraphs 3.8 to 3.16 raise issues about holding company meetings using electronic media, and ensuring that members have a reasonable opportunity to participate. **Questions 28 to 31 in the attached questionnaire seek views on these issues.**

### ***Voting at meetings***

3.18 As noted above,<sup>59</sup> the ability to vote would be a necessary element in determining whether remote participants have a reasonable opportunity to participate in the meeting.

3.19 Although no Australian issuer has yet offered electronic voting, United States companies listed on ASX<sup>60</sup> have already introduced Australian investors to this possibility. MYOB Ltd has also announced its desire to offer online voting for its next annual general meeting.<sup>61</sup>

raises the question whether electronic developments could do away with the need for shareholders to notify the company of proxy appointments at least 48 hours in advance of a meeting.

<sup>55</sup> John F Olson and Harvey L Pitt, *Securities in the Electronic Age: A Practical Guide to the Law and Regulation* (Glasser Legalworks, Little Falls, 1997, looseleaf service) p 7-9.

<sup>56</sup> Company Law Review Steering Group, *Modern Company Law for a Competitive Economy – Company General Meetings and Shareholder Communication*, October 1999.

<sup>57</sup> *Ibid*, para 29.

<sup>58</sup> *Ibid*, para 30.

<sup>59</sup> See ¶ 3.12.

<sup>60</sup> E.g. Bell Atlantic. This company is listed on ASX and offers telephone and Internet voting.

<sup>61</sup> Emma Connors and John Davidson, "Prospects good as ASIC clears way" *Australian Financial Review*, 3 July 1999 p 19.

3.20 There is no prohibition on voting by electronic means in the Corporations Law, either by a member or by a proxy appointed in advance of the meeting. The right to vote is conferred on members by the constitution. The replaceable rule in section 250E is typical of many constitutional provisions and states that a member has one vote on a show of hands and, on a poll, one vote for each share held. This is stated to be subject to any rights or restrictions attached to any class of shares. If there is no video connection, a remote online participant will not be able to raise their hand. However, a system of electronic voting could be devised that offers electronic equivalents of this concept and of voting on a poll. Some American companies are reportedly experimenting with systems that allow shareholders to vote directly via voice mail.<sup>62</sup>

3.21 Paragraphs 3.18 to 3.20 raise issues about electronic voting by remote participants. **Questions 32 to 35 in the attached questionnaire seek views on these issues.**

### **Proxies**

3.22 Sections 250B(3) and 252Z(3)<sup>63</sup> of the Corporations Law contemplate electronic submission of a proxy, by providing that an issuer receives an “appointment authority”<sup>64</sup> *inter alia*, when it is received at a place, fax number or electronic address specified for the purpose in the notice of meeting. Section 250BA of the Corporations Law requires that listed companies that are incorporated in Australia specify a place and fax number for the purposes of receipt of proxy appointments, and gives those companies the option to specify an electronic address.

### **Authentication**

3.23 An issue raised by these reforms is the process by which proxies submitted to an electronic address can be authenticated. Sections 250A and 252Y of the Corporations Law require that the appointment be *signed*. However, the Explanatory Memorandum to the Company Law Review Bill states that: “Given the nature of electronic transmission, it will not be necessary for the appointment to be signed”.<sup>65</sup>

3.24 The fact that section 250B(3) expressly refers to receipt of a proxy appointment at a fax number or electronic address specified for this purpose suggests that Parliament intended that electronic authentication would satisfy the signature requirement. This argument receives some support from cases<sup>66</sup> where a faxed proxy form has been treated as being “signed”. An

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<sup>62</sup> John F Olson and Harvey L Pitt, *Securities in the Electronic Age: A Practical Guide to the Law and Regulation* (Glasser Legalworks, Little Falls, 1997, looseleaf service) p 6-23.

<sup>63</sup> There are two subsections (3). This reference is to the second one.

<sup>64</sup> Presumably an “appointment or authority” was intended.

<sup>65</sup> Explanatory Memorandum to the Company Law Review Bill 1997, para 10.68.

<sup>66</sup> *Re a debtor (No 2021 of 1995); ex parte Inland Revenue Commissioners v The debtor* [1996] 2 All ER 345. Laddie J noted in this case (at p 352) that fax transmission was likely to be more reliable and was certainly a more speedy method of communication than post, and that it would be a pity if the rule required creditors to convey their views to the chairman by the older, slower and less reliable form of communication.

analogy was drawn in these cases with documents “signed” by using a rubber stamp or by having a signature impressed on the document by a printing machine.<sup>67</sup>

3.25 Against this argument, it may be noted that other provisions of the Corporations Law make some reference to alternative arrangements for authentication of documents: section 252Z(4)<sup>68</sup> (which relates to proxy documents in registered schemes) provides that a proxy appointment transmitted by fax or to an electronic address is ineffective if a requirement in the notice of meeting that the transmission be verified in a particular way or that the proxy produce the appointment and authority (if any) at the meeting is not complied with. Curiously, a parallel provision (proposed section 250B(4)) in relation to proxies appointed by members of a company was omitted before the Bill was enacted, notwithstanding the reference to this provision in the Explanatory Memorandum to the Company Law Review Bill.<sup>69</sup>

3.26 As noted in chapter 2 on *Electronic Delivery*,<sup>70</sup> legislation along the lines proposed in the Electronic Transactions Bill 1999 will in most cases treat an electronic signature as equivalent to a handwritten one, as long as: the electronic signature identifies the person, indicates the person’s approval of the information communicated and was as reliable as was appropriate for the purposes for which the information was communicated, at the time the method was used. However, there will still be practical issues to be addressed.

3.27 Authentication issues have also arisen in other countries and have been addressed at a practical level in a number of ways.

#### *United Kingdom*

3.28 E-vote is a service that conducts electronic voting instructions. It provides electronic links between registrars, custodian banks and underlying shareholders. It was initially established to provide electronic proxy notices to and accept votes from institutional shareholders and allow these electronic votes to be submitted to registrars. It has since been extended to private investors. The service is Internet based. It uses PINs and passwords for authorisation and digital certificates and electronic signatures to verify the identity of signatories. The vote status can be tracked and monitored at all stages of the voting process and various reports produced.<sup>71</sup>

#### *United States*

3.29 Third parties have offered electronic proxy voting services, initially to institutional shareholders, and subsequently to individual shareholders as well. Some systems use digital signature technology. Others identify members by PINs and other personal numbers (such as a social security number) and use the Internet or a touch-tone telephone.

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<sup>67</sup> *Re a debtor (No 2021 of 1995); ex parte Inland Revenue Commissioners v The debtor* [1996] 2 All ER 345, 349-50.

<sup>68</sup> Another example is provided by s 352, which provides that the effectiveness of electronic lodgment of documents with ASIC depends, among other things, on compliance with ASIC’s authentication requirements.

<sup>69</sup> Para 10.68.

<sup>70</sup> See above, ¶ 2.9.

<sup>71</sup> See further <<http://www.e-vote.net>>.

3.30 The United States experience has been that in the absence of clarifying legislation, conflicting decisions were reached as to the validity of electronically-submitted proxies (or datagram proxies as they are known). One judge has suggested that electronically transmitted proxies are valid even when the statute requires them to be signed.<sup>72</sup> However, this was on the basis that the legislation before him tracked the ABA Model Business Corporation Act, and that the official comments to the Model Act suggested a liberal view of the signature requirement. In particular, the comments contemplated that unexecuted proxies could be counted in an election, on receipt of a confirmatory telegram from the shareholder. It was ultimately unnecessary to decide this issue, as both parties had solicited votes by datagram, and so were estopped from challenging the legality of the election when they could have raised their objections beforehand. However, the issue has been raised directly in Delaware, where Jacobs VC held<sup>73</sup> that datagram proxies lacked the fundamental indicia of authenticity and genuineness needed to accord them the presumption of validity. The procedure adopted by the proxy solicitation firm in this case (Morrow & Company) involved shareholders calling a toll-free number. They were then asked a series of questions designed to elicit: (i) the shareholder's voting instructions; (ii) the shareholder's name, address, city, state, postcode and telephone number; (iii) the number of shares being voted; and (iv) whether the shares were being voted by an individual or a corporation. Morrow & Company did not request any other identifying information from callers. In particular, the common procedure of assigning a confidential PIN number to each shareholder was not adopted in this case.

3.31 In order to clarify this uncertainty, over one-third of all States have amended their corporate statutes to permit proxies to be returned electronically, verified by a PIN, digital signature, or similar electronic identifier from which it can be reasonably determined that the transmission was authorised by the shareholder.<sup>74</sup> This legislation leaves it open to the issuer to choose whether to adopt relatively straightforward authorisation requirements along the lines of verification by PIN and social security number, or whether to use the more complex digital signature technology, which requires each shareholder to obtain a digital certificate. The latter option provides greater certainty not only that the proxy was sent by the particular shareholder but also that the contents were not changed, which may be important in a contested matter.<sup>75</sup>

### Current Law Reform Proposals

3.32 The Parliamentary Joint Statutory Committee on Corporations and Securities received submissions on receipt of proxy appointments in its investigation of matters arising from the *Company Law Review Act 1998*. In its recent report, the Committee recommended<sup>76</sup> that section 250BA of the Corporations Law should define "sign" for electronic purposes to be the input of a "PIN".

3.33 Paragraphs 3.22 to 3.32 raise issues about authentication of electronically-submitted proxies. **Questions 36 to 41 in the attached questionnaire seek views on these issues.**

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<sup>72</sup> *Dynamics Corp of America v CTS Corp* 643 F Supp 215 (N D Ill, 1986), 221.

<sup>73</sup> *Parshalle v Realist Inc* 567 A 2d 19 (1989), 25

<sup>74</sup> Howard M Friedman, *Securities Regulation in Cyberspace* (2<sup>nd</sup> edn, 1997, Bowne, New York, looseleaf service) p 11-13 and n 55.

<sup>75</sup> *Ibid* p 11-14.

<sup>76</sup> Parliamentary Joint Statutory Committee on Corporations and Securities, *Report on Matters Arising from the Company Law Review Act 1998*, October 1999, para 13.26.



### **Reconsideration of the need for proxies**

3.34 The prospect of electronic voting may stimulate a reconsideration of the concept of appointing a proxy. The main reason for proxies was that widely dispersed shareholders could not feasibly attend the meeting.<sup>77</sup> It may no longer be necessary to retain this intermediary in circumstances where meetings may be held in more than one location and members are able to cast votes electronically. Of course, a further advantage of proxies is that members may not be available to attend at the time of the meeting. However, even the need for this service might be able to be removed if members were permitted to cast direct electronic votes prior to commencement of a meeting. This issue and the wider issue of absentee shareholder voting are discussed in CASAC's recent discussion paper, *Shareholder Participation in the Modern Listed Public Company*.<sup>78</sup>

### **Resolutions and minutes**

3.35 Sections 251A and 253M of the Corporations Law require that issuers keep *minute books*. Section 1306 of the Corporations Law provides that a book may be kept or prepared by recording or storing the matters by means of a mechanical or electronic device or in any other manner approved by the Commission, as long as the contents are capable of being reproduced in written form or a reproduction is kept in a written form approved by ASIC.

3.36 However, the signature requirements and related authentication questions that are discussed above in the context of proxies also arise here. Minute books are required to be signed by the chair<sup>79</sup> and signature requirements also exist for resolutions passed without a meeting<sup>80</sup> and for declarations by a director of a one-person proprietary company.<sup>81</sup> **Questions 42 to 46 in the attached questionnaire seek views on these issues.**

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<sup>77</sup> See George Ponds Kobler, "Shareholder Voting Over the Internet: A Proposal For Increasing Shareholder Participation in Corporate Governance" (1998) 49 *Alabama Law Review* 673, 691.

<sup>78</sup> CASAC, *Shareholder Participation in the Modern Listed Public Company*, discussion paper, September 1999, paras 4.64-4.77.

<sup>79</sup> Ss 251A and 253M of the Corporations Law.

<sup>80</sup> Ss 248A, 248B, 249A, 249B, of the Corporations Law.

<sup>81</sup> S 248B of the Corporations Law. See also section 224B of the Corporations Law regarding the appointment of an additional director by the single director of a one-person proprietary company.

## 4. ELECTRONIC LODGMENT

### Background

4.1 Electronic lodgment has advantages for both the regulator and investors. It is potentially cheaper for the regulator to process, maintain, track and retrieve lodged information.<sup>82</sup> It also provides the opportunity for efficient and effective dissemination of filed information to members of the public who have access to the means to receive it. Moreover, depending on the system adopted, electronically-lodged information may be more useful to investors than the same information provided in paper format, since many electronic formats have the potential to be searched and for information (for example, the financial statements) to be imported into spreadsheets for the purpose of analysis.

4.2 As noted in the companion Issues Paper, *Multimedia Prospectuses and other offer documents*, the ability to circulate prospectuses (or other documents) that include multimedia material raises questions as to:

- the ability of the lodgment system to accommodate this material; and
- the legal and practical implications of permitting multimedia material to be circulated to investors in circumstances where it cannot be lodged.

4.3 This chapter of the Paper describes ASIC's electronic lodgment facilities and the regulatory regime under which these facilities operate. It also compares the extent to which electronic lodgment and searching are possible in other countries. In light of these factors, it raises issues as to the direction of future developments in this area.

### Issues for consideration

#### *Electronic lodgment and search facilities*

##### **Australia**

4.4 ASIC offers several electronic lodgment facilities, each designed to meet the needs of particular clients: EDGE, eRegisters and electronic company registrations. Clients may choose whether to take advantage of these facilities or to lodge in paper format.

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<sup>82</sup> These advantages are referred to in SEC Release No 33-7472; 34-39269: *Rule to provide that the Commission will not accept paper filings that are required to be filed electronically*; 24 October 1997, <<http://www.sec.gov/rules/final/33-7472.txt>>. See also SEC Release No 33-7684; 34-41410; IC-23843: *Rulemaking for EDGAR System – Final Rule*, 17 May 1999, <<http://www.sec.gov/rules/final/33-7684.txt>>. See also Myles McGregor-Lowndes, "Corporate Disclosure, the Internet and the Australian Securities Commission" (1996) 14 *Company and Securities Law Journal* 219.

### *High volume lodgments - EDGE*

4.5 Since 1994, high volume lodging agents, such as accountants have been able to use ASIC's EDGE system to lodge annual returns and some changes to previously lodged information.<sup>83</sup> Around 60% of all annual returns will be lodged through EDGE this year. EDGE uses passwords for authentication, supported by a legal trading agreement.

### *Smaller volume lodgments – eRegisters*

4.6 In July 1999, ASIC launched a trial of an interactive website service, designed for directors, secretaries and small lodging agents called eRegisters. It allows ASIC clients to view their company details and make changes to them, lodge an annual return and pay any fees online. Initial response appears to be positive, with over 600 documents being lodged in the first two months since the trial was launched. eRegisters uses PINs for authentication.

### *Electronic company registrations*

4.7 In May 1999, ASIC launched its Electronic Company Registration facility (ECR), which enables the entire process of registering a company to be conducted online. ECR allows ASIC clients to:

- electronically prepare applications for registration;
- digitally sign them using private keys stored on commercial cryptographic smart cards;
- transmit them securely to ASIC over the Internet; and
- make associated payments electronically.

4.8 ASIC's ECR system is the first production application in Australia to use commercial smart cards for digitally signing information using public key technology. Electronic registration levels at the end of September 1999 accounted for 40% of all registrations.

### *ASIC's information database*

#### *ASCOT and DOCIMAGE*

4.9 ASIC stores all documents (including electronically lodged documents) in an image database (DOCIMAGE). A large amount of index information and data is also stored in a text database (ASCOT). Both databases are publicly searchable. DOCIMAGE provides the ability to deal with documents containing graphic and image material in a limited (black and white) manner.

#### *Searches*

4.10 Since 1991, the public has been able to search ASIC's databases electronically through a number of information brokers. Over 2.5 million such paid searches are conducted each year. Recently ASIC has added a number of free searches through its

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<sup>83</sup> E.g., changes in registered office, allotments of shares and changes in office holders.

website. The public can search for basic company details on the Internet with ASIC's National Names Index service (Netsearch) and also search ASIC's registers on-line. The registers include information from ASIC's professional registers, authorised representatives register, banned securities representatives and banned futures representatives registers and the disqualified directors register. Searches conducted through Netsearch and ASIC's network of information brokers now account for over 95% of all searches of ASIC's databases.

### *Prospectuses*

4.11 In anticipation of the commencement of the CLERP Act, ASIC is developing the FUNDEX fundraising infrastructure system to facilitate the examination of disclosure documents by ASIC and the market for the maximum possible time during the exposure period of 7 to 14 days. The project will provide a database, which will serve as a public index of all fundraising documents, initially those in the public exposure phase and subsequently a full index with history. ASIC is also considering an extension of FUNDEX, known as FUNDLodge, which would introduce full electronic lodgment of fundraising disclosure documents.

## **Overseas comparisons**

### *United States*

4.12 In the United States,<sup>84</sup> it has been mandatory since 1996 for all domestic public companies to make most of<sup>85</sup> their filings electronically on EDGAR (the SEC's Electronic Data Gathering, Analysis, and Retrieval system).<sup>86</sup> Documents filed with EDGAR can be searched, viewed and printed free of charge from the SEC's Internet Web page. They are also available for a fee through redistributors such as Nexis and Westlaw. In addition, there are several free access sources to EDGAR filings, although they do not offer the comprehensive full-text search facilities of the fee-paying services.

4.13 The SEC has recently begun modernising its EDGAR system, in an effort to reduce the costs of preparing and submitting electronic filings, as well as to permit

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<sup>84</sup> This information is taken from J R Budge and R A Sanders, *Electronic Filing and the EDGAR System: A Regulatory Overview*, 25 May 1999; <<http://www.sec.gov/edaux/news/edreg99a.html>> and SEC Release No 33-7684; 34-41410; IC-23843: *Rulemaking for EDGAR System – Final Rule*, 17 May 1999, <<http://www.sec.gov/rules/final/33-7684.txt>>.

<sup>85</sup> There is a group of documents (including annual reports) which may be filed electronically but are not required to be: Rule 101(b) of Regulation S-T, *General Rules and Regulations for Electronic Filings*.

<sup>86</sup> There is, however, a hardship exemption (Rules 14, 201 and 202 of Regulation S-T, *General Rules and Regulations for Electronic Filings*). There are also a limited number of documents that are not permitted to be filed electronically. (These include: confidential treatment applications; interpretive, no-action and exemptive requests; filings pertaining to Regulation A and other offerings exempt from Securities Act registration; shareholder proposal filings; filings under Section 8(f) of the Investment Company Act (except Forms N-8F and applications for deregistration filed under Investment Company Act Rule 0-2); investment company fidelity bonds and related documents; and litigation materials filed under Section 33 of the Investment Company Act: Rule 101 of Regulation S-T, *General Rules and Regulations for Electronic Filings*).

more attractive and readable documents. On 28 June 1999, it began accepting official filings submitted to EDGAR in HyperText Markup Language (HTML).<sup>87</sup> In addition, filers have the option of accompanying their required filings with unofficial copies in Portable Document Format (PDF). PDF documents have the advantage of retaining all the fonts, formatting and colours as well as images and graphics contained in the original document. The expectation is that all filing will eventually be in HTML format, and that graphic and image material will be able to be included. Animated graphics, whether in any official document or any unofficial PDF copy are prohibited while issues concerning how to capture and represent the animated graphics, which cannot be printed or searched, are resolved.

### *Canada*

4.14 Canada also mandates electronic filing of most disclosure documents of public companies and mutual funds under its System for Electronic Document Analysis and Retrieval (SEDAR).<sup>88</sup> The system was developed to facilitate three objectives:

- electronic filing of securities information (prospectuses, continuous disclosure documents etc) and the electronic payment of filing fees;
- public dissemination of securities information;
- electronic communication between electronic filers, filing agents and the securities regulatory authorities.

4.15 All documents filed in the system can be searched, viewed and downloaded from the SEDAR website free of charge. Profiles of all filers are also available.<sup>89</sup>

4.16 When it was initially established, SEDAR permitted filings in Portable Document Format (PDF), Corel WordPerfect and Microsoft Word. However, difficulties were experienced when using newer versions of the two word-processing packages. As a result, the SEDAR system now only accepts documents in PDF format.<sup>90</sup>

### *United Kingdom*

4.17 In 1998, Companies House launched an electronic filing service for companies registered in England and Wales that enables the electronic submission of certain documents.<sup>91</sup> Documents and acknowledgements are transmitted via email using the

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<sup>87</sup> Previously it had only permitted documents in ASCII format (American Standard Code for Information Interchange). This does not permit any text enhancements (such as bold or underlining) or graphic material.

<sup>88</sup> SEDAR National Instrument 13-101, *System for Electronic Document Analysis and Retrieval* <[http://www.sedar.com/sedar/national\\_instrument.htm](http://www.sedar.com/sedar/national_instrument.htm)> – adopted by the Canadian Administrators sets out general rules relating to filing of securities documents using the SEDAR system.

<sup>89</sup> The SEDAR profile contains basic information such as the issuer's address, contact information and stock exchange listings.

<sup>90</sup> This change was proposed in February 1999 and implemented by amendments to National Instrument 13-101 with effect from 7 September 1999.

<sup>91</sup> Change of Registered Office Address; Appointment of a Director/Secretary; Resignation of a Director/Secretary; Change of Director/Secretary Details and Annual Returns.

telephone network. Two specialist software packages have been approved by Companies House for electronic filing, Blueprint and Secretariat.

4.18 Companies House also offers an on-line search facility.<sup>92</sup> The register of disqualified directors and the companies name and address index with basic company information can be searched for free. Other documents can be searched for a fee, and there are also (fee-paying) facilities to view images of documents online and to download them.

4.19 Paragraphs 4.4 to 4.18 raise issues about electronic lodgment and search facilities and possible future developments in this area. **Questions 47 to 53 in the attached questionnaire seek views on these issues.**

### ***The regulatory regime - authentication***

#### **Australia**

4.20 Section 352 was inserted into the Corporations Law by the Company Law Review Act 1998. Section 352(1) provides for electronic lodgment of documents, if ASIC and the lodging party agree in writing or ASIC has given a general approval for electronic lodgment of documents of that kind. However, as a result of an amendment inserted in Parliament, section 352(2) requires a signed copy of the document to be held by the person lodging the document and for the person to make the signed copy of the document available to ASIC if required.

4.21 Section 1306 of the Corporations Law permits any “book” that is required by the Corporations Law to be kept or prepared to be kept or prepared by means of an electronic device. The definition of “books” in section 9 of the Corporations Law is very wide and includes “a document”. It might be possible to make an argument based on these sections that the signed copy of a document that must be kept under section 352(2) of the Corporations Law could be kept electronically. However, this construction would be inconsistent with the Parliamentary history of section 352(2). Accordingly, ASIC’s position continues to be that a paper copy of all electronically-lodged documents must still be signed and kept.

#### **Overseas comparisons**

##### ***United States***

4.22 EDGAR cannot accept manual signatures, and so “required” signatures in electronic filings must be submitted in typed form.<sup>93</sup> Electronic filers must retain a manually signed signature page or other document authenticating, acknowledging or otherwise adopting the signatures that appear in typed form within an electronic filing. They must also make the document available to the SEC or its staff upon request for a period of five years.

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<sup>92</sup> Companies House Direct – Keeping Your Finger on the Pulse: < <http://www.companies-house.gov.uk/services/index.html>>.

<sup>93</sup> Rule 302 of Regulation S-T, *General Rules and Regulations for Electronic Filings*.

*Canada*

4.23 If an electronic filing is required to be signed or certified, this must be done by an electronic entry of the name of the authorising person. A prospectus, take-over bid circular, issuer bid circular, directors' circular, officers' circular or annual information form for a mutual fund that contains a certificate signed by a person or company must not be filed in electronic format unless the person or company has manually signed a certificate of authentication. The certificate of authentication is also required to be filed within three business days after the electronic filing.

*United Kingdom*

4.24 Documents are authenticated by a six-digit authentication code, nominated by the company. In order to comply with the Companies Act, the code must initially be delivered to Companies House in writing by the company, signed by a serving officer of the company. The company must also nominate a "presenter" to deliver information on its behalf.

4.25 In order to provide an electronic equivalent of a director's consent to act, electronic appointment documents must contain three items of personal information provided by the appointee, which may include their:

- place of birth;
- date of birth;
- telephone number;
- house/flat number or name;
- national insurance number;
- passport number;
- mother's maiden name;
- eye colour; and
- father's first forename.

4.26 Paragraphs 4.20 to 4.25 raise issues about authentication of electronically-lodged documents. **Questions 54 to 57 in the attached questionnaire seek views on these issues.**

## CCLSR

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Centre for Corporate Law & Securities Regulation



THE UNIVERSITY OF  
MELBOURNE

## QUESTIONNAIRE

### 1. Electronic Delivery

#### Requirements for signing (¶¶ 2.8 – 2.12)

- (1) Do any of the signature requirements in the Corporations Law provide a cautioning function?
- (2) If so, which provisions fall into this category?
- (3) Should some special form of acknowledgement be required from an electronic signatory (in respect of these provisions) to indicate that the signatory understands the legal significance of their communication?
- (4) If so, what form should it take?

#### Requirements for personal or postal delivery (¶¶ 2.13 – 2.16)

- (5) Should electronic delivery be available in all cases where an intended recipient has nominated a fax number or electronic address or only where electronic delivery is expressly provided for in the relevant statutory provision?

#### Requirements for individual delivery (¶¶ 2.17 – 2.18)

- (6) Should the fact that notice was sent to an electronic address nominated by the intended recipient satisfy the obligation on an issuer to give individual notification?

#### Privacy considerations (¶¶ 2.19 – 2.22)

- (7) Are the risks that electronic communications will be read by recipients other than the addressee such that there are types of document that it would not be appropriate to disseminate electronically? (e.g. communications containing personal and confidential data such as dividend reinvestment statements or employee share ownership statements)?
- (8) If not, is this merely a matter of informed consent or should minimum precautions be prescribed to ensure the integrity, confidentiality and security of certain types of information?
- (9) Is it necessary/desirable to provide that the reference to recording each member's address in a register under section 169 of the Corporations Law refers to the member's postal address?

#### Deemed receipt of electronically-delivered documents (¶¶ 2.23 - 2.26)

- (10) Should a deeming provision along the lines in sections 249J(4) and 252G(4) apply to all types of electronic communication?



- (11) If so, should it be displaceable?
- (12) Is it appropriate to adopt the period that applies under these sections, namely the next business day after it is sent?
- (13) If not, what period would be appropriate?
- (14) Should any deeming provisions apply if the sender receives notice that the electronic message was undeliverable?
- (15) Should there be an obligation on the sender to provide a paper version of the document if it receives notice that the electronic message was undeliverable?
- (16) Is a deeming provision appropriate where an electronic message may be filtered by the recipient's employer's monitoring program (and therefore not delivered or delayed) without the sender's or the recipient's knowledge?
- (17) In the absence of a deeming provision, is guidance required as to when an issuer can be satisfied that a document has been delivered?
- (18) Is the approach adopted by the SEC appropriate in the Australian context? What problems might there be with it?

Notice of, access to and consent to electronic delivery (¶¶ 2.27 - 2.33)

- (19) Do issuers and/or investors want guidance on their ability to comply with terms such as "issue", "report", "notify", "send", "give" and "distribute" by electronic communications?
- (20) Should it be possible for an issuer to comply with delivery obligations by posting a document on its website?
- (21) If so, what additional notice should be given to investors?
- (22) Should there be either generally-accepted guidelines or a mandatory consent procedure for electronic communications?
- (23) In either case, should it be along the lines proposed in Canada?
- (24) Should a separate consent form be provided by the investor in respect of each issuer?
- (25) Should the consent need to be renewed, e.g. annually or is it enough that it is given on a one-off basis?
- (26) Should it be possible for an issuer to fulfil all its statutory communication obligations by electronic means?
- (27) What should be the preconditions, if any?

## 2. Electronic Voting and Company Meetings

### Holding meetings (¶¶3.8 – 3.17)

- (28) Are there uncertainties in the law that may inhibit treating remote participants who are able to hear the meeting and participate by email as personally present and as having a reasonable opportunity to participate?
- (29) If so, how might these uncertainties best be overcome:
- by clarification in the issuer's constitution?
  - by ASIC guidance?
  - by changes to the law?
- (30) Are there any reasons for not allowing or restricting participation of this kind?
- (31) If so, what are they?

### Voting at meetings (¶¶3.18 – 3.21)

- (32) Are there uncertainties in the law that may inhibit the use of electronic voting by members by, for example, the Internet or by telephone?
- (33) If so, how might these uncertainties best be overcome:
- by clarification in the issuer's constitution?
  - by ASIC guidance?
  - by changes to the law?
- (34) Are there any reasons for not allowing or restricting voting of this kind?
- (35) If so, what are they?

### Proxies (¶¶ 3.22 – 3.33)

- (36) Are there uncertainties in the law that may inhibit proxy appointments being submitted by a member (credibly authenticated, by a means suitable to an electronic communication) to an electronic address nominated by the issuer?
- (37) If so, how might these uncertainties best be overcome:
- by clarification in the issuer's constitution?
  - by ASIC guidance?
  - by general guidelines on electronic signatures?
  - by changes to the law?
- (38) Are there any reasons for not allowing or restricting proxy appointments of this kind?
- (39) If so, what are they?
- (40) Does authentication by PIN provide adequate certainty that the proxy was sent by the particular shareholder and that the contents were not changed?
- (41) Should other methods of electronic authentication be available?

Resolutions and minutes (¶¶ 3.35 – 3.36)

- (42) Are there uncertainties in the law that may inhibit resolutions that can be passed without a meeting and declarations by a director of a one-person proprietary company being achieved electronically?
- (43) Are there uncertainties in the law that may inhibit minute books being signed electronically?
- (44) In each case, might these uncertainties about the use of electronic signatures best be overcome:
- by clarification in the issuer's constitution?
  - by ASIC guidance?
  - by general guidelines on electronic signatures?
  - by changes to the law?
- (45) Are there any reasons for not allowing or restricting electronic signatures in these contexts?
- (46) If so, what are they?

### **3. Electronic Lodgment**

Electronic lodgment and search facilities (¶¶ 4.4 – 4.19)

- (47) What would be the costs and benefits to issuers (for example in terms of investing in the necessary infrastructure, preparing and submitting documents for lodgment, retaining records to verify lodgment and disseminating information to investors) if Australia moved towards a system of mandatory electronic filing?
- (48) What would be the costs and benefits to investors and other members of the public (for example in terms of investing in the necessary equipment, accessing, searching and downloading information) if Australia moved towards a system of mandatory electronic filing?
- (49) In each case, how would the costs and benefits differ if issuers instead posted this information to their Internet home pages?
- (50) Should Australia move towards a system of mandatory electronic filing?
- (51) Should Australia move towards a system where issuers post all filed information on their Internet home pages?
- (52) If the answer to question 50 was yes, how might user fees be structured to enable ASIC to recover its development costs?
- (53) If the answer to either of questions 50 or 51 was yes:
- within what time frame should it be established?

- should it apply to all issuers or only to entities with continuous disclosure obligations?
- if it should apply to all issuers, would it be appropriate to stagger the introduction of the system as it applies to proprietary companies and/or public companies that are not disclosing entities?
- bearing in mind that only certain formats will be acceptable if documents are to be searched, retrieved and displayed predictably from ASIC's database, what formats (including multimedia) should be adopted for submission/posting of documents?
- should the full text of submitted documents be able to be searched and downloaded electronically?

The regulatory regime – authentication (¶¶ 4.20 – 4.26)

- (54) What provision should be made for authentication of electronically-lodged documents?
- (55) Should filers be required to keep records to verify electronic lodgment?
- (56) If so, for how long?
- (57) Should these records be able to be kept electronically?

## **Your comments**

**Your response is invited to the enclosed questionnaire.**

**Responses are due by Friday 18 February 2000 and should be sent to:**

**Dr Elizabeth Boros  
The Online Corporation project  
Centre for Corporate Law & Securities Regulation  
The University of Melbourne  
Parkville Vic 3010  
Facsimile: (03) 9417 5452  
Email: e.boros@law.unimelb.edu.au**

**You can also contact the Centre for Corporate Law & Securities Regulation on 03 9344 5281 for information and assistance.**

**Your response (and your name) will be made available to ASIC.**

**Subject to legal limitations, your response will be kept confidential by both Dr Elizabeth Boros and ASIC. If at any stage you wish to withdraw your response, you are free to do so.**

**If you have any complaints or concerns about the conduct of this project, you can contact the Administrator of the Centre for Corporate Law & Securities Regulation, Ms Ann Graham, on 03 9344 5281.**

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