

VIRTUAL SHAREHOLDER MEETINGS: WHO DECIDES HOW COMPANIES MAKE DECISIONS?

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[There is no consistent theoretical conception of the corporation either in the Australian corporations legislation or in the case law. This poses interpretive quandaries for courts when confronted with provisions in a corporate constitution which may be inconsistent with the policy underlying a provision of the corporations legislation and/or address a situation that was not in the contemplation of the legislature at the time the legislation was drafted. This article examines this issue using virtual shareholder meetings as a case in point. The conclusions have implications for how we legislate in the corporate law field more generally, as well as for the specific question of whether it is possible for a company to hold a purely electronic ballot.]

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I INTRODUCTION

One of the areas in which the internet could have the greatest practical impact on corporate law is in the context of shareholder meetings in widely held companies. Virtual shareholder meetings could herald either the elimination of the last vestige of director accountability to shareholders or the revival of a moribund forum by offering shareholders the prospect of a low-cost and geographically limitless means of participation. The issues revolve around three questions which are addressed in this article: (i) why shareholders should meet; (ii) how shareholders should meet; and (iii) whether shareholders have to meet at all.

The article focuses particularly on the last of these three questions, as it has received less critical attention to date than the other two.¹ It concentrates on widely held public companies, where the changes brought about by virtual meetings are likely to be the most profound.

II WHY SHAREHOLDERS SHOULD MEET

A The Legislative Preference for Meetings

When corporations legislation was initially drafted, it was assumed that decisions would be made at conventional physical meetings. Even though the legislation in most countries now allows at least some decisions to be reached in other ways, it still contains a bias in favour of decisions reached in the traditional way.

The *Corporations Act 2001* (Cth) (*'Corporations Act'*) evidences this bias quite strongly. Although it contains provisions for circulating resolutions of proprietary companies with more than one member,² the requirement that circulating resolutions be agreed to unanimously contains an implicit statement that this form of decision-making is inferior to a decision made at a meeting, which can be reached by majority. A more subtle example of this bias can be seen in the procedures dealing with protection of class rights from variation.³ In the absence of any provision in the corporate constitution dealing with the matter, the legislation allows the variation to be approved by the written consent of members with at least 75 per cent of the votes of the class, as an alternative to a special resolution (which requires a three-quarters majority at a meeting). The fact that, at least in widely held companies, not all shareholders will vote (either in person or by proxy) means that a higher absolute number of votes will generally be required under the written consent procedure.

¹ See, eg, Stephen Bottomley, 'From Contractualism to Constitutionalism: A Framework for Corporate Governance' (1997) 19 *Sydney Law Review* 277; Ralph Simmonds, 'Why Must We Meet? Thinking about Why Shareholders Meetings Are Required' (2001) 19 *Company and Securities Law Journal* 506.

² See *Corporations Act* s 249A.

³ See *Corporations Act* s 246B.

Arguably, a similar assumption can be seen even in the more far-reaching written resolution procedures in the United States.⁴ For example, in Delaware, legislation allows shareholders to act without a meeting, with the same percentage of votes that would have been able to approve such action at an actual meeting if all shares entitled to vote were present and voted.⁵ This provision clearly places much less importance on the traditional meeting than does the Australian legislation. Nevertheless, in common with the Australian class rights procedure, the requirement for an absolute majority of votes under the written consent procedure will generally be more onerous than securing a majority of votes at a traditional meeting because of the low participation rates in general meetings of widely held companies.⁶

B Meetings in Practice

As many commentators have noted, there are a number of problems with the way general meetings operate in widely held companies.⁷ In particular, widely dispersed shareholdings make shareholders rationally apathetic, since the outcome of the meeting will generally be determined by proxy votes lodged in advance of the meeting by institutional shareholders.

Even retail shareholders who wish to participate in some way in company decision-making are unlikely to be able to attend meetings personally. The reasons for this include that they may not live in the city where the meeting is being held, and that general meetings are held on weekdays during business hours. The result is not only that the shareholders who are able to attend are not representative of the general body of shareholders, but also that there is a potential for meetings to be captured by special interest groups.⁸

⁴ Note that similarly far-reaching provisions (though restricted to private companies) are also proposed in the United Kingdom in place of the current requirement for unanimous shareholder consent for resolutions without a meeting: Department of Trade and Industry, United Kingdom, *Modernising Company Law*, Cm 5553 (2002) Draft Clause 170 <<http://www.dti.gov.uk/companiesbill/whitepaper.htm>>. See also at [2.26]–[2.27].

⁵ *General Corporation Law*, 8 DEL CODE ANN § 228 (1999). This is so, unless the certificate of incorporation provides otherwise. See also Renee Crean, 'Has New York Effectively Challenged Delaware's Market Dominance with Recent Amendments to the New York Business Corporation Law?' (1998) 72 *St John's Law Review* 695, 714–15.

⁶ The effect is, however, less marked in the United States than in Australia, as the participation rate in publicly traded United States companies is higher than in listed Australian companies. See, eg, Fiona Buffini, 'Institutions Still Loath to Use Voting Power', *Australian Financial Review* (Sydney), 11 March 2004, 5.

⁷ For a recent discussion, see Douglas Cole, 'E-Proxies for Sale? Corporate Vote-Buying in the Internet Age' (2001) 76 *Washington Law Review* 793, and references cited in that article, particularly at 794–5 fnn 5–6. For a good overview of the problems, see also Company Law Review Steering Group, Department of Trade and Industry, United Kingdom, *Modern Company Law for a Competitive Economy: Company General Meetings and Shareholder Communication* (1999) [18]–[22] <<http://www.dti.gov.uk/cld/1840shar.pdf>>.

⁸ This concern has led the Business Council of Australia to develop a Code of Conduct for general meetings: see Business Council of Australia, 'Getting Value from AGMs' (Press Release, 23 September 2003) <<http://www.bca.com.au/content.asp?newsID=92403>>. A large proportion of the Code is devoted to managing shareholder questions and comments: Business Council of Australia, *General Meetings — Code of Conduct* (2003) <<http://www.bca.com.au/content.asp?newsID=92421>>.

For different reasons, general meetings are also poorly attended by institutional shareholders, most of whom, in Australia at least, regard direct contact with management and routine analyst visits and enquiries as more effective methods of influencing the governance and business directions of companies in their portfolio.⁹

C Stakeholder Attachment to Meetings

Notwithstanding these acknowledged problems (and the not insubstantial cost of convening and holding a general meeting in a widely held company),¹⁰ there is a considerable reluctance on the part of both companies and shareholders to dispose of the traditional meeting. The consultation on this question undertaken in the United Kingdom by the Company Law Review Steering Group¹¹ elicited a strong defence of traditional meetings. A majority of respondents favoured retention of the Annual General Meeting ('AGM') as a forum for debate and face-to-face accountability for stewardship that was particularly valuable to retail shareholders.¹² A similar view has been expressed in the form of criticism of the Delaware legislation that permits virtual meetings,¹³ and has resulted in the abandonment of a proposal to legislate for virtual meetings in Massachusetts.¹⁴

Government and industry organisations in Australia and the United Kingdom appear to share this view and exhort companies to make greater use of this forum. Thus, in the United Kingdom, Principle D2 of the *Combined Code on Corporate Governance* states that 'the board should use the AGM to communicate with investors and to encourage their participation.'¹⁵ It also contains

⁹ Investment and Financial Services Association Ltd, *Shareholder Activism among Fund Managers: Policy and Practice* (2003) 15.

¹⁰ According to research conducted at the Australian National University, the median cost of preparing for and running an AGM was \$15 000 in 2003: Stephen Bottomley, Centre for Commercial Law, Australian National University, *The Role of Shareholders' Meetings in Improving Corporate Governance* (2003) 45. The average cost was \$44 042, with six companies reporting costs over \$200 000, and one with costs over \$850 000: at 45 fn 111. The cost in very widely held companies may, however, be even higher. In *National Roads and Motorists' Association Ltd v Snodgrass* (2002) 42 ACSR 371, 373, the group secretary and general counsel of NRMA, in affidavit evidence, estimated the cost of calling a meeting of that company separate from the annual general meeting ('AGM') to be in the order of \$2.6 million. If the meeting were held on the same date then her estimate was a cost of at least \$1.4 million.

¹¹ See Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: Company General Meetings and Shareholder Communication*, above n 7.

¹² The responses to the consultation are accessible online: *List of Responses to the Consultation Document 'Company General Meetings and Shareholder Communication' in the Order They Were Received* (2000) Department of Trade and Industry, United Kingdom <<http://www.dti.gov.uk/cld/question3.pdf>>. See also Rebecca Strätling, 'General Meetings: A Dispensable Tool for Corporate Governance of Listed Companies?' (2003) 11 *Corporate Governance: An International Review* 74.

¹³ See Janet Forgrieve, 'Ciber to Hold Virtual Shareholder Meeting; Greenwood Village Company Looks to Cyberspace to Draw Interest in Meeting', *Rocky Mountain News* (Denver), 5 April 2002, Business 5; Daniel Birnhak, 'Online Shareholder Meetings: Corporate Law Anomalies or the Future of Governance?' (2003) 29 *Rutgers Computer and Technology Law Journal* 423.

¹⁴ Ralph Ranalli, 'Corporate Meetings Bill Is Shelved, Shareholder Group Raps Online Forums', *The Boston Globe* (Boston), 24 August 2001, B1.

¹⁵ Financial Reporting Council, *Combined Code on Corporate Governance* (2003) 18 <<http://www.frc.org.uk/documents/pdf/combinedcodefinal.pdf>>.

guidelines for using the AGM constructively.¹⁶ The recommendations published by the Australian Stock Exchange Corporate Governance Council express similar sentiments,¹⁷ and are strengthened by a number of reforms to the *Corporations Act* introduced by the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth).¹⁸

Institutional shareholders in both Australia and the United Kingdom are also alternately cajoled to vote more actively in meetings¹⁹ and threatened with being required to do so,²⁰ along the lines of the United States Department of Labor Interpretive Bulletin on the *Employment Retirement Income Security Act (ERISA) 1974*.²¹

D Judicial Defence of Meetings

An explanation for the attachment to and attempts to revive traditional general meetings can be found in numerous judicial statements emphasising the value of the opportunity for deliberation which is afforded by a physical gathering, and the ideal that the opportunity for the minority to express their views may influence company policy in a way that outweighs the numerical value of their votes.

An Australian example is provided by the often-quoted dictum of Bowen CJ in *Re Compaction Systems Pty Ltd* that:

The right to receive notice of a meeting, and to attend, and to be heard, is not an insubstantial right. The right to advance arguments and to influence the course of discussion may in some circumstances have an effect, even a decisive effect, on the decision reached.²²

The same approach can be seen in Delaware in the dictum of Chancellor Allen in *Hoschett v TSI International Software Ltd* that

while the model of democratic forms should not too strictly be applied to the economic institution of a business corporation (where for instance votes are

¹⁶ Ibid 18–19.

¹⁷ See Principle D2 in Australian Stock Exchange Corporate Governance Council, *Principles of Good Corporate Governance and Best Practice Recommendations* (2003) 41 <<http://www.asx.com.au/about/pdf/ASXRecommendations.pdf>>.

¹⁸ Section 250PA provides a procedure for members of listed companies to submit written questions to the auditor before the AGM, and requires the company, at or before the start of the AGM, to make copies of the question list reasonably available to the members attending the AGM. This is complemented by s 250RA which requires the auditor of a listed public company to attend or be represented at the AGM.

¹⁹ See Financial Reporting Council, above n 15, 20 (Principle E3).

²⁰ In the United Kingdom, see Paul Myners, *Institutional Investment in the UK: A Review* (2001) [79], [5.90]–[5.94] <<http://www.hm-treasury.gov.uk/media/843F0/31.pdf>>. In Australia, see Leon Gettler, ‘Thumbs Down for Funds Plan’, *The Age* (Melbourne), 26 March 2003, Business 2.

²¹ *Employee Retirement Income Security Act of 1994*, 29 USC §§ 1001–1461 (2004). See also *Interpretive Bulletin Relating to Written Statements of Investment Policy, Including Proxy Voting Policy or Guidelines* 29 CFR §§ 2509–42 (2004).

²² [1976] 2 NSWLR 477, 485. See also *Re HR Harmer Ltd* [1959] 1 WLR 62; *Re Duomatic Ltd* [1969] 2 Ch 365; Justice Robert Austin’s comments in the foreword to Greg Bateman, *Company Meetings: What You Need to Know* (2001) v–vi.

weighted by the size of the voter's investment), it is nevertheless a not unimportant feature of corporate governance that at a noticed annual meeting a form of discourse (ie, oral reports, questions and answers and in rare instances proxy contests) among investors and between shareholders and managers is possible. The theory of the annual meeting includes the idea that a deliberative component of the meeting may occur. Shareholders' meetings are mandated and shareholders authorized by statute to transact proper business because we assume that at such meetings something said may matter. Obviously these meetings are very far from deliberative convocations, but a keen realization of the reality of the degree of deliberation that is possible, should make the preservation of residual mechanisms of corporate democracy more, not less, important.²³

E *Critical Defence of Meetings*

In line with these judicial statements, Stephen Bottomley has explored and advocated the value of the deliberative aspect of a meeting.²⁴ Ralph Simmonds places emphasis on this aspect as well,²⁵ but also relies on the key feature mentioned by stakeholders, namely the potential of the physical meeting to act as a forum for accountability. In an in-depth theoretical analysis of the necessity for meetings, he identifies four interconnected reasons for mandating AGMs for public companies, namely:

- the pervasiveness of positional conflicts of interests (that is, managers' interest in maintaining and enhancing their positions);
- the value of deliberative assemblies, such as the AGM, in addressing this problem;²⁶
- the unlikelihood that provisions for such assemblies would be generally accepted without the reinforcement of mandatory rules; and
- the unlikelihood that market effects would properly compensate for the lack of such provision.²⁷

If we assume the importance of having some form of AGM, the next question that arises is whether it is necessary that the meeting take the form of the traditional physical gathering.

III HOW SHAREHOLDERS SHOULD MEET

Despite some important differences between directors' and general meetings, the cases on directors' meetings are a useful starting point for this discussion, since the generally smaller number of attendees simplifies the practical issues, allowing courts to address the legal question of what constitutes a 'meeting'.

²³ 683 A 2d 43, 45–6 (Del Ch, 1996).

²⁴ Bottomley, above n 1, 304–7.

²⁵ Simmonds, above n 1, 511.

²⁶ See also Bottomley, above n 1, regarding the importance of deliberative assemblies in good corporate governance.

²⁷ Simmonds, above n 1, 515–16.

A Directors' Meetings

There are instances where judges have taken a literal view of what is required to constitute a meeting. For example, in *Guinness plc v Saunders*,²⁸ the English Court of Appeal had to decide whether a director had disclosed a payment involving a conflict of interest 'at a meeting of directors' as required by the *Companies Act 1985* (UK) c 6.²⁹ It was argued that formal disclosure was unnecessary because the board knew about the payment. However, as Fox LJ held:

that does not alter the fact that the requirement of the statute that there be a disclosure to 'a meeting of the directors of the company' (which is a wholly different thing from knowledge by individuals and involves the opportunity for positive consideration of the matter by the board as a body) was not complied with.³⁰

However, provided that there is some form of meeting of minds, courts have generally been open to finding that something other than a formally constituted meeting will suffice. For example, in *Swiss Screens (Australia) Pty Ltd v Burgess*,³¹ Bryson J held that any event in which the company's directors reached concurrence in taking some course in the company's affairs could be described as a 'meeting'.³²

In recent times, the most relevant application of this approach has been in the context of cases regarding directors' meetings by telephone. Most companies now put the validity of such meetings beyond doubt by providing expressly for them in their constitutions or articles of association. In addition, in Australia the *Company Law Review Act 1998* (Cth) introduced amendments designed to clarify that a directors' meeting may be held using any technology consented to by all of the directors.³³

However, even under articles that did not expressly refer to meetings using technology, the English judiciary was receptive to this development and, since at least 1989, it has been assumed that directors might validly be present at a board meeting by telephone.³⁴ Directors' meetings by telephone were also accepted as valid (in the absence of any authority, either in the statute or the board's own

²⁸ [1988] 1 WLR 863; aff'd [1990] 2 AC 663 (House of Lords).

²⁹ Section 317.

³⁰ *Guinness plc v Saunders* [1988] 1 WLR 863, 868. The other members of the Court of Appeal agreed with the judgment of Fox LJ. The same approach was taken in the much earlier case of *D'Arcy v Tamar, Kit Hill & Callington Railway Co* (1867) LR 2 Ex 158. For an Australian authority to similar effect, see *R v Byrnes* (1996) 20 ACSR 260, 270–1 (Bollen, Prior and Olsson JJ).

³¹ (1987) 11 ACLR 756.

³² See also *Wagner v International Health Promotions* (1994) 15 ACSR 419, 421–2 (Santow J); *Roden v International Gas Applications* (1995) 125 FLR 396, 397–8 (McLelland CJ).

³³ See what is now *Corporations Act* s 248D.

³⁴ See, eg, *Re Equiticorp International plc* [1989] 1 WLR 1010. At the time, the Court of Justice of the European Communities also took this approach: see, eg, *R v HM Treasury; Ex parte Daily Mail & General Trust plc* [1989] 1 QB 446.

rules) by the Appellate Court of Illinois in *Freedom Oil Co v Illinois Pollution Control Board*.³⁵

In Australia, one particular judge, Perry J, of the South Australian Supreme Court, has been much more hostile to departures from the physical meeting format.³⁶ In *Re Southern Resources Ltd; Residues Treatment & Trading Co Ltd v Southern Resources Ltd*, his Honour held that:

The words in art 105 'meet together'; the requirements as to a quorum; the provisions of art 106 disentitling a director while out of Australia to notice of a meeting of the directors; the words in art 106 that a director 'may attend and vote by proxy'; the words in art 108 referring to a quorum being 'present'; the requirement in art 113 as to the keeping within the minutes of a meeting of the names of the directors 'present at each meeting', all point inexorably to the conclusion that in the articles the word 'meeting' has its ordinary meaning, namely, that it refers to an assembly of people, that is, the directors.³⁷

His Honour also considered that the result would be no different if a conference telephone were used.³⁸

However, a few years later in *Bell v Burton*, Tadgell J would have been prepared to countenance a directors' meeting by 'telephone, video link, or any other electronic means which caters for a meeting of their minds'.³⁹ This approach received obiter approval from Santow J in *Wagner v International Health Promotions*, where his Honour considered that a constitutional reference to the directors 'meeting together' could include a meeting of minds made possible by modern technology (in that case a conference telephone).⁴⁰ This approach was applied to hold valid a directors' meeting where one director attended by telephone in *Re Ferguson*,⁴¹ and has been adopted in several subsequent cases.⁴²

B Shareholders' Meetings

There has been very little judicial consideration of what amounts to a valid meeting of shareholders. One exception is the decision of the English Court of Appeal in *Byng v London Life Association Ltd*,⁴³ which in 1990 accepted the validity of holding an AGM in several rooms connected by audiovisual links that

³⁵ 275 Ill App 3d 508 (1995). See also Jessica Natale, 'Exploring Virtual Legal Presence: The Present and the Promise' (2002) 1 *Journal of High Technology Law* 157.

³⁶ See *Magnacrete Ltd v Douglas Hill* (1988) 48 SASR 565, 603. In this case, separate telephone calls to directors were held not to amount to a meeting.

³⁷ (1989) 15 ACLR 770, 793.

³⁸ *Ibid* 794.

³⁹ (1993) 12 ACSR 325, 329.

⁴⁰ (1994) 15 ACSR 419, 421–2.

⁴¹ (1995) 58 FCR 106.

⁴² See, eg, *Re Farnell Electronic Components Pty Ltd* (1997) 25 ACSR 345; *Mulcon v MYT Engineering* (1996) 20 ACSR 606, 609–10 (Bryson J). Cf *B & M Property Enterprises Pty Ltd (in liq) v Pettingill* [2001] SASC 75 (Unreported, Perry J, 22 March 2001) [94]. In this respect, judicial thinking seems to have moved on from the position described in Ross Grantham, 'The Unanimous Consent Rule in Company Law' (1993) 52 *Cambridge Law Journal* 245, 254–5.

⁴³ [1990] Ch 170.

enabled those in all the rooms to see and hear what was going on in the other rooms.

Despite this evidence of the judiciary's willingness to embrace the use of technology in this context,⁴⁴ the Australian corporations legislation was amended in 1998 to clarify the legality of this approach.⁴⁵ In the United Kingdom, the Company Law Review Steering Group was equivocal about whether such reforms might be necessary.⁴⁶

Extending this approach to encompass a meeting involving a large number of shareholders, at locations which are not supervised by the company, presents practical as well as legal challenges. The practical challenges include keeping track of which members are 'present', verifying their identities in some way, and devising a forum that incorporates the features of deliberation and debate referred to in the cases discussed above,⁴⁷ as well as giving shareholders the opportunity to cast a vote in real-time.

Law reform may also be required. In Australia, there is no express provision allowing a meeting to be held in no place, although the legislation does expressly provide for a meeting to be held in more than one place.⁴⁸ Depending on how this requirement is interpreted, it might be possible to argue that this could extend to an entirely virtual meeting. The only guidance on how this provision might work is the statutory requirement that members as a whole must have a reasonable opportunity to participate in the meeting. In this context, the Explanatory Memorandum to the Company Law Review Bill 1997 (Cth) states:

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.⁴⁹

Both aspects of participation (namely deliberation and voting) are addressed in Delaware, which is the only jurisdiction that expressly permits virtual meetings.⁵⁰ The Delaware *General Corporation Law* requires that procedures be adopted by the board to enable stockholders and proxyholders to participate and vote in the meeting, including the opportunity to hear or read the proceedings of

⁴⁴ An interesting contrast is provided by the recent decision of Palmer J in the context of a creditors' meeting in *Holzman v New Horizons Learning Centre (Canberra) Pty Ltd* (2004) 22 ACLC 446.

⁴⁵ See what is now *Corporations Act* s 249S. This reform was introduced by the *Company Law Review Act 1998* (Cth).

⁴⁶ Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: Final Report* (2001) [7.7] <http://www.dti.gov.uk/cld/final_report/ch_7.pdf>.

⁴⁷ See above Part II(D).

⁴⁸ See *Corporations Act* s 249S.

⁴⁹ Explanatory Memorandum, *Company Law Review Bill 1997* (Cth) 43.

⁵⁰ *General Corporation Law*, 8 DEL CODE ANN § 211(a)(1) (1999). Subject to provision in the certificate of incorporation or by-laws, the directors may determine that the meeting will be conducted entirely by remote communication.

the meeting substantially in real time.⁵¹ The procedures must also enable the company to verify that each person deemed present and permitted to vote at the meeting by means of remote communication is a stockholder or proxyholder, and to record their votes.⁵²

There are press reports of two companies taking advantage of the Delaware legislation to hold virtual meetings. However, both appear to have been very limited experiments. In the case of Inforte Corp, no voting took place at the meeting,⁵³ and it is not clear whether any questions were asked⁵⁴ (although the company was prepared to answer questions emailed to its investor relations address). There are no press reports regarding the conduct of Ciber Inc's virtual meeting. However, a report in advance of the meeting that the company was hoping that more than 10 of its 28 000-plus shareholders would attend⁵⁵ suggests that it was not necessary for the company to grapple with the difficult issue of satisfactorily identifying shareholders and providing for real-time participation on a mass scale.

Moreover, although both sets of legislative provisions contemplate a physically dispersed meeting, it would appear that neither contemplates that a decision could be reached solely by electronic ballot without any element of deliberation,⁵⁶ since the Australian legislation contemplates a meeting being 'held' in some form,⁵⁷ and the Delaware legislation similarly refers to there being 'proceedings of the meeting'.⁵⁸ The ability of a company to dispense altogether with some form of 'proceeding' and instead resolve the issue by electronic ballot is explored further in the next section.

IV DO SHAREHOLDERS HAVE TO MEET?

Two propositions emerge from Parts II and III of this article, namely that:

- two key features of a 'meeting' are its potential as a forum for deliberation and debate of motions (as well as reaching a resolution on those motions by voting), and accountability for stewardship; and

⁵¹ 8 DEL CODE ANN § 211(a)(2)b(ii) (1999).

⁵² *General Corporation Law*, 8 DEL CODE ANN § 211(a)(2)b(i) (1999).

⁵³ Ninety-seven percent of the shares were voted by fax before the meeting: Tami Kamarauskas, 'Inforte Corp Hosts Virtual Shareholder Meeting' (2001) 5(5) *Wallstreetlawyer.com* 20. Inforte Corp repeated this experiment the following year, but there are no press reports of how that meeting was conducted.

⁵⁴ *Ibid.* Cf Broc Romanek, 'Technology Trends for 2002' (2002) 5(8) *Wallstreetlawyer.com* 25; Broc Romanek, 'Electronic-Only Shareholders' Meetings: Examining the Considerations' (2001) 4(2) *e-Securities* 3.

⁵⁵ Forgive, above n 13.

⁵⁶ A separate provision, § 228 of the Delaware *General Corporation Law*, which enables shareholders in some situations to reach decisions by the written consent of the majority (or other required vote) of the shareholders unless the certificate of incorporation provides otherwise, would permit this. However, corporations usually disapply this default rule because it had the unintended consequence of potentially disadvantaging management in control contests: Charles O'Kelley and Robert Thompson, *Corporations and Other Business Associations: Cases and Materials* (4th ed, 2003) 151.

⁵⁷ *Corporations Act* s 249S.

⁵⁸ 8 DEL CODE ANN § 211(a)(2)b(i) (1999).

- it might be possible to devise a virtual shareholder meeting with these elements, but no company with a very large number of shareholders has achieved this yet.

A question which emerges from the discussion of directors' meetings by telephone and which is developed in this part of the article is: is it more likely that judges will interpret silence in the legislation about a new way of doing something (such as holding a meeting) as an implicit permission or as an implicit prohibition?⁵⁹ The answer to this question has implications for how we legislate in the corporate field more generally, as well as for the specific question of whether it would be possible for a company to hold a purely electronic ballot.

In Australia, this is not a theoretical question. In 2001, National Roads and Motorists' Association Ltd ('NRMA Ltd') held a remote ballot for a half-board election,⁶⁰ where members were able to vote either by post or by an electronic interface set up by the company. Although it made no express provision for remote electronic voting, NRMA Ltd's constitution allowed for this by enabling election rules to be determined by the board in advance of the nomination period for a particular election, and requiring members to vote by one of the methods set out in the election rules for the relevant election period.⁶¹

Unlike most aspects of the general meetings of this tumultuous company, the electronic voting aspect of its proceedings passed relatively unremarked. However, it would appear to raise several questions: (i) whether a remote ballot (either electronic or postal) could substitute for an AGM; (ii) under what authority NRMA Ltd held its remote ballot for directors; and (iii) whether a company limited by shares could do the same thing.

Each of these will be addressed in turn.

A *Could a Remote Ballot Substitute for an AGM?*

It should perhaps be reiterated at this point that this article is concerned with widely held public companies. In Australia, proprietary companies need not hold an AGM unless required to do so by their constitutions, and there are proposals to reform the English companies legislation to achieve a similar result.⁶²

Australian public companies, however, are required to hold an AGM (unless they have only one member),⁶³ and s 317 of the *Corporations Act* requires the financial report, directors' report and auditor's report to be laid before the AGM of a public company (if it is required to hold an AGM). In light of the importance placed by the courts on meetings as a forum for deliberation and debate, I consider it unlikely a court would regard a remote ballot as satisfying the

⁵⁹ See, eg, Jesper Hansen, 'The Listed Companies and the Electronic Communication' (Copenhagen Stock Exchange Focus Paper No 62, 9 September 2003) <http://www.cse.dk/kf/kf_pressemeddelelser?languageID=1&c=Page&cid=1034698850162&contentid=1062141824343>.

⁶⁰ Selina Mitchell, 'NRMA Election on Net', *The Australian* (Sydney), 2 October 2001, 31.

⁶¹ *NRMA Constitution* (as amended November 2001) rr 61, 71–2.

⁶² Department of Trade and Industry, above n 4, [2.27]. See especially Draft Clauses 135, 127–31.

⁶³ *Corporations Act* s 250N.

requirement for an AGM.⁶⁴ Barrett J reached this conclusion in the context of creditors' meetings in *Re Love*,⁶⁵ where his Honour held that:

Implicit in any provision that a report or accounts or any other document be 'laid before' a meeting by a particular person are three clear expectations: first, that the person concerned will be in attendance at the meeting; second, that the document in question will be then and there in the possession of those present at the meeting or, at least, readily available to those of them who wish to have it; and third, that the content of the document and matters arising from it may be discussed by those present in the hearing of the person who has laid it before the meeting.⁶⁶

An analogous conclusion was reached in the Delaware case of *Hoschett v TSI International Software Ltd.*⁶⁷ It was held that the (then) mandatory requirement⁶⁸ in s 211 of the Delaware *General Corporation Law* to hold an annual meeting of shareholders for the election of shareholders was not satisfied by the shareholder consent procedure.⁶⁹

It should also be noted that the remote ballot conducted by NRMA Ltd was not intended to substitute for the company's AGM, which was convened for a date shortly after the remote ballot closed.

B Under What Authority Did NRMA Ltd Hold Its Remote Ballot for Directors?

There is no affirmative power for the holding of a remote ballot in this situation in the *Corporations Act*.⁷⁰ Despite this, it has long been the practice in Australia for companies limited by guarantee to use this method of passing resolutions, at least in relation to the election of directors, provided that their constitutions allow for this.⁷¹

Companies limited by guarantee are by definition public companies,⁷² and they are therefore generally required to hold an AGM.⁷³ Section 250R of the *Corporations Act* contains an indicative list of the items of business at an AGM,

⁶⁴ *Contra* Simmonds, above n 1, 517.

⁶⁵ (2003) 44 ACSR 367.

⁶⁶ *Ibid* 370–1.

⁶⁷ 683 A 2d 43 (Del Ch, 1996).

⁶⁸ The outcome of this case has since been affected by changes to s 211, which now permits shareholders to act by written consent to elect directors, provided that if the consent is less than unanimous, it is only effective if all the directorships to which directors could be elected at the annual meeting are vacant and all of those directorships are filled by the action: *General Corporation Law*, 8 DEL CODE ANN § 211 (1999).

⁶⁹ *General Corporation Law*, 8 DEL CODE ANN § 228 (1999).

⁷⁰ Until recently, the *Corporations Act* referred to postal voting in two circumstances: (i) the election of one or more directors of a company limited by guarantee where at least one of the candidates has attained the age of 72 (s 201C(11)); and (ii) approval of offers made under a proportional takeover bid and the company's constitution (s 648D(1)(c)(ii)). On 11 April 2003, s 201C of the *Corporations Act* was repealed in its entirety by the *Corporations Legislation Amendment Act 2003* (Cth).

⁷¹ See, eg, *Fiore v Carlton Football Club Ltd* (2003) 21 ACLC 145. Cf *Keep v Hurstville Soldiers' Memorial Hall Club Ltd* (1963) 80 WN (NSW) 1497.

⁷² *Corporations Act* s 112.

⁷³ *Corporations Act* s 250N.

and this list includes the election of directors. At first glance, the existence of a common practice of electing directors by another means seems somewhat perplexing. However, this section does not impose an obligation to include the listed items of business on the agenda; it merely offers the opportunity to do so without express notice. In any event, the fact that the practice of using remote ballots to elect directors is so settled in companies limited by guarantee would probably make it difficult to challenge a resolution reached in this way.

C *Could a Company Limited by Shares Do the Same Thing?*

The legislation is silent on this question,⁷⁴ and my research has not revealed any case where a postal ballot or electronic equivalent has been conducted by a company limited by shares. In 2000, the Companies and Securities Advisory Committee ('CASAC') recommended a legislative amendment to permit direct electronic voting,⁷⁵ but it is not clear from its report whether it regarded law reform as necessary in order to permit this, or merely as a desirable clarification.⁷⁶ Moreover, CASAC did not contemplate that absentee voting should be able to substitute for a physical gathering.⁷⁷ This issue therefore squarely raises the questions of the proper interpretation to place on the legislation's silence on this question, and whether a company limited by shares could provide in its constitution for a decision to be reached by a postal or electronic ballot.

This article does not attempt to engage in the debate regarding the desirable balance between mandatory and enabling rules in this area.⁷⁸ Rather, it attempts to determine judicial attitudes to where we are on the spectrum between mandatory and enabling rules in this context (and hence to address the questions identified above). Express judicial statements on this question are rare, and judicial support can be found for both concessionist⁷⁹ and contractarian⁸⁰ standpoints. It is therefore necessary to attempt to answer these questions by drawing inferences as to judicial attitude from the outcomes of decided cases. To this end, this article examines the case law on three related topics: (i) the doctrine of unanimous informal consent; (ii) s 1322 of the *Corporations Act* (which provides a mechanism for curing procedural irregularities); and (iii) cases

⁷⁴ The *Corporations Act* does contain one reference to postal ballots but it is not relevant in this context: see above n 70.

⁷⁵ CASAC, *Shareholder Participation in the Modern Public Listed Company: Final Report* (2000) 73 <[http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2000/\\$file/Shareholder_Participation_in_the_Modern_Listed_Company_June_2000.pdf](http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2000/$file/Shareholder_Participation_in_the_Modern_Listed_Company_June_2000.pdf)>. CASAC is now called the Corporations and Markets Advisory Committee ('CAMAC').

⁷⁶ Ibid 71. See also Simmonds, above n 1, 511.

⁷⁷ CASAC, above n 75, 76.

⁷⁸ See Simmonds, above n 1. See also Elizabeth Boros, 'Corporate Governance in Cyberspace — Who Stands to Gain What from the Virtual Meeting?' (2003) 3 *Journal of Corporate Law Studies* 149, 162–4; Robert Thompson, 'Preemption and Federalism in Corporate Governance: Protecting Shareholder Rights to Vote, Sell, and Sue' (1999) 62 *Law and Contemporary Problems* 215, 237–8.

⁷⁹ See, eg, *Re U Drive Pty Ltd* (1986) 10 ACLR 565, 566 (Young J); *Windsor v National Mutual Life Association of Australasia Ltd* (1992) 34 FCR 580, 589 (Black CJ and Beaumont J).

⁸⁰ See, eg, *Allied Mining & Processing Ltd v Boldbow Pty Ltd* (2002) 169 FLR 369, 379 (Roberts-Smith J).

where courts have (arguably) undermined the spirit of legislative provisions when giving effect to constitutional provisions.

1 *Cases on Unanimous Informal Consent*

Some guidance as to the importance placed by the courts on physical meetings can be found in the cases on unanimous informal consent. Under this doctrine (often referred to as the principle in *Re Duomatic Ltd*,⁸¹ although it predates that case),⁸² the unanimous informal assent of members is treated as being equivalent to a resolution, whether or not there is a physical gathering of members.⁸³ The outer limits of the doctrine are unclear.⁸⁴ One contentious issue is whether its operation is excluded in some situations because the corporations legislation requires the matter to be dealt with at a 'meeting'. This question often arises in the context of matters which are required to be dealt with by a special resolution.

(a) *Special Resolutions*

In *Cane v Jones*,⁸⁵ the defendant argued that an informal agreement between the shareholders was not effective as a special resolution altering the company's articles of association because the legislation required a special resolution to be passed at a 'meeting'. Michael Wheeler QC (sitting as a deputy judge) rejected this argument,⁸⁶ by extending the doctrine utilised in previous cases⁸⁷ to apply beyond situations in which there had been a meeting and a resolution, but defective notice. Although this decision has been followed in subsequent English cases,⁸⁸ this has not been without opposition. Thus in *Re Barry Artist Ltd*,⁸⁹ Nourse J considered in obiter⁹⁰ that the statutory requirement for a special resolution ought to be treated as an essential stage in the procedure for reducing a company's capital. His Honour stated: 'Section 66 says that [a reduction of capital] should be done by special resolution. Why should the court confirm it if it is done in some other way, however effective it may be?'⁹¹

Even stronger opposition can be found in the Australian case law. For example, Lehane J held in *Sipad Holding ddp v Popovic*:

⁸¹ [1969] 2 Ch 365.

⁸² The doctrine dates back at least to the dictum of Lord Davey in *Salomon v Salomon & Co Ltd* [1897] AC 22, 57.

⁸³ See, eg, *Re P W Saddington & Sons Pty Ltd* (1990) 19 NSWLR 674; *Parker & Cooper Ltd v Reading* [1926] Ch 975.

⁸⁴ See also Butterworths, *Ford's Principles of Corporations Law*, vol 1 (at 32-6-02) [7.590]; Grantham, above n 42.

⁸⁵ [1980] 1 WLR 1451.

⁸⁶ *Ibid* 1459.

⁸⁷ *Re Pearce Duff & Co Ltd* [1960] 1 WLR 1014; *Re Oxted Motor Co* [1921] 3 KB 32.

⁸⁸ See, eg, *Re Home Treat Ltd* [1991] BCLC 705.

⁸⁹ [1985] 1 WLR 1305, 1306.

⁹⁰ As explained by Harman J in *Re Home Treat* [1991] BCC 165, 168 (emphasis added): 'Nourse J expressly decided that as a matter of law a *written special resolution* was effective, but he expressed the view that as a matter of discretion it was undesirable and should not be utilised if the court's approval were wanted.'

⁹¹ *Re Barry Artist Ltd* [1985] 1 WLR 1305, 1306.

I confess that I am quite unable to see how a signed resolution under Art 51 could effectively alter the articles of association. The *Corporations Law* provides (s 176) that a company may by special resolution alter or add to its articles. No other means of doing so is provided. Section 253 of the Law tells us what a special resolution is: it is a resolution passed by a specified majority at a general meeting. A document signed under Art 51 is not a resolution passed at a meeting.⁹²

Although the question no longer arises in Australia in the context of special resolutions (as a result of a change in the statutory definition),⁹³ this case does provide an example of a literal approach in the Australian case law towards interpreting 'meeting' requirements.

(b) *Schemes of Arrangement*

Another context where this issue has arisen, and where there is a split in the Australian judicial attitude, is in the context of schemes of arrangement, where the legislation refers to the compromise or arrangement being agreed to 'at a meeting'.⁹⁴ In one case, a court was prepared to treat the unanimous informal agreement of the members as satisfying this requirement, and consequently to approve the scheme of arrangement.⁹⁵ However, in the subsequent case of *Re Montana Frocks Pty Ltd*,⁹⁶ Street J declined to approve a scheme of arrangement on the basis that the legislation required the summoning of a meeting by the court before the court had jurisdiction to approve the scheme.⁹⁷

(c) *One-Member Companies*

Most recently, this issue has arisen in the context of the one-member company. The legislative legitimation of the one-member company required the question of meetings to be dealt with expressly, and s 249B(1) of the *Corporations Act* states that '[a] company that has only one member may pass a resolution by the member recording it and signing the record.' However, in *CIC Insurance Ltd v Hannan & Co Pty Ltd*,⁹⁸ Barrett J identified two situations where the procedure in s 249B(1) might not be available because the *Corporations Act* indicates that a physical meeting is required, namely:

⁹² (1995) 61 FCR 205, 216. See also *M Dalley Co Pty Ltd v Sims* (1968) 120 CLR 603, 614 (Barwick CJ); *Re U Drive Pty Ltd* (1986) 10 ACLR 565, 566 (Young J); *Sycotex Pty Ltd v Baseler* (1994) 13 ACSR 766, 781 (Gummow J). Cf *Sutherland v Robert Bosch (Aust) Pty Ltd* (2000) 33 ACSR 680, 688 (Santow J).

⁹³ The definition of 'special resolution' was changed by the *Company Law Review Act 1998* (Cth) sch 2, [166]. Prior to this Act, the definition of 'special resolution' referred to it being passed 'at a meeting': *Corporations Law* s 253. The reference to 'a meeting' has been removed from the current definition, which refers only to the requirements for special notice and the passing of the resolution by at least 75 per cent of the votes cast by members entitled to vote on the resolution: *Corporations Act* s 9.

⁹⁴ *Corporations Act* s 411(4).

⁹⁵ *Re Barry & Roberts Pty Ltd* [1947] QWN 43.

⁹⁶ [1967] 2 NSW 584.

⁹⁷ See also R I Barrett, 'Corporations — Whether Special Resolution Can Be Achieved without a Meeting' (1996) 70 *Australian Law Journal* 199.

⁹⁸ (2001) 38 ACSR 245.

- s 203D(4)(b), which gives a director of a public company the right to speak to a resolution to remove the director; and
- s 497(1), which requires the company to convene a meeting of creditors either on the same day as or the day after it holds a meeting to consider the resolution for winding up.⁹⁹

Regarding the second exception, Barrett J considered that s 497(1) excluded the procedure in s 249B(1), because s 497(1) made it necessary to be able to identify in advance the day on which the meeting was to be held.¹⁰⁰

His Honour found additional support for the view that a physical meeting might be required in situations such as these from that fact that ‘[[u]nlike predecessor provisions allowing paper-based resolutions by a single shareholder ... s 249B of the *Corporations Law* does not deem such a resolution to have been passed at a meeting.’¹⁰¹

(d) *Summary*

The law on unanimous informal consent is itself quite confused. It is therefore not surprising that its limits in this context are difficult to define. To the extent that it is possible to draw conclusions from the above discussion, it might be argued that Australian judges are more likely than their counterparts in the United Kingdom to interpret a statutory requirement for a meeting as requiring a deliberative forum. Alternatively, it may simply be that the Australian cases have arisen in the context of provisions which involve the interests of stakeholders other than shareholders, so that it is not appropriate to exclude input by those stakeholders from the decision-making process.¹⁰² A further possible explanation for the difference between the two jurisdictions may be that Australian judges have greater scope to interpret statutory references to ‘meetings’ literally because of the existence of s 1322 of the *Corporations Act*. This section will now be discussed.

2 *Cases on Procedural Irregularities*

Section 1322 of the *Corporations Act* validates certain procedural irregularities, unless the court is of the opinion that the irregularity has caused or may cause substantial injustice that cannot be remedied by court order.

In *Re Montana Frocks Pty Ltd*,¹⁰³ Street J’s formalistic approach was fatal to the ‘resolution’, since his Honour also declined in that case to overcome the absence of a court-summoned meeting by the predecessor of s 1322. In contrast, in *Sipad Holding ddpo v Popovic*,¹⁰⁴ although Lehane J was not willing to apply the unanimous informal consent doctrine, his Honour gave effect to the purported resolutions by virtue of s 1322.¹⁰⁵

⁹⁹ Ibid 246.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² See also Grantham, above n 42, 251–2; Boros, above n 78, 158–61.

¹⁰³ [1967] 2 NSW 584.

¹⁰⁴ (1995) 61 FCR 205.

¹⁰⁵ See also *M Dalley & Co Pty Ltd v Sims* (1968) 120 CLR 603.

The very existence of s 1322 indicates a legislative intention to relax the rigidity of the procedural requirements for meetings, as long as there is no substantial injustice. Most of the cases decided under this section are responses to somewhat unusual facts, and therefore are not necessarily illustrative of any wider principle.

However, one case which stretches the boundaries of this section, and therefore warrants some discussion, is *Re Pembury Pty Ltd*.¹⁰⁶ The facts of this case were less extreme than some that have been litigated under this section,¹⁰⁷ but still unusual. There had been two earlier unsuccessful attempts to convene a meeting. In the first case, the notice was not properly served and in the other the notice was inadequate.¹⁰⁸ Byrne J placed some emphasis on the fact that the shareholder, who did not attend the third (also irregularly convened) meeting, had had some forewarning of the business to be transacted at the meeting by virtue of these earlier irregular communications. His Honour was therefore prepared to declare resolutions passed at the purported meeting valid, notwithstanding the deficiency of notice and the absence of a quorum at the third 'meeting'.¹⁰⁹ This was on the basis that the outcome of the voting would have been no different if there had been no irregularity. Byrne J attempted to limit the potential ambit of his decision, saying: 'This decision should not encourage the notion that shareholders with voting control may always give short notice of general meetings or pass effective resolutions in the absence of a quorum.'¹¹⁰ Nevertheless, the fact that the irregularities in calling and holding the meeting in this case were deliberate¹¹¹ means that Byrne J's decision to validate the 'resolutions' runs counter to the emphasis in other contexts on the meeting as a forum for accountability, debate and persuasion, even if the outcome may seem to be a foregone conclusion.

3 Cases on the Interrelationship between the Statute and the Corporate Constitution

(a) Removal of Directors

A third perspective on this question is the approach the courts take to attempts to use constitutional provisions to circumvent or undermine the policy underlying statutory provisions. A starting point is the English case of

¹⁰⁶ [1993] 1 Qd R 125.

¹⁰⁷ See, eg, *Re Clearwater Pty Ltd* (1981) 6 ACLR 201.

¹⁰⁸ *Re Pembury Pty Ltd* [1993] 1 Qd R 125, 127–9.

¹⁰⁹ *Ibid* 133.

¹¹⁰ *Ibid*. Indeed, in an appropriate case, this could amount to oppressive, unfairly prejudicial or unfairly discriminatory conduct contrary to *Corporations Act s 232*: see, eg, *Re HR Harmer Ltd* [1958] 3 All ER 689 (Court of Appeal).

¹¹¹ On this specific aspect of s 1322, see also *Re Clearwater Pty Ltd* (1981) 6 ACLR 201 and *Whitehouse v Capital Radio Network Pty Ltd* (2002) 21 ACLC 17, although in the latter case Underwood J held that validating the lack of quorum would cause serious injustice. Cf *Re P W Saddington & Sons Pty Ltd* (1990) 19 NSWLR 674 and *McGellin v Mount King Mining NL* (1998) 144 FLR 288, although in the former case Young J held that proceedings were valid on the basis that they had been ratified, rather than under s 1322.

Bushell v Faith.¹¹² In that case, there were three shareholders who each held 100 shares. Section 184 of the *Companies Act 1948* provided:

A company may by ordinary resolution remove a director before the expiration of his period of office, notwithstanding anything in its articles or in any agreement between it and him.¹¹³

The articles included a provision that on a resolution at a general meeting for the removal of any director from office, any shares held by that director should carry the right to three votes per share. A resolution was proposed to remove one of the shareholders as a director, and the issue in the case was whether he was able to cast 300 votes and outvote the other two shareholders. At first instance, Ungood-Thomas J held that the article was invalid as it infringed the statutory right of the shareholders to remove a director from office by ordinary resolution.¹¹⁴ However, the validity of the article was upheld by both the Court of Appeal¹¹⁵ and by a majority in the House of Lords.¹¹⁶

The outcome of this case clearly surprised and dismayed most commentators.¹¹⁷ Clive Schmitthoff considered that it ‘contravenes the spirit, if not the letter, of section 184.’¹¹⁸ J G Collier similarly regarded Lord Donovan’s view that the decision was probably in accordance with Parliament’s intention as ‘surprising’.¹¹⁹ Prentice said that the Court of Appeal decision (which was affirmed by the House of Lords) ‘reduced section 184 to an empty rhetorical gesture’.¹²⁰

On one level, the outcome is consistent with a literal or black letter interpretation of the statute. However, a closer examination of the policy of the statute makes the decision harder to categorise. Section 184 was introduced on the recommendation of the Cohen Committee, with the intention that shareholders should be given ‘greater powers to remove directors with whom they are dissatisfied’.¹²¹ Lord Morris (dissenting on appeal) and Ungood-Thomas J at first instance both endeavoured to give effect to that policy and therefore considered that to uphold the article would ‘make a mockery of the law’.¹²² In contrast, Lord Reid and Lord Upjohn acknowledged this policy consideration but felt compelled to take a literal approach to interpreting the section. Lord

¹¹² [1970] AC 1099.

¹¹³ *Companies Act 1948*, 11 & 12 Geo 6, c 38, s 184, quoted in *ibid* 1099.

¹¹⁴ *Bushell v Faith* [1970] AC 1099, 1101.

¹¹⁵ *Bushell v Faith* [1969] 2 Ch 438.

¹¹⁶ [1970] AC 1099. Lord Reid, Lord Guest, Lord Upjohn and Lord Donovan comprised the majority; Lord Morris dissented.

¹¹⁷ Even Bernard Cartoon, who supports the decision, begins his article with the words: ‘At first sight section 184(1) ... appears absolute’: Bernard Cartoon, ‘The Removal of Company Directors’ [1980] *Journal of Business Law* 17, 17.

¹¹⁸ Clive Schmitthoff, ‘Editorial’ [1970] *Journal of Business Law* 1, 2.

¹¹⁹ J G Collier, ‘Company — Power to Remove Director by Ordinary Resolution — Weighted Voting — Whether Ordinary Resolution’ (1970) 28 *Cambridge Law Journal* 41, 42.

¹²⁰ D Prentice, ‘Removal of Directors from Office’ (1969) 32 *Modern Law Review* 693, 696.

¹²¹ Company Law Amendment Committee, Board of Trade, United Kingdom, *Report of the Committee on Company Law Amendment*, Cmd 6659 (1945) [130].

¹²² *Bushell v Faith* [1970] AC 1099, 1106.

Donovan also formed a member of the majority, but reached his decision partly on the basis of a competing policy consideration: s 184 applied indiscriminately to all types of company and had the potential to work injustice in the context of quasi-partnership companies where there was scope for ‘family quarrels having their repercussions in the boardroom’.¹²³

This particular issue does not arise in Australia, since Australian proprietary companies are free to make whatever provision they consider appropriate for the removal of directors.¹²⁴ Nevertheless, the influence of *Bushell v Faith* on judicial deference to constitutional provisions can be seen in the interpretive approach taken to the Australian provision concerning the removal of directors of public companies.

The current Australian provision is s 203D of the *Corporations Act*, which follows the model of its English counterpart in providing that a director of a public company may be removed by an ordinary resolution, notwithstanding anything in the company’s constitution, any agreement between the company and the director or any agreement between any or all of the members of the company and the director. Another feature of the Australian provision is that at least two months’ notice must be given of an intention to move a resolution for removal of a director, so that the director has the opportunity to put a case to members as to why they should not be removed.

Thus there are clearly two policy considerations at play in the Australian provision: to ensure that shareholders in public companies have the right to remove directors; and to give directors a form of natural justice. The latter policy consideration is acknowledged and given some weight in several cases,¹²⁵ but has nevertheless not been determinative in others.¹²⁶

Australian courts have been faced with a number of decisions where corporate constitutions have contained provisions for the removal of directors which were different from or conflicted with s 203D (or its predecessors). In each case, they have been prepared to recognise the legitimacy of these provisions by treating the statutory and constitutional procedures as ‘concurrent and alternative’ procedures.¹²⁷ This was understandable given the history of the section which, until s 203D was introduced by the *Corporate Law Economic Reform Program Act 1999* (Cth), provided that the statutory removal power did not derogate from any power to remove a director which may exist apart from the section. Interestingly, however, this approach has been carried over into the interpretation of

¹²³ Ibid 1111.

¹²⁴ *Corporations Act* s 203C. A constitutional provision along the lines of that adopted in *Bushell v Faith* would also not be possible in a listed company in Australia because of the one-share one-vote rule imposed by r 6.9 of the Australian Stock Exchange *Listing Rules*.

¹²⁵ See *NRMA Ltd v Scandrett* (2002) 43 ACSR 401; *Dick v Convergent Telecommunications* (2000) 34 ACSR 86; *Australian Innovation Ltd v Petrovsky* (1996) 21 ACSR 218, 222 (Lockhart J).

¹²⁶ See, eg, *Browne v Panga Pty Ltd* (1995) 14 WAR 393.

¹²⁷ See, eg, *Shanahan v Pivot Pty Ltd* (1998) 26 ACSR 740, aff’d *Link Agricultural Pty Ltd v Shanahan, McCallum & Pivot Ltd* [1999] 1 VR 466; *Browne v Panga Pty Ltd* (1995) 14 WAR 393; *Howard v Mechtler* (1999) 30 ACSR 434; *Holmes v Life Funds of Australia Ltd* [1971] 1 NSWLR 860; *Claremont Petroleum NL v Indosuez Nominees Pty Ltd* [1987] 1 Qd R 1; *Vision Nominees Pty Ltd v Pangea Resources Ltd* (1988) 14 NSWLR 38.

s 203D, which makes no similar provision to save concurrent constitutional procedures.¹²⁸

Where shareholders choose to use the procedure in s 203D,¹²⁹ the fact that the company's constitution may also contain a (different) procedure for removing directors is academic. However, if instead shareholders choose to use the procedure in the constitution, this could undermine the additional policy of securing natural justice protection for directors.

This is arguably what happened in *Allied Mining & Processing Ltd v Boldbow Pty Ltd*.¹³⁰ Although specifically adverting to the fact that s 203D was in different terms from its predecessors, Roberts-Smith J adopted the approach taken in the earlier cases. His Honour noted that there was a tension between the competing policies of ensuring shareholders have the power to remove directors on the one hand, and guaranteeing directors natural justice when shareholders move to remove them on the other.¹³¹ He concluded that the tension should be resolved in favour of the shareholders.¹³² His Honour emphasised the fact that 'directors and shareholders are in a contractual relationship the terms of which are contained in the constitution of the company' and that '[s]ubject only to the requirements of the law they are free to determine their own procedures for the removal of directors'.¹³³ Accordingly, he rejected the submission that the defendant was obliged to proceed under and in compliance with s 203D.¹³⁴

Thus the cases on removal of directors collectively go to quite considerable lengths to give effect to constitutional provisions, even where this arguably undermines an aspect of the policy, if not the absolute letter, of the statutory provisions.

(b) *Appointment of Directors*

Deference (within limits) to constitutional provisions can also be seen in the cases on appointment of directors. Thus, in *DVT Holdings Ltd v Bigshop.com.au Ltd*,¹³⁵ Windeyer J held that the inherent power to appoint directors at a general meeting was excluded by a constitutional provision which provided that '[t]he company may appoint a person to be a Director, by Ordinary Resolution at an AGM.'¹³⁶

The opposite conclusion was reached in *Fiore v Carlton Football Club Ltd*,¹³⁷ where Warren J ordered that a general meeting be convened for the purposes of considering resolutions to appoint directors, despite the company's constitution, which provided for voting for the election of directors to be effected by post.

¹²⁸ See, eg, *Dick v Convergent Telecommunications* (2000) 34 ACSR 86.

¹²⁹ This occurred in *Dick v Convergent Telecommunications* (2000) 34 ACSR 86.

¹³⁰ (2002) 169 FLR 369.

¹³¹ *Ibid* 379.

¹³² *Ibid*.

¹³³ *Ibid*.

¹³⁴ *Ibid* 379–80.

¹³⁵ (2002) 42 ACSR 378.

¹³⁶ *Ibid* 380.

¹³⁷ (2003) 21 ACLC 145.

This occurred, however, in circumstances where the members had overwhelmingly passed a resolution of no confidence in the existing board, and the constitutional provisions provided for only one-third of the board to retire before each AGM. Warren J held that these extreme circumstances were outside those contemplated by the constitution, and activated the company's inherent common law power to appoint a director by ordinary resolution.

A case which attempts to give effect to both the statutory and the constitutional provisions is *Brierley v Santos Ltd*.¹³⁸ There, Zelling AJ rejected the plaintiffs' argument that s 226 of the *Companies Code* (SA) was a code governing the appointment of directors over the age of 72 years and held that it was also necessary to comply with a constitutional provision regarding nomination of candidates for election as director.¹³⁹

(c) *Restrictions on Statutory Rights*

Limits have, however, been recognised in the ability of the constitution to qualify statutory rights. It is interesting to note that in all of the cases to be discussed under this heading, the effect of the decision was at least potentially to enhance shareholder involvement in corporate decision-making.

In *Industrial Equity Ltd v New Redhead Estate & Coal Co Ltd*,¹⁴⁰ Street J had to consider an exercise of power by a chairman under a constitutional provision which stated that '[i]n the case of any dispute as to the admission or rejection of a vote the chairman shall determine the same and such determination made in good faith shall be final and conclusive.'¹⁴¹

It was argued that the chairman had improperly disallowed some proxies. Street J held that the constitutional provision did not preclude the court from examining the correctness of the chairman's decision. His Honour placed weight on the fact that the right to vote was no longer purely a creature of contract, but rather was guaranteed by statute, and that the constitution could not be permitted to frustrate that statutory right.¹⁴²

A limit on the corporate constitution was also recognised in *Re Hector Whaling Ltd*,¹⁴³ where Bennett J would not permit the constitution to determine the means of calculating the notice period for the passing of a special resolution. Similarly, in *New South Wales Henry George Foundation v Booth*, Gzell J held that a constitutional provision requiring a proxy to be a member of the company was an invalid restriction on the right to appoint a proxy in s 249X of the *Corporations Act*, saying:

In my view, the *Corporations Act* (Cth), Pt 2G.2, Div 6, prescribes the ways in which a shareholder may be represented at a meeting of a company's members. It does not simply describe some of the delegates who may act for a shareholder. It is not to be implied that other forms of shareholder representation are

¹³⁸ (1989) 1 ACSR 169.

¹³⁹ *Ibid* 173.

¹⁴⁰ [1969] 1 NSW 565.

¹⁴¹ *Ibid* 569.

¹⁴² *Ibid*.

¹⁴³ [1936] Ch 208.

permissible. It gives statutory force to the permitted methods of representation: by proxy and, in the case of a corporate shareholder, by individual representative.¹⁴⁴

V CONCLUSIONS

A *Can Public Companies Dispense with General Meetings Other than the AGM?*

Attempting to draw conclusions on the basis of the above discussion is a daunting exercise. This is not only because no clear theoretical conception of the corporation emerges from the cases on meetings generally,¹⁴⁵ but also because the question of remote voting involves a collision between two competing policy considerations that do emerge from the cases. These conflicting considerations are the conception of a meeting as a forum for deliberation and influence (which may not be measurable in terms of the votes cast), and the attempt by the judiciary to give effect to constitutional arrangements for a company's internal governance (even, in some cases, at the expense of the policy underlying the statute).

If a public company limited by shares were to provide in its constitution for a 'meeting' other than the AGM to be held solely by remote ballot, it is very difficult to predict to which policy the court would give higher priority.

I take some indirect comfort about not being confident to reach a firm conclusion on this question from the fact that law reform bodies in both the United Kingdom and Australia have similarly hesitated to express a view on whether legislative amendment would actually be required for a company to introduce a form of remote ballot.¹⁴⁶

B *Does It Matter if They Can?*

Clearly, it is difficult to give a legal answer to the questions posed in Part IV of this article. However, on a practical level, this very uncertainty means that very few companies limited by shares are likely to experiment with introducing remote ballots (be they postal or electronic) in light of the risk that their resolutions will be open to challenge.

It might also be argued that the possibility that public companies will contract out of the requirement to hold general meetings other than the AGM is not as serious a problem as it first appears. Shareholders will, after all, still have at least one physical gathering each year (the AGM) at which to express their views. Quite apart from the possible adverse public relations consequences of this course of action, I would treat this argument with some caution.

¹⁴⁴ (2002) 54 NSWLR 433, 438.

¹⁴⁵ This should, perhaps, come as no surprise. See Nicholas Foster, 'Company Law Theory in Comparative Perspective: England and France' (2000) 48 *American Journal of Comparative Law* 573, 591–2.

¹⁴⁶ Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: Company General Meetings and Shareholder Communication*, above n 7; CASAC, above n 75.

As noted above, courts and commentators have identified two justifications for holding physical gatherings: as a forum for face-to-face accountability for stewardship; and as a forum for deliberation and debate of motions.

Provided shareholders have an annual opportunity to put questions to directors and receive a face-to-face answer to them, the accountability feature of the meeting will be satisfied. This argument is given some additional weight by the introduction in 1998 of what is now s 250S of the *Corporations Act*, which guarantees a ‘reasonable opportunity for the members as a whole at the [annual general] meeting to ask questions about or make comments on the management of the company’.¹⁴⁷

However, the potential to limit the business that is dealt with at an AGM does pose an obstacle to the meeting fulfilling its deliberative function. There are minimal legislative requirements regarding the business of the AGM. Section 317 of the *Corporations Act* requires the financial report, directors’ report and auditor’s report to be laid before the AGM of a public company (if it is required to hold an AGM). Section 250R is also relevant, and identifies the following as matters which may be discussed at the AGM, even if not expressly referred to on the agenda:

- (a) the consideration of the reports referred to in s 317;
- (b) the election of directors;
- (c) the appointment of the auditor; and
- (d) the fixing of the auditor’s remuneration.

However, as evidenced by the common practice of companies limited by guarantee electing their directors in a ballot conducted separately from the AGM, s 250R does not appear to preclude the identified matters from being omitted from the agenda and resolved in a manner that does not involve any element of debate or deliberation. There are also many ad hoc matters which are required by the corporations legislation to be dealt with by a general meeting, but which are not part of the assumed business of an AGM, such as alterations to the corporate constitution,¹⁴⁸ alterations to the company’s capital structure¹⁴⁹ and matters where directors have a conflict of interest.¹⁵⁰

As noted at the outset, the outcome of motions put to the meeting is generally determined in advance of the meeting by proxy votes. Despite this, courts and commentators continue to attach importance to deliberative assemblies, and to the potential for company policy to be changed as a result of debate at a meeting, notwithstanding the formal outcome of the vote. It may be that other more cost-effective means of improving lines of communication between management and shareholders and other stakeholders could be developed, possibly using elec-

¹⁴⁷ Questions may also be asked of the auditor or their representative, if they are present at the meeting: *Corporations Act* s 250T.

¹⁴⁸ *Corporations Act* s 136(2). See also *Corporations Act* ss 157 (altering the company’s name), 162 (changing company type).

¹⁴⁹ *Corporations Act* ss 254H (converting shares into larger or smaller number), 256C (reducing its share capital), 246B (varying class rights), 257C (a buy-back exceeding the 10/12 limit), 257D (a selective buy-back), 260B (financial assistance involving material prejudice).

¹⁵⁰ *Corporations Act* pt 2E.1 (related party transactions), s 200B (directors’ retirement benefits).

tronic modes of communication. However, in circumstances where consultations with shareholders outside the general meeting are irregular (and generally precipitated by a crisis),¹⁵¹ and where the general meeting therefore still seems to serve a useful function in communicating shareholder and wider stakeholder views on company policy, I would approach with some reservation the prospect of alternative modes of company decision-making being adopted by widely held public companies limited by shares.

C *Legislative Style and the Theoretical Conception of the Corporation*

Moving away from the specific topic of remote ballots, the above discussion illustrates the interpretive quandaries¹⁵² that arise as a result of no consistent theoretical conception of the corporation having emerged from either the corporations legislation or the case law, and the legislative position having been further muddied in recent years by the tendency to remove 'superfluous' matters from the drafting of the corporations legislation (such as provisions which spelled out whether the statute was intended to govern the field or to coexist with constitutional provisions).¹⁵³ The picture is further confused by the designation of certain provisions of the corporations legislation as 'replaceable rules'. This carries with it the potential inference that provisions not so designated are mandatory. However, the case law on section 203D suggests otherwise, and section 1322 must necessarily also temper any such argument.

The implications of this require more detailed consideration than is possible in this article.¹⁵⁴ However, they should give pause for thought regarding how we legislate in the corporate law field in the future. While not necessarily advocating a return to the former 'belts and braces' style of legislative drafting, perhaps more explicit legislative guidance would be desirable, at least at a conceptual level, regarding how mandatory particular parts of the corporations legislation are intended to be. This might also provide a more coherent basis for deciding whether silence in the legislation should be interpreted as an implicit permission or as an implicit prohibition.

¹⁵¹ See, eg, Gautam Malkani, 'Vodafone to Review Pay after Shareholders Vote', *Financial Times* (London), 26 July 2001, 19; Stewart Oldfield, 'Kraehe Appeal to NAB Investors', *Australian Financial Review* (Sydney), 1 April 2004, 1.

¹⁵² For recent examples, see *Hanel v O'Neill* (2003) 48 ACSR 378; *Beck v Tuckey Pty Ltd* [2004] NSWSC 357 (Unreported, Austin J, 30 April 2004); Martin Pretty, 'Labor Vows Motion for Shareholders', *Australian Financial Review* (Sydney), 22 October 2003, 10, describing the controversy surrounding the amendment to Boral Ltd's constitution at its 2003 AGM. See also the more recent debate surrounding the validity of so-called pre-nuptial agreements designed to give directors power effectively to sack fellow board members for poor performance: Australian Securities and Investments Commission, 'Removal of Directors of Public Companies' (Media Release, 17 August 2004) <http://www.asic.gov.au/asic/asic_public_ns/byheadline/IR+04-40+Removal+of+directors+of+public+companies?openDocument>.

¹⁵³ See above nn 127–128 and accompanying text.

¹⁵⁴ See generally Ian Ramsay, 'Corporate Law in the Age of Statutes' (1992) 14 *Sydney Law Review* 474.