RESEARCH REPORT

PROXY VOTING

IN

AUSTRALIA'S LARGEST COMPANIES

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- host conferences to disseminate results of research undertaken under the auspices of the Centre or in other programs associated with the Centre
- develop and promote links with academics in other Australian universities and in other countries who specialise in corporate law and securities regulation
- establish and promote links with similar bodies, internationally and nationally, and provide a focal point in Australia for scholars in corporate law and securities regulation
- promote close links with peak organisations involved in corporate law and securities regulation
- promote close links with those members of the legal profession who work in corporate law and securities regulation

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Corporate Governance International Pty Limited (CGI) was formed in 1993 as a specialist consultant to institutional investors in the field of corporate governance.

CGI has been closely involved with many governance initiatives in Australia for the benefit of institutional and other investors. They include:

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- the issue by the Australian Securities and Investment Commission of its January 1998 Policy Statement 128 *Collective Action by Institutional Investors*, and
- the introduction into the Australian Corporations Law in July 1998 of a number of key governance reforms, including reforms to facilitate well considered shareholder voting in Australian listed companies by institutional and other public investors and to require best practice remuneration disclosure by those companies.

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PROXY VOTING IN AUSTRALIA'S LARGEST COMPANIES

EXECUTIVE SUMMARY

Introduction

- This Research Report describes a study of proxy voting at a sample of major listed Australian companies during 1999. The study was undertaken jointly by the Centre for Corporate Law and Securities Regulation, and Corporate Governance International Pty Limited (CGI), and follows a similar study last year by CGI on 1998 proxy voting levels.

- The study is extremely topical. The Minister for Financial Services, Joe Hockey, has recently expressed strong interest in corporate governance and the role of institutional shareholders, stating that "funds managers and trustees have a responsibility in particular to make boards accountable for the decisions they make on behalf of shareholders".

Aim and scope

- The aim of the study was to assess the level of proxy voting in major Australian listed companies in 1999.

- The study involved a review of 1999 AGM proxy voting statistics reported to the ASX under the Corporations Law by 59 of these companies.

Results

- In companies with a widely held shareholder base – that is, without a major non-institutional shareholder – proxy instructions for director-election resolutions represented on average 35% of total voting capital in 1999. The 1998 figure was 32%.

- For the full sample of companies – that is, including those with a major shareholder – proxy instructions for director-election resolutions represented on average 41% of total voting capital, compared with 39% the year before.

- The widely held companies provide the more significant measure because:

  - ◊ The scope for institutional investors realistically to influence voting outcomes is very much a factor of the presence or absence of a major non-institutional shareholder.
  - ◊ Both the highest and the lowest levels of proxy instructions were in companies with a major non-institutional shareholder. It is clear that, in the highest case, the major shareholder lodged a proxy form; and that, in the lowest case, this did not occur. This affects the average result.
  - ◊ The existence of a controlling or major shareholder may discourage the exercise by institutional and other public shareholders of their proxy vote on the basis that the will of the major shareholder would in any event ensure passage of the resolutions.

- The Australian averages compare poorly with those for the UK (50%), the US (80%) and Germany (73%).

  The Newbold Committee – which recently investigated institutional investor voting in the UK – stated that failure to achieve an increase in the UK level from 50% to around 60% over the next few years would "justify further investigation by the Government".

- The present study also revealed that:

  - Only 7 (12%) of the sample companies had a poll for director-election resolutions.
  - 98% of director-election resolutions were passed. All 4 of the resolutions that were lost were decided on a poll. Also, these 4 unsuccessful resolutions were the only shareholder-initiated resolutions. The 176 successful resolutions were board-initiated.
  - An overwhelming majority of voting instructions were to vote "For" the proposed resolution: on average, "For" instructions accounted for 88% of the voting capital for which proxy instructions were given on director-election resolutions. This figure would be even higher if the 4 shareholder-initiated proposals were excluded, bearing in mind that each of those proposals was defeated.
  - Contrary to a popular conception, it is not common for shareholders to lodge a proxy form giving their proxy discretion as to how votes may be cast.

- Some investment managers have a policy of not voting on resolutions which are deemed to be "routine", and instead voting only on what they consider to be controversial or major resolutions. In addition, some investment managers regard director-election resolutions as in the routine category. Therefore, all controversial resolutions at the sample companies were also examined – to determine whether or not a substantially greater level of voting occurred on these resolutions. The results reveal no evidence of a substantially higher level of proxy voting on controversial resolutions in comparison with the level on director-election resolutions.

Significance of the results

- Trustees of superannuation or investment funds and other fiduciaries who rely on professional investment managers should, for their own protection, take a close interest in their managers' performance on proxy voting.[*]

- Compulsory superannuation laws compel Australians to invest for their retirement. A large proportion of the assets of superannuation funds are invested in Australian equities. The Australian government is, therefore, right to take an interest in the issue of institutional investor voting.

- There is strong international interest in the voting policies and practices of institutional shareholders.

  - US private-sector pension plans are effectively required to exercise voting rights. The US Department of Labor, which is the regulator under the ERISA legislation, has

[*] See pages 6-7 of the Report.

long held the view that the vote is a scheme asset which needs to be managed by or on behalf of a scheme's trustee with the same care and diligence as other scheme assets.

◊ Key recommendations in the UK Newbold Committee's report[**] referred to earlier were that (i) regular, considered voting should be regarded as a fiduciary responsibility; (ii) trustee boards should record their policy position on voting in their statement of investment principles (a set of principles with which their investment managers must comply); and (iii) the institutional investors' industry bodies should continue to encourage and provide practical help to their members to adopt or review considered corporate governance and voting policies. Recommendation (ii) has subsequently been implemented by way of regulation.

◊ Also, the UK Secretary of State and Minister for Trade and Industry recently stated:

> "I very much agree that responsible voting involves the application of informed decisions reached within the framework of a considered corporate governance policy. High voting levels are important; but it is essential that voting is considered rather than just simple "box-ticking" if it is to benefit British companies."

Section 251AA

- Under section 251AA of the Corporations Law, listed Australian companies must disclose proxy voting details to the ASX. Section 251AA was introduced as one of the corporate governance reforms in the Company Law Review Act 1998. The empirical study described in this Report (and CGI's report last year on 1998 voting levels) was made possible by, and based on, section 251AA disclosures.

- 11 of the 74 sample companies from CGI's study had to be excluded from the present study because their proxy voting disclosure to the ASX did not contain all of the information required by section 251AA.

- That considerable degree of non-compliance raises the question of enforcement by the ASX and ASIC.

- The Parliamentary Joint Statutory Committee on Corporations and Securities has recommended that a key portion of section 251AA should be repealed. However, there are powerful reasons why the section should be retained.

[**] Committee of Inquiry into UK Vote Execution (Y Newbold, Chair)), *Report* (National Association of Pension Funds, London, 1999).

PROXY VOTING IN AUSTRALIA'S LARGEST COMPANIES

I. Introduction

This Research Report describes a study of proxy voting at the annual general meeting (AGM) of a sample of listed Australian companies during 1999.[1] The study was undertaken jointly by the Centre for Corporate Law and Securities Regulation, and Corporate Governance International Pty Limited (CGI). It builds on a study of proxy voting at 1998 AGMs carried out by CGI a year ago (CGI 1999). The Report contrasts the 1998 figures with those for 1999.

The issue of shareholder voting is extremely topical. In recent speeches, Financial Services Minister Joe Hockey has expressed strong interest in corporate governance and the role of institutional shareholders. The Minister has stated that "funds managers and trustees have a responsibility in particular to make boards accountable for the decisions they make on behalf of shareholders".[2]

Interestingly, Minister Hockey cited a voting figure of 30% as a (presumably partial) justification of his comments. This subsequently led to claims by the Investment and Financial Services Association (IFSA) – the industry association representing the major investment managers operating in Australia – that the Minister was quoting out of date figures (White 2000). A major contribution of this Research Report is providing voting figures for the most recent annual reporting season: 1999.

Section II of the Report outlines the institutional framework for shareholder voting. Subsection II.A summarises the issues on which shareholders in publicly listed companies are entitled to vote. Subsection II.B gives an overview of the way in which voting takes place, and also highlights the complexity of voting for institutional investors. Subsection II.C then addresses the issue of whether some types of shareholders – institutional shareholders – may be legally obliged to vote. This is followed in Subsection II.D by an outline of the "good practice" guidelines for voting by institutional shareholders. Finally, Subsection II.E describes the regulatory regime for disclosure of proxy voting.

Section III of the Report explores the role of shareholder voting (especially *institutional* shareholder voting) as a corporate governance mechanism. It summarises the findings of recent empirical research on the impact of institutional investor activism. Section IV describes the methodology of the study and presents the results. Section V is the conclusion, and there are two Appendices. Appendix 1 summarises the US and UK approaches to voting. Appendix 2 provides a detailed account of the mechanics of shareholder voting.

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[1] The authors thank Lisa Stapledon for research assistance. They also thank the ASX, and in particular John McMurtrie, for assistance in the data collection stage of the project.

[2] Hockey (2000a), available at http://www.minfsr.treasury.gov.au/transcripts/2000/003.asp See also Hockey (2000b).

II. The institutional framework

A. On which issues may shareholders vote?

In the vast majority of companies shareholders have no power to make decisions (by voting in general meeting) on matters concerning the management of the company's business. These matters are the domain of the board of directors and, where the board has delegated some of its powers, the senior executives and others to whom the board's management powers have been delegated.[3]

However, that still leaves a considerable range of matters in respect of which the general meeting of shareholders is entitled – and, in many cases, is *required* – to make a decision. The Corporations Law, the ASX Listing Rules, companies' constitutions and general company law give public-company shareholders decision-making or veto rights in relation to issues like:

- election and removal of directors;
- appointment and removal of the auditor;
- adoption and amendment of the constitution;
- changing the company's type (e.g. from a no liability company to a company limited by shares);
- changing the company's name;
- certain share-capital transactions, including reductions of capital and selective buy-backs;
- large placements of shares;
- variation of the rights attached to a class of shares;
- approval of certain related party transactions; and
- ratification of breaches of directors' duties.[4]

The empirical study described later in this Research Report focused on resolutions dealing with election or re-election of directors.

B. The mechanics of voting

1. Voting on a show of hands or on a poll

Most shareholder decisions in Australian public companies are made on a show of hands of those shareholders attending the general meeting.[5] On a show of hands, each shareholder present and voting

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[3] *John Shaw & Sons (Salford) Ltd v Shaw* [1935] 2 KB 113; *Howard Smith Ltd v Ampol Petroleum Ltd* (1974) 3 ALR 448 at 457.
[4] See Ford, Austin and Ramsay (1999) ch 7; Hanrahan, Ramsay and Stapledon (2000) ch 7.

has one vote – regardless of the number of shares they hold.[6] Institutional investors rarely attend general meetings. If they wish to vote they ordinarily complete a proxy form appointing a proxy to attend the meeting and vote on their behalf.[7] The chairperson of the meeting must have regard to the proxy votes lodged in deciding whether to accept the result on a show of hands as the decision of the meeting. It is a duty of the chairperson to determine "the will of the meeting" – and this requires the chairperson to call for a poll if it appears that a different decision could be obtained on a poll.[8] On a poll, decisions are taken according to the number of shares voted (that is, one-share/one-vote), including those voted by proxy.[9] As revealed by the empirical study reported later in this Report, it is relatively rare for a poll to be conducted.

A more detailed account of voting procedures is contained in Appendix 2.

2. *The complexity of voting for institutional investors*

The largest class of institutional investor in Australia is superannuation funds. For medium-sized and large superannuation schemes, exposure to Australian equities normally includes direct investment in shares as well as indirect investment through managed investment schemes that themselves hold shares. Commonly, the task of "managing" a superannuation scheme's direct investments in shares will be delegated to an investment management firm. It is also standard practice for a custodian to be hired to hold legal title to the scheme's share investments.

Importantly, as the custodian is the registered owner of the shares, it is the "member" for the purposes of Corporations Law and company constitution requirements regarding: (i) to whom the company must send notices of meeting and proxy forms;[10] and (ii) from whom the company must

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[5] This is a matter governed by the company's constitution or by the replaceable rule in section 250J of the Corporations Law. Proxies are also allowed to vote on a show of hands unless the company's constitution bars this: Corporations Law, section 249Y(2).

[6] This is the standard position: see Corporations Law, section 250E(1)(a) (a replaceable rule), and standard company constitutions.

[7] The Corporations Law now gives companies the power validly to receive proxy appointments sent electronically: sections 250B(3)(c), 250BA(1)(b). However, there is currently concern about how a company can validly receive proxy appointments electronically given the requirement in section 250A(1) that an appointment of proxy must be "signed" by the shareholder in order to be valid. See Parliamentary Joint Statutory Committee on Corporations and Securities (1999) ch 13; Boros (1999). Nevertheless, shareholders were permitted to make proxy appointments electronically for the 1999 AGM of Coles Myer Limited. The company set up a web page on which shareholders could enter proxy appointment and voting instruction details and a personal identification number (PIN) for verification. By using the web site, shareholders accepted that entry of their PIN was equivalent to "signing" a paper proxy appointment form. Electronic lodgement of proxy appointments is possible in many US states: see, for example, Delaware General Corporation Law, section 212(c); New York Business Corporations Law, section 609(i); Model Business Corporation Act, section 7.22(b). And the UK is currently introducing changes to its corporate law to facilitate electronic lodgement of proxy appointments: Department of Trade and Industry (2000); Electronic Communications Bill 2000; Draft Companies Act 1985 (Electronic Communications) Order 2000. Commercial providers have developed electronic proxy voting software and systems to be available once the legislative framework is in place: Bingham (2000).

[8] *Second Consolidated Trust Ltd v Ceylon Amalgamated Tea & Rubber Estates Ltd* [1943] 2 All ER 567. Besides the chairperson, a poll may also be demanded by (i) at least 5 members entitled to vote on the proposed resolution; (ii) members with at least 5% of the votes that may be cast on the proposed resolution on a poll; or (iii) fewer members or members with a lesser percentage of votes if the company's constitution allows for this: Corporations Law, section 250L.

[9] Again, this is the standard position: see Corporations Law, section 250E(1)(b) (a replaceable rule), and standard company constitutions.

[10] See Corporations Law, sections 249J, 249Z.

accept completed proxy forms or votes at the meeting.[11] But, as the custodian holds the shares on a bare trust for its client (the trustee of the superannuation scheme),[12] the custodian must act according to its client's instructions in regard to forwarding of notices of meeting, and exercise of voting rights. In practice, these matters will be determined by contractual agreement between the scheme trustee and the custodian, and between the scheme trustee and the investment manager. An increasingly common arrangement (which is illustrated in Figure A) involves:

- a clause in the contract between the scheme trustee and the investment manager saying something along these lines:

> "The Trustee authorises the Manager to exercise any right to vote attached to a share or unit forming part of the Portfolio *or to so direct the Custodian*. The Manager must use its best endeavours to implement any direction the Trustee gives on the appointment of a proxy and the way in which the proxy should vote but in the absence of any direction may exercise or not exercise the right to vote as it sees fit, having regard to any general direction contained in [the investment instructions set out by the Trustee in a schedule to the contract]." (Emphasis added.) (AIMA 1995, clause 12.1)

- clauses in the contract between the scheme trustee and the custodian requiring the custodian (i) to forward notices of meeting to the investment manager; and (ii) to fill-in proxy forms as instructed by the investment manager (before sending to the company).

The necessity for notices and forms to "pass through" the custodian, under the existing company law framework, increases the complexity of the voting process for institutional investors like superannuation funds. Evidence from the UK – where a very similar legal framework exists – indicates that the level of voting by institutional investors is impacted adversely by the involvement of custodians in the process. Poor systems at some custodial firms have led to "mismatches" – where an institutional investor has attempted to vote but the completed proxy form has never found its way to the company's registrar (Newbold Committee 1999, paras 1.8, 2.13). Given the similarity between the institutional investor sectors, and the relevant corporate law, in the UK and Australia, it would be surprising if the practical difficulties experienced in the UK did not also exist to some extent in Australia. It is arguable, therefore, that the Corporations Law should be amended to allow a by-passing of the custodian. That is, to allow direct relations between the company and the investment manager in regard to voting. The corporate governance advisory firm, Institutional Analysis, has recently advocated this kind of reform in a commissioned paper prepared for the UK Department of Trade and Industry (Stapledon and Bates 2000).

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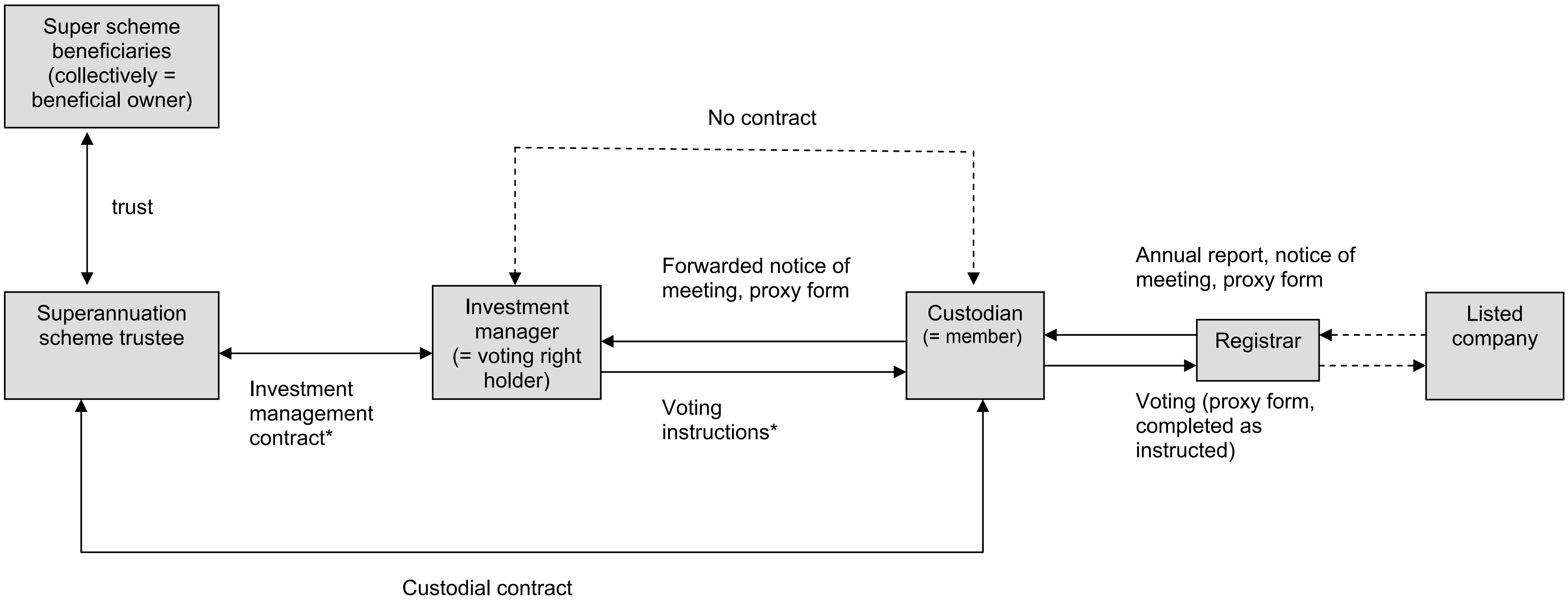
[11] See Corporations Law, sections 249X, 250E(1).

[12] The scheme trustee is itself in a trust relationship with the scheme beneficiaries, and so the custodian is really holding the shares indirectly on trust for the scheme beneficiaries collectively: *ASC v AS Nominees Ltd* (1995) 18 ACSR 459 at 472.

FIGURE A Typical directly invested superannuation scheme



Source: Stapledon and Bates (2000).

* Commonly the investment management contract gives the investment manager power to give voting instructions to the custodian. The investment management contract usually says that these voting instructions are subject to any instructions that the trustee of the scheme may give from time to time. See Stapledon (1996a) pp 89, 179.

C. Are institutional investors legally obliged to vote?

As a matter of company law, voting is optional for any shareholder.[13] But *institutional* shareholders are subject not only to company law rules, but also to other legal rules. For example:

- the trustee/s of a superannuation scheme[14] is subject to trust law rules and a range of rules arising under the Superannuation Industry (Supervision) Act 1993 (Cth);
- the directors of a life insurance company must comply with the same fiduciary and Corporations Law duties as the directors of companies in other lines of business, plus they must comply with the rules set out in the Life Insurance Act 1995 (Cth); and
- the responsible entity of a managed investment scheme (e.g. unit trust) is subject to trust law rules and also duties arising under the managed investments provisions in the Corporations Law.

Some commentators have claimed that the trust law duties of a superannuation scheme trustee require the trustee to exercise the voting rights attached to the scheme's equity investments, or at least to ensure that the voting rights are exercised (by, for instance, the investment manager with delegated responsibility for the shareholding).[15] This view reflects the approach of the US regulator responsible for private-sector pension schemes. In a 1994 policy statement, the US Department of Labor stated that voting rights attached to equity investments of US private-sector pension plans must be exercised "on issues that may affect the value of the plan's investments" (US Department of Labor 1994).

However, where – as is invariably the case – a particular shareholding of an Australian superannuation scheme is a non-controlling shareholding, the scheme trustee's duties are normally not going to require that a vote be cast. Rather, the principal legal obligation is to *consider* whether or not to vote, and – if a decision is made to vote – to consider how the votes should be cast (Stapledon 1998, pp 342-347). This obligation arises under the equitable (trust law) duties owed by trustees,[16] and also under the statutory duties contained in the Superannuation Industry (Supervision) Act 1993.[17] Where the trustee has hired an external investment management firm, and the investment management contract includes the typical voting clause:[18]

- the obligation to consider whether to vote rests with the investment manager; and

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[13] In some circumstances the Corporations Law or the ASX Listing Rules may bar a shareholder from voting on a particular motion. For example, where the shareholder is party to a related party transaction for which general meeting approval is required: see Corporations Law, section 224.

[14] It is very common practice for an Australian superannuation scheme to have a single trustee, and for that trustee to be a company. The directors of the corporate trustee may be referred to loosely as the trustees of the scheme, but in law the company is the trustee and it owes the relevant legal duties. However, under the Superannuation Industry (Supervision) Act and also under the general law, the directors of a corporate trustee *effectively* owe substantially similar duties to those owed by the corporate trustee: Stapledon (1998) pp 347-348.

[15] See, for example, Plender (1993).

[16] *McPhail v Doulton* [1971] AC 424 at 449, 456; *Re Gulbenkian* [1970] AC 508 at 518; *Karger v Paul* [1984] VR 161; Meagher and Gummow (1997) paras [1607-1616]; Ford and Lee (1996) para [1220].

[17] See in particular section 52.

[18] See the typical voting clause at page 4 above.

- the trustee has a duty to monitor and supervise the investment manager's exercise of its discretion in regard to voting (Stapledon 1998, p 350).

The relatively low aggregate voting figures revealed later in this Report indicate that on many occasions investment managers do not exercise their delegated voting power. This in turn begs the question whether they are meeting their obligation to consider whether to vote. From the perspective of superannuation fund trustees, the fact that they owe a duty to monitor their investment managers' exercise of voting discretion means that, for their own protection, trustees should take a close interest in the proxy voting performance of their investment managers.

D. Good practice guidelines on institutional investor voting

Various bodies around the world have produced guidelines on good corporate governance practices.[19] As far as Australian institutional investors are concerned, the guidelines of most relevance are those produced by their industry association: IFSA. IFSA's guidelines, known as its "Blue Book", include these recommendations relating to voting:

- Investment managers should vote on all material issues at all Australian company meetings where they have the voting authority and responsibility to do so.

- Investment managers should have a written policy on the exercising of proxy votes that is approved by their board and formal internal procedures to ensure that that policy is applied consistently.

- Wherever a client delegates responsibility for exercising proxy votes, the investment manager should report back to the client when votes are cast (including abstentions) on investments owned by the client. Reporting on voting should be a part of the regular reporting process to each client. The manager should report back to clients whether or not the votes are cast. (IFSA 1999, pp 16-17)

The International Corporate Governance Network (ICGN) is the global representative body for major institutional investors, institutional investor industry associations and advisers to institutional investors. In 1999 it adopted a *Statement on Global Corporate Governance Principles*, including: "Fiduciary investors have a responsibility to vote. Regulators and law should facilitate voting rights and timely disclosure of the levels of voting." (ICGN 1999, Principal 3)

In a similar vein, the UK's Newbold Committee (1999, p 7) has recently urged that "Regular, considered voting should be regarded as a fiduciary responsibility". The Newbold Committee's view was supported by the UK Secretary of State and Minister for Trade and Industry, Stephen Byers, who added:

> "I very much agree that responsible voting involves the application of informed decisions reached within the framework of a considered corporate governance policy. High voting levels are important; but it is

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[19] See, for example: Cadbury Committee (1992); Hampel Committee (1998); National Association of Corporate Directors (1996); OECD (1999); Bosch Committee (1995).

essential that voting is considered rather than just simple "box-ticking" if it is to benefit British companies."[20]

E. The regulatory regime for disclosure of proxy voting

Institutional investors have for several years urged listed Australian companies to disclose proxy voting statistics. The IFSA Blue Book contains this recommendation:

> "In announcing to the ASX the decisions made by shareholders in general meeting, a listed company should report the aggregate proxy votes validly received for each item of business in the notice of meeting. The report should disclose, in the case of a resolution passed on a show of hands, the aggregate number of proxy votes received in each voting category ("For", "Against", "Left to Proxy's Discretion" and "Abstain") and the aggregate number of votes not exercised by shareholders who submitted proxies ("No Intention"). In the case of a resolution submitted to a poll, the report should disclose both the information specified in the preceding sentence and the aggregate number of votes cast "For" and "Against" on the poll." (IFSA 1999, p 27)

Despite the above guideline, many listed Australian companies have in the past not disclosed proxy voting information.[21] Therefore, one of IFSA's predecessors – the Australian Investment Managers' Association – and other investment community interests pushed hard for a mandatory disclosure regime to be introduced. This occurred as one of the changes to the Corporations Law introduced by the Company Law Review Act 1998 (Cth). The regime is contained in section 251AA, which took effect on 1 July 1998.

Under section 251AA, an Australian company listed on the ASX must, following a general meeting, give the ASX this information:

> "in respect of each resolution in the notice of meeting, the total number of proxy votes exercisable by all proxies validly appointed and:
>
> (a) if the resolution is decided by a show of hands – the total number of proxy votes in respect of which the appointments specified that:
>
> (i) the proxy is to vote for the resolution; and
>
> (ii) the proxy is to vote against the resolution; and
>
> (iii) the proxy is to abstain on the resolution; and
>
> (iv) the proxy may vote at the proxy's discretion; and
>
> (b) if the resolution is decided on a poll – the information specified in paragraph (a) and the total number of votes cast on the poll:
>
> (i) in favour of the resolution; and
>
> (ii) against the resolution; and
>
> (iii) abstaining on the resolution."

The manner in which the ASX makes publicly available the information disclosed to it under section 251AA is discussed at page 14 below.

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[20] Byers (1999). The text of the speech in which this passage is contained is available at http://www.dti.gov.uk/Minspeech/byers1190799.htm

[21] For example, prior to July 1998 about half the Top 100 companies covered by the ISS Australia Proxy Advisory Service consistently declined to provide this disclosure.

The Parliamentary Joint Statutory Committee on Corporations and Securities (1999, para 8.47) has recommended the repeal of section 251AA(1)**(a)** of the Corporations Law.[22] The Parliamentary Committee endorsed submissions made to it that requiring disclosure of proxy instructions is of little benefit (see below). Supporters of section 251AA(1)(a) would take strong issue with this claim. For instance, IFSA points out that disclosure of proxy instructions:

- Enables shareholders to monitor whether the chairperson has fulfilled her or his duty to call a poll where the result on a show of hands does not reflect "the will of the meeting".
- Enables shareholders to assess how their voting intentions compare with those of other shareholders, and the relative importance of their voting instructions (as a proportion of total voting instructions given to proxies).
- Assists investment managers in reporting back to their clients on exercise of delegated voting rights.
- Is consistent with international guidelines on good practice in corporate governance (IFSA 1999, para 12.12.5).

In addition, section 251AA disclosures are the only empirically reliable way to check the level of voting at listed Australian companies. Having a reliable means of monitoring the voting level is important from the corporate governance perspective.

These arguments are persuasive. Also, some of the points made to the Parliamentary Committee which led it to recommend the repeal of subsection (1)(a) lack practical substance.

One point made to the Committee was that a shareholder which is itself a corporation may vote by sending a "representative" to the meeting,[23] rather than by appointing a proxy – and that section 251AA(1)(a) does not cover votes that will be cast by corporate representatives.[24] The submission added that "Institutional investors often prefer that method of representation".[25] However, this is not borne out by the empirical evidence on institutional investor voting. This evidence shows that, where institutions do vote, it is almost invariably by using the proxy mechanism rather than the use of a corporate representative (Stapledon 1996a, p 182; Mirador 1994, pp 135-140).[26]

Another point made to the Committee was that, even where a shareholder has appointed a proxy, the shareholder will sometimes attend the meeting and vote personally, which has the effect of negating the proxy's voting power on the resolution/s in question.[27] This point is technically valid, but it lacks practical force where institutional investors are concerned. It is implicit in the empirical evidence mentioned above that it would be very rare for an institutional investor to attend a general meeting (by way of a corporate representative) after previously appointing a proxy to vote for it at that meeting.

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[22] The Companies and Securities Advisory Committee (1999, paras 4.42-4.47) has expressed a somewhat similar view.
[23] Corporations Law, section 250D.
[24] Parliamentary Joint Statutory Committee on Corporations and Securities (1999) para 8.20.
[25] Parliamentary Joint Statutory Committee on Corporations and Securities (1999) para 8.20.
[26] There is an exception, which is where the meeting has been requested (or "requisitioned" in the old terminology) by a group of institutional investors with a view to removing and replacing some of the directors. This is a fairly rare event.
[27] Parliamentary Joint Statutory Committee on Corporations and Securities (1999) para 8.22. See also Corporations Law, section 249Y(3); Lang (1998) p 194.

Therefore, this Report recommends that section 251AA(1)(a) should be retained.

III. Voting as a corporate governance mechanism

Shareholder voting is one of several mechanisms that serve to minimise the divergence between the interests of senior corporate executives and shareholders (known by economists as "agency costs"). Other corporate governance mechanisms that serve the same broad purpose include market forces like the market for corporate control; executive incentive remuneration schemes that aim to tie executives' pay to corporate performance; monitoring by non-executive directors; mandatory disclosure rules; and independent audit of the preparation of financial statements. In this context, the focus of attention is commonly on voting by *institutional* shareholders.

The growth in institutional shareholdings in Australia in recent decades mirrors even greater growth elsewhere – particularly in the United Kingdom and the United States. As at 1997, institutions held about 65-70% of listed domestic equities in the UK, about 50% in the US and around 45-50% in Australia (Stapledon 1999, p 20).[28] The lower figure in Australia reflects the prevalence of large founding family and intercorporate stakes in almost half of Australia's large and medium-sized listed companies (Stapledon 1999, p 25).[29] However, the combination of compulsory superannuation[30] and the relative long-term outperformance of equities compared to bonds[31] should see a continued increase in the level of institutional shareholdings in listed Australian companies.

But why is the growth in institutional share ownership important? Who owned the bulk of listed equities before the institutions came along?

Aggregate share ownership statistics for listed Australian companies have only existed since the early 1990s. However, the UK's Office for National Statistics has figures on ownership of listed UK equities going back to the early 1960s. In 1963, UK-based individuals held 54 per cent of listed UK equities. This had fallen to just 16.5 per cent by 1997. In contrast, the holdings of UK-based institutions increased from 29 per cent in 1963 to 60 per cent in 1994, before slipping back a little to 56 per cent in 1997 (Office for National Statistics 1999).

A considerable majority of the shares held by individuals are held in relatively small parcels.[32] Therefore, in the early 1960s – and before – it is probably fair to say that the Berle and Means (1967) conception of a public company held true for many listed UK companies. Berle and Means, who studied the shareholdings of listed US companies in the late 1920s and early 1930s, found the typical company to have a mass of diffuse small shareholders (with directors and senior management owning

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[28] These figures combine the holdings of domestic and overseas institutions.

[29] See also Stapledon (1996b) pp 157-158. Examples include the Murdoch interests' 31 per cent stake in News Corporation Ltd; AXA's 51% stake in AXA Asia Pacific Holdings Ltd; Bank of Scotland's 55% stake in Bank of Western Australia Ltd; Kerry Stokes' 33% stake in Seven Network Ltd; and the Kimberley family's 57% stake in Just Jeans Group Ltd.

[30] The Federal Government's Retirement Income Modelling Task Force projects that the assets of Australian superannuation funds will grow in value from $250 billion in 1996 to between $1,494 billion and $1,825 billion in 2020 – an increase in real terms of between 190 and 250%: Financial System Inquiry (1997) p 128.

[31] Taking 10 year rolling returns between 1900 and 1993, Australian shares returned on average 11.9% per annum, compared with the average return on bonds of 5.0% per annum and the average inflation rate of 4.6% per annum: Mouatt (1994).

[32] As at 1999, the average value of an Australian individual investor's entire share portfolio was $28,000: ASX (2000). In the UK in 1994, nearly two-thirds of the shares held by individuals were in holdings of less than £100,000 value, and just over a fifth of them were in holdings of less than £5,000 value: Central Statistical Office (1995) p 8.

only a very small portion of the shares). A small shareholder in a large company stands to gain only a small reward for any efforts at monitoring the board and senior management, because the benefits from monitoring are shared among all the (many) shareholders. But monitoring is costly, and therefore most small shareholders are "rationally apathetic". The chief concern of Berle and Means (1967, p 82) was that "Where ownership is sufficiently sub-divided, the management can … become a self-perpetuating body even though its share in the ownership is negligible". This gave rise to the famous expression "a separation of ownership and control": ownership resting with the myriad of small shareholders, and control residing in senior management.

It is not surprising, therefore, that the rise in institutional shareholdings – with an accompanying increase in the concentration of shareholdings – has led many commentators optimistically to predict the end of the separation of ownership and control.[33] In the US, this optimism has normally been qualified by a reference to a plethora of legal barriers to institutional investor activism that would need to be addressed if institutions are to become a true force as monitors of corporate managements.[34] Some commentators have also highlighted a range of economic barriers that arguably restrict the institutions' level of involvement in corporate governance even more than the legal barriers.[35]

Has the rise in institutional shareholdings had a measurable impact on corporate performance so far? As regards Australia, a study which covered the period 1986-1989 found no significant relationship between the extent of institutional investment and Tobin's Q in listed Australian companies (Craswell, Taylor and Saywell 1997).[36] A more extensive Australian study is currently being conducted by the Centre for Corporate Law and Securities Regulation, and the Centre of Financial Studies, at the University of Melbourne.[37]

In their study involving listed UK companies, Faccio and Lasfer (2000) found that companies in which internally managed pension funds held large stakes did not outperform their industry counterparts. This accords with the finding of Franks, Mayer and Renneboog (1998) – that listed UK companies with a high concentration of institutional share ownership performed, on average, no better or worse than other listed companies over the period 1988 to 1993. The latter study also found no significant relationship between high levels of institutional share ownership and managerial disciplining (that is, regardless of whether or not poorly performing companies had a high concentration of institutional share ownership, the level of board turnover was not significantly different).

As far as the US is concerned, Black (1998) reviewed the empirical studies which have tried to determine whether institutional investors have had any impact on the performance of listed US companies. The studies summarised by Black have, collectively, addressed these five issues:

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[33] See, for example, Black (1990); Barnard (1991).
[34] See, for example, Black (1990); Grundfest (1990); Roe (1994); Sametz (1995).
[35] See, for example, Coffee (1991, 1994, 1997); Rock (1991); Stapledon (1996a) ch 10; Stapledon (1996b).
[36] Tobin's Q is a measure of corporate performance. It is the ratio of a company's market capitalisation to the replacement value of its assets.
[37] The research project, titled "The Impact of Institutional Investors on Capital Markets and Corporate Performance", was funded by an Australian Research Council Collaborative Grant, in conjunction with IFSA. The Chief Investigators for the project are Professor Kevin Davis, Professor Ian Ramsay and Dr Geof Stapledon.

- whether companies with a high level of institutional ownership, and therefore the possibility for accompanying monitoring, outperform companies with lower institutional ownership;
- whether institutional activism targeted at particular companies affects performance;
- whether there are abnormal share price returns around the date when a shareholder-initiated motion is announced, or the date when a company announces acquiescence to an informal shareholder proposal;
- whether discrete corporate events (for example, subsequent CEO turnover or corporate restructuring) occur more frequently at companies that have been targeted by institutions for governance efforts; and
- whether a regulatory change that increases the potential effectiveness of shareholder activism results in abnormal share price returns for companies that had been targeted before the regulatory change.

Black's review found that the studies produced mixed results – some indicate that institutional investor activism has a positive impact on corporate performance, some indicate that it has a negative impact, and some show no significant impact at all. There are at least two possible explanations for these mixed results.

First, as Black points out, nearly all of the studies focus on "visible" activism. Behind-the-scenes (or "invisible") activism also occurs in the US, but by definition its impact is very difficult to study.[38] Yet it is entirely plausible that invisible activism is more effective than visible activism: UK institutions have emphasised that their most effective interventions have occurred away from the public spotlight (Stapledon 1996a, pp 117-131).

Second, the mixed results may be a factor of which specific corporate governance feature was being targeted in the institutional investor action. Romano (1999), who analysed the same studies reviewed by Black, rationalises the mixed results on this basis. She demonstrates that institutional activism aimed at board structure and composition, for example, does not generally produce a statistically significant effect on company performance. This, according to Romano, is explicable by the fact that board structure and composition *itself* does not have a statistically significant impact on corporate performance (a fact discernible from a review of the broad range of empirical studies in this area).[39] On the other hand, institutional investor activism aimed at dismantling certain kinds of takeover defences – by voting against them – is often associated with positive share-price performance. Romano attributes this to the fact that these types of takeover defences have *themselves* been shown, empirically, to be shareholder-wealth destroying.

The upshot of the US empirical studies, in particular, appears to be that the growth in institutional shareholdings over recent decades has had an impact on corporate performance, but not in an across-

[38] For a US study which examined the behind-the-scenes activism of one large pension fund, see Carleton, Nelson and Weisbach (1998).

[39] For a review of studies of the impact of board composition on corporate performance, see Stapledon and Lawrence (1997). For recent Australian empirical studies, see Lawrence and Stapledon (1999); Muth and Donaldson (1998).

the-board sense. Exercise of voting rights by US institutional investors does appear to be value-enhancing in some areas, such as removal of certain types of takeover defences.

IV. The study

A. Methodology

1. Sample

The study involved a review of 1999 AGM proxy voting statistics reported to the ASX under section 251AA of the Corporations Law by 59 major Australian listed companies. A similar study was conducted in relation to 1998 proxy voting by CGI (1999). The 1998 study covered 74 companies. There was considerable overlap between the 59 companies in the 1999 sample and the companies in the 1998 sample. The present study examined resolutions for the election or re-election of directors, in order to facilitate a comparison with the 1998 study. But some investment managers have a policy of not voting on resolutions which are deemed to be "routine", and instead voting only on what they consider to be controversial or major resolutions (Ramsay, Stapledon and Fong 2000). And some investment managers regard director-election resolutions as in the routine category – at least where, at the time of the meeting, they have no grievances about the company's performance or other matters. For this reason, the present study also examined all controversial resolutions at the 59 sample companies – to determine whether or not a substantially greater level of voting occurred on these resolutions.[40]

2. Director-election resolutions

As just mentioned, some investment managers regard director-election resolutions as routine matters on which they do not ordinarily vote. Nevertheless, this Report focuses on director-election resolutions for two reasons.

First, no shareholder is excluded from voting on director-election resolutions. In contrast, in relation to certain other issues that go to shareholders for approval (for example, related party transactions), some shareholders are excluded from voting under the ASX Listing Rules and, sometimes, the Corporations Law.

Second, the election by shareholders of their representatives – that is, the directors – to superintend the strategy and management of the company on their behalf is among the most important decisions those shareholders have to make. Indeed, at the kernel of best practice in corporate governance is the appropriate composition of the board of a publicly listed company. In the experience of CGI, substantial destruction of shareholder value, in both Australia and other countries, has been associated with inappropriate board composition. For that and other reasons, the selection and monitoring of the performance of non-executive directors – especially *independent* non-executive directors – deserves particular care. Consequently, CGI recommends that investment managers should not regard resolutions for the election or re-election of directors as routine.

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[40] A resolution was classified as controversial if a "Vote Against" recommendation was made in respect of it by the proxy advisory service ISS Australia.

3. The non-compliance problem

As the above numbers indicate, several of the companies covered in the 1998 study were missing from the present study. Interestingly, for 11 these companies, the reason they are not included in the present study is because their proxy voting disclosure to the ASX did not contain all of the information required by section 251AA. In some instances the company merely disclosed that each resolution was approved at the meeting.

This non-compliance raises the question of enforcement by the ASX and ASIC. But is there an explanation for the apparent lack of action by the ASX and ASIC in regard to non-compliance with section 251AA? Section 251A (as opposed to 251AA) requires a company to maintain a minute book in which proceedings and resolutions of shareholder meetings are recorded within one month of the meeting. Failure to do this is a criminal offence by the company. The penalty is a fine of up to $5,000.[41] On the other hand, non-compliance with section 251AA is specifically *not* an offence.[42] Therefore, it seems that the only practical enforcement route available to ASIC is to apply to the court under section 1324 for a mandatory injunction requiring the company to disclose in accordance with section 251AA.

4. Accessing the data

When a company reports its proxy voting data to the ASX under section 251AA, the information is added to the other "company announcements" stored by the ASX. Although company announcements are available from several sources besides the ASX, including without charge on some web sites,[43] in the case of section 251AA disclosures it is currently (and somewhat frustratingly) necessary to inspect the "original" disclosure stored by the ASX if one wishes to see the complete disclosure. This is because the ASX has adopted a practice of editing the section 251AA disclosures before releasing them to other corporate information service-providers. The edited version shows merely the number of shares in respect of which proxies were instructed to vote for and against. It does not reveal the number of shares in respect of which proxies were instructed to abstain or vote at their discretion. This full information is available only by paying a fee to the ASX.

5. The voting categories

As can be gleaned from the wording of section 251AA(1)(a), it is possible for a shareholder to provide four different kinds of voting instructions to her or his proxy: "For", "Against", "Discretionary" (that is, at the proxy's discretion) and "Abstain". Technically, an "Abstain" instruction is an instruction not to vote. The "Abstain" instruction is, however, sometimes used deliberately by institutional shareholders when they wish to register a protest or warning vote stopping short of a vote

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[41] Corporations Law, sections 1311, 1312, Sch 3.
[42] Corporations Law, section 1311(1A).
[43] For example, http://www.tradingroom.com.au

"Against".[44] In that sense, it is influential and is counted as a voting instruction for the purpose of this Report.

In regard to votes actually cast on a poll, section 251AA(1)(b) uses three expressions: "In favour", "Against" and "Abstaining". However, where a poll is conducted, votes may only be cast "In favour" or "Against" the proposed resolution. A shareholder, or a proxy whose proxy form instructs them to do so, casts their votes simply by ticking the "For"[45] or "Against" box on the voting paper.[46] But a shareholder, or a proxy whose proxy form instructs them to do so, may also write "Abstain" on the voting paper or tick the "Abstain" box if there is one. If a voting paper has "Abstain" written on it, or if any "Abstain" box has been ticked, the shares to which that voting paper relates are not counted in determining whether or not the resolution has been passed.[47] Nevertheless, for the reason outlined above, this Report counts recorded abstentions in arriving at a figure for total votes cast on a poll.

6. *How the voting percentages were calculated*

The figures reported in the next section of the Report were calculated as follows. For each sample company, the total number of votes in each of the four voting-instruction categories for a particular director-election resolution was divided by the total number of issued ordinary shares as disclosed in the company's 1999 Annual Report. This gave the voting percentages for that resolution. The same exercise was conducted for every resolution concerning election or re-election of directors at that company's AGM. An average was then calculated for each of the four voting-instruction categories for that company – by averaging the figures for all director-election resolutions for that company. An overall average for each of the four voting-instruction categories was then calculated by averaging the 59 sample companies' averages.

Given that some companies had only one or two director-election resolutions and others had several (up to seven), the company-by-company averaging exercise was necessary in order to get an accurate picture of the overall average proxy voting position. To have calculated an overall average for each voting-instruction category simply from all 180 director-election resolutions would have skewed the average towards the percentages existing at the companies which had multiple director-election resolutions.

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[44] The Model Proxy Form in Appendix B of IFSA's Blue Book (IFSA 1999) is a recommended form of proxy for use by listed Australian companies. The recommended form is designed to facilitate proxy voting in any of the 4 voting categories, especially by a custodian which may hold shares in the listed company for a number of different institutional investors and may receive different voting instructions from each.

[45] It is more common for the term "For" to appear on the voting paper, rather than "In favour" – the expression used in section 251AA(1)(b).

[46] A custodian will normally hold shares on behalf of several clients – each of whom is a beneficial owner of some of the shares registered in the name of that custodian. As the custodian holds the shares on a bare trust, it is required under trust law principles (and also invariably as a matter of contract) to exercise the voting rights attached to shares held for a particular client only if instructed to do so by that client, or by someone appointed by the client (e.g. the client's investment manager). Some of a custodian's clients may instruct it to vote in favour of a proposed resolution, and others may instruct it to vote against the same resolution. In this case, rather than ticking a box, the custodian will have to write the relevant number of shares in the "For" box and the relevant number of shares in the "Against" box.

[47] Lang (1998) p 170: "The decision on each motion is arrived at by those persons who do vote … Generally, persons who refrain from voting do not affect the result."

The methodology just described was also adopted for the controversial resolutions. Finally, where a company conducted a poll, a similar exercise was conducted – with the only difference being that there were only three voting categories (in favour, against and abstaining).

B. Results

1. Introduction

Table 1 provides some summary statistics. Some interesting features include the relatively rare incidence of resolutions being decided on a poll. As mentioned earlier, the traditional procedure at general meetings of listed Australian companies is to deal with proposed resolutions on a show of hands, and for the chairperson to demand a poll only if the result on a show of hands does not reflect the likely outcome on a poll. In the 1999 study only 7 (12%) of the sample companies had a poll for director-election resolutions. Also, only 3 (14%) of the 21 companies that had at least one controversial resolution decided these resolutions on a poll.

Another interesting feature of Table 1 is the stark contrast between the number of director-election resolutions passed (176 out of 180, or 98%) and the number of director-election resolutions lost (4 out of 180, or 2%). All 4 of the director-election resolutions that were lost were decided on a poll. Also, these 4 unsuccessful resolutions were the only shareholder-initiated resolutions. The other 176 resolutions were board-initiated. A similar picture emerges in relation to controversial resolutions. 28 out of 34, or 82% of, controversial resolutions were passed, and only 6 (18%) were lost. 4 of the 6 controversial resolutions that were lost were decided on a poll. But again, all 6 controversial resolutions that were lost were shareholder-initiated.

TABLE 1 Summary statistics[48]

	Year	
	1998	*1999*
Number of sample companies	74	59
Number of widely held companies	46	40
Director-election resolutions Number of companies having at least one director-election resolution	74	59
Number of co's at which all director-election resol'ns decided on show of hands	70	52
Number of co's at which all director-election resol'ns decided on a poll	4	7
Number of director-election resolutions	245	180
Number of director-election resolutions decided on show of hands	232	152
Number of director-election resolutions decided on a poll	13	28
Number of director-election resolutions passed	243	176
Number of director-election resolutions lost	2	4
Controversial resolutions Number of companies having at least one controversial resolution	N/A	21
Number of co's at which all controversial resol'ns decided on show of hands	N/A	18
Number of co's at which all controversial resol'ns decided on a poll	N/A	3
Number of controversial resolutions	N/A	34
Number of controversial resolutions decided on show of hands	N/A	28
Number of controversial resolutions decided on a poll	N/A	6
Number of controversial resolutions passed	N/A	28
Number of controversial resolutions lost	N/A	6

2. Director-election resolutions: results for widely held companies

40 (68%) of the sample companies were widely held, in the sense that they did not have a shareholder holding 20% or more of their issued voting capital.[49] In the present context – that is, a public debate about the voting behaviour of Australian institutional investors – it is appropriate to focus on the results obtained for widely held companies, rather than all sample companies including those with one or more major shareholders. The reasons for this are:

- The scope for institutions realistically to influence voting outcomes is very much a factor of the presence or absence of a major non-institutional shareholder. Where there is a founding entrepreneur, founding family or overseas company holding a stake of, say, 40%, it will be virtually impossible for that shareholder to be outvoted on an ordinary resolution.[50]

- Both the highest and the lowest levels of proxy instructions were in companies with a major non-institutional shareholder. It is clear that, in the highest case, the major shareholder lodged a proxy form; and in the lowest case this did not occur. This affects the average result.

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[48] "N/A" indicates figures that are not available for 1998.
[49] 20% was adopted as a threshold as it is the percentage shareholding deemed to confer control under Australia's takeover laws: see Corporations Law, section 606.
[50] In the case of a special resolution – which to be passed requires votes in favour to account for at least 75% of total votes cast – there would be somewhat more scope for a 40% shareholder's wishes to be defeated.

- The existence of a controlling or major shareholder may discourage the exercise by institutional and other public shareholders of their proxy vote on the basis that the will of the major shareholder would in any event ensure passage of the resolutions.

A poll was conducted for director-election resolutions at only 4 of the 40 widely held companies' AGMs. For the widely held companies, the key aggregate voting figures for director-election resolutions are:

- Total proxy instructions accounted for between 18% and 66% of the company's total voting capital (the range in 1998 was 19% to 46%).
- Proxy instructions represented, on average, 35% of total voting capital (compared to 32% in 1998).
- Proxy instructions represented less than 30% of total voting capital in 14 cases (35% of the widely held companies – compared to 44% in 1998).
- Proxy instructions represented less than 50% of total voting capital in 38 cases (95% of the widely held companies – compared to 100% in 1998).

Table 2 compares the 1998 and 1999 voting figures derived from the section 251AA(1)**(a)** disclosure requirement, and Table 3 shows the 1998 and 1999 figures derived from the section 251AA(1)**(b)** disclosure requirement. That is, Table 2 sets out the split of voting instructions given by shareholders to their proxies at widely held companies – even though the vote may well have been conducted on a show of hands. And Table 3 shows the split of votes actually cast where a resolution was decided on a poll at widely held companies.

TABLE 2 Director-election resolutions: voting instructions given to proxies: widely held companies

Year	*Voting instruction given to proxy by shareholder (average % of issued ordinary shares)*				
	Vote for	*Vote against*	*Abstain*	*Discretionary*	*Total*
1998	24.11%	0.08%	4.49%	2.91%	31.59%
1999	29.44%	0.22%	1.59%	3.81%	35.06%

TABLE 3 Director-election resolutions: votes cast on a poll: widely held companies

Year	*Votes cast on a poll (average % of issued ordinary shares)*			
	In favour	*Against*	*Abstaining*	*Total*
1998	20.90%	5.95%	1.10%	27.95%
1999	20.48%	1.30%	0.13%	21.92%

3. Director-election resolutions: results for all sample companies

Tables 4 and 5 present the results obtained for all sample companies (not just widely held companies). Table 4 compares the 1998 and 1999 voting figures derived from the section 251AA(1)**(a)** disclosure requirement, and Table 5 shows the 1999 figures derived from the section 251AA(1)**(b)** disclosure requirement. That is, Table 4 shows the figures for voting instructions given by shareholders to their proxies; and Table 5 shows the actual voting outcome where a resolution was decided on a poll.

TABLE 4 Director-election resolutions: voting instructions given to proxies: all companies

Year	*Voting instruction given to proxy by shareholder (average % of issued ordinary shares)*				
	Vote for	*Vote against*	*Abstain*	*Discretionary*	*Total*
1998	29.51%	0.45%	2.38%	6.91%	39.25%
1999	36.55%	0.37%	1.20%	3.33%	41.45%

As Table 4 shows, proxy instructions represented on average 41% of total issued voting capital in 1999 compared to 39% the year before. Although this aggregate voting-instruction figure is a bit higher than the 35% figure for widely held companies, it compares poorly with those for the UK, the US and Germany. Studies of voting at UK companies in the FTSE 350 index reveal that the level of proxy instructions has increased from 40% of total issued voting capital in 1996 to 50% in 1999 (PIRC 1999). The US figure is about 80%, although there are special factors that partly explain the size of the US figure.[51] And the German figure for 1994 was 73% (Newbold Committee 1999, para 4.15).

An overwhelming majority of voting instructions were to vote "For" the proposed director-election resolution: on average, "For" instructions accounted for 88% of the voting capital for which proxy instructions were given. This figure would be even higher if the 4 shareholder-initiated proposals were excluded, bearing in mind that each of those proposals was defeated. Other figures lying behind Table 4 include:

- Proxy instructions were lodged for less than 30% of the total voting capital in 18 (31%) of the sample companies in 1999 – the same percentage as in 1998. These Australian figures compare poorly with those in the UK. A study covering 1998 AGMs for a sample of FTSE 350 companies found that proxy instructions lodged for less than 30% of total voting capital were reported in only 11% of companies (PIRC 1998).

- Proxy instructions were lodged for less than 50% of the total voting capital in 43 (73%) of the sample companies in 1999 – compared to 67% in 1998. In this respect, the Australian position is similar to that in the UK. The 1998 study mentioned above found that proxy instructions lodged for less than 50% of total voting capital were reported in 64% of the FTSE 350 companies (PIRC 1998).

- Proxy instructions were lodged for as low as 8% and as high as 87% of the company's total voting capital in 1999. The equivalent figures for 1998 were 6% to 91%.

What explains these major variations? As in the UK (PIRC 1999), in general the highest levels of proxy instructions occurred among the companies with one or more major shareholders. For example, at Queensland Metals Corporation Ltd – in which the Normandy group holds a 37% stake – proxy instructions represented 82% of total voting capital. And at Rothsmans Holdings Ltd – in which the British American Tobacco group held a 50% stake at the time of the study – proxy instructions

[51] See Appendix 1 for details.

represented 80% of total voting capital. In these cases the large shareholder has clearly lodged a proxy form, and this in turn has increased the overall level of voting instructions for these companies.

Interestingly, some companies with a major shareholder also featured low levels of proxy instructions. For example, at Telstra Corporation Ltd – in which the Commonwealth of Australia has a 50.1% stake – proxy instructions represented only 8% of total voting capital. Here, the major shareholder clearly did not lodge a proxy form. Instead, it attended the meeting (presumably by an attorney)[52] – which is revealed by the fact that the average level of votes cast on the resolutions decided on a poll at the Telstra AGM was 57% of the total voting capital. Sending a corporate representative or an attorney to the general meeting enables a corporate or government shareholder to vote on both a show of hands and, if necessary, on a poll without prior notification of its proposed vote to the company.[53]

TABLE 5 Director-election resolutions: votes cast on a poll: all companies

Year	*Votes cast on a poll (average % of issued ordinary shares)*			
	In favour	*Against*	*Abstaining*	*Total*
1998	40.23%	2.90%	0.55%	43.68%
1999	29.19%	4.58%	3.94%	37.71%

As Table 5 indicates, votes cast on a poll represented (on average) a smaller proportion of total voting capital (38%) than did voting instructions given to proxies (41%, as shown in Table 4). For any particular company that has conducted a poll at its AGM, one would expect the number of votes cast on the poll normally to exceed the number of votes attached to proxy instructions. This is because a reasonable proportion of the people attending an AGM will be shareholders who have not lodged a proxy form, and whose votes will be added to proxy votes when the poll is conducted.

The lower total figure in Table 5 compared to Table 4 is explicable by the fact that polls were conducted for director-election resolutions at only 7 sample companies. So, Table 4 relates to 59 companies whereas Table 5 relates to only 7 companies. A better comparison is between the number of votes attached to proxy instructions and the number of votes cast on a poll at the 7 companies that conducted polls. When this comparison is made, it transpires that in 6 cases the number of votes cast on a poll did exceed the number of votes attached to proxy instructions. The exceptional case saw proxy instructions representing 30.7% of issued voting capital, and votes cast on the poll equalling 29.6% of issued voting capital. The reason for this may lie in the fact that a proxy other than the chairperson is not required to vote on a poll.[54]

The figure for "Against" in Table 5 is considerably higher than that in Table 4, reflecting the fact that all 4 resolutions that were lost were decided on a poll. So, for 4 out of 28 resolutions decided on a poll, a majority of votes cast were "Against". When one focuses on voting instructions given to

[52] A corporate representative would not have been an option since the Commonwealth of Australia is not a body corporate.
[53] See Corporations Law, section 250D.
[54] Corporations Law, section 250A(4)(c), (d). If a proxy other than the chairperson does choose to vote on a poll, they must vote according to any instructions in the proxy form: section 250A(4)(d).

proxies, instructions to vote "Against" were in the majority for 4 out of 180 proposed resolutions – hence the diluted average figure overall.

As Table 4 shows, the "Discretionary" option was not overall a popular choice. Nevertheless, it is interesting to analyse how the proxies who had discretion as to how to cast their votes actually did cast those votes. The figures show that, for board-initiated resolutions, virtually no discretionary votes were cast "Against". But, for shareholder-initiated resolutions, almost all discretionary votes were cast "Against". This is probably a reflection of the person appointed as proxy with discretion: commonly this will be the chairperson.

Finally, in comparing the 1998 and 1999 figures in Table 5, caution should be exercised because so few companies conducted a poll on director-election resolutions: only 4 in 1998, and 7 in 1999.

4. Controversial resolutions: results for widely held companies

As mentioned above, some investment managers have a policy of normally not voting on director-election resolutions, on the basis that they deem these resolutions to be routine. Therefore, all controversial resolutions[55] at the sample companies were also examined – to determine whether or not a substantially greater level of voting occurred on these resolutions.

Of the 21 companies that had at least one controversial resolution, 13 were widely held. For these 13 widely held companies, the key aggregate voting figures for controversial resolutions are:

- Total proxy instructions accounted for between 18% and 56% of the company's total voting capital.
- Proxy instructions represented, on average, 32% of total voting capital. Significantly, this is 3 percentage points lower than the aggregate figure for director-election resolutions at widely held companies. There is, therefore, no evidence of a substantially higher level of proxy voting on controversial resolutions in comparison with the level on director-election resolutions.[56]
- Proxy instructions represented less than 30% of total voting capital in 5 cases (38% of the widely held companies that had at least one controversial resolution).
- Proxy instructions represented less than 50% of total voting capital in 12 cases (92% of the widely held companies that had at least one controversial resolution).

Table 6 sets out the split of voting instructions given by shareholders to their proxies at widely held companies, on controversial resolutions. Because only 3 companies decided their controversial resolutions on a poll, we have not included a table showing the split of votes actually cast on a poll, on controversial resolutions.

[55] As mentioned earlier, a resolution was classified as controversial if a "Vote Against" recommendation was made in respect of it by the proxy advisory service ISS Australia.
[56] An explanation may be that, if a proxy form is lodged, it tends to be lodged for all resolutions on the meeting agenda.

TABLE 6 Controversial resolutions: voting instructions given to proxies: widely held companies

Year	Voting instruction given to proxy by shareholder (average % of issued ordinary shares)				
	Vote for	Vote against	Abstain	Discretionary	Total
1999	19.83%	6.48%	0.93%	4.75%	31.99%

5. Controversial resolutions: results for all sample companies

For the 21 sample companies that had at least one controversial resolution, the key aggregate voting figures for their controversial resolutions are:

- Total proxy instructions accounted for between 18% and 87% of the company's total voting capital.
- Proxy instructions represented, on average, 41% of total voting capital. This is the same as the aggregate figure for director-election resolutions at all sample companies. So, again, there is no evidence of a substantially higher level of proxy voting on controversial resolutions in comparison with director-election resolutions.
- Proxy instructions represented less than 30% of total voting capital in 6 cases (29% of the companies that had at least one controversial resolution).
- Proxy instructions represented less than 50% of total voting capital in 14 cases (67% of the companies that had at least one controversial resolution).

Table 7 sets out the split of voting instructions given by shareholders to their proxies at all sample companies, on controversial resolutions.

TABLE 7 Controversial resolutions: voting instructions given to proxies: all sample companies

Year	Voting instruction given to proxy by shareholder (average % of issued ordinary shares)				
	Vote for	Vote against	Abstain	Discretionary	Total
1999	31.41%	4.19%	1.71%	3.76%	41.07%

V. Conclusion

The study described in this Report indicates that the level of shareholder voting at listed Australian companies is lower than that for major US, UK and German companies. The study also revealed that the degree of compliance with the disclosure rule in section 251AA of the Corporations Law is far from high. These findings relate to two important, but separate, issues. The first finding relates to the role of shareholder voting as a corporate governance mechanism. The second finding relates to the desirability or otherwise of a mandatory disclosure regime in this area. This Research Report has provided analysis and views on each of these issues.

Appendix 1: US and UK approaches to voting

A. Levels of proxy voting, and why the US level is higher

As mentioned in the Report, the average level of proxy voting at listed US companies is about 80%, and the average level at listed UK companies is about 50%. There are four special factors that probably go a considerable way towards explaining why the US level is so high. None of these factors exists in a significant sense in Australia or the UK.[57]

First, many beneficial owners of shares in US companies have their shareholdings registered in the name of a broker-dealer or other financial institution, mainly to facilitate easy transfer. In many cases the broker's terms provide for default voting on "routine" resolutions. Under this type of arrangement, if the beneficial owner has not submitted proxy instructions 14 days ahead of the shareholder meeting, the broker will generally have authority to lodge votes on "routine" resolutions at their discretion.

Second, even though on non-routine issues these default voting arrangements do not apply, the practice of proxy solicitation is entrenched in the US. Companies actively seek out support for proposed resolutions – especially where they are non-routine.

Third, under a typical US state corporate law statute, the default quorum for a shareholder meeting is shareholders and proxies representing a majority (i.e. at least 50% + 1) of the entire voting share capital. This may be altered by the company's by-laws, but typically the by-laws may not prescribe a quorum of less than one-third of the voting share capital.[58] In contrast, in Australia the default quorum is a mere two members.[59]

Finally, the figure recorded as the voting level for a meeting of a US corporation is that of the highest vote on a resolution.

Having said that, an additional factor that must go some way towards explaining the different voting levels in the US compared to Australia and the UK is the mandating of voting by the US regulator of private-sector pension schemes – as discussed in the next section.

B. Legal requirements in relation to voting

In the US, the Department of Labor, which is the regulator under the Employee Retirement Income Security Act (ERISA) of US private-sector pension schemes, has long held the view that the vote is a scheme asset which needs to be managed by or on behalf of a scheme's trustee with the same care and diligence as other scheme assets.

In a 1994 policy statement, the Department stated that voting rights attached to equity investments must be exercised "on issues that may affect the value of the plan's investments" (US Department of

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[57] Part of this summary is based on that in Newbold Committee (1999) para 1.13.
[58] See, for example, Delaware General Corporation Law, section 216; Model Business Corporation Act, section 7.25(a).
[59] Corporations Law, section 249T. This section is a "replaceable rule" which can be overridden by a clause in a company's constitution.

Labor 1994). The regulator has confirmed that this obligation extends to foreign as well as US equity holdings.

That lead has been followed by US institutional investors not subject to ERISA, perhaps through concerns of legal exposure if they adopted a lesser approach.

As far as UK institutional investors are concerned, their legal position is probably very similar to that of their Australian counterparts. As indicated earlier in this Report, the primary legal obligation on Australian institutional investors is to *consider* whether to vote.

In the UK, a range of interested parties – including the institutional investors' own industry associations – have for many years encouraged institutional investors to exercise their voting rights (Stapledon 1996a, p 97). However, against a backdrop of institutional voting understood to have stalled at about the 40% of voting capital level, the Blair government indicated in early 1998 that legislation to mandate voting by institutional investors could be considered unless their level of voting increased. This led to the establishment of the Newbold Committee, to investigate the voting levels and practices of pension funds and other institutional investors and to identify practical impediments to voting and how they may be overcome.

The Committee's main finding was that the voting process is, for many institutional investors, a "tortuous process" – mainly due to the need (under UK company law as under Australian company law) for the custodian (the "member") to play a role in the flow of meeting documents and proxy instructions between the listed company and the investment manager with day-to-day responsibility for the shareholding in question (Newbold Committee 1999, paras 1.7, 1.8, 2.1-2.13).[60] Nevertheless, the Committee believes that the introduction of electronic voting should see the UK voting level increase to around 60% in the next few years.

Another recent development in the UK is a requirement for pension scheme trustees to declare in their statement of investment principles "their policy (if any) in relation to the exercise of the rights (including voting rights) attaching to investments".[61]

C. Disclosure of proxy voting results

In the US, SEC regulations mandate disclosure of proxy voting results on a quarterly reporting basis by listed companies.[62]

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[60] See pages 3-5 above.

[61] Occupational Pension Schemes (Investment) Regulations 1996 (SI 1996/3127), regulation 11A (inserted by the Occupational Pension Schemes (Investment, and Assignment, Forfeiture, Bankruptcy, etc) Amendment Regulations 1999 (SI 1999/1849)). The statement of investment principles is a requirement of the Pensions Act 1995 (UK). The scheme trustee, or any investment manager hired by the trustee, must exercise powers of investment "with a view to giving effect to [these] principles … so far as reasonably practicable": section 36(5). Yet another UK development is the possible introduction of a requirement for listed companies to obtain shareholder approval of their executive remuneration policy, or alternatively to obtain an "advisory" vote from shareholders on the report of the board's remuneration committee: Department of Trade and Industry (1999). According to a recent leak to a newspaper, the UK government has apparently decided to adopt the latter option: Davis Global Advisors (2000).

[62] The SEC requires listed companies to publish voting results in their next quarterly 10-Q Report following the meeting. In disclosing the results, companies must disclose separately the votes "For", "Against", "Abstain" and "Withheld" (the latter being used primarily with respect to the election of directors). See SEC Rule 13a-13 and SEC Form 10-Q.

In the UK, the "Combined Code" appended to the FSA Listing Rules[63] recommends that listed UK companies "should count all proxy votes and, except where a poll is called, should indicate the level of proxies lodged on each resolution, and the balance for and against the resolution, after it has been dealt with on a show of hands".[64] Interestingly, nearly 60% of UK companies declined to disclose their proxy results when requested by a shareholder advisory firm in 1999 (PIRC 1999).

[63] From 1 May 2000, the role of UK Listing Authority was transferred from the London Stock Exchange to the Financial Services Authority (FSA) – a government regulator.

[64] Code provision C.2.1.

Appendix 2: The mechanics of shareholder voting in Australia

A. Initiative on shareholder decision making

It is possible for shareholders to take the initiative on motions to be put forward for a vote at general meetings.[65] The most common example in a publicly listed company is a move by one or more large shareholders to request a shareholder meeting[66] to vote on a change to the board, possibly to replace one or more existing directors with nominees of the large shareholder(s).

In the US, shareholder-sponsored resolutions have also been used as a wider governance tool by activist institutional and other investors to seek to implement shareholder decisions or to compel established boards to address certain matters.

In most cases, however, the shareholders do not take the initiative. For example, in practice, it is usually the board of a publicly listed company which first appoints new directors. Partially for that reason the ASX Listing Rule 14.4 requires a director appointed by the board, other than the managing director, to retire at the next AGM and thereby seek re-election by shareholders. Under the same rule, directors, other than the managing director, also must retire at least every three years and, if they wish, seek re-election. Similarly, decisions on other matters are usually made initially by the board and then recommended to shareholders for their approval.

B. How shareholder decisions are made

Shareholder decisions are made by shareholder vote in general meeting. Depending on the subject matter, the decision may need to be made by an ordinary resolution or a special resolution.

1. *Ordinary and special resolutions*

An ordinary resolution is passed if a simple majority of all votes cast on the resolution are in favour. A three-quarters majority of votes cast is required to pass a special resolution.

Again, whether a decision requires simple or three-quarters majority approval is determined by the Corporations Law, the company's constitution and the ASX Listing Rules:

- The election of directors is made by ordinary resolution.
- A special resolution is required to change the company's constitution.
- Some shareholder decisions are essentially giving approval to transactions between the company and related parties. Depending on the type of transaction an ordinary or a special resolution may be required.
- Where a shareholder vote relates to a related party transaction, the Corporations Law and the ASX Listing Rules are designed to ensure that the related parties and their associates do not vote.

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[65] See Corporations Law, section 249N.

In certain cases, the combination of a special resolution and exclusion of interested parties from voting means that a relatively low percentage of total capital can defeat the resolution.

2. Proxy Voting

Relatively few public shareholders actually attend the general meetings of the listed companies in which they hold shares. Of those shareholders who do participate in shareholder decision making, the vast majority, by choice or necessity, participate by sending in their proxy vote.

Most institutional investors are in that category. For example, many investment management firms which manage share portfolios for superannuation and other clients must, for legal or practical reasons, use a recognised custodian company to hold the shares. Consequently, the investment manager can vote those shares only by instructing the custodian, which is the shareholder ("member") on the company register, how to vote.[67]

In turn, each custodian may be holding shares in the same listed company for a variety of institutional clients. In those circumstances, the only practical way for the custodian to vote is by proxy using a form which aggregates the various voting instructions of those clients.

To facilitate that activity and its computer processing by the company's share registry, the industry body representing institutional investors (IFSA) has recommended that listed companies use a pro forma proxy form which, among other things, enables the custodian to insert the aggregate number of votes it is instructed to exercise in each of the 4 voting categories ("For", "Against", "Abstain", "Discretionary").

3. Procedure

The procedure for voting by shareholders in an Australian publicly listed company on ordinary or special resolutions is essentially as follows:

1. The listed company sends the notice of annual (or other) general meeting and any associated documents (e.g. an explanatory memorandum) to its shareholders prior to the meeting.[68] The notice specifies the resolutions to be voted on by shareholders at the meeting, and identifies them as either ordinary or special resolutions. It must also include any additional explanation or information so that shareholders can consider all relevant issues and make a fully informed decision on whether to attend the meeting, and whether (and if so how) to vote.[69]

2. The listed company must include a proxy form with the notice,[70] which is intended to enable shareholders not attending the meeting to exercise their vote by proxy on each resolution.

3. For valid proxy instructions to be lodged, the proxy form has to be completed and returned to the company, or its share registry, prior to the meeting (so that the form can be checked for validity and

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[66] The power to do this is in section 249D of the Corporations Law.
[67] See pages 3-5 above.
[68] The minimum notice period is 28 days: Corporations Law, section 249HA.
[69] Corporations Law, section 249L(b); *Fraser v NRMA Holdings Ltd* (1995) 15 ACSR 590 at 601-603.
[70] ASX Listing Rule 14.2.

the voting instructions recorded prior to the meeting). The Corporations Law specifies 48 hours before the meeting as the maximum prior lodgement time which the company can require.[71] Most Top 100 Australian companies require the full 48 hours but a few allow 24 hours, apparently with no proxy processing problems from that shorter time period.

Since July 1998 section 250BA of the Corporations Law has provided that "In a notice of meeting for a meeting of the members of a [listed] company, the company … must specify a place and a fax number … for … receipt of proxy appointments".[72] Shareholders have therefore been able to lodge their proxy form by fax. Especially where the last date for lodgement is a weekend or public holiday, that facility provides a material benefit to shareholders.[73]

Section 250BA also provides that a listed company "*may* specify an electronic address … for … receipt of proxy appointments" (emphasis added). But, to date, there has been only a handful of companies seeking to make use of this further convenience for shareholders. This, though, is itself a reflection of concern about how a company may validly receive proxy appointments sent electronically given the requirement in section 250A that, in order for a proxy appointment to be valid, it must be "signed" by the shareholder making the appointment. The Parliamentary Joint Statutory Committee on Corporations and Securities (1999, ch 13) has recommended that a definition of "sign" be introduced into the Corporations Law, making clear that the term includes use of a personal identification number (PIN).[74]

4. Most of the major listed companies contract the maintenance of their share registry to one of a few specialised registry managers. The work contracted includes processing of proxy forms received for resolutions to be voted on at annual or other general meetings.

   Modern computer technology is used to produce for company management a number of reports on proxies lodged. Those reports can range from the aggregate number of voting instructions in the four possible categories ("For", "Against", "Abstain" and "Discretionary") to details of how individual shareholders have instructed their proxy to vote.

5. At the meeting, voting on each resolution is normally initially by a show of hands ("For" and "Against") of the members attending the meeting.[75] Although those voters most often comprise a

[71] Corporations Law, section 250B(1), (5).
[72] Section 250BA applies "despite anything in the company's constitution".
[73] In one 1998 case prior to the introduction of section 250BA, the last date for lodgement (i.e. 48 hours before the meeting) was Easter Monday. As the specified lodgement address was a high-rise floor in a CBD office building, and the company did not offer a fax lodgement facility to shareholders, the effective last time for lodgement was before the close of normal office hours on the Thursday before Easter. Thereby, for practical lodgement by public shareholders of their proxies, almost a week was cut off the notice period for the meeting.
[74] Electronic lodgement of proxy appointments is possible in many US states: see, for example, Delaware General Corporation Law, section 212(c); New York Business Corporations Law, section 609(i); Model Business Corporation Act, section 7.22(b). And the UK is currently introducing changes to its corporate law to facilitate electronic lodgement of proxy appointments: Department of Trade and Industry (2000); Electronic Communications Bill 2000; Draft Companies Act 1985 (Electronic Communications) Order 2000. Commercial providers have developed electronic proxy voting software and systems to be available once the legislative framework is in place: Bingham (2000).
[75] Proxies are also entitled to vote on a show of hands unless the company's constitution forbids this: Corporations Law, section 249Y(2).

small proportion only of total voting capital, the outcome of their show of hands determines whether the resolution is passed unless a poll is held.

6. A poll may be called by the chairperson, by members and/or proxies representing at least 5% of total voting capital, or by 5 or more individual members and/or proxies.[76]

   The duty of the chairperson is to determine "the will of the meeting" on the business before it.[77] Effectively, that means the chairperson should call a poll on a resolution if it appears that a different result might be obtained on a poll. That is why the chairperson needs information on the aggregate number of proxy instructions lodged in the 4 voting categories referred to in 4 above.

7. On a poll, the result is determined by the number of shares voted "For" and "Against", including the number voted by proxy.

   Where the proxy form has given the person appointed as the shareholder's proxy a discretion on how to vote, that person can decide whether to vote the shares concerned "For" or "Against" the resolution or to "Abstain". Traditionally, the proxy form has specified that person as the chairperson of the meeting – but in a publicly listed company the shareholder can appoint any person to that role. In most listed companies, however, it is a reasonable assumption that a major proportion, if not the bulk, of the votes to be exercised at the proxy's discretion will be entrusted to the chairperson. Since the chairperson of the meeting will usually be the chairperson of the board of directors – which has recommended the resolution for shareholder approval – a discretionary vote given to the chairperson is effectively almost always a vote "For" the resolution. The figures revealed in the 1999 study described in this Report confirm that "Discretionary" instructions were almost invariably voted in favour of board-initiated proposals and against shareholder-initiated proposals.

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[76] Corporations Law, sections 250L(1), 249Y(1)(c). The company's constitution may provide that fewer members or members with a lesser percentage of votes may demand a poll: section 250L(2).

[77] *Second Consolidated Trust Ltd v Ceylon Amalgamated Tea & Rubber Estates Ltd* [1943] 2 All ER 567.

References

AIMA (Australian Investment Managers' Association) (1995), *AIMA Standard Investment Management Agreement* (AIMA, Sydney).

ASX (Australian Stock Exchange) (2000), *Share Ownership Survey 2000* (ASX, Sydney).

Barnard, J W (1991), "Institutional Investors and the New Corporate Governance", 69 *North Carolina Law Review* pp 1135-1174.

Berle, A A and Means, G C (1967), *The Modern Corporation and Private Property* (revised edn, Harcourt Brace & World, New York).

Bingham, K (2000), "Clickety-click", *Governance*, March 2000, pp 1-3.

Black, B S (1990), "Shareholder Passivity Reexamined", 89 *Michigan Law Review* pp 520-608.

Black, B S (1998), "Shareholder Activism and Corporate Governance in the United States" in P Newman (ed), *The New Palgrave Dictionary of Economics and the Law* (vol 3, Stockton Press, New York), p 459.

Boros, E (1999), *The Online Corporation: Electronic Corporate Communications* (Discussion Paper, Centre for Corporate Law and Securities Regulation, University of Melbourne).

Bosch Committee (Working Group of the Australian Institute of Company Directors and others (H Bosch AO, chair)) (1995), *Corporate Practices and Conduct* (3rd edn, FT Pitman Publishing, Melbourne).

Byers, The Hon Stephen MP (1999), "Directors' Remuneration" (Speech given on 19 July 1999). Available at: http://www.dti.gov.uk/Minspeech/byers1190799.htm

Cadbury Committee (Committee on the Financial Aspects of Corporate Governance (Sir Adrian Cadbury, chair)) (1992), *Report* (Gee & Co, London).

Carleton, W T, Nelson, J M and Weisbach, M S (1998), "The Influence of Institutions on Corporate Governance Through Private Negotiations: Evidence from TIAA-CREF", 53 *Journal of Finance* pp 1335-1362.

Central Statistical Office (1995), *Share Ownership: A Report on the Ownership of Shares at 31st of December 1994* (HMSO, London).

CGI (Corporate Governance International Pty Limited) (1999), *Proxy Voting in Major Australian Listed Companies: July-December 1998* (CGI, Sydney).

Coffee, J C (1991), "Liquidity Versus Control: The Institutional Investor as Corporate Monitor", 91 *Columbia Law Review* pp 1277-1368.

Coffee, J C (1994), "The SEC and the Institutional Investor: A Half-Time Report", 15 *Cardozo Law Review* pp 837-907.

Coffee, J C (1997), "The Folklore of Investor Capitalism", 95 *Michigan Law Review* pp 1970-1989.

Companies and Securities Advisory Committee (1999), *Shareholder Participation in the Modern Listed Public Company* (Discussion Paper, CASAC, Sydney).

Craswell, A T, Taylor, S L and Saywell, R A (1997), "Ownership Structure and Corporate Performance: Australian Evidence", 5 *Pacific-Basin Finance Journal* pp 301-323.

Davis Global Advisors (2000), "Flashpoints: Pay to Vote", *Global Proxy Watch*, 28 April 2000.

Department of Trade and Industry (1999), *Directors' Remuneration* (Consultative Document, URN 99/923, DTI, London).

Department of Trade and Industry (2000), *Electronic Communications for Companies: An Order Under the Electronic Communications Bill* (Consultative Document, URN 00/626, DTI, London).

Faccio, M and Lasfer, M A (2000), "Do Occupational Pension Funds Monitor Companies in which They Hold Large Stakes?", 6 *Journal of Corporate Finance* pp 71-110.

Financial System Inquiry (Stan Wallis, chair) (1997), *Final Report* (Australian Government Publishing Service, Canberra).

Ford, H A J and Lee, W A (1996), *Principles of the Law of Trusts*, (3rd edn, LBC Information Services, Sydney).

Ford, H A J, Austin R P and Ramsay I M (1999), *Ford's Principles of Corporations Law* (9th edn, Butterworths, Sydney).

Franks, J, Mayer, C and Renneboog, L (1998), "Who Disciplines Bad Management?" (Working Paper, Said Business School, University of Oxford).

Grundfest, J A (1990), "Subordination of American Capital", 27 *Journal of Financial Economics* p 89.

Hockey, The Hon Joe, MP (2000a), "Corporate Governance" (Transcript of a speech given at the Securities Institute Research Centre of the Asia-Pacific Seminar, Sydney, 23 March 2000). Available at:
http://www.minfsr.treasury.gov.au/transcripts/2000/003.asp

Hockey, The Hon Joe, MP (2000b), "corporategovernance.com" (Speech given at The Sydney Institute, 1 May 2000). Available at:
http://www.minfsr.treasury.gov.au/speeches/2000/006.asp

Meagher, R P and Gummow, W M C (1997), *Jacobs' Law of Trusts in Australia* (6th edn, Butterworths, Sydney).

Hampel Committee (Committee on Corporate Governance) (1998), *Final Report* (Gee Publishing, London).

Hanrahan, P, Ramsay, I and Stapledon, G (2000), *Commercial Applications of Company Law* (CCH, Sydney).

ICGN (International Corporate Governance Network) (1999), *ICGN Statement on Global Corporate Governance Principles* (ICGN, London).

IFSA (Investment and Financial Services Association) (1999), *IFSA Guidance Note No 2.00: Corporate Governance: A Guide for Investment Managers and Corporations* (IFSA, Sydney).

Kavanagh, J (2000), "Funds Under Fire for Letting Boards Get Out of Line", *BRW*, 14 April 2000, pp 32-33.

Lang, A D (1998), *Horsley's Meetings Procedure, Law and Practice* (4th edn, Butterworths, Sydney).

Lawrence, J J and Stapledon, G P (1999), "Do Independent Directors Add Value?" (Research Report, Centre for Corporate Law and Securities Regulation, University of Melbourne).

Mirador (1994), *Corporate Governance in Australia: The Attitudes and Practices of Funds Managers* (Research Report commissioned by the Australian Institute of Superannuation Trustees, Melbourne).

Mouatt, P (1994), "Why the Onus Should Remain on Equities", *Superfunds*, August 1994, p 58.

Muth, M M and Donaldson, L (1998), "Stewardship Theory and Board Structure: A Contingency Approach", 6 *Corporate Governance: An International Review* pp 5-28.

National Association of Corporate Directors (NACD) (1996), *Blue Ribbon Commission Report on Director Professionalism* (NACD, Washington DC).

Newbold Committee (Committee of Inquiry into UK Vote Execution (Y Newbold, Chair)) (1999), *Report* (National Association of Pension Funds, London).

OECD (Organisation for Economic Co-operation and Development) (1999), *OECD Principles of Corporate Governance* (OECD, Paris).

Office for National Statistics (1999), *Share Ownership: A Report on the Ownership of Shares at 31st of December 1997* (The Stationery Office, London).

Parliamentary Joint Committee on Corporations and Securities (1996), *Report on the Draft Second Corporate Law Simplification Bill 1996* (Parliament of the Commonwealth of Australia, Canberra).

Parliamentary Joint Statutory Committee on Corporations and Securities (1999), *Report on Matters Arising from the Company Law Review Act 1998* (Parliament of the Commonwealth of Australia, Canberra).

PIRC (Pensions and Investments Research Consultants) (1998), *Proxy Voting Trends at UK Companies 1993-1998* (PIRC, London).

PIRC (1999), *Proxy Voting Trends 1999* (PIRC, London).

Plender, J (1993), "Survey: Pension Fund Investment: Focus on Investors' Behaviour", *Financial Times*, 6 May 1993, sec III, p 7.

Ramsay, I M, Stapledon, G P and Fong K (2000), "Corporate Governance: The Perspective of Australian Institutional Shareholders", 18 *Company and Securities Law Journal* pp 110-142.

Rock, E B (1991), "The Logic and (Uncertain) Significance of Institutional Shareholder Activism", 79 *Georgetown Law Journal* pp 445-506.

Roe, M J (1994), *Strong Managers, Weak Owners: The Political Roots of American Corporate Finance* (Princeton University Press, Princeton).

Romano, R (1999), "Making Shareholder Activism a More Valuable Mechanism of Corporate Governance" (Paper presented at the Tilburg University Conference on Convergence and Diversity in Corporate Governance Regimes and Capital Markets, Eindhoven, 4-5 November 1999).

Sametz, A W (1995), "An Expanded Role for Private Pensions in US Corporate Governance", 8 *Journal of Applied Corporate Finance* pp 97-110.

Stapledon, G P (1996a), *Institutional Shareholders and Corporate Governance* (Clarendon Press, Oxford).

Stapledon, G P (1996b), "Disincentives to Activism by Institutional Investors in Listed Australian Companies", 18 *Sydney Law Review* pp 152-192.

Stapledon, G P (1998), "The Duties of Australian Institutional Investors in Relation to Corporate Governance", 26 *Australian Business Law Review* pp 331-357.

Stapledon, G P (1999), "Share Ownership and Control in Listed Australian Companies", 2 *Corporate Governance International* pp 17-32.

Stapledon, G P and Bates, J J (2000), "Reconceptualising the Nature of Modern Shareholding (and Making Voting Easier)", 18 *Company and Securities Law Journal* pp 155-159.

Stapledon, G P and Lawrence, J J (1997), "Board Composition, Structure and Independence in Australia's Largest Listed Companies", 21 *Melbourne University Law Review* pp 150-186.

US Department of Labor (1994), *Interpretive Bulletin 94-2*.

White, A (2000), "We'll Prove We're Not Lazy, Joe: Lynn Ralph", *Investor Weekly*, 17-23 April 2000, p 23.