CHARTERED SECRETARIES
AUSTRALIA

Leaders in governance

14 September 2007

David Sullivan
The Secretary
Parliamentary Joint Committee on Corporations and Financial Services
Suite SG.64
Parliament House
CANBERRA ACT 2600

By email to: corporations.joint.@aph.gov.au

Dear Mr Sullivan

Inquiry into shareholder engagement and participation

Chartered Secretaries Australia (CSA) welcomes the opportunity to comment on the engagement and participation of shareholders in the corporate governance of the companies in which they are part-owners. CSA is the peak professional body delivering accredited education and the most practical and authoritative training and information on governance, as well as thought leadership in the field. Our members are all involved in governance, corporate administration and compliance with the Corporations Act (the Act), in both listed and unlisted companies. We have drawn on their practical, applied and authoritative knowledge of the processes involved in ensuring shareholder engagement and participation.

Summary of comments on shareholder engagement and participation

- ***Regulatory information overload***

One of the key barriers to effective shareholder engagement, particularly for retail shareholders, is information overload. CSA strongly supports short-form reports to shareholders, but recommends that:

- companies be left to communicate directly with their shareholders as to what form of non-statutory reports shareholders would like to receive
- such short-form reports remain non-statutory.

- ***The lack of direct voting is a barrier to shareholder engagement and participation***

The use of appointing a proxy to vote as the only means of absentee voting is a barrier to the effective engagement of shareholders, particularly retail shareholders, in the governance of companies at the present time. Australian companies need to be encouraged to investigate direct voting and introduce this mechanism into their constitutions. Legislative change is not required to effect direct voting.

- ***Voting and institutional shareholders***

Institutional investors should be encouraged to vote, but should not be required to vote, or required to disclose how they vote on individual companies.

- ***Nomination of directors***

The nomination of director candidates is dealt with in a company's constitution and should not be regulated.

- ***Pre-selection of directors***

It is important to distinguish between the practice of candidate nomination and selection in political elections, where candidates are elected to represent different constituencies, and candidate nomination in company elections, where directors are not elected to represent constituencies. Indeed, given that directors have a fiduciary duty to act in the best interests of the company as a whole, it constitutes a conflict of interest should they be elected to represent a particular constituency. Pre-selection would fundamentally undermine directors' duties.

- ***Voting arrangements***

CSA strongly encourages Australian companies to provide for direct voting in their constitutions. CSA published a *Guide to Implementing Direct Voting* in March 2007 and sent a copy to the company secretaries of all public listed companies in Australia, to facilitate the introduction of direct voting. No legislative change is required to effect direct voting.

- ***Conduct of annual general meetings***

CSA research over a number of years shows that shareholder attendance at AGMs is declining. Companies should be encouraged to investigate further informal shareholder briefings, but this should not be regulated due to the imposition of costs directly born by shareholders.

CSA suggests that, while the ASX top 300 companies should be obliged to hold AGMs, other listed companies should not be required to hold a physical AGM unless:

- resolutions concerning directors' remuneration are on the agenda or the meeting is to vote on a special resolution
- it chooses to do so
- an AGM is requested by members with at least five per cent of the votes that may be cast at the general meeting; that is, it would become an opt-in provision for smaller listed companies.

- ***100 member rule***

CSA again calls for the reform of s 249D allowing 100 members to requisition general meetings of companies (the 100 member rule). The State Attorneys-General should be encouraged to support this reform, given its widespread support from multiple industry parties that represent a range of interests from retail shareholders to large institutions as well as bipartisan support during the seven-year consultation process on this issue.

- ***Electronic communication with shareholders***

There are no longer any significant barriers to effective electronic communication. Further exploration of electronic communication with members is underway, with companies innovating and experimenting as how to best achieve effective communication.

- ***Members submitting questions prior to the AGM***

Legislative intervention is not required in relation to the submitting of questions prior to the AGM. Companies are already engaging shareholders in this way.

- ***The particular needs of shareholders who may have limited knowledge of corporate and financial matters***

The most formidable barrier to effective engagement by shareholders with limited knowledge of corporate and financial matters in the governance of companies is the sheer volume of statutory-driven information that they are required to digest. The Parliamentary Joint Committee on Corporations and Financial Services could review the total sum of mandated information that is sent to shareholders and check whether there is ongoing justification for the information to be mandated.

The need for any legislative or regulatory change

Shareholder privacy and protection: access to the share register

There is privacy legislation, at both Commonwealth and State level, designed to protect Australian citizens from the infringement of their privacy rights, yet the law relating to access to and use of the register of members does not meet acceptable privacy standards.

CSA recommends that the law be reformed to provide increased privacy and protection to shareholders in relation to accessing and using their details on the register of members.

General comments

CSA supports legislative and other initiatives that enhance shareholder engagement and participation to the extent that they assist shareholders in achieving their objectives. It is therefore important to ensure that shareholder engagement and participation is balanced with a structure for efficient management and decision-making in a company.

CSA believes that shareholder engagement and participation are valuable mechanisms to assist shareholders in achieving their investment objectives. These objectives are usually to maximise return and minimise risk. Some shareholders also seek to ensure that the companies they invest in are 'good corporate citizens', through enlightened self-interest and, in some cases, ethical conviction.

CSA believes that there are no substantial legislative or regulatory barriers to the effective engagement of shareholders in the governance of companies. CSA recognises that there are areas where further improvements could be made but does not recommend any regulatory action on this front. Our comments on the Terms of Reference speak to the areas where further discussion and communication by relevant parties could engender improvements, but we stress that any additional regulation at this point is more likely to create regulatory and administrative burdens on companies than facilitate the effective engagement of shareholders.

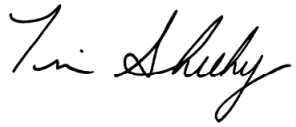
To this end, we note that corporations legislation, in Australia and other common law countries, is very clear as to the division of responsibilities in companies. The business of a company is to be managed by or under the direction of a board of directors appointed by and accountable to the shareholders, and the directors exercise all powers of a company except those that are required to be exercised in a general meeting. At no point has corporations legislation either here or overseas contemplated shareholder participation in the management of listed and broadly held companies on a day-to-day basis. That is, corporations legislation recognises that it would be impractical for shareholders to be involved in every decision. Indeed, it would paralyse a company if each decision had to go before shareholders.

CSA notes that corporations legislation recognises the role directors play as agents for shareholders, with their fiduciary duties to act in the best interests of the company as a whole encompassed by statute and common law. Having shareholders involved in each decision would not only grind the mechanisms of company decision-making to a halt, but would undermine the concept of fiduciary duties, as shareholders have no fiduciary duties to act in the best interests of the company as a whole. They need only act in their own interests.

Equally, corporations legislation recognises that mechanisms are required for the review of decisions taken by directors. It has been noted that 'lazy investors get lazy returns'. As part-owners, shareholders should be engaged in the corporate governance of companies. Again, the question is one of balance — ensuring that any structure to facilitate engagement and participation is clear as to when it is productive and when it is counter-productive.

Our comments on the following pages are offered within the context of seeking a framework that balances shareholder engagement and participation with a structure for efficient management and decision-making in a company.

Yours sincerely



Tim Sheehy
CHIEF EXECUTIVE

Barriers to the effective engagement of all shareholders in the governance of companies

a) Regulatory information overload

One of the key barriers to effective shareholder engagement, particularly for retail shareholders, is information overload. It is not unusual for the statutory annual reports of large listed companies to run to 300 pages or more of detailed financial and accounting disclosures which are largely impenetrable to the lay reader.

CSA welcomes the recent amendments to the Corporations Act to allow companies to elect to distribute annual reports by making them available on their websites, subject to certain administrative requirements.

The new law allowing companies to make annual reports available on the internet, with hard copies provided only on request, has reduced the regulatory information overload, as it has:

- provided shareholders with greater flexibility as to what information they wish to review, given that the information needs can differ substantially between individual shareholders and groups of shareholders (such as retail and institutional shareholders). For example, CSA notes that only 970 Telstra shareholders out of a total of 1.5 million have requested the full annual report in hard copy subsequent to the introduction of the reforms to the Corporations Act
- ensured that companies can engage more meaningfully with their shareholders. With shareholders able to view parts or all of the information required by statute on the website, companies have the opportunity to send shareholders non-statutory reports effectively communicating a company's market, strategy and investment proposition.

CSA notes that the concise report was originally introduced into the Corporations Act to facilitate such communication, but that increased regulation saw the concise report increase dramatically in length, such that it no longer met the needs of shareholders.[1] The increased length of concise reports and the recognition by companies that the majority of shareholders want only specific and very concise information has led some companies to seek additional means of communication with their shareholders, such as introducing short-form non-statutory financial reports.

CSA notes, for example, that Australia and New Zealand Banking Group Ltd introduced a short-form non-statutory report in 2005. In that year, 40,000 out of 300,000 shareholders requested this report rather than the annual report or concise report, and in 2006 this figure increased to 70,000.

The high success of such initiatives highlight that no further regulation is required in this area, as regulation is likely to lead to the return of regulatory information overload, rather than meeting the information needs of shareholders. CSA notes that the 'one-size-fits-all' approach to the annual and concise report that was in place prior to the recent amendments clearly showed that regulating one model does not meet the differing needs of shareholders. Shareholders are clearly welcoming the flexibility of the new approach as introduced by the Corporations Legislation Amendment (Simpler Regulatory System) Act 2007.

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[1] Research conducted into the top 200 listed companies by CSA over a number of years showed a declining number of shareholders electing to receive the full annual report. In 2005, only 19 per cent of shareholders in Australia's largest companies (which tend to have a higher proportion of 'Mum and Dad' investors) elected to receive the full annual report, down from 38 per cent per cent in 2003. Meanwhile, the introduction of the concise annual report did not met the needs of those shareholders who chose not to take the full annual report, with 35 per cent of shareholders in the largest companies electing to receive the concise annual report, down from 50 per cent in 2003 and 60 per cent in 2001. All statistics taken from *Benchmarking Governance in Practice in Australia 2006,* published by CSA.

CSA strongly supports short-form reports to shareholders, but recommends that:

- companies be left to communicate directly with their shareholders as to what form of non-statutory reports shareholders would like to receive
- such short-form reports remain non-statutory.

b) The lack of direct voting

If Australian companies wish to encourage greater shareholder participation, one way is to investigate direct voting and introduce this mechanism into their constitutions. CSA provides further information on direct voting later in this submission (under Voting arrangements), but notes that the use of appointing a proxy to vote as the only means of absentee voting is a barrier to the effective engagement of shareholders, particularly retail shareholders, in the governance of companies at the present time.

Appointing a proxy is not voting

When appointing a proxy, shareholders are temporarily transferring to another party some of the rights attached to their membership, especially their right to vote. It is a common misapprehension that appointing a proxy to exercise the shareholder's vote is a direct vote. Shareholders do not necessarily appreciate that they are temporarily only transferring some of the rights attached to membership to another party, especially the right to vote or to make a decision not to vote.

Voting by appointing a proxy does not provide the most transparent vehicle for expressing the voice of shareholders. The appointment of a proxy to cast a vote interposes the law of agency between the shareholder and the corporation and is therefore by its nature indirect. This is because the member temporarily transfers some of the rights attached to their membership to another party, who is deputed as their agent.

In appointing a proxy, corporate representative or attorney, the relationship between the shareholder and their representative is primarily governed by agency law. This relationship sits alongside the relationship between the shareholder and the corporation, which is governed by contract and the corporations law.

Appointing a proxy is currently seen as the only model for absentee voting. CSA contends that the introduction of direct voting assists shareholder participation in general meetings.

Whether institutional shareholders are adequately engaged, or able to participate, in the relevant corporate affairs of the companies they invest in

CSA notes that there are no legislative or regulatory barriers to the ability of institutional shareholders to engage and participate in the relevant corporate affairs of the companies in which they invest. CSA can point to no significant issues of concern, and strongly opposes any suggestion that regulation may be required in this regard.

Notwithstanding the lack of any significant problems and the concomitant lack of any need for regulation, CSA would like to point to some areas where further discussion and cooperation could bring enhanced transparency to the engagement of institutional shareholders.

a) The need for greater transparency in the role of proxy advisory services

CSA notes that proxy advisory services wield significant influence on how institutional shareholders respond to companies and the information they report. CSA recognises that proxy advisory services play an important role in promoting governance in Australian companies by undertaking a research, assessment and advisory role. Exploring proxy proposals requires substantial research and time, and institutional investors are not always able to devote

resources to such analysis, given the number of stocks in which they invest. In undertaking this work on behalf of institutional investors, proxy advisory services wield power, as it places great emphasis on the quality of the information they provide to their clients. What began as an additional source of information for institutional investors has become the primary decision maker, with institutional investors frequently 'outsourcing' their decisions on how to vote proxies to the proxy advisory services. The recommendations of proxy advisory services thus have a material effect on voting results.

CSA notes that there is a clear need for:

- greater transparency as to the decision-making processes undertaken by proxy advisory services, as well as standards, methodology, compensation arrangements and conflicts of interest
- better opportunities for the proxy advisory services to engage with companies. CSA believes that it would be a sensible approach to achieving a good governance outcome for proxy advisory services to make their reports available to the company where they are critical of the company's practices, as this provides the opportunity for the company to provide input before the report is made public. It may be that the proxy advisory service has misunderstood aspects of a company's practices, or it may be that the company has not explained them well. It may be that the company needs to change its practices. Making the report available to the company provides the opportunity for a full and frank debate on governance practices, and the potential for companies to improve their explanatory material or even change their practices, which can only be beneficial for all shareholders.

b) Voting and institutional shareholders

CSA notes that there are no barriers to institutional shareholders voting. Institutional shareholders are more engaged than ever before and most vote.

CSA recommends that institutional investors be encouraged to vote, but strongly opposes any regulation of this. CSA firmly believes that institutional shareholders should not be required to vote, or required to disclose how they vote on individual companies.

CSA suggests that institutional shareholders may wish to consider developing policies on voting, and disclose those policies to their members.

Best practice in corporate governance mechanisms

a) Pre-selection and nomination of director candidates

Nomination

CSA notes that the nomination of director candidates is dealt with in a company's constitution and is not regulated. CSA does not believe that it should be regulated.

CSA notes that there are few barriers if an individual wishes to nominate to be a director of a company. Nominations generally are not confined to members of a company or to any particular pool of candidates. Any misapprehension that directors can only be nominated by the board needs to be addressed through education, both by companies and relevant professional associations such as the Australian Shareholders' Association (ASA).

All public listed companies must report against the ASX Corporate Governance Council's *Principles and Recommendations of Corporate Governance*. Recommendation 2.4 notes that companies should establish a nomination committee, with responsibilities for making recommendations to the board concerning:

- the necessary and desirable competencies of directors
- review of board succession plans

- the development of a process for evaluation of the performance of the board, its committees and directors
- the appointment and re-election of directors.

CSA notes that most public listed companies have a policy on board tenure. The revised ASX Corporate Governance Council guidelines place additional emphasis on board renewal but do not specify length of tenure. They state that '…directors should be conscious of the duration of each director's tenure in succession planning'. It is up to individual companies to determine how long a director should remain on the board.

The ASX Listing Rules also require directors to submit themselves to re-election every three years, which ensures that directors are subject to shareholder scrutiny on a regular basis.

CSA notes that the ASX Corporate Governance Council's guidelines are the benchmark for governance practice for Australian companies, and that many unlisted, not-for-profit and public sector organisations also follow the guidelines as appropriate.

CSA believes that the processes for nomination of directors are in good working order and do not require any legislative intervention.

Pre-selection

CSA notes that, unlike the election of parliamentarians, there is no concept of pre-selection of director candidates in company board elections. To the extent a political analogy is appropriate, a company board is much more akin to cabinet than parliament.

It is important to distinguish between the practice of candidate nomination and selection in political elections, where candidates are elected to represent different constituencies, and candidate nomination in company elections, where directors are *not* elected to represent constituencies. Indeed, given that directors have a fiduciary duty to act in the best interests of the company as a whole, it constitutes a conflict of interest should they be elected to represent a particular constituency. Pre-selection would fundamentally undermine directors' duties.

Indeed, CSA notes that not-for-profit organisations frequently have to contend with members seeking election to the board who misunderstand their fiduciary duty to act in the best interests of the company. In not-for-profit companies, it is not uncommon for members with little or no experience to seek election to the board specifically to 'represent' a particular interest or constituency, with no intention of acting in the best interests of members as a whole. This poses a particular difficulty for not-for-profit companies. CSA has published *Conflicts of Interests in Not-for-Profit Organisations* to assist members of these companies to identify and manage such conflicts of interest.

Another problem that many not-for-profit companies may face is that director nominations issue from the membership body, without any nominations from outside that body. This can make it difficult for such organisations to achieve a high-quality and comprehensive mix of skills and experience on the board. CSA recommends that not-for-profit organisations put in place nomination committees, to review the skills and experience required on the board and to both facilitate nominations from outside the organisation and review any nominations received from the members themselves. CSA does not recommend that this should be mandated.

b) Advertising of elections and providing information concerning director candidates, including direct interaction with institutional shareholders

CSA notes that the *Guidelines to notices of meetings*, as issued by the ASX Corporate Governance Council, clearly set out how information concerning director candidates should be dealt with, as follows:

> Companies should give clear guidance in notices of meeting containing resolutions for the election of directors, as follows:
> 7.1. Companies should ensure that each candidate for election be considered separately in a distinct resolution, except as contemplated by 7.2.
> 7.2. Where the number of candidates for election exceeds the number of available positions on the board, the notice should provide clear guidance on the voting method by which the successful candidates will be selected at the meeting as well as the method to be used for the counting of votes.
> 7.3. The views of candidates standing for election as directors without the support of the board should fairly and equitably represent the views of candidates.

CSA does not believe that any legislative intervention is required in relation to the advertising of elections and providing information concerning director candidates.

c) Presentation of ballot papers

CSA notes that the *Guidelines to notices of meetings*, as issued by the ASX Corporate Governance Council, clearly set out how voting on resolutions (ballot papers) should be managed, as follows:

> Notices should encourage shareholders' participation either through direct voting or the appointment of proxies. Accordingly:
> 4.1. The notice of meeting should include a clear reference to the shareholders' rights to appoint a proxy, or where the constitution so provides, to cast a direct vote which is not dependent on the actions or attendance of an appointee.
> 4.2. Companies should consider allowing shareholders to lodge direct votes or proxies electronically, subject to the adoption of satisfactory authentication procedures.
> 4.3. Companies should encourage shareholders appointing a proxy to consider how they wish to direct the proxy to vote. That is, whether the shareholder wishes the proxy to vote "for" or "against", or abstain from voting on, each resolution, or whether to leave the decision to the appointed proxy after discussion at the meeting. If the instruction is to abstain from voting, companies should state whether such votes will be counted in computing the required majority on a poll.
> 4.4. Voting forms should be drafted in such a way as to ensure the shareholder clearly understands how the chairperson of the meeting intends to vote undirected proxies.
> 4.5. Companies are encouraged to take guidance from the Chartered Secretaries Australia best practice direct voting and proxy form available on that organisation's website, www.CSAust.com.

CSA does not believe that any legislative intervention is required in relation to the presentation of ballot papers.

d) Voting arrangements (eg, direct, proxy)

As noted earlier, CSA believes that Australian companies can encourage greater shareholder engagement and participation by investigating direct voting and introducing this mechanism into their constitutions.

What is direct voting?
Direct voting enables shareholders to exercise their voting rights without the need to attend meetings (which may not always be practicable) or to appoint proxies or representatives over whom they may have no control. A shareholder completes a voting form which is binding.

Direct voting improves the exercise of voting rights because it removes the intermediary between the shareholder and the company. Shareholders need no longer transfer some of their rights to another party. If direct voting is implemented, cherry picking, that is, voting some but not necessarily all shares covered by the proxy, will not be a possibility.

Legislative change is not required to effect direct voting. The Corporations Act as it is now worded does not exclude members voting directly. If a company's constitution provides for it, direct voting is already feasible. No company needs to wait for legislative reform before working to ensure that shareholders can exercise their voting rights in this manner.

CSA notes that some companies, such as Telstra, Australian Foundation Investment Company, Amcil Ltd, Djerriwarrh Investments Ltd and Mirrabooka Investments Ltd, took the initiative to introduce direct voting in their constitutions in the 2006 general meeting season with strong support from their shareholders and commends them for their initiative.

CSA action
In 2006, Chartered Secretaries Australia (CSA) released a discussion paper *Expressing the voice of shareholders: a move to direct voting*. We were encouraged to proceed with this initiative, having received extensive and thoughtful responses to this paper, all of which concurred that direct voting was feasible without legislative change. It was clear that the corporate community thought that the time had come to implement direct voting and everyone wanted to be assured that it would be done in the most effective and considered manner.

Respondents raised questions concerning the practical issues of implementation as part of this process of investigating how direct voting could be implemented. CSA analysed all of the questions raised and in March 2007 published a *Guide to Implementing Direct Voting.* The Guide steps companies through the practical issues of implementation to assist them to implement provisions in their constitutions to enable shareholders to exercise their voting rights through direct voting, in addition to exercising their existing right to appoint a proxy holder. The Guide contains information on:

- constitutional change — sample wording for a resolution to put with the Notice of Meeting concerning the changes a company needs to make is provided, as are Sample Rules for the votes of shareholders at a general meeting that could be adopted by a board of directors
- how voting forms would work — a sample voting form is provided
- how does the voting form deal with abstaining votes?
- what happens if the shareholder fills out both the direct voting form and the proxy appointment?
- can shareholders who have voted directly still attend meetings?
- amendments to voting instructions
- voting on additional resolutions
- procedural motions
- lodging and counting direct votes, including how to deal with a show of hands
- recording votes
- authentication of direct votes lodged by electronic means
- adjournment of meeting

CSA wrote to the company secretaries of all public listed companies in Australia in March 2007, enclosing a copy of CSA's *Guide to Implementing Direct Voting*.

A copy of both CSA's discussion paper and *Guide to Implementing Direct Voting* are attached as Appendices A and B.

Voting by appointing a proxy

CSA strongly supports the work being undertaken by the Investment & Financial Services Association on improving the proxy voting system in Australia. This work has seen all relevant parties involved in joint discussion to resolve the following issues:

- paper-based weaknesses of the present system
- clarification of company constitution to facilitate electronic proxy voting
- lack of an audit trail
- time pressure to reconcile votes lodged against entitlement to vote
- exercise of discretion by share registries and/or issuers
- standardising the disclosure of proxy results to the ASX.

CSA fully supports the recommendations made by IFSA in its submission to the Committee on matters relating to proxy voting.

e) Conduct of annual general meetings

Poor attendance

CSA research over a number of years shows that shareholder attendance at AGMs is declining, as shown in Tables 1 and 2.[2]

Table 1: AGMs attracting 300 or more shareholders 2001–2005

2001	2003	2005
35.7%	34.3%	27.9%

Table 2: AGMs attracting fewer than 100 shareholders 2001–2005

2001	2003	2005
23.2%	22.4%	38.2%

CSA notes that the AGM was created in an era of horse and coach; pen and ink; limited printing and a fledgling postal service, all of which dictated that members would physically meet with directors annually. It is now an era of advanced technology: mobile telephones; cameras and text messaging; the internet; webcasting; powerful portable computers and geographically dispersed shareholders. CSA believes that it is important to review how best to achieve the dual functions of reporting and decision-making that sit at the heart of stewardship, accountability and transparency and for which the AGM provides the current mechanism.

At present, the AGM is considered to be the forum for:

- the reporting function and the concomitant questioning of directors as to their stewardship, and
- the decision-making function, including the appointment, dismissal and reward of directors and auditors.

However, with, frequently, less than one per cent of votes present at an AGM, while the general meeting functions as a mechanism for decision-making, CSA believes it cannot be said to be a forum.

CSA notes that the information that is dealt with at an AGM is available many months before the AGM is held and that this affects attendance.

[2] All statistics quoted in this section are from Chartered Secretaries Australia, *Benchmarking Governance in Practice in Australia 2006* and refer to research conducted on the Top 200 ASX listed companies.

Engaging retail shareholders at the AGMs of large companies

CSA notes that while the financial reporting function of an AGM is largely anachronistic, given the time lag between the release of results and the general meeting, there is strong support for the real-time questioning of directors as to their stewardship. Both directors and shareholders perceive the AGM as a powerful motivator and influencer of a company's approach to governance. While tabling accounts three months after the results are released to the market and analysts are briefed might no longer serve a useful purpose, the non-binding shareholder vote on the remuneration report ensures that directors justify to their shareholders their remuneration practices. Thus the symbolic importance of the AGM as a reporting forum needs to be considered.

Many institutional investors attend AGMs via the webcast. Technology has therefore assisted engagement by shareholders, even if they are not physically present. However, sophisticated and targeted communication to institutional investors via analyst briefings provides a stream of engagement with institutional investors that is separate from the AGM, and thus they do not rely on the general meeting as the prime forum for engagement.

However, retail shareholders do rely on the AGM as the prime forum for engagement, and there is potential to engage with them more effectively. Retail shareholders desire similar information as is given to analysts, in a concise form. The information is lodged with ASX but examining the information on a website is different from being able to hear the information presented and put questions to directors and management on that information in person.

One possibility is for companies to hold a formal meeting of 5-10 minutes, with the next hour devoted to a more informal meeting. Another possibility is to divorce the formal process of voting on resolutions, including voting on directors (on an annual basis) completely from information sessions, which would become shareholder briefings. CSA notes that with continuous disclosure regulation, there is little new information to announce at an AGM.

However, to be cost-effective, CSA notes the informal discussion would need to take place at the close of the formal brief AGM.

A further possibility is to reverse this order and have an informal briefing followed by the formal proceedings. It would be the choice of the company.

CSA stresses that any informal shareholder briefings should not be regulated. Different companies will have different resources to facilitate such briefings and the 'one-size-fits-all' approach of regulation would create a regulatory burden for many companies.

CSA also stresses that it is not proposing reforms that provide directors with the comfort of not having to face shareholder questioning. CSA notes that the buoyant market of the last decade has, for the most part, ensured relatively little shareholder concern as to the management and governance of companies. CSA notes that shareholders turn up to the AGM when markets are less buoyant and returns diminish as a result.

Shareholders and the smaller companies

CSA members note that the AGMs of small companies attract either a handful or no shareholders, which means that the mechanism is failing to engage the shareholders of smaller companies. Moreover, the costs of webcasting are too expensive for small companies, and so technology does not solve the problem of poor attendance.

CSA suggests that, while the ASX top 300 companies should be obliged to hold AGMs, other listed companies should not be required to hold a physical AGM unless:

- resolutions concerning directors' remuneration are on the agenda or the meeting is to vote on a special resolution
- it chooses to do so
- an AGM is requested by members with at least five per cent of the votes that may be cast at the general meeting; that is, it would become an opt-in provision for smaller listed companies.

Thus a physical AGM would not be obligatory where the resolutions concerned tabling of accounts, director elections or re-elections, the non-binding vote on the remuneration report, and refreshing of option plans. In these instances, shareholders would vote directly online. All appropriate material, such as the remuneration report, would be sent out with the direct voting form.

CSA notes that such an amendment would provide shareholders concerned about various issues with the opportunity to call a physical meeting, without putting shareholders to the expense of a meeting where there was no interest in one.

Special interest groups and the AGM

CSA notes that the AGM has the potential to be hijacked by special interest groups. The Blake Dawson Waldron report of over 70 AGMs in 2006, *2006 AGMs: Review and Results* (in conjunction with CSA and the Business Council of Australia), found that special interest groups dominated question time (by asking more than 50 per cent of the questions asked) at 25 per cent of the meetings surveyed.

The Australian Shareholders' Association participated (by asking questions) in 66 per cent of the meetings surveyed (compared with 72 per cent of meetings surveyed in 2005). Other special interest groups and lobbyists (including the Finance Sector Union, community groups and environmental activists) appeared to participate in 24 per cent of the meetings surveyed (up from 16 per cent of meetings surveyed in 2005).

The report notes that the majority of companies believe it is important to 'communicate with special interest groups before the meeting and that, provided the input is cordial and measured, the contribution of special interest groups can be productive'. The report also notes that it is important 'for special interest groups to demonstrate to their members that they are actively seeking to further their interests (this may explain why some groups asked questions at the AGM which had apparently been previously discussed with the company before the meeting)'. For example, the Australian Shareholders' Association met privately with many companies before their AGM for a discussion on specific questions. The Australian Shareholders' Association also used the forum of the AGM to raise some of these issues publicly.

100 member rule

CSA has advocated for many years on the need to repeal s 249D allowing 100 members to requisition general meetings of companies (the 100 member rule). CSA welcomed the Parliamentary Joint Committee on Corporate and Financial Services' report, *Inquiry into the Exposure Draft of the Corporations Amendment Bill (No 2) 2005*, which recommended reform and noted that while there is little history of the rule being abused, its potential for abuse remains clear. Both political parties have noted that it is not necessary for parliament to wait until some quota of abuses is observed, before reforming the provision. CSA firmly supports this view.

CSA notes that the State Attorneys-General advise that they will not support reform of this provision as proposed in the Corporations Amendment Bill (No 1) 2006. The State Attorneys-General propose that a square root rule should be introduced.

A September 2006 submission to the Parliamentary Secretary to the Treasurer on the difficulties attached to the square root rule and the misunderstandings associated with reform of the 100-member rule, jointly written with the Australian Shareholders' Association, Business Council of Australia, Australian Employee Ownership Association, Australian Institute of Company Directors, Investment & Financial Services Association, Australasian Investor Relations Association and FINSIA is attached as Appendix C.

The effectiveness of existing mechanisms for communicating and getting feedback from shareholders

a) Distribution of annual reports online

As noted earlier in this submission, CSA welcomes the recent amendments to the Corporations Act to allow companies to elect to distribute annual reports by making them available on their websites, subject to certain administrative requirements.

The new law allowing companies to make annual reports available on the internet, with hard copies provided only on request, should be the catalyst for companies to use the advantages of the online medium to develop more effective and engaging ways to communicate.

CSA recommends that companies do more than just post a PDF of the annual report on their website, but instead move beyond the constraints of a static publication and create interactive annual reports that let shareholders choose the information they need and how they want to receive it. For example, companies might video-cast introductions to the report from the chairman, webcast presentations from the AGM, and provide pop-up windows explaining concepts and financial information, as well as the capacity to drill down into information in the financial statements.

However, CSA notes that different companies will have different resources to facilitate interactive annual reports and stresses that decisions as to how annual reports appear on a website should remain unregulated. CSA notes that it would be counterproductive to regulate online publishing conventions relating to annual reports as:

- the 'one-size-fits-all' approach of regulation would create a regulatory burden for many companies
- it would also interfere with the process of companies engaging with their shareholders to ascertain how they would like to receive information
- technology is constantly shifting and any regulation of publishing conventions would constrain the use of new technology
- regulation is inappropriate for questions of publishing format and design.

b) Electronic communication with members

CSA notes that further exploration of electronic communication with members is underway, with companies innovating and experimenting as how to best achieve effective communication.

CSA notes that allowing annual reports to be distributed online required legislative amendment, but that no further legislative amendment is required in relation to electronic communication (see our points above concerning any regulation of publishing conventions).

There are no longer any significant barriers to effective electronic communication.

c) Members submitting questions prior to the AGM

CSA notes that larger companies ask shareholders to submit questions prior to the AGM and that this process works well. The most frequently raised issues are collated and addressed by either the chairman or chief executive in their reports to shareholders. Companies including Telstra, BHP Billiton, NAB, Commonwealth Bank and Australia and New Zealand Banking Group all call for shareholders to submit questions and issues prior to the AGM.

CSA also notes that it is more common for companies with a large shareholder base, particularly a large retail shareholder base, to either call for shareholders to submit questions prior to the AGM and for the shareholders in such companies to submit issues as called for. Those companies with a smaller shareholder base or one comprising fewer retail shareholders have either not undertaken this process or have not experienced the level of take-up by shareholders of this initiative when it was introduced.

CSA strongly supports this initiative remaining optional, that is, it is for companies to determine whether this initiative works or not.

CSA does not believe that any legislative intervention is required in relation to the submitting of questions prior to the AGM.

The particular needs of shareholders who may have limited knowledge of corporate and financial matters

CSA believes that the most formidable barrier to effective engagement by shareholders with limited knowledge of corporate and financial matters in the governance of companies is the sheer volume of statutory-driven information that they are required to digest.

This has a particular impact on the retail shareholder. Mandating volumes of highly technical information makes it virtually impossible for unsophisticated shareholders to ever get ‘up to speed’ on making sense of what is put before them. For example, the introduction of IRFS has rendered the financial information so technical that a significant degree of financial expertise is required to comprehend the financial accounts.

CSA recommends that the Parliamentary Joint Committee assess and articulate via this Inquiry the total sum of mandated information that is sent to shareholders and check:

- if any of the information is repetitive
- if any of the information is so technical that anyone lacking technical expertise would not be able to make sense of it
- whether there is a clear policy objective behind the regulated information being sent out and, if so, whether that policy objective is being achieved
- whether there is ongoing justification for the information to be mandated.

The need for any legislative or regulatory change

Shareholder privacy and protection: access to the share register

CSA has been advocating for some time that urgent changes are required in relation to access to and use of the register of members of companies and its treatment in the *Corporations Act*. At present, the law does not provide acceptable privacy rights for shareholders in relation to public access to and use of their details on the register.

CSA represents the company secretaries of most of Australia's largest public and private companies, all of whom are involved in maintaining registers of members and considering requests to access and use those registers. Our members have had to deal with requests to access and use the register from a number of bodies and have had to respond to shareholders who have objected, we believe quite rightly, to the use of that information. Our members' experience forms the basis of our recommendations in this section of the submission.

There is privacy legislation, at both Commonwealth and State level, designed to protect Australian citizens from the infringement of their privacy rights, yet the law relating to access to and use of the register of members does not meet acceptable privacy standards. CSA believes the law requires reform to provide increased privacy and protection to shareholders in relation to accessing and using their details on the register of members.

Benefits of reform

The compelling reasons to support reform include:

- *Shareholders should have more acceptable privacy rights*

Companies and registries should only use or disclose personal information on the share register for the purposes for which the information was provided, that is, administering the shareholders' shareholdings in the company. This obligation should be subject to the same or similar exceptions to Principle 2 of the National Privacy Principles set out in Schedule 3 to the Privacy Act. At present, shareholder consent is not required to access or use their details on a share register.

- *There is a stark contrast between the protection of investors' privacy in bank accounts and superannuation and their lack of privacy in shareholdings*

The Corporations Act is out-of-date in relation to privacy rights in operation for Australians, and not aligned with the obligations to protect privacy relating to other forms of financial information. Australians have a right to privacy in relation to their wealth holdings in bank accounts, yet retail shareholders cannot prevent public disclosure of their wealth holdings in shares. There are also strict privacy requirements protecting investors in relation to superannuation contributions, which also contrast starkly with shareholders' lack of privacy.

- *Retail shareholders are primarily disadvantaged by the current lack of privacy*

Shareholders whose shareholdings are held indirectly via a custodian company are protected from the general public accessing their particulars. Currently, those Australians with direct shareholdings, that is, retail shareholders, are disadvantaged, despite the government encouraging Australians to directly invest. Direct shareholders, with less complex structures in the management of their shareholdings, should have similar levels of privacy and protection to those whose shareholdings are held indirectly.

- *A mechanism already exists for public disclosure of a substantial shareholding that could influence the company*

The substantial shareholding provisions in the Corporations Act (s 671B in Part 6C1) provide a mechanism to require any shareholder with more than five per cent of shares to publicly disclose their interest in the company. This information is commonly used for understanding the levels of control of any particular company and CSA supports its retention on public policy grounds. Improved privacy rights for shareholders would not counteract this mechanism.

- *Mechanisms already exist for members to access and use the register for a proper purpose*

Members already have protection embedded in the legislation to ensure they can ask the company for a copy of the register if they have called a meeting (s 249E(3)); give a company notice of a resolution they propose to move at a general meeting (s 249N(1)); and distribute statements to all members on any matter that may be considered at a general meeting (s 249P(1)). Increased privacy for shareholders would not affect existing rights to access and use the register for a proper purpose.

- *Mechanisms already exist regarding access to and use of the register as part of a takeover bid*

If offers are made to shareholders as part of a takeover offer, they are subject to regulation as set out in Part 6 of the Act, which is designed to protect shareholders. At present, any other offers are subject neither to regulation, nor to shareholder consent to disclosure of their details for the purpose of receiving such offers.

General comments

The register of members has historically been a public register and indeed under s 173 of the Corporations Act 2001 the register is open to inspection by any member without charge and any other person on payment of such fee as may be prescribed. In addition, any person (whether or not a member) may require a copy of the register and, on payment of the prescribed fee, the company must provide the copy within seven days.

CSA fully supports the obligation on any shareholder with more than five per cent of shares to publicly disclose their interest in the company. There are compelling public policy reasons why it is important for members and the general public to be able to understand the levels of control of any particular company. However, CSA cannot point to any public policy objective that is achieved by having all shareholders' details open for inspection on a public register and obtainable upon request.

CSA contends that making all shareholders' details publicly available is an anachronism in the 21st century, when shareholders are no longer, as they were at the time of the introduction of the concept of limited liability, a small group of gentlemen in need of each other's particulars in order to confirm the application of a new concept. Today, shareholders can amount to millions of geographically dispersed individuals participating in wealth acquisition. Modern technology makes the disclosure of shareholders' particulars vulnerable to predatory behaviour, in a way that is not possible with other forms of wealth holdings such as bank accounts and superannuation.

CSA notes that Australians understand their right to privacy, as embodied in legislation, and increasingly query why they have no right to privacy as investors. With the growth of the numbers of shareholders in Australia, the question of providing privacy and protection to them has become more urgent.

Shareholders should have more acceptable privacy rights

Currently, shareholders have no privacy or protection in respect of access to the register of members who hold shares directly. Shareholders cannot prevent any member of the public from accessing their name, address and wealth holdings. Indeed, shareholders' lack of privacy in respect of public disclosure of their addresses and their financial affairs and their subsequent vulnerability to contact by people seeking to either make unsolicited offers to purchase their shares or sell services to them under the guise of supplying them with research is unprecedented.

There is privacy legislation, at both Commonwealth and state level, designed to protect Australian citizens from the infringement of their privacy rights, yet the law relating to access to the register of members falls short of other measures designed to protect citizens from invasions of privacy.

CSA notes that, with the recent introduction of the Do Not Call Register, Australians can choose not to receive telemarketing calls in their home, even if their name and address is available in a public telephone directory. Yet shareholders in Australia cannot choose *not* to receive either predatory offers to purchase their shares or offers of an investment and advisory group's latest research report on the company in which the shareholder invests, which automatically places the shareholder on the investment and advisory group's client list, despite the shareholder not having agreed to such an inclusion.

Such offers come from offerors who argue that their request for information from the register is relevant to the shareholding and therefore within the s 177(1A) exemption. CSA members are concerned that such offers may well be predatory or marketing, yet under the current law, cannot refuse access to the register, even if they believe such offers to be for an improper purpose. CSA members certainly know from their dealings with many disgruntled company shareholders, angry that their names and addresses have been provided to third parties, that such shareholders view these approaches as being for an improper purpose.

Recent legislation in the United Kingdom granting protection to shareholders

A proper purpose test has recently been introduced in the United Kingdom. The Companies Act UK provides that where a company receives a request for a copy of the register, it must either allow an inspection or provide a copy of the register or apply to the court. A company cannot simply decline a request. If the court is satisfied that the inspection, or copy, is not sought for a proper purpose, it directs the company not to comply with the request. It may also direct that the company does not have to comply with similar requests. If the court considers the request to be for a proper purpose, the company must immediately allow the inspection or supply the copy.

CSA recommendations for reform

CSA contends that the improvements in shareholder engagement and participation of the past decade have not been matched by any improvement in the provision of acceptable privacy rights to shareholders.

To achieve acceptable privacy rights, CSA recommends that third parties (including other shareholders) should only have access to or a right to obtain copies of personal information concerning a shareholder on the share register:

- with the consent of the shareholder
- where the person seeking access has lodged a bidder statement with ASIC in connection with a takeover of the company
- where ASIC or the courts directs that a person is given access to or a copy of the register. ASIC or the courts could then be asked to apply a proper purpose test similar to the one in operation in the United Kingdom.