CHAPTER 8

DISCLOSURE OF PROXY VOTING

Listed companies should be required to disclose more information relating to proxy votes

8.1 Section 251AA of the Corporations Law provides that listed companies must record in the minutes the number of proxy votes exercisable by proxies validly appointed in relation to each resolution in the notice of meeting. Also, where voting is by a show of hands, the minutes must record the total number of proxy votes for, against, abstaining from the resolution and where proxies may exercise their own discretion. Where a resolution is decided on a poll, the minutes must, in addition to the information about proxy votes, also record the total number of votes cast in favour, against and abstaining from the resolution. Companies required to notify the ASX of resolutions passed at meetings, must, at the same time, pass the information about proxy votes to the ASX. The disclosure of proxy voting information was the fourth of the four matters which have been the subject of complaint and/or concern expressed to the Government by the business community.

8.2 There is also an additional disclosure requirement. New section 250J(1A) requires that, for a company that is subject to a replaceable rule and does not provide to the contrary in its constitution, the Chair must inform the meeting, before any vote is taken, whether any proxy votes have been received and how the proxy votes are to be cast.

8.3 The PJSC received a range of views on the purpose and operation of sections 251AA and 250J(1A), and other related matters which it has set out below.

Arguments in favour of disclosure of proxy voting information

Enhancing the monitoring role of institutional investors

8.4 The Investment & Financial Services Association Ltd (IFSA) supported the disclosure of information relating to proxy voting on a number of grounds, including the positive effect that such disclosure will have on the capacity of institutional investors to fulfil their responsibilities:

> In the absence of disclosure, institutional investors are unable to properly fulfil their monitoring role or to comply with client mandates which require reporting on the outcomes of proxy voting activity. Disclosure of this kind is already compulsory under the SEC legislation in the United States and has recently been recommended

for adoption in the United Kingdom by the Hempel Committee Report.[1]

8.5 The IFSA highlighted the significance of this issue given that voting is one of the most "potent rights" of investors, coupled with the fact that proxy voting is the most feasible method of voting for the majority of investors in listed companies and for institutional investors who often vote via the custodian. According to IFSA, the show of hands method of voting is generally unsuitable for custodians because of the number of investors whom the custodian represents. Yet most resolutions are passed by the show of hands method. IFSA raised the concerns that, in the absence of satisfactory disclosure about proxy voting, the efforts of many institutional investors to discharge their voting responsibilities are unseen and consequently institutional investors have difficulty in reporting their unseen efforts to the satisfaction of their clients. The disclosure of such information will enhance the monitoring function of institutional investors and enable them to satisfy their clients that they have properly discharged the responsibilities entrusted to them.[2]

Transparency of all voting

8.6 The Chair of the general meeting is obliged to ensure that decisions reflect the true will of the meeting. For this reason proxy votes are counted and the results made available to the Chair prior to the meeting. The Chair can then assess whether decisions taken on a show of hands would differ if taken on a poll. If so, the Chair must call for a poll. IFSA submitted that shareholders have a legitimate interest in knowing the proxy voting information. Including this information in the reports to the ASX will enable shareholders to properly monitor the Chair's decisions in relation to the true will of the meeting. According to IFSA, the transparency of voting which the disclosure will facilitate will ensure that shareholders are able to make assessments about the voting process which they were previously unable to do.[3] For example, shareholders can assess the relative importance of their vote, the extent of proxy voting and its impact, and the possible relevance of that information for future votes.[4]

Policy objective needs to be balanced

8.7 The Australian Law Reform Commission (ALRC) applauded the policy objective behind the new provision. According to the ALRC, the disclosure of proxy information will:

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1 Investment & Financial Services Association Ltd, Submission 34, p 6.

2 Investment & Financial Services Association Ltd, Submission 34, pp 6-7.

3 Investment & Financial Services Association Ltd, Submission 34, pp 7.

4 Investment & Financial Services Association Ltd, Submission 34, pp 7-8.

> enable shareholders to know the nature of the proxies given by major shareholders and the way in which they are determinative of particular issues before shareholders' meetings.[5]

8.8 The ALRC recognised that the new provision might place too high an administrative burden on company officers in recording precise details, particularly where detailed breakdowns were not necessary. The ALRC was of the view that any administrative difficulties that do arise need to be carefully weighed against the policy objective so that compliance costs did not outweigh the benefits of disclosure.[6]

Disclosure would reveal the true picture of company control

8.9 The PJSC was told that before the disclosure requirement was introduced it was difficult to obtain information relating to proxy voting to enable an assessment of the extent to which voting by institutional investors is exercised by proxy and the extent of control exercised by major shareholders over a company.[7] On the basis of the limited information that was available, Corporate Governance International Pty Ltd (CGI) found that the average level of proxy voting in the group of 100 major listed companies was 32%. In some cases it was as low as 15-20% of the total available voting shares. It also advised that in one case the number of shares held by a few custodians but not voted by them by proxy, exceeded the total number of shares voted by proxy. In theory at least, it was possible that the resolution may not have been passed if the shares not voted had been voted. Given that institutional investors own or manage around 60% of Australian equities, CGI concluded that a substantially large number of votes on shares managed or owned by those institutions is not being exercised by proxy.[8] CGI submitted that:

> This has implications not only for the investment management industry and their clients and beneficiaries but even potentially for the control of a listed company and the test whether it is a subsidiary of another company. For example, if, say, 70% of the voting capital of a listed company is owned or managed by institutional or other public investors but only 25% is ever voted by proxy, what does that say for the ability in practice of a 30% major shareholder to control the composition of the board? It is, therefore, important to extend the number of companies whose proxy voting statistics are disclosed so that the results summarised above of the sample can be tested.[9]

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5 Australian Law Reform Commission, Submission 10, p 4.

6 Australian Law Reform Commission, Submission 10, p 4.

7 Corporate Governance International Pty Ltd, Submission 62, pp 10-11. See also Mr Sandy Easterbrook, Committee Hansard, 17 August 1999, pp 231-32.

8 Corporate Governance International Pty Ltd, Submission 62, pp 11.

9 Corporate Governance International Pty Ltd, Submission 62, p 11.

8.10 A case in point is the disclosure of the BHP proxy voting information following its 1998 AGM and the influence of the proxy vote of the Beswick holding:

> BHP is a very good example. Very interesting because it actually owns 17 per cent of itself under the Beswick holding which is now actually being removed. It is being done away with. When one looked at the voting last year by BHP, which was the first time it had to be disclosed, effectively that 17 per cent called the shots. That made the decision as to what would happen.[10]

8.11 In the period since the introduction of the disclosure requirement, CGI noted that the disclosure of proxy voting statistics has been made by companies which previously withheld this information.[11]

Disclosure will assist in increasing institutional investor voting levels

8.12 The PJSC was told of current initiatives in the UK to encourage institutions and funds managers to make positive use of their voting rights in enhancing company performance.[12] The 1998 UK Hampel Report noted that there had been no significant rise in institutional investor voting which remained at 40%. The July 1999 report of the Committee of Inquiry into UK Vote Execution found a similar low voting figure which partly reflected conscious decisions by institutional investors not to vote on routine matters of corporate business but also a complex and antiquated voting system. Referring to the Committee's report, Mr Sandy Easterbrook, Director of Corporate Governance International Pty Ltd observed that:

> The average voting level in widely held top 100 companies was 32 per cent compared with the 45 per cent to 50 per cent in the UK. The UK Secretary of State is saying, 'This has got to go up.' It has to. The report, which has been done by a committee of inquiry, came out in July in the UK saying that it has to go to 60 per cent. If it does not go to 60 per cent, the government is going to have to do something about it. If you contrast the UK figure with the Australian figure, it is just mind-boggling.[13]

8.13 It was submitted to the PJSC that the only economical and effective way for institutions to exercise their voting rights is by proxy.[14] The disclosure

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10 Mr Sandy Easterbrook, Committee Hansard, 17 August 1999, p 232.

11 Corporate Governance International Pty Ltd, Submission 62, p 11.

12 Mr Sandy Easterbrook, Committee Hansard, 17 August 1999, p 237. See UK Secretary of State's Speech, 19 July 1999, "Directors' Remuneration", tabled at the PJSC hearing on 17 August 1999.

13 Mr Sandy Easterbrook, Committee Hansard, 17 August 1999, p 237.

14 Mr Sandy Easterbrook, Committee Hansard, 17 August 1999, p 237.

of proxy voting information enhanced the transparency of all voting and assisted institutional investors in fulfilling their responsibilities.[15]

Corporate governance disclosure

8.14 The Accounting Bodies supported the disclosure requirement as it was in keeping with the standards of corporate governance disclosures. The Accounting Bodies noted also that the disclosure of proxy voting results was consistent with the recommendation of the UK Hampel report. The Hampel report recommended that once a resolution had been decided on a show of hands, the total proxy votes for and against the resolution should be announced.[16]

Qualified support

8.15 A number of submissions gave qualified support for the disclosure requirement noting that:

- Disclosure should extend not only to the total number received on each specific motion but also to the for/against split of proxy votes given to the Chair as 'open cheques' for the Chair to cast as the Chair sees fit;[17]
- Disclosure should be limited to poll voting, otherwise it would impose an onerous corporate administrative requirement on companies. Poll voting is generally of greatest interest;[18]
- Administrative problems may arise if last minute authorities by corporate shareholders are tendered in instead proxies being lodged.[19]

Arguments against disclosure of proxy voting information

Section 251AA leads to the recording of meaningless information

8.16 The principal argument raised against the disclosure requirement in section 251AA is that it adds no value and is "misconceived":

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15 See Investment & Financial Services Association Ltd, Submission 34, p 8.

16 Joint Submission by the Australian Society of CPA and the Institute of Chartered Accountants in Australia, Submission 73, p 4. See also Mr Nick Renton, Submission 58, p 2.

17 Mr R Furlonger, Submission 4, p 6.

18 Association of Mining and Exploration Companies Inc, Submission 45, pp 2-3.

19 Australian Listed Companies Association Inc, Submission 66, p 3.

> It has the hallmarks of something dreamed up by someone concerned with the recording of useless and irrelevant statistics merely for the sake of recording useless and irrelevant statistics.[20]

8.17 The PJSC was told that the application of the requirement to situations where a resolution is disposed of by a show of hands is "at best anomalous and at worst meaningless".[21] Voting will be by a show of hands only when it is clear that the result on the show of hands represents the wishes of the membership and that there is no real point in proceeding to a poll. The meeting's capacity to make that finding is assisted by the compulsory advance notification of proxies under section 250J(1A). Section 250L provides that a poll can be demanded by at least 5 members entitled to vote on the resolution or by members with at least 5% of the votes or by the Chair. The argument follows then that:

> In these circumstances, the compulsory recording under section 251AA(1)(a) in relation to a determination reached by show of hands of information about what would (or, more accurately, might) have happened had the matter been decided by a poll serves no purpose whatsoever. Recording of idle speculation is not something usually compelled by statute. And here it is entirely pointless. [22]

8.18 Similarly the Chartered Institute of Company Secretaries advised that section 251AA(1)(a) was misconceived. It requires the minutes of the meeting to record proxy votes that, on a show of hands, have no bearing of the determination of the resolution. The Institute was concerned that such disclosure could be seen to question the validity of a decision reached on a show of hands where that did not coincide with the proxy votes.[23]

8.19 Mr Barrett also queried what section 251AA(1)(b) was intended to achieve. In Mr Barrett's experience, although a person might lodge directions as to voting in a proxy form with the company, there is no guarantee that the appointor's votes will be cast in accordance with that direction. Mr Barrett referred to instances where persons are appointed as proxy without their knowledge and never exercise the votes of the appointors, where proxies have failed to attend meetings and where appointors have changed their voting directions to proxies without informing the company. In these circumstances, Mr Barrett submitted that "nothing" is achieved by recording all of the information required under section 251AA(b).

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20 Mr RI Barrett, Submission 5, p 5. See also Chartered Institute of Company Secretaries in Australia Ltd, Submission 1, p 4.

21 Mr RI Barrett, Submission 5, p 5.

22 Mr RI Barrett, Submission 5, p 6.

23 Chartered Institute of Company Secretaries in Australia Ltd, Submission 1, p 4.

8.20 Mr Barrett also pointed out that voting by proxy represents only one method of voting by an agent. Shareholder corporations can also appoint a representative under new section 250D. Institutional investors often prefer that method of representation. These appointments will not be taken into account when statistics concerning proxies are recorded under section 251AA. This further detracts from any relevance that the disclosure requirement might have.[24] In summary, Mr Barrett concluded that section 251AA "serves no intelligible purpose and should be repealed".[25]

8.21 The West Australia Joint Legislative Review Committee of the Australian Society of CPA, the Institute of Chartered Accountants and the Chartered Institute of Company Secretaries commented in similar terms:

> There does not seem to be any benefit to be gained from minuting the proxies lodged with the company, other than a comparison between those figures and the votes actually cast. However, even if there is a discrepancy between the two (which is common) there is no conclusion that can be drawn from such a result. The proxy leaving the meeting before the vote is taken would cause this outcome and it is not the duty of the chair to ensure that other proxies meet their obligations. We do not have a firm position on this section.[26]

Misleading statistics

8.22 Rio Tinto Ltd submitted that information on proxy voting intentions required to be disclosed under section 251AA(1)(a) served no useful purpose other than to confuse.[27] When voting is by show of hands, that is when votes are not cast, proxy intentions play no part in the determination of the resolution. The same applies where the vote is taken by poll. In the latter case, some shareholders who have lodged a proxy attend the meeting and vote and revoke the proxy appointment. Further, some corporate representatives attend the meeting and vote instead of lodging a proxy. It was argued, therefore, that "the statistics of voting intentions, other than being superfluous, are also misleading."[28]

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24 Mr RI Barrett, Submission 5, p 7.

25 Mr RI Barrett, Submission 5, p 8.

26 West Australia Joint Legislative Review Committee of the Australian Society of CPA, the Institute of Chartered Accountants and the Chartered Institute of Company Secretaries, Submission 18, p 4.

27 Rio Tinto Ltd, Submission 89, p 5.

28 Rio Tinto Ltd, Submission 89, p 6 and correspondence to the PJSC, 24 August 1999, *Voting at Shareholder Meetings*. See also report on additional proxy statistics, as required under section 251AA, filed with the ASX attached to the report, *Voting at Shareholder Meetings*.

A target level for institutional investor voting is irrelevant

8.23 The PJSC was told that there was no "ideal" or target level of voting that would encourage a rise in institutions to register their votes or one that was indicative of corporate best practice. In a report, *Voting at Shareholder Meetings*, Rio Tinto Ltd summarised the results of shareholder participation since 1993 and concluded that "the level of shareholder participation increases with the importance of the resolution and vice versa."[29]

		Shareholders Lodging Proxies		**Votes**	
		Number	% of Total Shareholders	Number (m)	% of Total Issued Shares
AGM	April 1994	416	1.2	39	12.8
AGM	April 1995	314	0.9	32	10.5
EGM	December 1995	13,507	33.8	192	62.8
AGM	May 1996	3,577	8.8	92	28.0
AGM	May 1997	2,583	6.5	86	26.2
EGM	February 1998	4,024	10.0	117	35.6
AGM	May 1998	2,714	6.8	104	31.7
AGM	May 1999	2,444	6.0	84	27.2

All items of business covered at the meeting shown above were passed with a "for" vote in excess of 98% of the total votes.[30]

8.24 The report found that the level of voting for "routine" corporate business at AGMs was lower than that for the more important matters covered at the EGMs. The EGM in December 1995 sought shareholder approval for the Dual Listed Company merger with Rio Tinto plc, while the EGM in February 1998 was held to consider the introduction of a share buy back program.

8.25 In addition, Rio Tinto Ltd submitted that the disclosure requirement has had no effect on increasing the level of shareholder voting. In fact the level of voting had fallen from 31.7% at the May 1998 AGM to 27.2% at the May 1999 AGM. The report noted that:

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29 Correspondence to the PJSC, 24 August 1999, *Voting at Shareholder Meetings*, p 1.

30 Correspondence to the PJSC, 24 August 1999, *Voting at Shareholder Meetings*, p 1. The table covers the Rio Tinto Ltd vote only and not the joint venture. The report noted that voting levels were similar for all items of business at the particular meeting.

> …S251AA has not led to higher shareholder participation which seems to have been, at best, part of the logic which led to its introduction. If indeed there is a desire to increase the level of voting, it would seem preferable to target the shareholders rather than the companies (through additional questionable mandatory disclosures) to encourage greater voting. It also seems logical for those groups which seek higher levels of voting to communicate this with their membership (institutions) and perhaps require their members to report on proxies lodged and voting rather than mandate it for the companies in which they invest.[31]

Disclosure is irrelevant where business is formal

8.26 The Henry Walker Group Ltd described the use of proxy voting by institutional investors as "extensive". In these circumstances, the Group queried the relevance of disclosing how proxies have voted especially on a show of hands and at annual general meetings when the nature of business is in most cases a formality.[32]

8.27 Several other submissions opposed the requirement for companies to disclose more information about proxy votes on the following grounds:

- There is sufficient information provided already on entitlements and requirement of proxy voting;[33]
- Section 251AA is difficult to comply with logistically, especially at a large meeting where votes are on a show of hands;[34]
- Logistical difficulties are compounded if different classes of shares are involved;[35]
- The disclosure of information required by section 251AA duplicates what is included in the minutes under section 250J(1A);[36]
- The announcement of proxy intentions might save meeting time but will lose the goodwill of small shareholders.[37]

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31 Correspondence to the PJSC, 24 August 1999, *Voting at Shareholder Meetings*, p 3.

32 Henry Walker Group Ltd, Submission 12, p 3.

33 National Can Industries Ltd, Submission 49, p 1. See also Suncorp-Metway Ltd, Submission 17, p 2.

34 Arnold Bloch Leibler, Submission 23, p 8.

35 Arnold Bloch Leibler, Submission 23, p 8.

36 Australian Institute of Company Directors, Submission 47, p 4.

37 Mr JA Sutton, Submission 57, p 1.

Additional disclosure requirement – new section 250J(1A)

8.28 Freehill Hollingdale and Page addressed the disclosure requirement in new section 250J(1A) that before a vote is taken the Chair must inform the meeting whether any proxy votes have been received and how the proxy votes are to be cast. Freehill Hollingdale and Page commented that:

- Section 250J(1A) is ambiguous about the details the Chair should provide to comply with the section and whether the Chair has to disclose proxy votes in favour of the Chair or all proxy votes received. If the intention is for disclosure to be limited to proxy votes given to the Chair, the wording in section 250J(1A) should be clarified;
- The disclosure requirement in section 250J(1A) fails to take into account that meetings may involve thousands of proxy votes, many of which are revoked at the meeting, and it is often impossible to determine how many proxies there are; and
- It is impractical to require the details about proxy votes to be disclosed prior to the meeting.[38]

8.29 The Chartered Institute of Company Secretaries told the PJSC that section 250J(1A) would discourage attendances at general meetings and drive away genuine individual shareholders:

> Section 250J(1A) reinstates a procedure that was commonplace at shareholders' meetings for many years, but was discontinued in the face of strong shareholder dissent. It was not unusual for shareholders to state that "If that was the attitude of the Chairman (ie. to present the meeting with a fait accompli by announcing the proxy voting intentions in advance), what was the value for small shareholders in attending the meeting at all?"[39]

8.30 Similarly Arnold Bloch Leibler opposed the disclosure requirement in section 250J(1A) noting that it placed voters at the meeting in a different position from those that voted by proxy.[40] In the past, the practice of announcing the number of proxy votes received prior to a vote being taken at a meeting was criticised by shareholder representatives on the basis that it was used as a tactic to stifle pre-vote discussion.[41]

8.31 The West Australia Joint Legislative Review Committee drew attention to possible inconsistencies regarding section 250J. As noted above, that section

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38 Freehill Hollingdale and Page, Submission 40, p 4.

39 Chartered Institute of Company Secretaries in Australia Ltd, Submission 1, p 4.

40 Arnold Bloch Leibler, Submission 23, pp 7-8.

41 See also Computershare Registry Services, Submission 68, p 3.

requires the Chair to disclose the number proxy votes received and how these are to cast before a vote is taken. This is misleading because section 250A(4) provides that proxies do not have to vote on either a show of hands or a poll. Therefore, there is potential for discrepancy between the pre-vote position announced by the Chair prior to the vote and the actual vote.

8.32 The Review Committee also pointed out that the wording in section 250J is open to differing interpretation. The words in section 250J(1A) "how they are to be cast" could be taken to refer to the method used in casting their votes rather than the anticipated number of votes.[42]

Inconsistency between sections 250J and 251AA

8.33 Several submissions advised that there is an inconsistency between sections 250J and 251AA.[43] Arnold Bloch Leibler noted that section 251AA requires the company to record in its minutes how proxy votes are cast. This provision is at odds with section 250J(2) which, in part, provides that "neither the chair nor the minutes need state the number or proportion of the votes recorded in favour or against".[44]

Related Matters

Exemption from provisions relating to proxies

8.34 The Grains Council of Australia Inc submitted that decisions regarding the restructure of the Australian Wheat Board and the company structure of the Australian Wheat Board Limited (AWB Ltd) may be in conflict with provisions of the *Company Law Review Act 1998*. The AWB Ltd was established following negotiations with grower organisations and an independent review of the Australian Wheat Board. To reflect grower control and ownership of the AWB Ltd, the Grains Council drafted into the constitution of the AWB Ltd and its Nominated Companies specific requirements relating to:

- The number of Directors elected from a region, which is based on the "weighted" voting system of A and B Class shareholders;

- The definition of a grower; and

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42 West Australia Joint Legislative Review Committee of the Australian Society of CPAs, The Institute of Chartered Accountants and the Chartered Institute of Company Secretaries, Submission 18, p 4.

43 See Australian Institute of Company Directors, Submission 47, p 4 and Arnold Bloch Leibler, Submission 23, p 8.

44 Arnold Bloch Leibler, Submission 23, p 8.

- A restriction on the number of open proxy votes to be held by the Chairman and Directors of AWB Ltd and the nominated companies.

8.35 To prevent the disenfranchisement of Class A shareholders, who represent all wheat growers, due to the disaggregation of the shareholding the Grains Council resolved to restrict the number of open proxies to be held by the Chairman and/or Directors of AWB Ltd.[45] It was also resolved that the Chairman and/or Directors of the company should not exercise more than 5 open proxies in relation to any resolution.[46] The PJSC was told that the Senate Rural and Regional Affairs Legislation Committee had examined the company structure of the AWB Ltd and recommended that it should be exempted from any of the unintended consequences of the Company Law Review Act that may impact on the system of proxy voting.[47] The Grains Council argued that the structure of the new company was unique and derived from the old statutory authority:

> **Mr Fisher**-…the grains industry believes that we are slightly different from all of the companies which will now be treated under the Company Law Review Act because, as you are probably aware, the new company AWB Ltd is a transfer from an old statutory authority into a new private company. Growers have had a two per cent compulsory levy deducted from their proceeds since 1989 and the government, supported by the opposition, made a decision that those deductions would be compulsorily transferred into shares and growers would have those shares allotted to them.
>
> The debate about the AWB restructure has been very emotive and very passionate on a regional basis and on an individual basis. We believe that there is a strong case in the interim to allow the AWB to be treated slightly differently from normal companies, given the history of the AWB and its transfer from, as I said, a statutory authority which started in 1949-over 50 years ago-to where it is today.
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> In particular, grain growers will be shareholders. There are approximately 40,000 to 50,000 grain growers out there who are on individual properties and they are a very disaggregated and dispersed group of shareholders. We believe it is important that there be mechanisms allowed under the constitution of AWB Ltd to empower those shareholders to give them a sense of ownership and also a sense of duty to their new company.

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45 The AWB Ltd constitution provides that Class A shareholders can receive more shares and elect more directors according to their production.

46 Grains Council of Australia Inc, Submission 51, p 8.

47 Senate Rural and Regional Affairs and Transport Legislation Committee, *Report on the Consideration of a Bill Referred to the Committee: Wheat marketing Legislation Amendment Bill 1998*, June 1998, p 18.

> Currently, the determination by the government is that the constitutions of AWB Ltd should reflect the Company Law Review Act 1998, and we believe that that is not consistent with empowering our shareholders…We have proposed that directors be allowed to hold only five open proxies for the election of directors. We have no view on how many closed proxies they hold-that does not interest us-but because of our disparate shareholding we believe that the worst thing that could happen to AWB, as it launches into its private life, would be for a group of shareholders to travel to an AGM in order to elect their directors to their new AWB, only to find that the current directors were holding open proxies and that they had the capacity to outvote the growers who had actually made the effort to attend the AGM.[48]

Revocation of an earlier proxy appointment

8.36 Computershare Registry Services submitted that section 250A(7) in respect of the appointment of a proxy was flawed. Section 250A(7), which reads "A later appointment revokes and earlier one if both appointments could not be validly exercised at the meeting" made little sense, unless the word 'could' is substituted for the words 'could not'.[49]

Whether an abstention is counted as a vote

8.37 Section 251AA requires listed companies to record the number of proxy votes validly appointed in relation to each resolution in the notice of meeting. Where voting is by show of hands, the minutes must record the total number of proxy votes "For", "Against", "Abstaining from the resolution" and "May vote at the proxy's discretion".[50] Where a resolution is decided on a poll, in addition to the information about proxy votes, the minutes must record the total number of votes cast "In favour of the resolution", "Against the resolution", "Abstaining from the resolution".[51]

8.38 The PJSC was told that section 251AA(1)(b) as it stands could be interpreted to mean that an abstention is a vote cast and may be counted in the total number of votes cast, whereas an abstention is a vote not cast.[52] As Mr Ian L Falconer, Chairman of the Legislation Review Committee of the Chartered Institute of Company Secretaries explained to the PJSC:

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48 Mr Neil Fisher, Committee Hansard, 17 February 1999, p 2.

49 Computershare Registry Services, Submission 68, p 3.

50 Section 251AA(1)(a).

51 Section 251AA(1)(b).

52 Computershare Registry Services, Submission 68, p 3; Rio Tinto Ltd, Submission 89, pp 5-7. See also Mr David Cantrick-Brooks, Committee Hansard, 16 June 1999, p 77.

> The way that is set out in the section is contrary to the common law approach to an abstention, in which we feel an abstention is not a vote, whereas the Corporations Law talks in terms of an abstention being a vote and having to report the number of abstentions. Our submission quoted what we feel is the leading authority on this- Horsley's Law and Procedure of Meetings. Clearly, their view and the common law approach is that the abstention is not a vote.[53]

8.39 The practical effect of counting abstentions as votes cast is to increase the total number of votes in determining the percentage of votes cast in favour of a resolution.[54] In addition, there is the practice described by Rio Tinto Ltd for some institutions to use the abstain box to record those shares where no voting instructions have been received in order to balance the number of shares on the proxy form with the total shareholding of the institution.[55]

Conclusions

8.40 The PJSC accepts that the rationale for disclosing proxy voting information is to encourage institutions to exercise their voting assets. Notwithstanding this rationale, however, the PJSC agrees with Rio Tinto Ltd that the promotion of shareholder voting is not achieved by mandatory disclosures of this kind. To date, there is no evidence to suggest there is a step change in the way shareholders or institutions use their voting rights as a result of the requirement for additional information. In the case of Rio Tinto voting this has led to a fall in shares actually voted. Further, the evidence before the PJSC suggests that shareholders do not vote on routine items of business.

8.41 The PJSC was told that a high proportion of Australian equities are now held by institutional investors, although these shares are held on behalf of individuals, as members of superannuation funds and holders of insurance policies. This places a particular responsibility on institutions to promote a transparent relationship with the company and to be prepared to reveal to clients what their voting records are. The PJSC believes that as a first step institutions should have voting policies for the way in which they exercise their voting assets. Institutions should be able to explain their voting policies and volunteer to their clients information on how they voted.[56]

8.42 The PJSC received considerable evidence on the need for transparency in the voting process and for both small and large shareholders to have

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53 Mr Ian L Falconer, Committee Hansard, 17 August 1999, p 191.

54 Computershare Registry Services, Submission 68, p 3.

55 Rio Tinto Ltd, Submission 89, p 7 and Mr Ian L Falconer, Committee Hansard, 17 August 1999, p 192.

56 Regulations to the UK Pensions Act, introduced on 1 July 1999, require pension fund trustees to declare the policy they have in directing the exercise of the voting rights attached to their investment.

confidence in the meeting and the way in which the meeting is conducted. Records should be maintained and open for inspection so that there is an accurate and faithful record of how that voting was exercised. That is not in doubt. However, witnesses told the PJSC that sections 251AA and 250J(1A) are inconsistent and may lead to confusion and unnecessary administrative difficulties. The reporting of proxy voting intentions may also be misleading as the Corporations Law does not reflect accurately the nature of a voting direction to an agent either with or without voting instructions. The PJSC notes that the Companies and Securities Advisory Committee (CASAC) has examined the operation of section 251AA in a recent discussion paper and concluded:

> The Advisory Committee considers that the existing requirements regarding disclosure of proxy voting details are unworkable. It considers that the minutes should only be required to record the outcome of the show of hands or the poll, not the additional information required by the current provision. Also, because the proxy information to be included under the current requirement concerning voting by show of hands takes no account of shareholders present in person or by corporate representative, it provides no reliable guidance on the extent of shareholder participation in meetings. [57]

8.43 The PJSC endorses the findings of CASAC on this matter.

8.44 As a proxy appointment lodged with the company is not required to disclose voting intentions, it is difficult to see how the reporting requirement can be accurately met. The PJSC accepts that there is no reason for the minuting of proxy intentions where these have not been exercised when a resolution is disposed of on a show of hands or when a vote is taken by poll. Accordingly the PJSC concludes that section 251AA should be amended to remove the unnecessary requirement in subsection 1(a). The PJSC also concludes that section 250J(1A) should be replaced with a provision that requires the minuting of proxy votes "For" and "Against" the resolution when a resolution has been decided on a show of hands.

8.45 The PJSC believes that in respect of the treatment of abstentions from voting or refraining from voting on a resolution the Corporations Law should reflect the position at common law. The authority on the procedure, law and practice of meetings, *Horsley's Law and Procedure of Meetings* states that under common law principles "…every person who is present at a meeting and entitled to vote has one vote. At his discretion he may exercise that vote or refrain from voting. The decision on each motion is arrived at by those persons who do vote, on the basis that its is carried if more votes are cast for the motion

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57 Companies and Securities Advisory Committee, *Shareholder participation in the modern listed public company*, Discussion Paper, September 1999, paragraph 4.47.

than against it and it is lost if the reverse is the case. Persons who refrain from voting do not effect the result."[58] An abstention therefore is neither a vote cast nor an intention to vote. The latter construction has been used by institutions in balancing the number of shares on the proxy form with their total shareholding. The PJSC is concerned that this practice could lead to a situation where an institutional investor is required by the courts to disclose whether or not it received instructions from the beneficial holder before marking the abstain box on the proxy form. Clearly this situation is undesirable. The PJSC concludes that subsection 251AA(1)(b) about votes cast abstaining on the resolution should be removed.

8.46 In the view of the PJSC the issue raised in respect of appointing a proxy does not relate to the exercise of a dual proxy or whether two appointments are mutually exclusive, but rather which appointment should take precedence if more than one appointment can be exercised at the meeting. The PJSC agrees with Mr Cantrick-Brooks that there is a presumption that a later appointment reflects a person's current thinking. The PJSC concludes that section 250A(7) should be drafted to reflect this.

Recommendation

8.47 The PJSC recommends that the Corporations Law should be amended as follows:

(i) section 251AA(1)(a) should be repealed;

(ii) section 250J(1A) should be repealed and replaced with a provision that requires the minuting of proxy votes "For" and "Against" the resolution when a resolution has been decided on a show of hands;

(iii) section 251AA(1)(b)(iii) should be repealed;

(iv) section 250A(7) should be amended to correct what appears to be a drafting oversight.

(v) the AWB Ltd should be granted exemption from the provisions of the Law relating to proxy appointments.

58 *Horsley's Meetings: Procedure, Law and Practice*, Ed W J Taggart, Butterworths 3rd Edition, 1989, p 100.