Submissions - Mr Les Callan
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JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES

Reference: Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003

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I am a Director of Compliance Logistics Pty Ltd, a company that offers scrutineering and proxy processing services in relation to meetings of members. Additionally Compliance Logistics is reviewing a range of options to offer products designed around the introduction of Schedule 8 of the CLERP 9 Bill.

As such, the following submission does produce a conflict of interest for me in giving opinions free from personal or commercial interest. Having said that I have not knowingly tainted this submission by incorporating, or remaining silent, on issues solely for the purposes of furthering my personal interests or the interests of Compliance Logistics Pty Ltd.

As a brief background statement I have been involved, as a consultant, in the demutualisation of both AMP and the National Roads and Motorists' Association. On each occasion I was a member of the Logistics Committee dealing with the actuarial formulations required to create the share registry data files, the logistical operations to bring on the various member and shareholder meetings, the provision of call centre facilities for the members use, the quality assurance regimes overlying the various corporate actions required and a member of the Share Registry selection tender team.

In 2001, I processed the proxy forms, provided the software and data files used to register members into the meeting and tallied the poll results for the National Roads and Motorists' Association Annual General Meeting.

As a consequence much of my submission is written from a logistical perspective. I have recently worked closely with both the Institute of Company Directors and the Institute of Chartered Accountants in Australia to deliver to the non listed marketplace a set of Guidelines (or templates) allowing a Chairman to develop a comprehensive set of Adjudication Rules to be used in respect of the processing of proxy forms, meeting registration and poll tally activities.

The diligent and responsible performance of tasks is only possible if clarity of the rules governing the process can be clinically itemised and acted upon.

Having said that, this submission also contains some suggestions that touch upon the wider issue of both company and member rights - much of which stems from my involvement in the operations of, and scripting for, various call centres dealing with member concerns and confusion in relation to very large and important Meeting of Members.

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Submission 1 - Cherry Picking.

Cherry Picking is an action, taken by a person with the assumed power to do so, to circumvent a directed vote of a member (given by the use of a proxy form) from being included in the tally used to determine the outcome of a resolution at a Meeting of Members.

The current Section 250 A (4)(d), when read without reference to the Common Law principles governing the agency duties attached to a proxyholder, could be construed so as to legitimise this practice. That Section dictates that where an instrument (in the singular) appointing a proxy has a direction on how to vote then:
The proxy (other than the Chairman) need not vote; but,
If the proxy does vote, the proxy must vote as directed.

The proxy therefore has a right to determine, independently in respect of each single proxy form, if it will be cast as a vote at the Meeting. For example, each single proxy instrument directing a "For" vote for a resolution is cast (proxy must voted as directed) while each single instrument directing an "Against" vote is not cast (proxy need not vote).

I draw to the attention of the Committee the following company Constitution Rule of a very large listed company:

> "Any appointment of a proxy under Rule 68(2) which is incomplete may be completed by the Secretary on the authority of the Board and the Board may authorise completion of the proxy by the insertion of the name of any Director as the person in whose favour the proxy is given."

The practice of Cherry Picking would allow some company constitution rules to be used such that a directed vote on an incomplete form could be effectively discarded at the whim of the Board by placing that vote in the hands of a person, other than the Chairman of the Meeting, likely to not vote such proxies. I have no information in relation to such constitutional rules being used in this manner and selected this company purely for indicative wording purposes.

I contend that Cherry Picking is already illegal and while some change is desirable for transparency purposes, there is no forensic need to change the Law to stop such practices occurring. Several Supreme Court judgements have confirmed the Common Law principle that a proxyholder, as agent, must vote and must vote as directed. Section 250 (A)(4)(d) of the Law is simply dealing with the proxy form itself. A proxy, solely by virtue of being named on an instrument appointing a proxy, has not entered into any real or implied agency agreement with the member.

Logically the agency agreement between the person named as proxy and the member arises when that person accepts the documents enabling him or her to vote at the Meeting. The proxy (the person offered the agency) becomes a proxyholder (an agent acting for the member at the meeting) when the

Meeting polling paper is accepted. That acceptance ensures that no other person, including the Chairman of the Meeting, named on the proxy form as an alternate proxy can deal in any way with that member's vote (either directed or undirected) while the proxyholder remains at the Meeting. A proxyholder under Common Law must vote and must vote as directed. Consequently the cherry picking action is in breach of the Common Law duty overtly accepted by the proxyholder by the acceptance of the polling paper.

If the proxy did not wish to vote as directed by the member then it is open for the proxy to refuse the proxyholding at registration into the Meeting thus allowing the alternate proxy (usually the Chairman of the Meeting) to become proxyholder so as to enliven those directed votes in the final tally.

Suggested Solutions

Add a Note after 250(A)(4)(d) to the following effect:

> A proxy, who attends the Meeting and is prepared to act on behalf of the member as indicated on the instrument, becomes a proxyholder for the member and must vote as directed. Evidence of a preparedness to act as proxyholder is the acceptance of a voting instrument issued to the proxy at the Meeting (generally referred to as a Polling Paper or Voting Card).

In the alternative:

Change the wording of Section 250 (A) (4) (c) and (d) to the effect of:

> (c) if the proxy is the chair—the Chairman must accept the proxyholding and vote on a poll, and must vote that way; and
>
> (d) if the proxy is not the chair—the proxy need not accept the proxyholding but if the proxy does, the proxyholder must vote on a poll and must vote that way.

In the alternative:

Devise a new and more transparent proxy appointment regime:

> Where a member directs the manner in which a vote is to be cast at a Meeting of Members, the Chairman of the Meeting will act as facilitator for the member for the purpose of casting the directed vote - irrespective of who the member nominates as proxy.
>
> The proxy nominated on the instrument appointing a proxy shall, if willing and evidenced by acceptance of a voting instrument issued to the proxyholder at the meeting, act on behalf of the member for all other purposes (undirected votes, procedural motions and, if allowed by the individual Constitution or By Laws covering the Meeting, addressing the meeting on the members behalf and or voting on a show of hands).

In relation to the third alternative above (Devise a new proxy regime) the following logic may assist to test the veracity of the suggestion:

A member who has directed a vote on a proxy form wants that vote counted in the tally. The mechanics used to include the vote in the tally is of no consequence to the outcome of the Meeting.

A member who does not direct the manner in which a vote is to be cast is placing a trust in the proxyholder to determine the most suitable vote and to do that generally after taking into account the discussions held at the Meeting. The proxyholder may vote, or not vote, as the proxyholder sees fit on behalf of the member. The growing incidence of Chairman declaring all polls open at a point of time well before the conclusion of discussion on one or more resolutions before the Meeting is difficult to countenance if I am right about the importance of the discussions for those proxyholders charged with undirected votes.

A proportion of members give their proxy to the Chairman of the Meeting, many in the belief that the Chairman will use such a vote in the best interests of the Company. The fiduciary requirement for the Chairman, and directors generally, to act in the best interests of the Company when dealing with proxy votes is subject to commentary in Whitlam v. Australian Securities & Investment Commission [2003] NSWCA, 183 paragraphs 152 onwards. Suffice to say that members, when choosing a proxy, should not globally rely upon this commonly held assumption.

A proportion of members who do not direct their vote on a specific resolution do so in the belief that, by not voting, they in fact are not participating in that portion of the business before the Meeting. They do not realise that a failure to vote on a resolution give rise to an undirected (or open) vote to the proxyholder. This is exacerbated by the absence of an Abstain option on the majority of proxy forms in current use.

Under this alternative suggestion, the person accepting the position as Chairman of the Meeting is charged with the responsibility of ensuring that all directed votes validly assigned on proxy forms for the Meeting are accumulated into the poll tally for each resolution. This feature would simplify the administrative tasks. In all other respects the Chairman has the same duties and responsibilities as other proxyholders in relation to proxy assignments.

A member may assign any person or body corporate (as allowed by other provisions of CLERP 9) to be their proxy. Should that person or entity not become the proxyholder (not attend the meeting or refuse the proxyholding) then all directed votes would be counted but undirected votes (including any in respect of procedural motions called at the Meeting) will dissolve without being used by any person, position or entity.

Under this regime a member may vote on as many resolutions as they feel competent to properly address and have those votes counted in the tally without any requirement to necessarily assign any person or entity as their proxy. The Constitution Rule quoted above and similar Rules therefore become redundant and incapable of being used for Cherry Picking purposes.

The ASX Listing Rules partly support the underlying premise of this new regime by requiring proxy forms to be crafted such that a shareholder can, in some circumstances, elect not to have an undirected vote cast by the Chairman of the Meeting who otherwise can act as proxyholder (see ASX Listing Rule 14.2.3).

Additional pressure to change the present regime can be found in the number of shareholder, member and commentator calls for the appointment of an independent Chairman at contentious Meetings. Currently National Australia Bank is being requested to make such an appointment.

Obviously I believe that the Chairman should not be replaced on independence grounds but that the position of Chairman itself should be made more independent so that proper process is never in doubt.

Submission 2 - The "Abstain" vote.

Abstain - revisiting an old term

1.1 Abstain - definition
1.2 Abstain and it's purpose in the modern voting environment
1.3 Abstain and the role of the Fund Manager in the democratic process
1.4 Abstain and vote counting considerations
1.5 Abstain and quorum considerations
1.6 Abstain and the standing proxy appointment

1.1 Abstain - definition

"To decide not to use your vote" - Cambridge Advanced Learner's Dictionary;

"If you abstain from voting, you do not vote although you are permitted to vote" - Cambridge Dictionary of American English[1].

There is however another meaning of the word "abstain" that, in the past, has been applied in the voting context - the concept of "abstain" as an attempt to "hinder" or "object" in some way to the subject matter of the vote or the manner in which the vote is being conducted[2]. That is, the decision not to vote is given some negative motivational connotation.

1.2 Abstain and it's purpose in the modern voting environment

Corporations Law now provides more robust remedies for those seeking to "object" or "hinder" the voting process at meetings of members other than by the use of the abstain vote[3].

However, the "abstain" vote does have a variety of functional roles which, when correctly applied by members, can enhance the democratic processes surrounding meeting of members.

An abstain vote, by it's existence, should allow the reasonable assumption that the voter acknowledges the legitimacy of the subject under discussion

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[1] Middle English *absteinen*, to avoid, from Old French *abstenir*, from Latin *abstinēre*, to hold back.

[2] Abstain \Ab*stain"\, v. t. To hinder; to withhold. (Webster's Revised Unabridged Dictionary 1913)

[3] A resolution must be within the power of the meeting to pass (the fit and proper purpose test) and 5 members present at the meeting can now demand a poll after a show of hands vote. Additionally, for a listed company, the tally for the poll must be published in the minutes of the meeting to allow transparency of the process to the membership. The judicial system can grant injunctive relief to a company not to put a resolution, or to overturn a result where the "objection" is meritorious.

and the meeting process itself. It also strongly infers that the voter is content to have the matter decided by those members who are across the topic at hand and will support such a peer decision.

Where conflicts of interest arise by a member casting a directed vote on a specific resolution, the "abstain" vote allows for participation in other matters before the meeting without influencing the mood of the meeting on the specific resolution by the member casting an undirected vote.

The breadth of some share portfolios held by members can make proper consideration of every resolution across a variety of companies simply impossible. Without the ability to "abstain" on some resolutions, the voter would be left without a mechanism to selectively participate in the business of a particular meeting. Consequently the proxyholder exercises the underlying agency of the proxy against a backdrop of having no instructions or direction from the member or the member is forced to not participate in the meeting at all.

1.3 Abstain and the role of the Fund Manager in the democratic process

This topic is particularly important given the recent IFSA guidelines urging the fund managers to vote at meeting of members on behalf of the beneficial owners of the shares held in listed companies and the proposed CLERP 9 amendments making voting mandatory for some managers.

Fund Managers may simply not have the research resources to form an informed opinion on each and every resolution put forward at AGMs where their portfolio covers a substantial portion of the listed marketplace. A series of undirected votes or ill considered directed votes, being brought into existence purely by the requirement to participate, is hardly a step forward in responsible shareholder participation.

What is required is a mechanism for selected participation coupled with a clear message to the marketplace that no inference of protest should be drawn by their non-participation in other matters before the meeting. The fund managers also have right to assurance that the "Abstain" vote does not interfere or influence the result of debate on the topic. That is, the poll result will be decided on the balance of valid "For" and "Against" votes cast by those present, in person or by proxy, at the Meeting.

As a consequence, all company issued proxy forms should contain an Abstain option for each resolution and the forms should carry words to the effect that "Where a poll is called for a resolution, votes cast 'Abstain' will be disregarded in determining the outcome of the poll"

1.4 Abstain and vote counting considerations

The following guidelines should apply to an "abstain" vote:

- The proxyholder is not able to participate in a "show of hands";

- The proxyholder is still subject to the common law requirement to vote as directed by the member (that is, the proxyholder must vote the abstain with the consequence that it can be recorded in the minutes of the Meeting if appropriate);

- Where a decision is made to publish an intention to vote by a proxyholder or a proxyholder provides to the public domain a historical list of voting decisions made in respect of resolutions before meetings of members, the "Abstain" vote should be included in such publications;

- The percentage of votes calculation required to carry a resolution will ignore the "abstain" votes. That is, a poll is carried if the "For" vote satisfies the percentage requirement when compared to the total of "For" and Against" only.

Theoretically a member may Abstain even if the proxy form issued by the company does not allow for an "abstain". A failure to mark either the "For" or "Against" box but accompanied by a clear intention to abstain should not give rise to an open or undirected vote. That is, the right to "abstain" is not a right granted by a company to its members, is not available only by way of the option being present on the proxy form and is not subject to anything within the Constitution of the company.

1.5 Abstain and quorum considerations

"The presence of a quorum means a quorum competent to transact and vote upon the business before the meeting. If some of those present are disqualified from voting and there is not otherwise a quorum, no business can be validly done." - J Joske [4]

"Where a person abstains from voting at a meeting, but not as a result of some disqualification from voting but by voluntary refrain, it is appropriate to continue to count them among those constituting a quorum"[5].

1.6 Abstain and the "standing" proxy?

It is difficult to justify a standing proxy that directs the proxyholder (normally the Chair) to "Abstain" on all resolutions considered at any future meetings until such time as the proxy is revoked. Some fund managers may prefer to issue such proxies and then selectively revoke the forms in the event that they wish to vote in respect of a resolution from time to time. In effect this is merely a formality that annuls the intent of the current IFSA guidelines on participation and presumably the CLERP 9 Amendments.

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[4] Joske J in **Steuart v Oliver (No 2)** (1971) 18 FLR 83 at 84 – 85

[5] **A M Spicer and Son Proprietary Limited (In Liquidation) v Spicer and Howie** (1931) 47 CLR 151 at 187

Submission 3 - Scrutineering - Democratic Transparency.

A traditional scrutineering regime is basically one of observation and enquiry into the proxy processing activities of the organisation conducting the administrative functions on behalf of the Chairman of the Meeting.

The pace of processing, the restraints imposed by the inability to physically inspect the paper and computer records while at the processing centre and the restrictions on access generally in and around the site make this traditional form of scrutiny superficial and detracts from its clinical ability to allow the Scrutineer to form a view as to the accuracy and completeness of the processing result.

In Lew v Coles Myer Limited & Anor [2002] VSC 535 these difficulties resulted in the rights of Mr Lew, as a Director, to examine the books and records of the Company to be constrained, amongst other impediments, to a review of a limited number of proxy forms (the top 200 by shareholding forms from over 120,000 submitted forms).

In NRMA Limited (Application of); NRMA Insurance Limited (Application of) [2000] NSWSC 408 at Paragraph 94 His Honour said:

> On the meetings generally, I do not consider there was any difficulty in failing to appoint scrutineers, being a matter to be decided in the discretion of the board of directors. There is nothing in the constitutions of Association and Insurance to require scrutineers. Control procedures were in place for the processing of proxy forms including quality assurance by Artcan and review by KPMG. The overall process was under the control of an independent company providing specialised services in the area, Computershare.

Corporations Law is silent as to who has the right to call for scrutineering of proxy forms. The Chairman of the Meeting or the Board may elect to appoint a scrutineer. Other judgements of various Supreme courts would infer that a person requisitioning a meeting or resolution at a meeting also has the right to scrutineer proxy forms.

I would suggest that the Law be amended to specify that the following have a right to appoint scrutineers for a Meeting of Members:
The Chairman of the Meeting;
The Board of the Company;
A candidate for the Board and the subject of a resolution to consider the appointment;
Any Director (irrespective of the operation of Section 249C or Section 249CA or otherwise applying to the Meeting);
A member requisitioning a meeting of Member under Section 249D; or
A member requisitioning a resolution to be put at a Meeting under Section 249N.

For listed companies, the ASX should also be allowed to appoint scrutineers at the company expense where such action is demanded by the ASX.

N,B. Current ASX Listing rule 14.8 *If ASX asks, an entity must appoint its auditor, or another person selected with the approval of ASX, as scrutineer to decide the validity of votes cast at a general meeting and whether the votes that should have been disregarded were disregarded.*

There may be some merit in allowing a number of shareholders or members to requisition a Chairman of the Meeting to appoint a scrutineer at company expense. The threshold would need to be such that the appointment is not needlessly commonplace.

A scrutineering report that presents figures purporting to represent error rates at the processing centre will create concerns in the minds of many members. Sensational media handling and embittered interpretation by activists of such scrutineering reports could destabilise the orderly marketplace for shares and discredit the administration of Not for Profit organisations reliant on good will and trust to achieve their social, community or charitable ends.

The Chairman of the Meeting is the final adjudicator of each proxy form and until such time as the Chair announces the proxy counts any initial decision made via the validation process is interim and subject always to the Chairman's approval. A scrutineer's role is therefore to request either the processing centre and or the expected Chairman of the Meeting to review a particular proxy instrument. Once that review has taken place to the satisfaction of the Chairman the scrutineers report should only contain commentary where the scrutineer does not agree with that final result as sanctioned by the Chairman. In this way the tally is layered with an additional quality assurance mechanism without any other petty administrative errors (many of which would have in any event been corrected by the centre's own internal Quality Assurance measures) being reported and consequently being capable of misinterpretation.

For scrutineering to work effectively (and democratically), the scrutineer needs to be able to inspect each, and every, proxy form received by the Company. Traditionally this creates some logistical problems at the processing centre and can be quite disruptive to the administrative tasks being performed at the physical site.

An acceptable and cost effective answer involves the use of scanning technology. A scrutineer can simply do much of his or her work by reviewing images of the forms and drawing such conclusions as are necessary from that exercise. The majority of proxy forms processed by larger processing centres are scanned as part of the counting process particularly by the major registries and many of the larger Non Listed companies. Where necessary, a manual count would not be disrupted to any significant extent if it became necessary for the scrutineer to personally scan the forms.

I have no reason to suggest that the major share registries do not perform this proxy counting function properly. Indeed, having been on the share registry tender committees for both AMP and NRMA Insurance (now IAG) as

well as working closely with Computershare on the NRMA 2001 AGM I personally believe these processing centres are well run and efficiently.

Having said that, shareholders have a right to know that their votes are being counted correctly in spite of the volume of work that has to be done in a short period during the pre meeting season (Sept- Nov each year). While it would be unfair to suggest that the processing is tainted with incompetence or bias, it is equally unfair to suggest that mistakes are not made on occasions and capable of correction by third party review.

Additionally the fact that share registries have a superficial conflict of interest (they process proxy forms for company clients while performing other lucrative share trading activities for that client) does require transparently of process to be available in the form of independent third party scrutiny. The use or otherwise of ASX listing Rule 14.8 itself is tainted (from a transparency point of view) by the fact that the ASX owns ASX Perpetual Limited, the second largest proxy processing centre in Australia.

To progress the clarity of scrutineering generally the following actions are required:
Determine who may engage a scrutineer;
Allow the scrutineer the right to access existing images of the proxy forms or create images where such images otherwise do not exist;
Restrain a scrutineer from reporting transient error results until the Chairman has properly adjudicated upon the proxy form in question;
Restrain the scrutineer in the use of the images for any other purpose.

Submission 4 - Requisitions

The threshold to call a meeting of members (249D), to put a resolution at a meeting of members (249N) and to distribute a member statement (249P) is currently set at 100 members or 5% of the voting rights.

My submission does not directly deal with the threshold itself, as I have no formula that equitably balances the rights of members with the financial cost incurred by the company of acceding to the requisitions.

Rather my submission is that there is absolutely no restraint on directors of companies using this member right to avoid calling a meeting themselves under Section 249C or 249CA for fear of having to resign should the resolution in question fail to gain sufficient support.

If a resolution should be put before the members then directors have a duty to do it themselves so that a full coherent argument supporting the resolution is placed in the Notice of Meeting rather being left to others to write. Additionally the fiduciary duty as a director to call a meeting should not be impeded by the requirement to meet the threshold (presumably that is why no threshold exists under Sections 249C and 249CA).

There is equally no restraint on the scripting being used to tout for the required signatures. I processed the 2001 NRMA AGM proxy forms and during the course of that project I was approached to sign a requisition to "keep the membership fees from increasing". The requisition was actually the removal of a number of directors.

In this submission I ask the Committee to consider the following:

A member who wishes to requisition the company under Sections 249D, 249N or 249P must first deliver to the company a 1,000 word or less statement details the reasons for the requisition.

The company must distribute the statement to each member of the Board.

The company, or any director of the company, can take the necessary action required by the statement (call a meeting or distribute the statement for the next meeting or propose the resolution as the case may be).

Where the company and each director refuse to do so, the member must be advised within a 21-day period of receipt of the member statement and the company may provide a 1,000 word or less statement as to why it, and each and every director, have refused to act upon the member statement.

The member can then collect signatures to satisfy the threshold.

Any person approached to sign the requisition must, upon demand, be given reasonable access to a copy of the member statement and any company response before signing the requisition.

It would then be difficult, having refused to act on the members proposition for the company to recommend a "For" vote or for any individual director to vote in favour of the resolution. If the member is reasonable and concludes after reading the company statement that the proposition is genuinely flawed then the member may well decide not to proceed with the signature collection process. The member (and each signatory) has a clear awareness that the directors will vote against the proposition at any meeting and will quickly loose peer member support as a company activist unless the proposition has real merit in spite of the company statement.

A requisition with the requisite numbers of signatures should not be a utility used in an ambush on a corporation but the last resort of members when reasonable dialogue with the company is stalemated. Sensibly, the Law should require at least a small amount of dialogue (in my submission a simple exchange of statements) between the member considering the requisition and the company before stakeholder funds are expended calling a meeting of members.

I submit to the Committee (unless there is a change to the Law) it is not unreasonable to conclude that the "nominated notification means" as stipulated in Section 8 of the CLERP 9 Bill will, if used by companies, be the proper "address" to include on a Register of Members created pursuant to Section 169(1) of the Law given that "address" is not a word defined in the Laws Section 9 Dictionary. (Refer Sunrise Auto Ltd v Deputy Commissioner of Taxation (1995) 133 ALR 274. An address could be defined `...as the place at which a person may be reached for the purpose of making formal delivery of a notice [of assessment] ...the place "where a person may be found or communicated with"'.)

The Committee may decide to review the wording of Section 169(1) or insert a definition in Section 9. If not then the inclusion of email addresses on the Register of Members will dramatically increase the opportunity to collect signature for requisitions. This, in my view, may be a good outcome as the threshold can be increased in line with the ease and lower costs of communicating with fellow members. The suggested member and company statements will bring reasonable argument to bear on the topics under discussion prior to the company incurring expense to bring on an EGM when the resolution is doomed by lack of member support beyond a committed few.

In a futuristic world the collection of a lower number of signatures (20-50) would see the company compelled to distribute the member and company statements to those members normally communicated with by use of the "nominated notification means" and a 10-15% threshold applied to the requisition Sections of the Law. While a substantial minority of members remain unable or unwilling to supply a "nominated notification means", this option remains oppressive to such members on participation grounds. I raise the point because the march of technology is so swift that dealing with the anticipated future should be part of the current legislative planning process.

Submission 5 - EPV a competitive marketplace for the services.

The provision of Electronic Proxy Voting systems for listed companies will likely become the sole province of the share registry service providers. Given that ASX Perpetual and Computershare hold the registers of the majority of the listed market, EPV will create a Listed duopoly for the provision of the services.

The fact is that to allow third parties to breach the firewall securing the registry core software systems would be relatively dangerous. Increased competition in the provision of the service would be preferable but the market security risks of hackers and inappropriate use of data access may be too high.

Having said that, I would like to suggest the following:

A mechanism is put in place (possibly by Regulation) so that some uniformity of screen layouts, requirements and jargon is used on EPV screens. That uniformity, as far as possible, should be developed not just for Listed company EPV screens but for Non-Listed company use as well. I suggest that the first screen should solicit an acknowledgement that the person appointing a proxy:

> Has access to the Notice of Meeting, any proxy form completion Instructions issued by the company and the Constitution (and or By-Laws, Articles etc) of the company;
>
> Understands that an EPV vote will revoke any other electronic or paper based proxy previously submitted (unless both are capable of being actioned - see Section 250(A)(7));
>
> Understands that a proxy appointment can be revoked by a further proxy instrument being submitted either electronically or in paper form.
>
> Has access to a Help link on the opening screen that displays a brief overview of Electronic Proxy Voting, a dictionary of terms and other information that would provide information to the user. I personally would prefer that screen to be authored (and possibly hosted) by ASIC after the relevant consultation with EPV providers etc.

The Law should require any company using EPV to ensure that a link exists directly to the web page that commences the collection of EPV data (the opening screen as described above). That screen, and those following, should be free of any marketing or extraneous material and the link address details should be freely available.

In this way institutions such as the Australian Shareholders Association, secure email service providers, activists and other interested parties could,

with certainty, have a facility to offer the EPV screen for a number of companies listed on their website. In this way the site's preamble commentary can be read by the member and the proxy form completed without the reader having to overtly activate a different website.

Additionally, the Law should provide that the opening screen should list other websites that have registered a request for this to be done with the supplier of the EPV collection process (the share registry or individual company or individual company's service provider).

That is, the screen will show other sites carrying an entry point to the same opening screen. This allows members, should they choose, to visit those sites and read whatever commentary and advice such sites may hold so as to make as an informed decision as it possible.

A by-product of this requirement is that fringe agitators unwilling to present a coherent and balanced argument (and therefore unwilling to be listed as a link) will be less likely to be given any credence by the members. Additionally the company can keep itself informed as to the commentary being given to the members and issue statements etc to clarify any misconceptions or offer a counter balancing argument before the member directs a proxy on how to vote at the Meeting.

A less attractive by-product is the likelihood that there will be an increase in interlocutory injunctions seeking to remove material from websites for defamatory or misleading content. When weighed against the opportunity to provide a transparent and democratic information flow to the members I think it is still a valid and worthwhile suggestion.

Submission 6 Other Matters

This submission is a collection of observations where clarity of the Law may assist the orderly conduct of members in processes relating to the governance of companies in which they have a stake holding (either as shareholders or members).

Can a Chairman of a Meeting vote prior to the close of a poll at the meeting?

I will use the recent, and well known case below to comment on the question as best I can.

By my understanding of the ASIC case against Whitlam (Australian Securities and Investments Commission v Whitlam [2002] NSWSC 591), the ASIC contention was that a Chairman could not properly vote after the close of a poll on a resolution.

I would like to add some logistical considerations should the Committee agree that the question still remains unanswered and may require a revision of the Law to provide clarity.

Up until the close of a poll a proxyholder may (in my view must) vote all directed proxies held and may vote one or more undirected proxies held.

To cast those votes the proxyholder must be in attendance at the meeting.

If the proxy is not in attendance then the alternative proxy (usually the Chairman) deals with the proxy votes. Commencement of attendance by the primary proxy can occur at any time up to the close of the poll.

Therefore until the poll is closed the Chairman does not know, nor can possibly know, the number of votes (both directed and undirected) available to the Chair. To be required to vote an unspecified number of votes is difficult to justify. The Chairman may choose to vote undirected votes so as to franchise the underlying members but cast them such that they do not affect the outcome (i.e. vote proportionally with the cause). Alternatively, the Chairman, sensing a close vote may choose to cast the undirected votes so as to give an increased mandate to the inevitable result for stability of corporate direction purposes.

Adjudication Rules - Feel good best practice or a necessary component in the Meeting management regime.

The Chairman of the Meeting is responsible for the validity of each vote cast and for declaring the results of the votes taken at the Meeting. Section 249U and most Constitutions set out a hierarchy of persons eligible to be the Chairman of a Meeting of Members.

The expected Chairman directs the manner in which adjudication will be performed during the proxy processing exercise and satisfies himself or herself that such directions have been properly carried out. However in the case where, for whatever reason, an alternate Chairman is appointed the adjudication directions already applied to the proxy forms need to be reviewed and agreed to by the Chairman before the declaration of the results can sensibly take place. That is the Chairman would require a set of Adjudication Rules to review before declaring the results of the poll.

I also would recommend that a Notice of Meeting must announce who is expected to Chair the meeting and the adjudication rules used at the meeting be available for viewing on demand at the meeting by any person with the authority to attend the meeting. In this way a member can determine if a challenge as anticipated by Section 250G of the Law should be sensibly made to the Chairman.

A useful by-product of such a Section is to ensure that the Chairman does in fact understand what is being adjudicated at the processing centre. Additionally the companies themselves will evolve a standardised set of Adjudication Rules (with minor variations in each to take into account specific requirements in the individual company Constitution). A set of Guidelines has been recently published by the Institute of Chartered Accountants in Australia and the Australian Institute of Company Directors to assist non-listed companies to create such Rules by providing a basic template.

These Rules become a basis for ensuring that the Chairman, the company and members do understand the process properly thus alleviating a lot of misunderstanding and suspicions that can and do at times unfairly create concerns and mistrust in the meeting process. Their publication and consequent access by members will increase democratic transparency.

Third parties cannot collect proxy forms

I note a past judicial decision referring to the inappropriateness of third parties collecting member proxy forms and delivering them to the Company at the convenience of the collector (see Bisan Ltd v Cellante & Ors; Eromanga v Cellante & Ors [2002] VSC 430). Administratively however, such occurrences are at times unavoidable and the failure of members to send their proxy to the correct address (usually by using the incorrect Business Reply Envelope) should not fall within the tactical campaign category admonished by this Supreme Court decision or the Law.

The Committee may consider adding a Note or a new Section that amplifies the Bisan decision and applies a penalty to those persons who deliberately intercept or tout for the redirection of completed proxy forms. Prior to doing that however a decision needs to be made in relation to whether or not it is appropriate for a Director (with fiduciary duties towards the collected forms) to collect proxy forms for ultimate delivery to the company (e.g. Lew and Coles Myer).

I have written a short article on this topic due to be published in the Institute of Chartered Accountants journal in July 2004 and I am happy to make it available to the Committee.

Members and proxies have the right to know why a proxy form has been ruled invalid

I would like to draw to the attention of the Committee the decision in Fast Scout Ltd -v- Berger & Ors [2001] WASC 343 (26 November 2001). At paragraph 77 of the decision "Although the decisions in ***ANZ Nominees Ltd*** and ***Maori Development Corporation Ltd*** were that instruments appointing proxies could not be impeached on grounds not specified at the relevant meeting, the underlying principle is that the failure of the person or persons having authority to raise an irregularity must be taken as a waiver."

If I understand the situation correctly, where a proxy form is ruled invalid, the member and/or proxy is entitled to know the reason for this decision. The requirement to advise a member of an irregularity in the proxy instrument does present some small administrative and mailing costs being incurred during the period leading up to the Meeting as reasonable attempts to allow for a member to redress any shortfall in the proxy form submitted are made.

In this submission I believe that a proxy form failing to meet the criteria of Section 250(A)(1) is not subject to this disclosure requirement (except by choice as a member relations exercise by the company concerned). It is not reasonable for a member to assume that the instrument is valid (i.e. that any irregularity it may contain is waived by the Chair) if it breaches Section 250(A)(1) as the Chairman has no power to do so.

The failure to sign a proxy form by a member is generally the most common reason for a form to be invalidated. While it is unreasonable for these members to assume that the requirement to sign can be granted a waiver by the Chair unless exceptional circumstances prevail, I would suggest that reasonable attempts should be made to give these members the opportunity to sign their form.

Where other irregularities still exist at the registration into the Meeting stage, the member and/or the proxy must have access to the reasons for invalidating a proxy appointment.

The requirement to have available at the meeting sufficient information to inform members and proxies of the particulars of invalid instruments and lists of the persons appointing a particular proxy is purely a reporting function of information already marshalled by the processing system. That is, the information has already been derived for poll and ballot paper preparation purposes. The additional cost of the report generation will be negligible and the demand for the reports will hopefully be extremely small.

In this submission I suggest that the Law be changed so as to allow a Chairman to invalidate a proxy form that does not conform to Section 250(A)(1) without having to raise that specific irregularity publicly at the meeting to which the proxy form relates. I also suggest that the member/ proxy's right to be advised of other proxy forms invalidated for the Meeting itself be included in the Law.

Section 249C or 249CA Directors right to call a meeting of members.

There appears to be an accepted principle that directors cannot dismiss other directors from office. That power is solely with the membership itself and the right to remove or appoint directors can be done at a general meeting of members in spite of any other method set out in the company Constitution.

In appointing a director to office, the membership determines the person as suitable for the position and provides that person with a set tenure in the position.

A director, using Section 249C (or 249CA) to remove another director from office, compulsory demands that the membership review a binding decision already taken by the membership and within their power to review should they choose to do so at a future point of time.

I have no view as to the appropriate stance the Law should take on this use of Section 249C (or 249CA) for this specific purpose but again clarity in the Law would be of assistance given that an argument could be mounted that this use by a director is not for a fit and proper purpose.

Directors resolutions - mass removal, individual appointment

The effect of the current Law (Section 201 E(1)) is that, generally speaking, a director appointed at a general meeting of members must be carried by the passage of a resolution that does not additionally seek to appoint any other director.

The only explanation I have found for this Section is for 'the purpose of saving members the embarrassment of having to elect X whom they may not want when they elect Y whom they do want.' Howard v Mechtler (1999) 30 ACSR 434 at 443.

I, and many others in the community, am at a loss as to why a member would not be equally embarrassed should, so as to remove X, they also have to remove Y (whom they may not want to remove) simply because the two removals are bound into a single resolution.

Voting for Directors at a Meeting of Members

Some companies hold director elections outside of the meeting of members process. This process is costly given that the Annual General Meeting still

has to be held. Generally a Returning Officer is appointed and the process is conducted at arms length from the company as a purely independent exercise. The Returning Officer both sets the rules (within the limits imposed by the Law and the individual company Constitution) and performs such adjudication functions as are required.

The exercise is expensive and redundant provided always that the same function, with the appropriate safeguards, could be performed at the Annual General Meeting. It is worth noting that, in any event, members have common law right to appoint directors at any meeting of members. See for example Fiore and Hunter v Carlton Football Club Ltd and Anor [2002] VSC 455 at para 22: "Whilst dealing with a different set of circumstances, the Court of Appeal in Link Agricultural Pty Ltd v Shanahan and Ors restated the position at common law that the company constituted by the members in General Meeting retains an inherent power to appoint a director by ordinary resolution (see p.485)".

At a general meeting of members the Chairman has the sole responsibility to set the rules of the meeting and perform all the adjudication functions required. While others may describe themselves as Returning Officers (and I see no harm in that) they can be no more that advisors and administrative assistants supporting the Chairman in exercising his duties.

I note that Mr Steven Mayne mentioned to the Committee his concerns about the Chairman of the Meeting voting undirected proxies against resolutions where the person concerned was thought less suitable for the position of director that others. The Chairman, voting undirected votes in favour of other preferred candidates, amplified Mr Mayne's concerns.

This opportunity arises when a member neither votes for or against each resolution seeking to appoint each and every person concerned. I note that it is open to the members to vote in respect of every resolution so as to not allow the creation of undirected votes ("You may vote 'for' up to x number of resolutions and may vote 'against' as many resolution as you wish" is the effect of most wording on the proxy forms that I have seen).

Having said that I would find it incredible that the majority of members do not assume that they can only vote for X number of candidates and should only vote against a resolution in the event that, to their sure knowledge, the person is unsuitable for the position. Most reasonable members would have some concerns about voting against a person when they have no logical or factual reason to do so. A system that requires such action on the part of the member so as to not enliven an undirected vote is, in my view, oppressive.

We should not loose sight of the fact that some members are aware of the ramification of not voting and do so to empower their proxyholder to use those votes as the proxyholder sees fit. I for one would incorporate into my decision-making process the likelihood or otherwise of creating a

factionalised and otherwise dysfunctional Board by electing persons unlikely to be able to work cohesively together.

Without a great deal of member education even a compulsory Abstain option would only be of limited help to ensure that the proxyholders actions are in line with the members expectations when completing the proxy form. The introduction of a specific "undirected" option to sit beside the "for" and "against" options (thereby making all other votes by default an "abstain") is also problematical without widespread voter understanding of the implications.

In my view, the lesser evil is to change the Law so as to disallow any proxyholder, including the Chairman, to use an undirected vote in relation to resolutions that seek to either appoint a person as director or remove a director from office. If a member chooses to vote in the manner preferred by the Chairman, a specific director or some other interested party then the member can still accept advice prior to submitting the proxy instrument on the manner in which they should direct their vote. To assist in making that possible each candidate and each existing director should have the opportunity to provide a statement to members in the Notice of Meeting.

On any view of democracy the practice of sequencing the resolutions on the proxy form and meeting agenda then, when sufficient candidates have received more that 50% of the votes, declare the remaining candidate resolutions void (as no more positions are available to be filled) should be banned. Additionally where a Constitution sets the number of Board members (with quorum and short term vacancy safeguards) it is difficult to condone the practice of short filling the member preferred number of positions when the opportunity arises for tactical reasons by existing Board members (Mr Steven Mayne's submission dealt with this point more fully).

Considerations for Non Listed Companies

The current Corporations Law does not mandate that a proxy form need list each resolution identified within the Notice of Meeting (being the business before the Meeting). This requirement for Listed companies to allow for a member to vote "For" or "Against" a resolution on the proxy form is found in the ASX Listing Rule 14.2.1. This Rule, expanded so as to include an "Abstain" vote, should be incorporated in Section 250 (A) (1) of the Corporations Law and apply to all public Companies.

Non-Listed public companies are not compelled to allow for the member to vote on each resolution in any uniform manner. The resolutions need not be listed on the proxy form and the member, by way of freehand text, can describe any instructions he or she may choose to make in relation to the proxy holding. Obviously, with the growth in retail shareholding comes a greater need for uniformity in process for members dealing with their interests in an ever widening personally held mix of Listed and Non-Listed companies. Secondly, the clarity and transparency of process expectations

of members of Non-Listed companies increases with the exposure such members have with the Listed company regime.

As a general point (and I use Mr Easterbook's address as an example rather than a criticism of his submission generally), the Committee has heard such comments as:

"More than half the Australian market is in the hands of sophisticated institutions, yet our Corporations Law seems to still be thinking that the whole market is owned by mums and dads who do not know a thing".

Additionally, I note that Schedule 8 of the Bill refers to Shareholder Participation and Information. I dislike the term in that, by my reading, it is misleading. Non-Listed companies are also subject to these amendments and are allowed to benefit from the freedoms to communicate with their memberships via electronic means. Non-Listed companies are not in the hands of "sophisticated institutions"; they are in the hands of ordinary people. By my understanding, there is not a large difference between the number of shareholding and memberships in Australia (both between 20-25 million).

Many Non Listed companies have a use for electronic authentication of a members' identity for purposes that would otherwise preferably require a hand written signature. A majority of Associations and other institutions require (quite correctly in my view) a member, amongst other things, to agree to abide by the Constitution (or Articles, By-Laws etc) when renewing their membership. The use of electronic authentication in the exact same manner as for Electronic Proxy Voting would help a very large number of companies conduct their membership affairs both diligently and cost effectively.

An example of a written signature requirement in relation to a member agreeing to be bound to a Constitution can be found in Section 140(2)(b) of the Law.

It would be absurd to suggest that an electronic identification mechanism is sufficient identification for a person to cast a valid vote to change a Constitution but insufficient to identify a person agreeing to be bound by the Rules contained in the very same document.

While it may not be strictly within the boundaries of the Committee's frame of reference, I none the less take this opportunity to plead that the State and Federal Governments make efforts to bring the various State Association Acts and the Corporations Law into one uniform body of Law so that all members, boards and administrators of corporations can have a single, well known set of Rules to rely upon when dealing with the interests all Australians have in these companies and institutions.