

**PARLIAMENTARY JOINT COMMITTEE ON CORPORATIONS AND  
FINANCIAL SERVICES**

**INQUIRY INTO SHAREHOLDER ENGAGEMENT AND PARTICIPATION**

**ACTU SUBMISSION**

November 2007

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## INTRODUCTION

1. Working Australians, through their superannuation funds, are the beneficial owners of a sizeable proportion of Australian listed shares.
2. In general, discussion of shareholder rights is confined to the rights of the legal holders of those shares – fund managers and superannuation funds – rather than those who depend on the underlying companies for their retirement incomes.
3. Public company shares are held more widely in the community than ever before. It is no exaggeration to say that shareholder concerns are those of the community as a whole, yet this is not necessarily reflected in the attitudes and actions of company directors and senior executives.
4. The ACTU believes that companies have an obligation to take into account the interests and views of their shareholders in addition to complying with all legal requirements in relation to disclosure and governance.
5. Companies should also understand that shareholders may also have other relevant relationships with the company – as employees, customers, suppliers or neighbours – and that duties are owed to these stakeholders in that other capacity.
6. It should be no surprise when employees, for example, raise concerns about a company's adherence to fair employment practices and compliance with international labour standards as shareholders, as well as through traditional employment channels.
7. In some cases, these concerns will be shared by investors who recognise that good employment practices reflect a well-run company.

8. However, although the ACTU supports union members campaigning through company AGMs, for instance, to bring concerns to the attention of other shareholders, the ACTU is very clear about the distinction between the role of employee representatives on trustee boards of superannuation funds and the role of union representatives.
9. The ACTU and its affiliated unions have never attempted to use our trustee role to pursue an industrial agenda and will not do so in the future.
10. The ACTU supports superannuation funds in exercising their influence over companies and in voting their proxies in accordance with their fiduciary duty to fund members and in no other way.

#### **BARRIERS TO EFFECTIVE SHAREHOLDER ENGAGEMENT**

11. Shareholder engagement is an important means of ensuring that companies are run honestly and competently. A key issue is that directors and senior executives act only in the interests of the company as a whole, and not in their own interests or those of some shareholders.
12. Directors' duty to the company as a whole means that they must appropriately balance short-term and long-term issues, including share price.
13. Excessive focus on short-term share price can run counter to the long term interests of the company. Price surges prior to a takeover, for example, have frequently been a prelude to frenzied asset stripping, disproportionate gearing and/or reckless expansion followed by destruction of company value and consequent damage to shareholders.

14. The weight of superannuation money means that investors are virtually forced to remain invested in the top 50 or 100 Australian companies, with the result that they benefit little from short-term volatility but lose out in the long-term.

### **Role of boards**

15. Corporations law gives enormous power to company boards. Their role is to manage companies, with only a very restricted role for shareholders, other than the ability to remove and replace directors.

16. In theory, the power to appoint and remove directors is very strong. Sadly, the practice is otherwise. The truth is that public company boards are largely self-perpetuating.

17. While the desirability of including a significant number, if not a majority, of independent directors on a board has received prominence and acceptance, the fact is that most “independent” directors are selected by the board they are joining.

18. The furore around the Government’s appointment, last year, of a director to the Telstra board against the wishes of other directors, illustrates the jealous hold many boards keep on their ability to nominate directors for *pro forma* election by shareholders.

19. If board membership is to be, in practice, by invitation, it is hardly surprising that there are concerns about the independence of directors who are dependent on their fellow board members for the remuneration and prestige which comes with the appointment.

20. A precondition to effective shareholder engagement is a board comprising directors who are not distracted by their own interests in relation to the company. Alinta and Qantas are examples where it would appear that directors and senior executives were highly involved in and promoting proposed buy-outs which would have significantly benefited them personally. This conduct caused a real basis for apprehension that they would not be able to carry out their duty to the company with the required disinterest.
21. There has been an ongoing debate in Australia about the appropriate processes for Government appointment to public boards, with some support for the establishment of an independent body to nominate candidates based on their merit and suitability for the position.
22. In light of this the ACTU submits that consideration should be given to the establishment of an independent body to appoint non-executive directors to public company boards.

**Recommendation 1: Consideration should be given to the establishment of an independent body to nominate non-executive directors to the boards of public companies following appropriate inquiries and consultation.**

**The information gap**

23. Effective shareholder engagement with a company requires information.
24. While legislation requires extensive financial information to be made available to shareholders this is not the case with other areas of operation relevant to company performance and risk.

25. It is now widely accepted that environmental, social and governance (ESG) issues are central to companies' risk management. Given the impact that failure in these areas can have on shareholder value, together with the growing importance of risk management, the ACTU believes that company reports should, to the extent compatible with commercial confidentiality concerns, report to members on the extent of these risks and the manner in which they are being addressed within the company.

26. The ACTU submits that public companies should be required to report on potential risk issues in their financial, environmental, social and governance operations.

**Recommendation 2: Public companies should be required to report to members on significant risk issues in their financial, environmental, social and governance operations.**

### **Resolutions at general meetings**

27. The ACTU accepts that management of companies is the role of boards and executives but submits that the ability of shareholders to move resolutions at company meetings should be extended beyond amendments to the company constitution and some other relatively small matters.

28. The introduction of a requirement at an AGM for a non-binding resolution on a company's remuneration report together with the detailed information required to be included in that report have indisputably had a positive effect on shareholder engagement and on remuneration practices. In particular, the mandatory inclusion of explanations of performance-linked remuneration arrangements and of share-linked remuneration have allowed these issues to be debated in the context of shareholder value.

29. In light of the success of the remuneration provisions, the ACTU submits that provision should be made for non-binding resolutions on significant issues of company policy including financial, environmental, social and governance issues.

**Recommendation 3: Provision should be made for non-binding shareholder resolutions at public company AGMs on high level financial, environmental, social and governance issues.**

**The thresholds for proposing resolutions and calling meetings**

30. The ACTU reiterates the submission made to the inquiry into the Exposure Draft of the Corporations Amendment Bill (No 2) 2005 in relation to thresholds for proposing resolutions and calling meetings.

31. The ACTU supports a reduction from 100 to 20 in the minimum number of members required to put forward a resolution to a company's annual general meeting as proposed in the Exposure Draft, with the same reduction in the minimum number required for the distribution of member statements.

32. The ACTU said in its submission:

*“These provisions will enhance the capacity of minority shareholders to submit resolutions to the ordinary meetings of the company, while providing companies with a means to reduce costs through the electronic distribution of material.”*

33. The ACTU did, however, oppose the proposal to increase the threshold for the calling of special meetings, arguing that the requirement for 100 members to requisition such a meeting was a sufficient barrier to the calling of meetings on a vexatious basis.

**Recommendation 4: The ACTU recommends that the threshold for the proposing of resolutions at a company AGM be reduced to 20 and that the current 100 minimum for calling of special meetings be retained.**

## **ENGAGEMENT OF INSTITUTIONAL SHAREHOLDERS**

34. Institutional shareholders, including superannuation funds, hold the shares of most Australians. Although the earlier section of this submission addressed means by which individual, as well as institutional shareholders could be assisted in engaging with investee companies, the reality is that most engagement is through institutional shareholders.
35. Although the legal ownership is with the institution, it needs to be remembered that the beneficial owners are the individual fund members or unit holders.
36. Recommendations 1-3 are not intended to be prescriptive; rather, they are designed to strengthen the framework for engagement which is largely voluntary, private and informal, although underpinned by the possibility of a public process.
37. The ACTU acknowledges that there has been a positive response from many companies to engagement approaches from institutional shareholders, whether individually or, as is more common, through collective organisations established for the purpose such as ACSI and CGI.

### **Proxy voting**

38. One measure of increasing levels of institutional shareholder engagement is through proxy voting, which has increased over recent years.
39. Exercising the voting rights attached to shares to contribute to an investee company's overall performance is part of an institutional shareholder's fiduciary duty to the ultimate owners of these shares.



40. As voting takes on increasing importance, and as voting contrary to director recommendations increase in some cases, it is important that attention is paid to the voting method.
41. The ACTU believes that the current voting method for directors, which allows a ‘for’ an “against” vote for each candidate is not the optimal method, reminiscent as it is of the questions typically put to voters in systems based on one party dictatorships.
42. The ACTU would like to see the development of a voting system for company directors which allowed for more plurality of background and views while avoiding institutionalisation of factionalism.

**Recommendation 5: Consideration should be given to a voting system for public company directors which incorporates elements of preference and proportionality.**

43. Equally concerning is the issue of “lost” votes, highlighted earlier this year by AMP Capital:

*“After identifying many instances where the ‘Results of Meeting’ reported by companies contained less ‘against’ or ‘abstention’ votes than AMP Capital alone lodged, we conducted a full audit of such votes and were able to determine that votes have gone missing in two main ways; either as a result of data entry and human errors, or as a result of late trading causing reconciliation difficulties and share registries disregarding voting intentions on an entire shareholding.”<sup>1</sup>*

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<sup>1</sup> AMP Capital Corporate Governance Report” January 2007 p10 [www.ampcapital.com.au](http://www.ampcapital.com.au)

44. Linked to this issue is the ability of proxy holders to fail to lodge or exercise them. In calling for shareholders to have the right to vote directly, rather than through proxies, Chartered Secretaries Australia referred cases including:

*“..... Nick Whitlam’s failure to sign poll papers that that constituted the votes of almost 4,000 NRMA members, and Solomon Lew leaving the Coles Myer AGM with a pocketful of proxies he had forgotten about.”<sup>2</sup>*

**Recommendation 6: Public companies should be required to provide for a secure and independently-controlled direct voting system for shareholders to exercise their voting rights other than through attendance at a meeting.**

## CONCLUSION

45. The ACTU recognises that significant progress has been made in encouraging genuine shareholder engagement with the major public companies whose shares are owned by many millions of Australian working people and whose retirement benefits are dependent on their performance.

46. The ACTU’s proposals for regulatory change are designed to facilitate engagement around key issues contributing to shareholder value while avoiding unreasonably restricting the ability of boards to manage their companies.

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<sup>2</sup> Chartered Secretaries Australia “Clean up proxies with direct voting alternative” Media Release 9 March 2006 [www.csaust.com](http://www.csaust.com)