COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES

Reference: Exposure draft of the Corporations Bill (No 2) 2005

THURSDAY, 28 APRIL 2005

CANBERRA

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JOINT STATUTORY COMMITTEE ON

CORPORATIONS AND FINANCIAL SERVICES

Thursday, 28 April 2005

Members: Senator Chapman *(Chair)*, Senators Brandis, Lundy, Murray and Wong and Mr Bartlett, Mr Bowen, Ms Burke, Miss Jackie Kelly and Mr McArthur

Members in attendance: Senators Chapman and Wong

Terms of reference for the inquiry:

To inquire into and report on:

the Exposure Draft of the Corporations Amendment Bill (No.2) 2005, considering:

a) the need for the proposed amendments;

b) the impact of the proposed amendments on corporate governance;

c) the impact on shareholder participation of the Bill, including proposed amendments to the '100-member' rule;

d) the impact of the proposed amendments to rules for proxy voting;

e) possible alternative approaches; and

f) any related matter.

WITNESSES

Subcommittee met at 8.57 a.m.

CHAIRMAN—I call the committee to order. Today the committee will hear evidence regarding its inquiry into the exposure draft of the Corporations Bill (No. 2) 2005 and relevant and related matters. The committee expresses its gratitude to the contributors to this inquiry, including those who will be appearing before us as witnesses today.

Before we start taking evidence, I reinforce for the record that all witnesses appearing before the committee are protected by parliamentary privilege with respect to the evidence provided. Parliamentary privilege refers to special rights and immunities attached to the parliament, or its members and others, necessary for the discharge of parliamentary functions without obstruction and fear of prosecution. Any act by any person that operates to the disadvantage of a witness on account of evidence given by him or her before the parliament or any of its committees is treated as a breach of privilege.

I also wish to state that unless the committee should decide otherwise, this is a public hearing and, as such, all members of the public are welcome to attend. However, if at any time witnesses wish to give evidence in camera, they may request that of the committee and we will consider such a request. Today's hearing is the only hearing the committee will be conducting on this reference.

[8.58 a.m.]

MUNCHENBERG, Mr Steven, General Manager, Government and Regulatory Affairs, Business Council of Australia

O'REILLY, Mr David John, Senior Policy Manager, Investment and Financial Services Association Ltd

SHEEHY, Mr Timothy Brian, Chief Executive, Chartered Secretaries Australia

TATE, Ms Diane Elizabeth, Senior Manager, Policy and Government Relations, Securities Institute of Australia

CHAIRMAN—I welcome our first witness group, the representatives of various business groups and councils. I now invite you to each make an opening statement and, at the conclusion of that presentation, I am sure we will have some questions.

Mr Sheehy—I thank you on behalf of my colleagues for the opportunity to speak before the committee today. I have been nominated to make the first opening statement. All of the groups represented here today, including the Australian Institute of Company Directors, which was unable to attend, are organisations which are deeply involved in the promotion of good corporate governance and have a substantial track record in that regard over a number of years. Also, we are all deeply interested in promoting shareholder participation by various methods, and equally have an extensive track record in that regard.

On the major issues under discussion today, all five groups—the four here today and the Institute of Company Directors—are generally of the same opinion, and we have made that known through a letter that was put before this committee some time ago. However, while we do accept being put together in a panel today, we do represent different constituencies and there may be some matters on which we have some difference of opinion. We would welcome the opportunity to speak individually following this collective opening.

Senator WONG—I am sure we can manage that, Mr Sheehy. We will be very interested in the differences of opinion.

Mr Sheehy—It is not so much differences of opinion but some technical matters that we have different perspectives on. Most importantly, we are in agreement particularly with regard to the removal of the 100-member rule and for the maintenance of the five per cent of voters test, which is in section 249D. This matter has been around a long time and the removal of the 100-member rule brings us into international agreement. We are in very strong agreement on maintaining the current requirement for 100 members or five per cent of voters to place a resolution on the agenda of a scheduled meeting, most particularly the annual general meeting. We are in agreement on adopting the recommended provisions that prohibit cherry picking and we are in agreement on repealing the requirement for the chair to inform the meeting of proxy votes received.

I will speak briefly on the 100-member rule and the reduction to 20 to put a resolution on an agenda of a meeting. We strongly support removal of the 100 members. There are very large companies in this country in which 100 members places an inordinate requirement on them to schedule meetings at excessive expense. Submissions that we have made and my colleagues have made over the years clearly outline the reasons that the 100-member rule should be deleted. However, most importantly, we are opposed to reducing to 20 the number of people required to put a resolution on the agenda of a scheduled meeting. I would mostly like to speak to that.

We are of the view that reducing it to 20 will actually go against the interests of shareholders, and this proposed bill's main objective is to improve shareholder participation and communication. We are of the view that, if the threshold is reduced to 20, the agenda will be unnecessarily clogged, genuine matters that are of interest to shareholders will not get an adequate hearing, a meeting can be unnecessarily prolonged and issues which are really issues for special interest groups or very small minorities will clog the agenda. It must be remembered that shareholders always have an opportunity to ask questions at a meeting and, if there are special interests, this avenue is always open to them. In addition, we do not think there needs to be a trade-off between removal of the 100-member rule for the calling of a special meeting and some sort of quid pro quo that you have to then reduce the 100 to 20 for putting a resolution on a scheduled meeting.

I would like to point out that Australian companies continue to evaluate and introduce methods to improve communication and engage shareholders. A number of options have already been floated through the discussion paper 'Company + shareholder dialogue' that was driven by the Business Council of Australia and co-authored by us and the Institute of Company Directors. We look at shareholder participation on a company-by-company basis. Companies are different; their circumstances differ. We do not believe legislation to enforce one or another is appropriate. That concludes my opening comments. I know some of my colleagues would like to make some additional points.

Mr O'Reilly—IFSA represents fund managers in their capacity as responsible entities of managed investment schemes, trustees of public offer super funds and investment managers which service both superannuation and managed investments. It was surprising to us that the proposals in the bill were directed only at companies and not at managed investment schemes, since the provisions relating to meetings and to resolutions in each are the same.

Our members' interests are primarily as representatives of their members—that is, investors—and they have as shareholders in public companies a vested interest in the measures and in ensuring that member value and member worth are preserved and not wasted. Generally, we support the proposals in relation to the removal of the 100-member rule. Leaving simply the five per cent requirement is certainly sufficient on its own and the five per cent requirement acts in effect as a sliding scale. As Tim was saying, in terms of putting resolutions on the agenda of meetings, we have an issue with reducing the number to 20 for the same reasons outlined.

Mr Munchenberg—The Business Council does not have any particular additional issues to raise. We support most of the provisions of the bill, with the exception of the proposal to reduce the 100 threshold down to 20. I am sure we will discuss that at length, so I will not go any further.

Ms Tate—The Securities Institute obviously recognises the attempts to have this bill as a balance between participation for shareholders and efficient operations for companies. As with my colleagues, we support the changes to section 249D in terms of the five per cent rule. We have concerns around the 20-member rule proposal, if I can call it that.

Some other areas where we think some further consideration should be given is in terms of the distribution of member statements. We have some concerns around the side effect of the reduction of that to 20 members and also the electronic distribution issue. In principle obviously we support electronic distribution as it allows greater participation, more active shareholding and timely and comprehensive information to be circulated. I think we need to be careful about the consequences of frivolous, vexatious and even defamatory statements being circulated.

One of the other proposals that we have some concerns with is the removal of section 323DA in terms of disclosure of information filed overseas. We believe the proposal is a good proposal; however, it needs to be coupled with a listing rule amendment to ensure that there is not a disclosure gap. We are happy to talk about these in more detail as we go through.

CHAIRMAN—Thank you for your opening statements. This bill initially arose from recommendations made by this committee, I think some 5½ years ago, that the 100-member rule be replaced by a five per cent rule. I think that at that stage the opposition and the minor parties would not accept the proposals. So the legislation has now been reintroduced. I am waiting to get a copy of my report back from then, but my recollection is that the committee did not recommend the reduction to 20 members for the listing of items on the agenda of a general meeting or an annual general meeting. Have you had any discussions with the government or Treasury on this issue? If so, do you have any insight on their thinking in putting forward the 20-member rule?

Mr Munchenberg—When it was first proposed I discussed it with the government to express our concerns about the practical implications of reducing it to 20. The impression I gained was that the government was looking to strike a balance between, on one hand, removing the 100-shareholder rule in regard to extraordinary general meetings and, on the other hand, giving enhanced rights to shareholders in relation to resolutions and the distribution of members' statements. Our primary concern is that in practical terms we do not believe that is what it actually does. We believe that reducing the threshold down to 20 shareholders is contrary to the interests of the majority of retail shareholders who attend annual general meetings and will be used—some might say abused—by groups with special interests to pursue, where they are effectively using shareholders rights to pursue broader campaigns, whether it be industrial relations campaigns or environmental campaigns.

CHAIRMAN—Mr O'Reilly, I think you said the legislation does not change the existing 100-member rule for managed investments.

Mr O'Reilly—That is right. The draft legislation does not touch at all the provisions in relation to managed investment schemes, either for calling a meeting or putting resolutions on the agenda of a meeting. The proposals are limited to companies alone. As you would be aware, the company provisions are in effect reflected, and repeated, in equivalent managed investments scheme provisions.

CHAIRMAN—When you talk about managed investments, you are talking about property trusts, equity trusts. Are there any other entities, as such?

Mr O'Reilly—It is anything which is a managed investment scheme as defined under the act—a registered managed investments scheme. There is a whole range of circumstances in which meetings can be called in a managed investment scheme context. It can be for the retirement of the manager or the removal of the manager. It can be for a change to the scheme constitution which was possibly adverse. In those circumstances, meetings can be called.

CHAIRMAN—Do you have any insight into why managed investments have been ignored in the proposed changes?

Mr O'Reilly—When I raised the matter with Treasury officials, when I initially read the bill, I simply assumed that the provisions would extend across both companies and managed investments. It was only when I looked at the details of the bill that I realised they did not. When I raised it with Treasury they indicated to me that most of the focus in the past years, in terms of problems with these provisions, had come from companies, hence their focus on companies.

Mr Munchenberg—But we do not want to see inconsistencies of that sort creeping into the law, if we can avoid it.

CHAIRMAN—The discussion paper 'Company + shareholder dialogue: fresh approaches to communication between companies and their shareholders' of 2004 suggested, among other things:

- asking shareholders in advance to identify those issues that they wish to see discussed at the annual general meeting;
- placing issues identified by shareholders formally on the agenda of the annual general meeting;
- holding regular 'shareholder meetings' to supplement annual general meetings;

… … …

- having the heads of Board committees available to answer shareholder questions ...
- establishing and implementing 'Shareholder Communications Policies'

I know that some major listed companies have placed prenominated discussion items on agendas for AGMs and also have developed shareholder communication policies. I am wondering what your view is of those proposals. Can you tell me to what extent these proposals are being implemented into regular company procedures?

Mr Munchenberg—I should caveat it by saying that the paper itself only came out I think in September of last year, which was really too late to influence last year's AGM season. By September the majority of companies will have already been in the process of having organised their AGM. So we would not expect to see the ideas in the paper picked up until this year's AGM season, the majority of which will be held in October or November this year. What I can say, as indicated in our submission, is that when we put that paper together, I think we included two or three companies that, for example, were going out to their shareholders with the notice of meeting, asking shareholders to nominate issues that they wanted discussed at the AGM. A number of additional companies introduced that last year. We have included in our submission a list of some of those companies. So to the extent that two data points can give you a trend, we are seeing that as a trend, a more frequent occurrence. I am not aware that any company has yet

taken the next step that we suggested, which was to formally put those items on the AGM agenda. As I said at the start, we would not have expected that to have occurred until this year anyway.

Ms Tate—In terms of the Securities Institute's position on this, we note the alternative approaches that are outlined in the discussion paper. One of the aims that we would like to see is that AGMs remain a useful communication and participation mechanism, which is why we have concerns around the 20-member rule proposal actually working against that. We think some of the proposals, such as having an AGM split into the formal business section plus a special section for those interests of shareholders, provides a good balance for that participation without opening up the AGM to misuse.

Mr Munchenberg—I should add that one of the things we tried to achieve with the paper was to communicate the fact that different companies really have different needs with AGMs, for example, in terms of their retail shareholder base. Companies like Telstra or IAG or Qantas have very large retail shareholder bases, in which case certain proposals or certain actions will be more appropriate for them. For example, Qantas and Telstra will have booths outside the AGM where people can raise concerns as consumers of the services of those companies, rather than strictly shareholder issues. That is not going to be appropriate to companies that have fewer retail shareholders. We very much put this paper out to get companies thinking about how best to engage with their shareholders. But it does underline the fact that it is horses for courses. So a standard legislative response to these things is not going to be appropriate across all companies.

Mr Reilly—I need to also say that managed investment schemes, of course, do not have AGMs, which may in part explain why the focus of the legislation was on companies.

CHAIRMAN—With a managed investment the only way a meeting can occur is if—

Mr Reilly—If it is called by members or called by the responsible entity itself. Of course, part of the reason for that is that, in a managed investment context, responsible entities have got both statutory and other fiduciary obligations specifically to members to prefer the interests of the members to their own interests. In terms of licensing for responsible entities, they are required to have both internal and external dispute resolution arrangements so there is ample opportunity for dissatisfied members to actually bring matters to a head in the normal course of business.

CHAIRMAN—If the 100-member rule is repealed, are you confident that the quality of the relationship between shareholders and companies is adequate to ensure that any serious matters that arise can be adequately dealt with in the 11 months between AGMs?

Mr Sheehy—Yes. The provision we want to stay is the 100 members to put an item on the agenda of a regularly scheduled meeting.

Senator WONG—Can I clarify that, Mr Sheehy. You are not suggesting any additional requirement associated with that?

Mr Sheehy—Correct. Our view, and the view of the people who signed the letter, is to maintain the status quo.

Senator WONG—I am sorry. I thought the BCA was flagging an economic interest.

Mr Munchenberg—We have suggested that there should be an economic interest attached.

Senator WONG—So they want to tighten that up as well. What is the CSA's position?

Mr Sheehy—The CSA's position is to leave it as is and have no change in that regard. In fact in all the submissions that I have seen of our organisation, going back to 1999, we have always said to leave it alone.

Senator WONG—You have maintained consistency.

Mr Sheehy—Back to Senator Chapman's question on whether matters would be adequately aired and so forth by the repeal of that 100-member rule, we think so, and partly we do not think that the five per cent test is too onerous. So it does not mean that matters cannot get up between AGMs; it just means that you need to get what we think is a critical mass of shareholders to support it to avoid special interest issues clogging an organisation's time. In addition to that, at the regularly scheduled AGM you still need only 100 people. So we think that the five per cent, which is what we are advocating, takes care of things that are so critical that you would easily get five per cent of the votes to support it. If it is not that critical, it can wait the 11 months and you need only 100 members.

Mr Munchenberg—It is a fairly urgent and serious matter to call an extraordinary general meeting. Our view would be that, if the company were facing such problems or issues that an EGM were appropriate, you would not have trouble getting the five per cent of shareholders. You will get institutional investors who want to have this issue debated with the company through an EGM.

CHAIRMAN—Generally how much time is allocated at company AGMs for shareholders to ask questions? Is there an average time, or does it vary significantly?

Mr Sheehy—I am not aware of a prescribed time, but it is significant.

Mr Munchenberg—No. The legislative requirement is that shareholders have 'realistic opportunities to ask questions'. The practice tends to be that, with the majority of particularly high-profile, publicly listed companies—which are the ones that attract the most interest and retail shareholders—the chairman will allow the discussion to go on for quite some time. Some of these meetings run for three, four, five, six, seven and longer hours. The times when a chairman might pull up a questioner is when, as you do get at some AGMs, there is serial questioning on the same issue from a particular interest group where the same question is asked repeatedly, or when you get a long and discursive commentary from a questioner from the floor and, in the interests of moving the meeting on, the chairman curtails it. But chairmen are very reluctant to do that.

CHAIRMAN—Generally speaking, would you say that meetings run out of questions before the time that the chairman is willing to allow for questions, or do they run out of time and people still have questions to ask?

Mr Munchenberg—I think the major concern is that you see, particularly with AGMs that are dragging on, a lot of retail shareholders leave before the meeting is concluded, and they may well leave before certain matters of business have been brought on to the agenda. This is of further concern. The more resolutions you add to an AGM, the longer that meeting is going to go on. To be quite frank, the majority of retail shareholders are not going to want to sit around for seven hours in the hope that they will be able to ask a question. They will leave, and they do in droves.

CHAIRMAN—Again, I suppose it is hard to get an average but how many questions would shareholders ask at an AGM?

Mr Munchenberg—In my experience it is from zero through to dozens and dozens. It really does depend on the company and the circumstances of the company. Obviously, a company that is underperforming or performing below shareholder expectations for whatever reason is liable to attract a lot of questions. If an AGM is being used by, for example, an environmental group or a union to raise their issues, they will ask 10, 20 or sometimes 30 questions at a go. It varies enormously but the opportunity is consistent, if you like.

Mr Sheehy—We also have to remember that it is a very, very small proportion of companies which have these large AGMs and a potential even for a large number of shareholders to want to engage. There are a great many listed companies in which the meetings are rather businesslike, go for a very short time and everybody goes home.

CHAIRMAN—Apart from institutional investors, how many shareholders—if you like, the smaller shareholders—would contact companies with queries on issues between AGMs?

Mr Sheehy—Usually it ends up being the company secretary who gets the letter. It is continual but it is hard to put a number on it. I think it would come back to the circumstances the company is in at the time. There would have been members of ours who, say, were working for a company which was in the news quite a bit over the time. For them it is constant. Then there will be long periods of time for organisations where there will be no contact whatsoever. It is a main part of the role of the company secretary to receive that and deal with it—and it is dealt with.

CHAIRMAN—The Investor Relations Association has expressed concern that there exists a lack of control over 'the appropriateness and relevance to the company of resolutions or statements distributed for consideration by shareholders'. The IRA also notes that decisions of the courts can rule a matter out of order in advance if it is outside the constitutional authority of the company's AGM. However, it also notes that it is difficult to draw the line and it is 'quite likely to provoke disorderly conduct on the part of an aggressive small group'. What is the panel's response to that comment from the Investor Relations Association?

Mr Sheehy—I do not wish to comment on it.

Mr Munchenberg—The point I would pick up on is that there is a real issue with the information that is being provided. One of our concerns—and it is often not recognised—is that when a group gets a resolution up on an agenda they also get the right to distribute a member's statement. They can get that right separately as well, but certainly if you put a resolution up you have a right to a distribution of the statement. There are very few statutory controls on the

content of that statement. I think there is a protection in the Corporations Act against having to distribute defamatory material. But apart from that fairly narrow protection there is nothing that allows a company to not issue a document which the company considers to be factually incorrect or malicious or even to some extent irrelevant, although there needs to be some attempt to tie it back to the company. Usually what is done there is that the more sophisticated groups will tie it to a constitutional change. They will put up their resolution saying that the constitution of the company should be changed according to the resolution and then the constitutional change becomes the link that makes the content of the resolution and the member's statement relevant to the company and so not able to be excluded under the Corporations Act.

Senator WONG—You just raised the issue about a company having to distribute something it may not agree with. There is an issue of free speech there, isn't there? The companies may be advocates, in the sense of advocating against a particular proposition, as is their right, but they also have a formal convenor role where the dissemination of information is something required of them.

Mr Munchenberg—We do not dispute that. We accept the obligation of companies to distribute members' statements. What we are concerned about is that, by lowering the threshold, you have got potentially a very small—

Senator WONG—I understand that proposition, Mr Munchenberg. I was just a little bit alarmed, I suppose, at the proposition that: 'We don't like this because sometimes we have to put things out that we don't agree with.' My view about that, frankly, is: that's life.

Mr Munchenberg—We accept that. That is an existing provision and we are not suggesting that that be removed. Our concern is how open to use—or, indeed, abuse—that particular provision is. At the moment you need to get 99 other shareholders to be able to put your statement out. To reduce that to just 19 we feel opens that up to use by a much wider range of groups. As we have indicated in our submission, if I were in a campaign based group and could access one million Australians by just pulling together 20 people for a free mail-out of my material, it would be a great opportunity. Why would you not do it?

Senator WONG—When I get to the point where I get the call more formally, I really would like some examples of what you are talking about—how often it has occurred.

Ms Tate—Certainly the Securities Institute shares the concerns of the BCA in this respect. We acknowledge that electronic distribution of members' statements will assist shareholders to better understand business activities and so forth. However, we are concerned that the increased material may lead to inaccuracies, lack of quality and statements that may be defamatory. We have had conversations with the ASX. They are concerned about the electronic distribution of members' statements where they become the publisher and therefore are liable for statements such as defamatory issues. In terms of the proposal to section 249P for the distribution of members' statements, we need to think about the consequences of how lowering the threshold to 20 may impact on the efficiency of the operation of the company and the interests of the majority of shareholders as well as of those who are involved in the distribution of that material.

Senator WONG—I suppose the underlying assumption that you are proceeding with is that the reduction to 20 necessarily increases the chance of vexations and defamatory material.

Mr Munchenberg—Yes. It is the way in which it is going to be used rather than the underlying principle that we are concerned with.

CHAIRMAN—In relation to the reduction from 100 to 20 members, as you say it is probably only a few companies where significant numbers of people attend AGMs and they would generally be larger companies—the Telstras and the like. Given the fairly large shareholder base of those companies, is the reduction from 100 to 20 really of any significance? One hundred members is a relatively small proportion of the membership. Is reduction to 20 to any significant degree smaller than that again? In other words, does it really matter whether it is 20 or 100—they are both relatively small numbers in terms of the total shareholder base?

Mr Sheehy—From Chartered Secretaries' point of view, we philosophically think that 100 is rather small. We have chosen to not advocate to change that because at least it does give a vehicle for people to put something up to a regularly scheduled meeting. Chartered Secretaries' point of view has been to avoid wastage of resources and anything which goes against the efficient and effective communication between a company and its shareholders. We acknowledge that 100 is not a large test, but we are prepared to live with that. Dropping it to 20 drops it fivefold and it will have a detrimental effect. Will it have a gigantically detrimental effect? We cannot say, but we believe it will have some. Quite frankly, any detrimental effect is counterproductive. But we are not going to advocate to change the 100.

Mr Munchenberg—From the Business Council's point of view, we believe that 20 is significantly easier to achieve than 100. While 100 shareholders still represent an infinitesimally small interest in the actual company, at least if you have 100 shareholders who are concerned enough about an issue to put their name on a resolution there is clearly some concern about that issue; it is not just a frivolous matter. Finding 19 other people is significantly easier than finding 99 other people who share your view and also hold shares in the company. So I think it will be a significant lowering of the threshold and make it significantly easier for a variety of interest groups to use the shareholder rights to pursue their ends if they so choose.

Ms Tate—In terms of what we believe the bill is trying to achieve here, the Securities Institute acknowledges that we are seeking to improve the platform for communications and thereby improve the way shareholders and companies interact with each other. We have concerns that lowering to 20 will actually go against that aim.

CHAIRMAN—Do you really think that lowering that threshold will result in a flood of additional resolutions coming onto AGM agendas?

Mr Munchenberg—We are not able to predict the future, but our expectation would be that, if you require only 19 other people to put a resolution up, what appears to be a growing interest of trade unions, environmental groups and other special interest groups in using shareholder rights under the Corporations Act to pursue their campaigns means you would have to expect that they would increasingly use these provisions to publicise and promote their particular points of view. Before Senator Wong picks me up on this, we have no issue with shareholders being able to put resolutions onto AGM agendas. The issue is to find what is a reasonable threshold, a reasonable balance between running an efficient meeting that allows those issues of most concern to the majority of people attending the meeting to be heard properly and allowing

AGMs to be increasingly dominated by groups that have only a very narrow support base and raise particular issues as special interests.

Mr Sheehy—I might add that we are having a discussion about lowering a threshold on something that I am not aware that anyone was calling to have lowered. It just appeared out of the blue as part of a desire for a quid pro quo, I guess. But I am not aware of any group asking for that number to be dropped from 100 to 20. I find it curious that we are having a debate about legitimising something that has never been asked for in the past. It is an effective measure as it is. The proposal has come out of the blue, and we would like to see it go back to where it came from.

CHAIRMAN—So, in a sense, you see it as a political trade-off.

Mr Sheehy—I do.

CHAIRMAN—Even in the absence of any demonstrated need for a political trade-off.

Mr Sheehy—That is right. There has been no call whatsoever from any group. Maybe there have been some, but I have not noticed any.

CHAIRMAN—Senator Wong, do you have any questions on the 100-member rule?

Senator WONG—No. I have a whole range of questions on all of it.

CHAIRMAN—I suggest that perhaps we deal with the five per cent and the 100-member and 20-member rule then move on.

Senator WONG—Why don't you just allocate me an appropriate proportion of the hearing?

CHAIRMAN—You can have as long as you want, Senator Wong, but I suggest that we deal with this area then move on to the other sections of the bill—that is, deal with it in sections.

Senator WONG—I would prefer to go through what I would like to ask, actually. Have you finished?

CHAIRMAN—No, I have not. I have questions on other sections of the bill.

Senator WONG—You want to deal with the EGM requisitioning issue?

CHAIRMAN—Yes.

Senator WONG—I will start by saying that I understand, from the submissions that you have put in, the concerns that people have regarding the current 100-member rule. Has the BCA signed off on the modified square-root provision or not?

Mr Munchenberg—No, we have not.

Senator WONG—That was the CSA—

Mr Sheehy—That was CSA, AICD, IFSA, ASA and the Securities Institute. There were five that signed that letter back in 2001.

Senator WONG—I am sympathetic to the fact that this has been a proposition that your organisations have been putting to the parliament for some time. We are not in disagreement that, as a matter of principle, boards are accountable to their shareholders and that there need to be formal avenues for engagement with those shareholders, of which, presumably, requisitioning a meeting is one. So, as a matter of principle, I assume we agree that.

Mr Sheehy—That is fine by me.

Senator WONG—Mr Munchenberg?

Mr Munchenberg—Sorry, can you restate your premise?

Senator WONG—I assume we agree on the principle that boards are accountable to shareholders.

Mr Munchenberg—Yes.

Senator WONG—And that that accountability does require some formal avenues of engagement, of which extraordinary general meetings would be one.

Mr Munchenberg—Yes.

Senator WONG—So the key issue for your organisations is how much of an economic interest is required before you are put to the difficulty of holding an extraordinary general meeting.

Mr Munchenberg—That is correct. There needs to be a balance between the costs and the benefits.

Senator WONG—I suppose one of the key issues for us is the mischief towards which this amendment is directed. The BCA goes through a couple of examples, but it has not been put to me very clearly that there is widespread abuse of this provision.

Mr Munchenberg—I think it is fair to say that it is not widespread in that there are not a huge number of examples of where this provision has been used or misused. The number of times it has been used understates the effect of the provision, though, because we understand from talking to our members that it is used as a negotiating tactic or as a threat. You could come into a meeting with a company and say, 'You had better negotiate with us because we have 100 shareholders who have signed up, and we will put you through the pain of an EGM unless you give us some concessions.'

Mr Sheehy—It is not only the frequency, it is also the cost. There are some substantial costs to a large company in having to put on an extraordinary general meeting.

Senator WONG—I am sympathetic to that.

Mr Sheehy—It would be in the seven-figure sums for some companies to put on a meeting for an issue which has absolutely no hope whatsoever of progressing favourably.

Senator WONG—I think that is the most compelling argument.

Mr Sheehy—There is that argument. There is also the company being bogged down for some period of time to deal with this when it should be trying to improve shareholder value. So it halts an organisation somewhat—not an entire organisation but parts of it—and certainly it halts the board and the senior management.

Senator WONG—Sure. I accept the anecdotal evidence that you give about this provision being used as a threat or as a negotiating tactic, but how many occasions can you point to in the last three years when an EGM was called through the misuse of this provision?

Mr Munchenberg—We provided you with a list of recent uses of the provision. Whether any of those are in the last three years I do not recall. I suspect that, conveniently, the last use that we have referred to was four years ago. As far as I am aware, it has not been used in the last three years to call an EGM; nonetheless, the threat and potential remains. Given that we are not aware of any compelling benefits for retaining the rule, we would argue that the existence of that threat is sufficient reason to remove it.

Senator WONG—Obviously the parliament is concerned about the evidence. You give three examples—two in 1999 and one in 2002. Is that right?

Mr Munchenberg—Three examples of where it has been invoked.

Senator WONG—Right.

Mr Munchenberg—But we have not given examples—because we do not consider it appropriate and certainly the companies involved would not consider it appropriate—of where it has been threatened.

Senator WONG—But you are asking the parliament to make an amendment in order to remove a provision of which you can point to three arguable misuses in six years.

Mr Munchenberg—They are the only uses of the provision as well. What we are arguing is that where this provision has been used it has been used for arguably inappropriate purposes.

Senator WONG—From your perspective.

Mr Munchenberg—For arguably inappropriate purposes. In addition to that actual usage, it is also used as a threat or as a negotiating tactic with companies. We are also arguing that there is no measurable benefit that we are aware of as to why that 100-shareholder rule should be retained. Our case would be substantially weakened if there were three examples where we would argue it was inappropriately used but there were also three examples where it had been appropriately used—but there are no such examples.

Mr Sheehy—We can talk about the relativeness of this, but in the absolute it is a provision which is counterproductive to organisations. I think the fact that we can easily cite three points to three misuses. So evidence exists. I do not think it is a case of: 'Do we have to have four or five or six or seven or eight to prove a point?'

Senator WONG—No. I am simply making the point that we are talking about a reasonably low level of abuse of the provision in terms of the evidence that is before the committee and the parliament.

Mr Sheehy—There is a low level.

Senator WONG—Yes.

Mr Sheehy—But in a factual sense there is abuse. It exists.

Mr Munchenberg—And all uses of it are arguably inappropriate. It is not like we are saying that there are three out of 10 that were inappropriate and therefore there is an abuse.

Senator WONG—Why are all uses—

Mr Munchenberg—Because they are the only three times it has been used at all. We did not just give you a list of the three ones that we disagreed with; as far as I am aware, they are the three times in which that power has been recently exercised.

Mr O'Reilly—What I want to say, in support of my colleagues, is that the law should not permit or facilitate mischief of the type that has been outlined. So if there is abuse, and the law does enable and facilitate that abuse, surely it should be changed.

Senator WONG—I am not necessary disagreeing with the proposition that it should be changed. I want to be clear about the basis on which we proceed on this and I am reluctant to proceed on the basis of, frankly, an overblown argument about misuse—not that I suggest you are putting it to us. I would have to say that the evidence does not appear to me to indicate extreme abuse of the provision. Having said that, it may be that what you want as your legal framework is not currently what is there. I think there are a number of different issues that we are exploring. In terms of abuse and the issues that you raise, I can accept that from your perspective, Mr Munchenberg, you would argue that the 1999 EGM regarding North's involvement in the Jabiluka mine was inappropriate.

Mr Munchenberg—Yes. We would argue that the nature of the issue itself is not the point of relevancy or inappropriateness; it is the extent to which the use of that power is likely to have an outcome or be supported by a majority of members. If an organisation called an EGM and a significant proportion of shareholders supported the proposition—as was the case with the NRMA Insurance example—then you would have to argue that that may well have been an appropriate use. I think 30 per cent of shareholders supported the NRMA use of that. You would have to argue that if 30 per cent of shareholders want an issue debated then that could well have been an acceptable use.

Senator WONG—I was actually going to go through them. I presume the Wesfarmers 1999 forestry industry involvement discussion would be something that your organisation would regard as an abuse of that provision.

Mr Munchenberg—I just want to emphasise the test we apply is not whether uranium mining or forestry logging are relevant to the company; the test is the extent to which those resolutions were supported by the majority of shareholders as a test of whether that was an appropriate use of shareholders' funds.

Senator WONG—Yes, I think that is reasonable. My view would be that—for example, in the case of the 2002 NRMA meeting—requiring shareholder approval for the payment of retirement benefits is not an unusual proposition. It is something that was bandied around by a number of groups, parties and individuals in the context of CLERP. I have to say that I look at that and it does not seem to me to be a hugely clear example of a misuse of this provision. And, as you say yourself, the resolution did gain 30 per cent support, which is not an unreasonable level of support for a non-board endorsed resolution. So, of the three examples, really we are talking about two in six years where the actual provision has been activated in a way that the BCA has an issue with, given the results of the voting at the EGM.

Mr Munchenberg—I do not know the answer to this—we can certainly go away and try to find out if you are interested, Senator Wong—but, in relation to the NRMA Insurance resolution, more than five per cent of shareholders may in fact have pushed for that EGM. So the 100-shareholder rule may not even have been relevant in that case.

Senator WONG—It says it was 237 shareholders. I am not sure whether that would be five per cent.

Mr Munchenberg—I do not know either. We can go and check. I do not know whether or not it was five per cent. It may only have been 0.5 per cent, for all I know. But I think the point is that, where you are likely to get strong support for a resolution, five per cent is not an impossible threshold to achieve. Where you cannot even get five per cent of people supporting the resolution being put on, the chances of that resolution succeeding are extremely remote. In that case, you have to ask whether it is appropriate for an EGM to be called when the chances of that EGM resolving in a certain way are so remote.

Senator WONG—I think that is a cogent argument. How do you deal with the issue of the impact of a five per cent rule on a large company?

Mr Munchenberg—In relation to the number of shareholders that represents?

Senator WONG—Yes. I assume that was one of the reasons behind a modified square root rule, that there was a bit of a floating requirement depending on the size of the company.

Mr Sheehy—That was the philosophy behind it—that the test trigger needed to move in relation to the size of the company. The five per cent does that.

Mr Munchenberg—The shareholder engagement paper—I hope you are aware of that document; we provided it when we made our submissions—actually goes through a range of

alternatives and presents a table as to what they mean in terms of both the percentage ownership of the company and the number of shareholders involved. There is no doubt that five per cent for a company with a very large shareholder base is a significant number of shareholders. But the five per cent rule is based on the interests in the company. You can have one shareholder who has five per cent. Again, this gets back to: why are we calling an EGM? The only reason to call an EGM is if there is a real issue to be debated and a real chance that a significant number of shareholders want to support that. In the table here there are figures like 80,000 shareholders being needed. That is assuming they each hold 1,000 shares. Many shareholders in the company will hold vastly more shares, so you may only need two or three or four shareholders to get to five per cent

Senator WONG—One of the concerns would be that in a company with a large shareholder base, is it going to be practically feasible for, say 80,000—I think that was a figure you indicated—

Mr Munchenberg—That is assuming they all only hold 1,000 shares.

Senator WONG—Let us just assume that for the moment. Is it essentially that a requirement to try and get 80,000 shareholders to agree to the proposition will prevent any likelihood of the meeting being requisitioned? It seems to me that there is a level of economic interest which ought to be required to put a company through this process. I do agree with that. I suppose some of my reservations about five per cent might be in the context of a very large company, that the effect of five per cent would be to really preclude any retail shareholders ever being able to requisition an EGM. The resources needed to actually garner that level of votes requires a level of sophistication that some people may simply not have. The difficulty with that is they may well have a very important proposition.

Mr Munchenberg—On their own I would agree—80,000 retail shareholders in a particular company are unlikely to be able to get organised sufficiently because of the logistics. However, we are talking about requisitioning an EGM here. If there is a large group of retail shareholders who have a valid issue that does justify the calling of an EGM, I would suggest that that group would be able to get institutional investor support for it—particularly from, for example, superannuation funds, which are increasingly important within the marketplace. So I would suggest that if a group of retail shareholders had a valid concern that warranted the calling of an EGM—because there are other vehicles and avenues through which these shareholders can communicate their concern—I expect they would almost certainly be able to get support from institutional shareholders that would easily lift them above the five per cent.

Senator WONG—Do you think, though, that that essentially leads to a situation where retail shareholders are almost entirely dependent on the goodwill of institutional investors?

Mr Munchenberg—To call an EGM, yes, but not to raise their concerns.

Senator WONG—So it is a concentration of power?

Mr Munchenberg—Yes—in relation to the calling of an EGM, which is a significant, disruptive and costly event. But I would argue that that is appropriate. There are other avenues available to retail shareholders. I do not believe that retail shareholders are excluded from calling

an EGM. But they do require the support of other owners of the company who hold substantial shares in the company, and I think that is appropriate.

Mr Sheehy—The issue of balance is missing in this argument. You have chosen to take the extreme of a very large company in which each shareholder has a small shareholding—and we have 80,000 shareholders in this discussion.

Senator WONG—That is because this is really the only area where I have substantial concerns.

Mr Sheehy—I think your concerns are valid in that you feel that retail shareholders will lose an avenue. But my issue is one of balance—that a company is going to be put to a great deal of expense, time, energy and effort for something which, if we stayed with the 100-member rule, could have absolutely no hope whatsoever of progressing—or succeeding or whatever word we want to attach to it. So what we are talking about is an issue of balance. The example of 80,000 shareholders is at one end of the spectrum. I would have to agree with my colleague that, if the issue was that important, institutional shareholders would be on side. You would not need 80,000 different individuals to get to five per cent.

Senator WONG—I appreciate that, but I am just making the point that, for large companies, the proposal would essentially mean that retail shareholders are beholden to the views of institutional shareholders in order to get an EGM. That may well be the desired policy outcome, but it is still the policy outcome.

Mr Munchenberg—Let me present that in a different way. If a group of retail shareholders genuinely want to get a resolution passed at an EGM, they will go to institutional shareholders seeking their support anyway.

Senator WONG—Yes, I am aware of that.

Mr Munchenberg—In that sense, I do not think we have suddenly made retail shareholders beholden to the support of the majority owners of companies—the institutional investors. In a sense, we have formalised it.

Senator WONG—To requisition the EGM. And, as you point out, that may be the end it itself, to actually have the discussion aired, even if there is no reasonable prospect of success.

Mr Munchenberg—In which case, we would argue that an EGM is not the appropriate vehicle for doing that.

Mr O'Reilly—I would add that institutional shareholders and our members, who are acting under fiduciary responsibilities and obligations, are actually representing your retail investors.

Senator WONG—Yes.

Ms Tate—The Securities Institute believes that the five per cent rule is a relatively straightforward solution, because it easily understood by all people involved, including retail shareholders. They understand the proposition and know how to get to that end. As Mr

Munchenberg has said, it is unlikely that the matter would be of relevance if you are unable to achieve five per cent, and therefore calling an EGM is a very costly and unnecessary exercise that ends up flowing through to the funds of shareholders anyway.

Mr Sheehy—I would add that you have the four of us here as the business group but there is another group coming in soon after us which represents retail shareholders. They have agreed to this provision, and that is their constituency. Some time ago, in 2001, they agreed to the modified square root and what was put forward. So there has been consistent agreement by the group before you representing retail shareholders to change this provision of the law. It is not just the business groups who are sitting in front of you today; it is also retail shareholders, through that group, who recognise the inefficiency and the wastage of it. They would rather see the companies they invest in getting on with business.

Senator WONG—So you have no concerns at the large company end of the scale?

Mr Sheehy—I do not. I believe that if it were a sufficiently important issue then institutional investors would join. If a retail shareholder, or a group of them, was unable to get any institutional investors up to the five per cent then it should not go to an EGM. It can go to an AGM, but not an EGM.

Senator WONG—Which is why you retain the 100-member AGM resolution provision, is it?

Mr Sheehy—I have consistently said that for nearly six years—leave it alone. Our issue is one of effectiveness and wastage.

Senator WONG—What sorts of costs are we talking about?

Mr Sheehy—For our larger companies, you could be looking at in excess of a million dollars.

Mr O'Reilly—To put the issue in a managed fund context, and remembering that managed funds go from quite small to very large, a number of years ago one of our members did a costing. They were looking at simply amending the scheme's constitution. It was an old constitution and they wanted to tidy it up. Their advice was that they would be required to call a meeting of members. They did the costings for that meeting. They had at that time about 230,000 members. Their costings for external costs alone were somewhere between $1 million and $1.5 million for having that meeting—and they were external costs alone. Since then, I think the membership has grown to about 300,000. So they are the costings for these meetings—I would assume that they are similar in large companies—in the context of a managed investment scheme.

Mr Munchenberg—We have provided some costings in our submission, and they range from $100,000 up to over $1.5 million.

Senator WONG—But that is for your membership, I assume.

Mr Munchenberg—They are for larger companies, and they would be outgoing costs—the cost of actual mail-outs and meetings.

Senator WONG—As opposed to staff time?

Mr O'Reilly—Yes.

Senator WONG—Mr O'Reilly, you made the comment earlier that your members obviously have retail shareholders for whom you essentially act as fiduciaries and, therefore, that they are represented through you.

Mr O'Reilly—Yes.

Senator WONG—But to what extent do you actually engage with them regarding issues that might go to an EGM or resolutions that may come up to an AGM?

Mr O'Reilly—I cannot answer you specifically. All I would say is that our members, being the funds managers and responsible entities, get contacted by their members on a regular basis through correspondence about issues that are arising.

Senator WONG—Does IFSA have a range of policies that its members apply in determining what its investors think of either proposed EGMs or resolutions put up at an AGM?

Mr O'Reilly—No. Certainly we have a range of standards and guidelines, but not specifically on those matters. But our members stand in fiduciary relationship to their investors and, under the law, their requirement is to act in the best interests of their investors as a whole.

Senator WONG—Yes, I am very familiar with what fiduciary duties are. I am making the point, though, that it is problematic to put to the parliament that, because managed funds have retail shareholders, the interests of retail shareholders are therefore being promulgated through them in the absence of very clear procedures, processes and policies by which that occurs. I am not trying to be critical of this—

Mr O'Reilly—I do not see why, because you either accept that they are in a fiduciary relationship or you do not. If they are, they are acting in the best interests of their members with the funds under their management.

Senator WONG—Mr O'Reilly, my point is that, at times, determining the best interest surely would require certain communications between the investor and the funds manager.

Mr O'Reilly—And all I am saying is that quite often, if members do have a concern or interest, they will write to or otherwise communicate with the funds manager.

Senator WONG—Can I just clarify the 100-member rule to put a resolution onto the agenda of the AGM: is it only the BCA out of the business groups here today which is flagging the possibility of a minimum economic interest for that right?

Mr Sheehy—We are not.

Mr O'Reilly—We are not.

Ms Tate—The Securities Institute did not put it in our submission, but we think it could be worth considering.

Senator WONG—Does anyone know where the 20-member proposition came from?

Mr Sheehy—I think it came out of the blue. I believe it was a trade-off. In an informal discussion I had with the government, the words were: 'There is nothing magical about 20.'

Senator WONG—I do not recall the opposition actually calling for it anyway, or the ASA.

Mr Sheehy—As I said, I do not know of anyone who called for it. We find ourselves having a discussion about something that no-one has asked for.

Ms Tate—Certainly the Securities Institute's discussions with Treasury indicate that they are also unclear as to where it came from.

CHAIRMAN—If I could just intervene, in our initial recommendation on this matter in October 1999, we expressed concern that the 100-member rule not be abandoned as part of the CLERP reforms and reinforced our earlier recommendation. I just note that in our report there is reference to evidence from Mr Mayne, who expressed difficulty in the 100-member rule applying to listing items for AGMs. I think his evidence referred to the fact that in America you only have to own $US2,000 worth of shares to put a resolution on the notice paper. Maybe he was the initiator of this.

Senator WONG—We blame Crikey, do we? It is Stephen Mayne you are talking about?

Mr Sheehy—I do not believe the committee then went on to recommend the change.

CHAIRMAN—No, we did not.

Mr Sheehy—So we are left with Crikey.

CHAIRMAN—This is just in terms of trying to track down the source of the proposition.

Mr Munchenberg—Just to digress, if I may, his representation as I understand it is correct but in the US there are much more stringent guidelines as to the content of the resolution that is put up.

CHAIRMAN—I was going to ask you about that later when Senator Wong finished her questions.

Senator WONG—Mr Munchenberg, BCA's submission states:

... some of the shareholder rights being considered under [this bill] are not as fundamental as they once were.

I am not really sure I understand that proposition.

Mr Munchenberg—Out of context I am not sure, but I can speculate on what we were referring to. The point that we have been making consistently is that the AGM in times past was the primary and indeed often the only vehicle through which shareholders could engage with and question companies. Our point is that that has broadened significantly and there are now other avenues through which shareholders can communicate. We still see AGMs as important and we still support AGMs being a requirement. Our only point is that when we look at any of these proposals we should not just look at them in isolation; we should look at them in the context of the range of ways in which shareholders and companies are in fact engaging with each other.

Senator WONG—I will ask a general question of the panel. If we agree with the proposition of five per cent and retaining the current 100-member rule for putting a resolution to an AGM, what are the methods, which have been alluded to, or the other ways of engaging with shareholders which you could point to or suggest to strike the balance on the other side of the coin? I suspect the move to 20 for the resolution is an attempt to look at the other side of the coin, given that there is very little support for that. What are the other mechanisms? I will just preface the question by saying that when I talk about engagement I do not just mean companies disseminating information. I think the point of both of these provisions is that they are avenues for dissenting views to be put. That may be pesky and that may be irritating but that is a necessary aspect of being a public company. It seems to me there need to be avenues for alternative views to be put. We do need to ensure that the framework is such that that does not become too onerous or too open to mischief but it is an aspect that is important. What would you point to in view of the current EGM provisions?

Mr Munchenberg—One of the main opportunities the retail shareholders have of raising issues is that anyone can ask a question. I do not mean you need to be a shareholder or a proxy holder but anyone can ask a question at an AGM. That can be used quite effectively where a small number of shareholders are organised to ask a series of questions, and you will see at an AGM that you will get an issue raised repeatedly by a group of shareholders, and it has to be dealt with by the company. In the vast majority of cases, it is dealt with respectfully by the company up to the point where it becomes apparent that the same question is being asked repeatedly.

Senator WONG—Just to clarify, the BCA is not pushing for AGMs to be abolished?

Mr Munchenberg—Not at all, nor have we ever done so, despite some enthusiastic reporting by some—

Senator WONG—I seem to recall a *Financial Review* article that suggested something else, but let us not go there. As long as that is the position, I am happy for you to rely on the AGM as a response to my question.

Mr Munchenberg—I do feel I need to clarify that. Our point merely was that AGMs are not working as well as they might. If we cannot make them work better for the shareholders and companies, then we should ask whether, in the modern age, they are still relevant. That is as far as we went, and we certainly have no intention of getting rid of the AGM.

Senator WONG—Are you still asking the question?

Mr Munchenberg—I think it is a valid question to ask, in the context of how we improve AGMs. We put out a document last year which was largely about how we make AGMs better for shareholders and the boards and company executives that have to be participants in the AGM. It is still a valid point to raise. We put out a number of proposals last year. We identified what some of the leading practices of companies were, such as canvassing shareholders in advance of the AGM about what their issues to be addressed at the meeting were, and we would expect to see companies increasingly pick up those sorts of proposals as we progress. There is nothing stopping shareholders communicating with companies at any time. In our paper we suggested that, where companies have not already done so—some companies have—they should establish hotlines, whether phone or email based, which shareholders can use to question companies at any time through the year and expect to get a prompt answer to their concerns.

Senator WONG—To whom are they addressing the questions? Isn't the point about an annual general meeting, and presumably an EGM, that you actually get the directors?

Mr Munchenberg—The proposal is—and I understand that a number of companies have done this already—that these questions go to the chairman. Obviously directors and the chairman have limited time and capacity to deal with the wide range of these issues, but where an issue is of concern to a significant number—not necessarily a large number—of shareholders it will get onto the radar of the board. It will get into the media. As you are no doubt an avid reader of the *Financial Review*, as am I, you know issues are always being raised by shareholder groups which have a particular concern with what a company is doing. Sometimes they are institutional investors, but more often they are retail shareholders, because institutional investors have their own ability and avenues for communicating with the company. So there are different ways in which shareholders can raise issues. I go back to this point: if an issue is sufficiently urgent and important, there is still the retention of the EGM power within the proposed legislation.

Mr Sheehy—It comes back to the quid pro quo. If I might take a liberty, your general question to me almost sounded like: 'If you are going to take this away, can you point to some other things that would replace it which would ensure the same degree of effective communication?' I do not know if that was the intent of your question, but I am not aware that there is anything broken in terms of the AGM process, which is a statutory provision to allow shareholders to have an open vehicle to ask questions. I do not think that this is a case where we are taking something away by removing the 100-member rule and dramatically reducing the effectiveness of a shareholder to communicate with the organisation. I do not think there is a compelling need to replace it with something—either dropping to the 20 or some other mechanism. However, there is a clear opportunity for a shareholder to ask a question in an AGM, and if a written question comes into the organisation, it will go either to the head of investor relations or to the company secretary to be dealt with and a reply will be made. I cannot speak for every company, but certainly the larger ones that we are talking to deal with those things effectively.

Senator WONG—I do not recall the legal framework around that. Is that just a matter of internal practice of the company as to how a shareholder question outside of an AGM context might be dealt with? I am just clarifying that there is not a code of conduct or clear procedures in the Corps Law or anything that deals with this.

Ms Tate—The Securities Institute and the Australasian Investor Relations Association are currently working on some best practices in relation to communications between analysts and listed entities. While the focus of that will be in relation to how analysts interact with investor relations and other senior management within companies, it is also to do with equitable access and improving communication so that information flow to the market is improved. From the listed entities' perspective on this project they are looking at point of contact processes which can be used not just in terms of analysts but also in terms of shareholders, including retail shareholders.

Senator WONG—I would have liked to have had AIRA here because there were a couple of issues about direct voting that were raised in their submission which I wanted to explore. Can I just say to you, Mr Sheehy, that I do not ask these questions from the political perspective that we have got to do something here because we have taken away something over there. I have a very strong view that engagement by shareholders is extremely important and that governments' regulatory frameworks should facilitate that. I also recognise the cogency of the arguments put about, I suppose, the cost benefit or utility of an EGM where the resolution really has very little chance of getting a substantial proportion of votes. My view is more that, if we are talking about better ways to engage shareholders that do not have an unreasonable set of unnecessary consequences, such as an EGM where you only get, say, a couple of per cent of the vote, what can we point to or do that facilitates that engagement in a constructive way, including engagement where a dissenting view from that of the directors is put? That is where I am coming from. I do not particularly want to approach this with a 'let's throw it in the air and try to find a political fix' attitude. It seems to me we have an issue here that we have to find an appropriate set of provisions for—in relation to AGMs, EGMs and other aspects of shareholder engagement with companies. I am inviting the business groups to put to me ways in which they say that engagement can be utilised or implemented.

Mr Munchenberg—As we indicated in our shareholder engagement publication last year, companies are also increasingly producing and publicly releasing shareholder engagement policies or strategies or whatever. Those will often include details for the shareholders as to how they can contact the company. I accept that none of these things gives a group of shareholders the sort of publicity that forcing a major listed corporation to hold an EGM gives, but we see that as an inappropriate vehicle for communicating their issues anyway.

Senator WONG—And if the proposition is an allegation of wrongdoing or substantial problems you are saying they will get five per cent?

Mr Munchenberg—If there are substantial issues of concern to all the shareholders of the company then they will have no trouble reaching the five per cent threshold.

Senator WONG—Ms Tate, did you have anything further to add on other ways to engage shareholders?

Ms Tate—As I mentioned, obviously in the AIRA standards they have mechanisms for allowing engagement with listed entities. The Securities Institute has a code of ethics that looks at the way that analysts communicate, including with listed entities. The project that I mentioned before, which you are aware of because I have spoken to you about it before, Senator, is about improving and making consistent interactions in terms of communications. So, where you asked,

'Is there a current code of practice?' I can say there is embedded in a number of industry groups conduct provisions in terms of how to deal with these matters. The proposals that we are looking at here are looking at EGMs and AGMs, and they are but one vehicle for being able to interact.

Senator WONG—Correct. That was my point. Did you have anything to add, Mr O'Reilly?

Mr O'Reilly—No. All I would say is that our larger members have quite large investor relations areas. Members are continually calling with issues, problems or some sort of direction. They look very much at meeting the needs of their members, just on a normal, day-to-day basis. Of course, in the managed funds context, you have a whole range of licensing issues and requirements which apply to the managed funds industry in terms of meeting the needs of their investors.

Senator WONG—Do people have a view on direct voting?

Mr Sheehy—Chartered Secretaries would like to explore it, because we do believe it has some merits. With changes in technology, we know it is possible. It has been done in some state elections in the United States, so it has been achieved at a political level. We think it has merit because it avoids all the issues of the cherry-picking types of things that we have in here—which in a way is a bandaid solution to a bigger problem. We have also heard discussions against direct voting, in that lots of things come out at AGMs and so forth that would change people's votes, and we somewhat question that. You perhaps could have a vote after a meeting. So we certainly think that direct voting is something that should be looked at and seriously considered.

Senator WONG—We obviously do not have time to explore that now, but are there discussions occurring? Certainly in the CSA I understand that there are discussions occurring about this.

Mr Sheehy—There are internally, yes.

Senator WONG—And in the Securities Institute?

Ms Tate—Certainly.

Senator WONG—Is that something that the BCA is involved in or intending to be involved in?

Mr Munchenberg—We are not involved. We see it as an inevitable trend in that sort of direction. Our only caution would be that there are things that technology is capable of and there are things that people are prepared to use technology for. In other words, we do not want to disenfranchise those shareholders who feel less comfortable with electronic means of communication.

Ms Tate—Certainly the Securities Institute has made comments in relation to the cherry-picking proposals, and we support eliminating cherry picking as it undermines the integrity of the decision-making processes. We have also provided comments recently to the ASX on some proposed listing rule amendments in relation to listing rule 14.2.3, which goes to improving proxy voting forms so that there is more clarity around the voting process for shareholders,

companies and proxy holders. But I think certainly, as something further down the track, we need to be thinking about how technology can facilitate more direct shareholder participation, whether that be by telephone or other electorate means of voting.

Senator WONG—Obviously there will be further discussions on that.

Ms Tate—Just to let you know, the ASX Corporate Governance Council has also been looking at this as an issue.

Senator WONG—Yes. Can I just very quickly move on to proxy voting provisions?

CHAIRMAN—We will move on to that item now.

Senator WONG—That was the cherry-picking provision—shall I call it that?

Mr Sheehy—That is a great name.

Senator WONG—Is there general agreement from the business groups on that?

Mr Munchenberg—Yes.

Mr O'Reilly—In terms of the concept, yes. The IFSA reading of it was that provision 250A could be made clearer.

Senator WONG—I see what you are saying. That is at point 5 in your submission. So you are saying that you just have to make sure that the provision requires this—a multiple proxy situation with different instructions.

Mr O'Reilly—That is right.

Ms Tate—Part of the amendments that the ASX are looking at in terms of listing rule 14.3 seek to ensure that the proxy forms themselves are understandable where there are directions given.

Senator WONG—I will quickly mention 250J. Is there a difference of opinion on this? This is the obligation on the chair to announce proxy tallies—is it prior to a show of hands?

Mr Sheehy—I think there may be some differences there.

Senator WONG—I understand IFSA's submission. You say:

To permit voting on a show of hands in other than procedural matters effectively disenfranchises a large number of members who have lodged proxies.

I see. You are saying: limit the show of hands to procedural matters only.

Mr O'Reilly—That is right.

Senator WONG—Does the CSA have a view on 250J?

Mr Sheehy—We are supportive of the legislation that no longer requires the chair—if that is the one you are talking about.

Senator WONG—Yes.

Ms Tate—We note that the chair is able to put the question about whether and when the proxies are disclosed. We also note that the law requires that companies disclose the details of proxies in the minutes of the meeting. An alternative put forward by the BCA is that you can disclose after the debate but before the poll. We think that is an interesting proposal in terms of not having an undue influence on the debate itself.

Senator WONG—Is the idea of not having the chair give an indication of which way the proxies will go before a show of hands to not make people feel like they are wasting their time?

Ms Tate—It is about two things really. It is about disenfranchising participation. If they think it is a done deal, then that leads to a certain outcome. The other thing is unduly influencing the outcome. There may be a good debate or discussion to be had for those who are present. The disclosure of proxies before that has been had may have an influence on the outcome.

Mr Munchenberg—We did quite a bit of talking to both companies and shareholder representatives last year to try and come to a position on this. To be honest, we decided there was such diversity of view that there really could not be a position one way or the other. One group of companies or shareholders would argue that knowing how the proxies fall beforehand kills debate. Others would say that, if you know the resolution is passed or lost and allow debate to go on without that knowledge, you are misleading people. Opinions were quite strongly divided, even amongst directors, on what was the best way to do it. Therefore we certainly support there not being any statutory resolution of this if both companies and shareholders are divided on what is the best way to go. We suggested, in an earlier document, as my colleague from the Securities Institute pointed out, that it could fall after the discussion but before the poll. But realistically, at the end of the day, it is something that should and can be put to the shareholders as to how they want the meeting to be conducted.

Senator WONG—Which would mean that, from a legislative perspective, you would remove the current position.

Mr Munchenberg—Yes. I do not think there needs to be any legislative requirement in relation to this matter.

Senator WONG—But I think there should be some requirement to disclose the proxies tallies.

Mr Munchenberg—Yes. We do not take exception to that.

Senator WONG—It is just a question of when you do that and in what circumstances.

Ms Tate—Section 251AA requires listed companies to disclose details in the minutes of the AGM. It is in the minutes, so there is a disclosure of proxies at that point. I believe the proposal to have the chair go to the shareholders and ask them their views on when disclosure should be made at the AGM is a reasonable way to approach this issue; therefore, the Securities Institute supports their removal.

Senator WONG—So you would put a provision in that said that, in relation to the disclosure of proxy tallies, the issue of when that is disclosed at an AGM prior to the publication of the minutes is a matter the AGM should determine.

Ms Tate—Correct.

Mr Munchenberg—It should be left up to companies.

Ms Tate—It could be a constitution issue.

Senator WONG—I do not know that I agree with that.

Mr Munchenberg—Our position is that this is not an area which requires statutory intervention.

Senator WONG—You might have a situation where it is important that it be disclosed and it is not disclosed to the general meeting. Surely members should be—

Mr Munchenberg—We have no problem with disclosure. There should be a requirement—and it is in the company's interest—to disclose how resolutions have been determined at the meeting, particularly for members who are large, publicly listed and highly exposed. People are going to want to know anyway. I do not see any issue with disclosing, but I do not see that there needs to be any statutory intervention in relation to when or how it is decided there is disclosure. I think that can be left up to companies and their shareholders to sort out.

Ms Tate—Agreed.

Senator WONG—Finally, have you any comments on the disclosure of information reported to overseas exchanges.

Ms Tate—In terms of this proposal, the Securities Institute support the removal from the law, but we believe it needs to be coupled with an amendment to the listing rules to ensure that there is not a disclosure gap. Currently, listing rule 3.1 covers the disclosure of any material information on a continuous basis.

Senator WONG—Would you agree that information that has been provided on overseas exchange by a company is material information? I would have thought it would be.

Ms Tate—It may not be. There could be a filing that occurs in the US where a dual listed company—where they are listed on the ASX and also the New York Stock Exchange—may provide something to the New York Stock Exchange that is not considered material in terms of the ASX's provisions. Listing rule 1.15.2 applies to foreign exempt listings, which requires them

to disclose to the ASX any information filed on their overseas exchange. So, regarding conversations that the SIA has had with the ASX, we believe an easy solution to this is to remove listing rule 1.15.2 and place it in the body of the main rules so that it applies to all listed entities. That will then make sure there is equal treatment of investors in terms of information so there is no differential for disclosure across jurisdictions.

Senator WONG—That is the concern I would have. I am just not sure how onerous it is. If you are already disclosing to an overseas exchange, is it significantly onerous to also disclose to the ASX?

Ms Tate—We believe that it would not be significantly onerous. However, we do not believe that there is a provision in the listing rules that would go to the information which is not material or price sensitive. It is other information. So this is not about materiality; this is about ensuring equal disclosure across jurisdictions. We agree with the Shareholders Association in terms of the possibility that local investors could be disenfranchised because they do not have the same access as overseas investors to the same information. We think that it is a simple solution in terms of a listing rule amendment, so therefore we support the removal from the law.

Senator WONG—I find that a little bit difficult. You are saying that you agree with it but that you do not want it to be compulsory other than through the listing rules.

Ms Tate—We think that the appropriate place for this type of disclosure provision is for it to rest with the listing rules. If you think about the umbrella framework, you have the provision to have continuous disclosure within the law, but then listing rule 3.1 gives certain information about what it is to meet your obligation under the law. We think that the information regarding what is disclosable should rest within the listing rules.

Senator WONG—Yesterday or the day before in the *Financial Review*, the ASX mentioned having its own regulatory functions. Does that alter your position at all?

Ms Tate—I have seen your media release of yesterday and I believe that there is some degree of co-regulation clarity required between ASIC and the ASX. On this particular point the Securities Institute discussed it with senior ASX people and they believe that an amendment is appropriate. It is not viewed as a big deal; it is actually something that should just be there. It was seen as a gap. It already applies to foreign entities and it should apply to local entities.

Senator WONG—Mr Munchenberg, do your members have an issue with disclosing to the ASX what is disclosed to overseas exchanges?

Mr Munchenberg—We do not have a strong view one way or the other. We see the argument having merit in that, given the materiality requirement here, if what you have disclosed overseas is material here then you are required under Australian law and the listing rules to disclose it anyway. I think that the Securities Institute has raised a valid issue about the uniformity of information. I think that the idea that all shareholders or potential shareholders have uniformity of information is utopian anyway but I can understand the merit of that argument.

Senator WONG—As a principle to aspire to.

Mr Munchenberg—It is the principle to which we all aspire but we do not have a strong sense beyond the fact that we would expect that the vast majority of information that is disclosed overseas is going to be material here anyway. The only issue we have, not being intimately familiar with the disclosure requirements in all other jurisdictions, is that there may be—

Senator WONG—But if your members are in those jurisdictions they would have to be anyway. I am just not sure where the notion that this is a problem comes from. It is a bit unclear.

Mr Munchenberg—To be honest, it is not an issue that we have raised with the government but I speculate that it may have been an issue the ASX raised if the ASX felt that a lot of immaterial information was being disclosed.

Mr Sheehy—We are in support of the provision and we do think that it should be covered by the listing rules. Perhaps it was—

Senator WONG—The current provision or the proposed provision?

Mr Sheehy—The proposed provision. We believe that listing rule 3.1 and Australia's continuous disclosure regime are more than adequate to deal with the disclosing of material information. I have no idea where the call for this came from. Perhaps it is just a case of overlapping jurisdictions and it best sits with the listing rules.

Senator WONG—Thank you very much.

CHAIRMAN—In relation to cherry picking and proxy voting, the Securities Institute suggested that there were several examples recently of irresponsible administration representation of proxy votes. Can you enlarge on that?

Ms Tate—I think there have been examples in the media quite clearly in terms of some large companies where proxy voting has not been managed in the best interests of all those who have provided proxies. I am not wanting to put the finger on the particular companies—we all know who they are. I think it highlights that proxy votes should be cast as they are directed. Our comments that have gone to this hearing, and also to the ASX in terms of their consideration of listing rule 4.2.3, are with regard to improving the understanding of shareholders, companies and proxy holders about how proxy voting operates. One of those things is why we consider the move towards more direct voting as a possible avenue for the future. I think proxy voting is important to ensure that shareholders are able to participate in company operations, and cherry picking undermines the integrity of the decision-making process. It is in the interests of the company shareholders and the proxy holders to ensure that proxy voting operates effectively and efficiently.

CHAIRMAN—Are there other forms of voting that could be considered, such as pre-poll or a form of postal voting, rather than proxy voting?

Ms Tate—I think technology provides an avenue for telephone or other forms of electronic voting. As I said before, the ASX Corporate Governance Council is looking at this type of activity to improve access to companies in terms of voting.

CHAIRMAN—Regarding the electronic distribution of statements to members—sections 249O and P—can you tell me what proportion of shareholders currently prefer to receive notification of meetings by electronic means? What sort of growth is there in that preference?

Mr Sheehy—I cannot give you a number off the top of my head. My recollection of some surveys we have done is that the numbers are still relatively low but growing. I do not have a percentage. I can come back to you on that because we have done surveys on take-up rates and so forth.

Mr Munchenberg—As a surrogate for that, the BCA submission includes some work which we have pinched from Chartered Secretaries on the number of shareholders who elect to receive their annual reports electronically, which is something that companies are very keen to promote. The number that elect to receive it in that format is still very low—it looks like about five to six per cent, based on the chart in front of me.

CHAIRMAN—Even though every time a dividend is received they try to encourage people to do that?

Mr Munchenberg—Yes. Even with active encouragement there is still a very low acceptance of that.

Senator WONG—What is the trend?

Mr Munchenberg—I am not sure.

Senator WONG—Is it stable at five or six per cent or is that a substantial increase over a few years?

Mr Sheehy—To my knowledge it is a very gradual increase—but 'very gradual' would be the key words there.

Senator WONG—I heard the emphasis, Mr Sheehy.

CHAIRMAN—Has any work been done to try to fathom why greater use is not being made of electronic communication by shareholders? Does it reflect the age profile of shareholders perhaps not trusting technology or electronic communication and wanting the paper in their hand?

Mr Sheehy—I am not aware of any work that has been done, but from talking to my members who have to deal with it I think it is all of the above. You have some individuals who are not up to speed with technology. You have a lot of people with dial-up modems, for example, and receiving large PDF files is an enormous problem.

Senator WONG—You have to fix up Telstra's broadband.

Mr Sheehy—I am not going to go there! Some people like the paper. Some people do not read anything anyway and do not read the notice giving them the option. I think there is a wide variety of reasons as to why. But I can assure you that particularly the larger companies, which

face huge printing and mailing costs and so forth, would dearly love to have more people taking advantage of electronic communication. They take every opportunity to promote that avenue.

Ms Tate—That is why the Securities Institute supports the proposals for electronic distribution. But we need to ensure that those who do not have access to technology are also receiving the same information. In terms of improving shareholder participation and the timely distribution of information, technology is a win-win for companies and for shareholders. But we cannot forget that not everybody is operating in a technology environment.

CHAIRMAN—I have two more questions. Firstly, do you think there should be any different treatment of mutuals under the proposed changes? Should it be the five per cent and, as you say, the 100-member rule for listing items?

Mr O'Reilly—You know my position on that. The provisions are the same and should remain the same.

Mr Munchenberg—We have not formed a view on it.

Mr Sheehy—No comment.

CHAIRMAN—In summary, would it be fair to say that your collective view is that, to the extent that this legislation reflects earlier recommendations of the committee, we should reinforce those recommendations?

Mr Sheehy—Yes.

Mr Munchenberg—Yes, and obviously with the additional view as to our position on the 20.

CHAIRMAN—As I say, to the extent that it reflects our earlier recommendations—the committee previously has not had a recommendation with regard to that matter. As there are no further questions, I thank all of you for your appearance before the committee and for your contributions to our inquiry.

[10.41 a.m.]

MATHESON, Mr Ian, Chief Executive Officer, Australasian Investor Relations Association

CHAIRMAN—Welcome. The committee prefers that all evidence be given in public as this is a public inquiry, but if at any stage you wish to give evidence in camera you may request that of the committee and we would consider such a request. I invite you now to make an opening statement, at the conclusion of which I am sure we will have some questions.

Mr Matheson—Thank you for the opportunity to appear before the committee. We would like to raise a couple of issues about the exposure draft and about three related issues that do not form part of the exposure draft but are in the context of the committee's terms of reference where you ask for any other issues to be raised. We think these three other issues are germane to the exposure draft.

The two issues in relation to the exposure draft that we would like to specifically mention in our opening statement relate to the 100-member rule for requisitioning meetings and to the 20-member rule for getting resolutions onto the notice of meeting. As the committee is aware, the Australasian Investor Relations Association is a member of the alliance that wrote to the minister, the Treasury and I think to the committee strongly supporting the abolition of the 100-member rule and supporting the restoration of the old five per cent rule for the requisitioning of a members meeting. So we would like to strongly reinforce the position expressed by the Business Alliance—that is, supporting the abolition of the 100-member rule and the restoration of the five per cent of the equity rule to requisition a members meeting. We are also strongly opposed to the proposal in the exposure draft for 20 members to be allowed to put a shareholder proposal up. If the argument for abolishing the 100-member rule is that it provides minority shareholders with a disproportionate influence, then we would submit that, if we adopt the 20-member rule, that would confer an even greater disproportionate influence on an even smaller minority group. I am sure those matters have already been raised by my other colleagues on the business panel earlier this morning.

In the limited time left, I want to raise three other issues which we raised in our submission and which we feel are germane to the discussion and issues raised in the exposure draft. The first of those three issues is about direct voting by shareholders of Australian listed companies. The association is of a view that voting on resolutions proposed in the notice of shareholder meetings of listed companies could be by direct voting. AIRA endorses direct voting by way of post, fax, electronic communications and telephone voting where it could be of benefit to shareholders. If direct voting were to be adopted by companies, the process of voting by a show of hands could be limited to procedural matters arising in meetings and would not be available for matters that are the subject of another meeting.

Firstly, we submit that the direct voting by one of those methods—that is, post, fax or via the internet or telephone—circumvents the problems raised by proxy voting, a number of which are identified in the bill; for example, cherry picking. Secondly, it is simpler, more efficient and leads to greater transparency. Thirdly, it encourages participation for those shareholders who cannot attend the meeting in person and whose views may not otherwise count towards the final

determination. Lastly, it would ensure that the results of a resolution as notified to shareholders accurately reflect the shareholdings of all investors, including institutions, unlike the current show-of-hands provisions. As the committee may be aware, this goes to the heart of the one-share, one-vote principle, which is very different from the one-person, one-vote principle, which applies in the political domain.

Having advocated direct voting, we want to nonetheless emphasise that, with the inclusion of direct voting as an option for listed companies, the association recognises the value of the meeting as a forum at which relevant questions can be asked of or directed to directors in connection with activities of the company. Accordingly, AIRA does not intend to suggest that the meeting itself be abolished. Rather, it can be run more efficiently in facilitating increased shareholder participation if direct voting is adopted. Increased shareholder participation, it seems to us, certainly has been one of the major thrusts of government policy in recent years. That is all I wish to say at this point.

CHAIRMAN—Thank you very much. Are you suggesting direct voting could be a substitute for proxy voting or could be an alternative to proxy voting so that it could be either/or—to engage in either direct voting or proxy voting?

Mr Matheson—Voting by proxy is really a method of direct voting, although direct voting would essentially abolish the need to appoint a proxy. Instead of attending the meeting in person, a shareholder could lodge the equivalent of a postal vote via mail, telephone, fax or the internet and express his or her wishes without having to appoint a person who represents them as their proxy.

CHAIRMAN—Would it be your intent to still allow someone to appoint a proxy if they so chose rather than exercising a direct vote?

Mr Matheson—Yes. We are not saying it is an either/or. It could be considered to be an alternative for those companies who do have large numbers of holders who reside outside of, for example, the city where the annual general meeting might be held.

There were two other matters that were not raised in the exposure draft but that I want to raise quickly with the committee. The first is direct voting; the second is disclosure of the percentage of shareholder votes. The committee may be aware that, after a shareholders meeting, the company discloses to the Stock Exchange the number of shares voted for, against or abstained from on each resolution. But it is always very difficult to ascertain what percentage of the issue capital has voted on each resolution. We submit that, as a matter of good corporate governance, listed companies should be required under section 251AA to also disclose to the exchange the percentage of the ordinary share capital that has voted in favour of and against each resolution at the end of the meeting. We submit that from a transparency point of view it is important that shareholders, the market and government have access to this information, as it is often difficult to obtain a clear view of shareholder sentiment and trends in voting when only the number of shares voted is disclosed.

The other issue we want to raise with the committee is a provision that was introduced under CLERP 9, which is in relation to the register of relevant interests that is required pursuant to the new section 672DA(9) of the Corporations Act, which requires that information on relevant

interests received by the company or responsible entity be entered onto the register within two business days of receipt. In practice, that is very difficult for a company or its agent to comply with, and we submit that those two days be extended to 30 days to facilitate an alignment of time in which a full analysis of relevant interests can be completed before the company discloses a relevant interest on the register for public inspection. It is submitted that this amendment is not contrary to the aim of this section, which is to make information already collected available to the wider market. We understand that such an amendment would also be in line with international standards on this issue, particularly in the US and the UK. That is all; thank you.

CHAIRMAN—Given your views on direct voting, do you have any views in relation to shareholder participation on the difficulty that appears, apparently—and we discussed this towards the end of the business panel's evidence—in encouraging shareholders to use electronic means of communication with companies?

Mr Matheson—I think one of the disincentives for many shareholders, large and small, at the moment is that they feel as though their votes do not count. It does, as far as the share registrar aggregating up all the votes received by proxy prior to the meeting is concerned, but in the normal course of a meeting most resolutions go to a show of hands. It is therefore only those who are represented on the floor of the meetings and who stick up their hands who determine the outcome of a resolution. So I think it is a widely held view amongst shareholders, large and small, that their vote does not count. The number of open proxies—that is, proxies that are not directed by the shareholder and therefore allow the chairman or the proxy to vote how he or she thinks fit—has certainly been called into question and I think has concerned a number of shareholders as to how their votes may be being used. This method of direct voting certainly eliminates any confusion and also eliminates any perceptions that votes are not being counted towards the final determination of the resolution.

CHAIRMAN—With regard to your proposed requirement for companies to release after an AGM the voting results in terms of the proportion of capital that voted for and against, is that likely to impose any additional costs of any significance on companies?

Mr Matheson—No. Our understanding is that it is a statistic that the share registrar would provide in the normal course of the report that it would give to the company following the meeting anyway.

CHAIRMAN—Can you enlarge on your view of the proposal in the legislation to reduce to 20 the threshold needed for members to list resolutions on the agenda of an AGM?

Mr Matheson—As I said in my opening paragraph, we believe 20 shareholders is an extremely low number to get a shareholder proposal up onto the notice paper. Given the ability of any holder to share-split now, in essence this proposal could allow one holder to split his or her holding—or its holding, in the case of a corporate entity—into 20 different parcels and therefore satisfy this proposal. If that were the case, one holder would be able to legally split—as they are—their holdings into 20 different parcels and therefore satisfy this 20-member test. It just seems ridiculous, really, for essentially one person or one holder to be able to split their holding into 20 different parcels to satisfy the test. Also, there is no limitation or minimum threshold on the size of holding that the 20 holders have or on the duration of their holdings et cetera. There are those sorts of issues as well.

The association represents 60 listed companies at this time, with a combined market capitalisation of about $470 billion—or over half the capitalisation listed on the ASX. We believe 20 members proposing resolutions could be very disruptive to the meeting and could only extend the duration of the meeting, to no-one's benefit. As I said, if the justification for abolishing the 100-member rule is that it provides minority shareholders with a disproportionate influence, we would submit that introducing this 20-member rule for a shareholder proposal would confer an even greater disproportionate influence on even smaller minority groups.

Senator WONG—I just have a couple of quick questions because I understand you have to go. On your discussion about direct voting: do you have anything you could put to the committee about what we could do from our end to progress the proposition of direct voting?

Mr Matheson—Sure. For the committee's information, this is the modus operandi in the United States. Shareholders there only vote in this way, so we could certainly get some information on how it works in the US and convey that to the committee.

Senator WONG—Mr Matheson, if you did have time it would be useful—certainly from my end; I cannot speak for Senator Chapman—if we could receive some information about particular propositions you might recommend or at least a process by which this could be taken forward. Obviously this is something that the corporate sector will need to be involved in. It seems to me that we have been discussing this now in a general sense and in a number of reports over several years, and I am keen to try and progress it a little bit more concretely. If you could take that on board, I would appreciate it.

I want to clarify your position on the removal of the 250J(1A) provision regarding disclosure by the chairperson at the meeting of proxy voting. You are opposed to that on the basis that there is a general expectation from your perspective that this disclosure occurs.

Mr Matheson—Yes.

Senator WONG—You set out in more detail some of what should be included in the pre-poll statement. In relation to the latter—that is, the detail of the pre-poll statement on the proxies—is that something that has been discussed with directors or the business community more generally?

Mr Matheson—It has not specifically, but a legal adviser brought that to our attention.

Senator WONG—Does it differ substantially from the current practice?

Mr Matheson—No.

Senator WONG—Finally, the disclosure of the percentage of shareholder votes—has that also been the subject of any discussion with directors or the business community generally?

Mr Matheson—It certainly has with directors.

Senator WONG—And is there opposition to it?

Mr Matheson—Not to my knowledge.

Senator WONG—I think your answer to Senator Chapman was that from your perspective you did not perceive that to impose a significant additional cost.

Mr Matheson—No.

Senator WONG—The only other thing was your suggestion that there is a technical problem with 250A(5), which is the directed proxies section. It is at the top of page 5 of your submission.

Mr Matheson—Correct.

Senator WONG—We will have a look at that. If you are able to get us anything on the direct voting, Mr Matheson, I would certainly appreciate it.

Mr Matheson—Thank you.

CHAIRMAN—In summary, you support generally the amendments that are proposed in the legislation, with the exception of the 20-member reduction.

Mr Matheson—Correct, and also we do not support the repeal of 250J(1A).

CHAIRMAN—Thank you for your appearance before the committee. We have finished almost in time with your requirement, so we have done pretty well.

[11.02 a.m.]

WILSON, Mr Stuart Henderson, Chief Executive Officer, Australian Shareholders Association Ltd

CHAIRMAN—Welcome. This is a public hearing and therefore the committee prefers that all evidence be given in public. If at any stage of your evidence you wish to give evidence in camera, you may request that of the committee and we would consider such a request. I invite you to make an opening statement, at the conclusion of which we will move to questions.

Mr Wilson—Thank you very much for the opportunity to appear. I will go briefly through some of the main points of our submission. We support the removal of the 100-member rule in relation to calling an extraordinary general meeting. We do not support the reduction of the threshold to put a resolution on a notice paper of an annual general meeting or circulate a statement to 20 shareholders. We believe that this is too low, that the 100-member rule should be retained and that some consideration should be given to making that a '100-members with a marketable parcel' rule.

We have some concerns about membership organisations and mutuals such as the Australian Shareholders Association and the NRMA, where the five per cent rule equates to a prohibitive number of requisitionists. Whilst we do not have a particular solution for that, we do identify that as an issue. We also have an issue with listed property trusts which are not required to hold annual general meetings. Therefore, we would argue that removing the 100-member rule in that instance does not give the smaller shareholders adequate compensation, because they are unable to put resolutions or notices for annual general meetings.

We support the electronic circulation of statements. I am not surprised that the take-up by retail shareholders of the electronic alternative is low. The issue of access to broadband for the internet, combined with huge files with lots of pictures in annual reports, does make that prohibitive for some people. We agree with the cherry-picking proposals. We at the ASA often represent our members and other retail shareholders by proxy. If a person is appointed a proxy and is unaware of it, we want to make sure that that does not mean they inadvertently contravene this law.

Finally, in relation to the disclosure of information reported to overseas exchanges, we would like to see that retained. We believe that many of our members will go to one source for their information, and that is usually the Australian Stock Exchange. Whilst there may be some technical overlap, we believe that, in a practical sense, retail shareholders would prefer to have all of their information at the one source, irrespective of whether it is material or immaterial.

CHAIRMAN—You say in your submission that annual general meetings are often the only opportunity for shareholders to have direct contact with company directors. Telstra in its submission says that small shareholders have a number of alternative means of communication with fellow shareholders and the company. To what extent do shareholders need a direct dialogue with directors as compared with the other means of communication, in your view?

Mr Wilson—It really depends. In relation to larger listed companies with extensive investor relations teams, that necessity may be somewhat diminished. However, we have seen an increase in the public relations nature of investor relations teams, and it is invariably always better to get answers from directors and/or the chairman. In that way, we think that it is appropriate that there is some sort of dialogue between the two parties.

CHAIRMAN—As an organisation, do you have information as to the extent to which retail or small mum-and-dad shareholders in particular communicate with their companies between AGMs in terms of raising queries and seeking information and the like?

Mr Wilson—Yes. It is usually sporadic but it is on the increase. It tends to peak whenever there is a major negative issue facing the company, and it usually occurs by telephone, email or written letter. Given the improvements in technology, I think communication has been on the increase. There has certainly been an increase in the one-way communication from companies to shareholders. In addition to that, companies have been increasingly seeking comments and questions. When they release their annual reports, there is usually a feedback form in which shareholders are able to list their questions and concerns and return them to the company. The chairman will usually take the more popular questions and comments and address those at the annual general meeting.

CHAIRMAN—With regard to lowering the threshold from 100 to 20 for the listing of items on the agenda of the AGM, is your fear that it will tend to clog up the agenda and that shareholders, particularly small shareholders who may have more business oriented issues to raise, will therefore not have the opportunity to do that? What is your concern with that issue?

Mr Wilson—I do not want to agree with the BCA that the annual general meeting may be a waste of time sometime in the future. However, we fear that lowering the threshold could very well escalate a number of non-shareholder issues and really diminish the efficiency of an annual general meeting, which is already under attack in some circles.

CHAIRMAN—You are coming at this from the perspective of small shareholders.

Mr Wilson—That is right. We understand the trade-off between the right of shareholders to call a meeting and the costs involved. There is an unwritten ASA policy that we would never call an extraordinary general meeting unless we were fairly confident that we would be able to win the resolution. We have called only one extraordinary general meeting in our history, and we used the five per cent method. We approached a number of large shareholders, who were only too happy to put their signatures on the piece of paper.

CHAIRMAN—You comment on the proposed abolition of the 100-member rule and the substitution of the five per cent rule in relation to mutuals and the difficulty of getting five per cent of the members of a mutual organisation together to be able to call a special meeting. Could you enlarge on that? Isn't the enormous expense to which a mutual would have to go to call a special general meeting in fact a safeguard?

Mr Wilson—I imagine the cost for a listed or a mutual entity would be similar, depending on the size of its register. But where you have a one-member, one-vote situation—for example, the NRMA—with, say, a million members, you would need the signatures of 50,000 requisitionists

who are like-minded. In relation to an extraordinary general meeting, obviously it would be something that was of urgent need and could not wait until the annual general meeting. So just the practical imposition on it would make it completely unworkable.

CHAIRMAN—Do you have an alternative proposal that could apply to mutuals?

Mr Wilson—I don't. I am happy to leave that to you.

Senator WONG—That was going to be one of my first questions: 'What do you suggest we do about mutuals?' Maybe the mutuals will know. One of the effects of the proposed change would be to require that institutional investors agree to the calling of an EGM—and there are some very sound arguments for that. Do you see any circumstances where the particular economic interests of a retail shareholder would be substantially different from those of an institutional investor such that it would be very difficult for the retail shareholders to gain institutional support?

Mr Wilson—We probably have a couple of lingering concerns about that, and it is very hard to see whether they will pan out or not. The first one is that traditionally institutions have been very shy when it comes to making public statements. We have found that institutions much prefer to speak to companies behind closed doors to deal with issues, whereas the calling of an extraordinary general meeting could not be more public. So we would be concerned that there may be some reticence from the institutional shareholders to put their pens to paper, even if they have a like-minded viewpoint on a particular issue.

Senator WONG—Why is that?

Mr Wilson—You may have to ask them, but they may fear a damaged relationship with the company in which they have a large shareholding, or there may be another reason. The only other issue that we may see is where there is a director of a company who also happens to be the director of the parent of the institution. Many institutions these days are owned by the major banks, and the directors on the boards of major banks often have wide-ranging multiple directorships with a number of other listed companies. Invariably, there is going to be some sort of crossover. You would expect there to be no meaningful discussion between a director of a common company and the institution itself, but one would fear that they may receive some pressure from that director to avoid the embarrassment of going to an extraordinary general meeting.

Senator WONG—So how do we deal with that?

Mr Wilson—I think you would have to go back to the fiduciary duties of the institution.

Senator WONG—Arguably, it is an extraneous consideration in their role as director of the institution.

Mr Wilson—It could be, and there could be conflict there. That needs to be addressed.

Senator WONG—Someone has raised off-market share buybacks as an example of where there might be a difference of interests. Do you have a view on that?

Mr Wilson—We are doing some research on off-market share buybacks at the moment. We do not have a strong view on it. However, we do note that off-market share buybacks do tend to favour entities that have a lower tax threshold. But the offsetting side to that is that they are willing to pay more and they are able to sell their shares for less as a result. Overall, that benefits the remaining shareholders. But we have not completed research as to what benefits who the most, so I could not comment any further.

Senator WONG—So that would not necessarily be an example of a situation where there might be a difference of financial interest between a retail shareholder and an institutional investor, which is relevant to this discussion of five per cent?

Mr Wilson—No, not necessarily. I would find it hard to justify calling an extraordinary general meeting over off-market share buybacks.

Senator WONG—I think you were here for the discussion over the phone with AIRA about direct voting.

Mr Wilson—Yes.

Senator WONG—Do you have a different view about the direct voting?

Mr Wilson—We see some benefits in direct voting. We think that it could streamline the proxy process. We would not like to see the removal of the proxy process. We think that many people will appoint a proxy-holder to attend the meeting, listen to the debate and finally determine which way they should vote. That does not seem to be able to be facilitated by direct voting.

In addition, a number of times we have heard the suggestion that voting by a show of hands should be relegated to procedural issues. We strongly disagree with this. We think that the main premise behind this argument is that whenever a vote on a show of hands is lost it is of considerable embarrassment to the chairman. We think the argument that direct voting would be more efficient is incorrect. There is nothing more efficient than a 30-second show of hands and, wherever the result disagrees with what would have been the result of the poll, most usually a poll is called in any event. We do not have a strong opinion on direct voting. We think it could be a good thing—it needs further exploration—but we disagree with the removal of the show of hands.

Senator WONG—That is section 250J(1A). You are suggesting that the initial vote should be on a show of hands.

Mr Wilson—The initial vote should be on a show of hands, yes.

Senator WONG—And the disclosure of the proxy tallies occurs when? I am just not clear what you are actually suggesting in terms of process here.

Mr Wilson—I was really just indicating that there should be no suggestion that the show of hands should not occur at all.

Senator WONG—Is that being suggested?

Mr Wilson—No, I thought that that is what the AIRA was suggesting in their submission.

Senator WONG—So what is your position on the removal of an obligation on the chair to announce proxy tallies? That is section 250J(1A).

Mr Wilson—We have seen very strong compliance with this. Companies do disclose their proxies, both to the meeting and to the market. We would prefer that the disclosure occurred after the discussion and, better still, after the show of hands, for all the reasons that have been put forward this morning. We think the disclosure of the proxy results to the meeting and to the ASX is sufficient.

Senator WONG—What is your view of the overseas exchange disclosure?

Mr Wilson—We disagree with the proposal here. We feel that shareholders in Australia should expect the same information as is given to shareholders overseas. Many Australian shareholders are not particularly sophisticated and would prefer to go to the one source in order to receive the information on the accounts and any other forms that are lodged with foreign exchanges. We would like to see that retained. I noted a proposal to include it in the listing rules as a replacement to this, and we have no objection to that so long as shareholders get all of the information that everyone else does.

Senator WONG—Can I take you back to page 4 of your submission, where you discuss the cherry picking of proxy votes:

In relation to the provision of relief to proxy holders who for some reason do not vote on a poll we would prefer that valid directed proxies were automatically included in the tally of voting.

When are you suggesting that should occur? Are you suggesting that proxy votes should be recorded at the start of a meeting in case a poll is recorded during the meeting?

Mr Wilson—Yes, that is correct. It is in case a poll is opened. We have had some experience where meetings go for so long that the proxy holder simply cannot wait until after midnight in order to lodge their proxies when the poll is opened. I guess this is similar to the direct voting idea.

CHAIRMAN—On an unrelated matter which is not directly relevant to this inquiry, but I will ask you about this while I have you here as a representative of small shareholders, does the ASA have any current view on the compulsory acquisition rules? This question particularly relates to recent takeover offers which do not include a script-for-script alternative as eventually small shareholders who do not want to relinquish their shares but have to under compulsory acquisition may be faced with a capital gains tax bill, which they did not want to have applied to them. Do you think there is a case perhaps to amend the compulsory acquisition rules so that they apply only where a script-for-script alternative is offered to shareholders?

Mr Wilson—That is a tough question. I do not know if that is the case. I have seen some proposals that the rollover relief be extended to cash bids where the cash is reinvested within a

short period of time. I think that sort of thinking may be more appropriate than the question you have asked.

CHAIRMAN—Thank you very much for you appearance before the committee and for your contribution to our inquiry.

[11.35 a.m.]

SIBREE, Mr Mark William, Executive Director, Mutual Strategies Pty Ltd

CHAIRMAN—The committee prefer all evidence to be given in public because this is a public hearing. If at any stage of your evidence you wish to give evidence in camera, you may request that of the committee and we would consider such a request. I invite you to make an opening statement, at the conclusion of which we will proceed to questions.

Mr Sibree—The position of mutuals is different from other companies with a shareholding. The mere possibility of the use by members of the 100-member rule is an important part of the governance armoury which keeps managements rather more responsive to members, so the rule for mutuals should be kept in some form. I am most familiar with the regimes of the private health funds and also of the transferring financial institutions. The latter are basically former state based institutions under the former financial institutions scheme which became companies on 1 July 1999, and they include credit unions, building societies and friendlies.

My informal inquiries of those in those industries could not uncover one use of the 100-member rule in these types of companies, despite their importance to the economy. Perhaps there has been one or two uses of that rule but it has been far from well publicised. I do know however from informal discussion with credit union executives that it is in the back of the minds of many of those who are well informed. So the 100-member rule is not a problem in these industries. In fact, its use by a more informed membership base could be very beneficial to some members of some institutions.

My paper gives the example of two credit unions in the defence community which, if they merged, would almost certainly produce benefits to their members equivalent to at least one per cent off their loan repayment interest rates. I get this from statistics in their annual reports. For instance, if there is a duplication of over 30 branches in the Defence Force establishments—that is, the branches that notionally face each other across the street—then you get that reduction. These defence credit unions service the same market of Defence Force personnel and their families as well as related industries. An empowered membership of one or both of them, if they were informed of these facts, may bring about a rationalisation which their boards have been unable to do. Of course it is possible that, although lacking formal authority in this area, senior officials or even the minister might engage in behind the scenes persuasion to bring this about. This logic might apply to the two defence health funds.

I would also like to emphasise to the committee that my proposed solution of requiring a bond of requisitioners is only a tentative one. It has some difficulties but perhaps solutions to those difficulties can be found. Some of these solutions may revolve around having a fixed cap on the type of bond required of perhaps $100 per requisitioner to avoid some sort of unlimited liability. Another solution could be to precisely prescribe the types of resolutions which requisitioners might be able to put. I note that in the submission by AEF Rofe there are listed various legal tests that resolutions could be put through anyway.

In concluding my opening remarks I would like to add three things. Firstly, I note that my biography does not list my current directorships, which include two private companies of a family nature and one medium-sized health insurer. Secondly, this submission is being made on a self-funded basis and on behalf of no client. We regard the input involved as a market development expense. Thirdly, I speak as a former CEO of a large mutual. Our submission addresses the issues from a practical governance point of view—that is, how things actually happen—rather than dwelling on the legal issues. Consequently, I have made no attempt to address the other complex issues that have been raised in the draft bill and have been dealt with comprehensively in other submissions. That concludes my opening remarks.

CHAIRMAN—Thank you very much. In other submissions it has been noted that shareholder activism is on the rise. In your submission you argue that, except in the case of NRMA, mutuals have not experienced frivolous or vexatious attempts to use the 100-member rule. Given that shareholder activism in listed companies is on the increase, do you envisage any comparable rise in activism amongst members of mutuals and, if not, why not?

Mr Sibree—There could be such a rise in activism, I think, if there were one or two examples where it has actually worked and that became reasonably public. Typically, the members of mutuals are really members in name only. They regard themselves, largely speaking, as having bought a product. They have bought a product in a health fund or in a friendly society bond or they have a deposit with a credit union. They regard their governance, their membership activities and their membership role as very much a secondary issue. There are some mutuals which make a great deal of capital out of membership and being a member, as distinct from being a customer, but largely speaking those organisations are very limited in number. To return to your question, 'Do we see a rise in activism?', perhaps we could see one or two examples of activism being successful, say, in the case, as I have mentioned, of defence issues. There are other, say, credit unions or health funds which would also profit their members by having a merger. Perhaps it is difficult for their boards to see their way clear to take that rather difficult plunge.

CHAIRMAN—You referred to benefits that could arise from the mergers of some of the smaller credit unions—in particular, those related to the defence forces. Can you comment on the current state of merger activity that is occurring within that sector? Is it significant or is it nonexistent?

Mr Sibree—No, there are merger discussions occurring in most mutuals most of the time. You would find in a typical merger that there might be one or two chats per annum with likely suitors. The real issue is that they very infrequently come off. However, I did note in my paper that the credit union industry as a whole has been quite successful in having a gradual consolidation. My point would be that perhaps it could happen a lot more rapidly. That is not to say that some of the essential characteristics of some credit unions should go out of existence. The mergers obviously should take place in an environment where the bond of the two credit unions, say, remains similar—that is, they draw from a similar marketplace with similar philosophical backgrounds. Defence is one area. Education based credit unions are another. There are credit unions associated with the emergency services which, in my view, could profit from some form of consolidation et cetera. So I guess those are the issues.

CHAIRMAN—You say in your submission:

However, mergers between mutuals depend as much on good timing as anything else, so a requirement to wait perhaps 12 months to ventilate an issue not supported by management may not be in members' overall interests.

Does that indicate that, in between AGMs, there is very little engagement between management and members of mutual funds?

Mr Sibree—The wise credit union or mutual management uses a range of devices for communicating with its customer/membership base. Increasingly, they use web based services and email. However, those communications tend to be product oriented. It is a rare mutual which has managed to distil, shall we say, philosophical issues and promote them to its membership base as a commercial plus. We find that large friendly societies, for instance, mimic small life insurance companies and that very large credit unions, in some respects, are similar to small regional banks. So they are losing their character. Returning to your question, the interaction is largely one-way.

CHAIRMAN—I recall that when we examined this issue five or six years ago the NRMA was the case at the front of our minds. It was argued at the time, I think by Mr Whitlam, that the 100-member rule was too onerous on mutuals. You have referred to the large membership base making it difficult for a five per cent rule to apply fairly to members in terms of requisitioning a special general meeting. On the other hand, the argument has been put that, in a very large membership base, 100 is a disproportionately small number, compared with the membership base of a listed company, and the cost to an organisation like the NRMA of organising a special general meeting is much greater in terms of the number of people that have to be advised of a meeting, and the like. What is your response to that argument? Perhaps leading on from that, if moving to the five per cent rule is not appropriate for mutuals, is there a figure somewhere between the current 100-member provision and the five per cent rule that might obviate the argument about the extra cost incurred by mutuals in having to requisition an EGM—large mutuals in particular—in comparison to the cost incurred by companies?

Mr Sibree—Some creative solutions have been proposed to this—for instance, the square root rule, which I think the BCA promoted in a paper last year. The square root of one million is 1,000, so if you had one million members you would need 1,000 requisitioners. The logistics of getting 1,000 signatories are quite difficult and perhaps destructive for the organisation, even before a requisition meeting is held. If the organisation is a financial institution that depends on the confidence of its customers, it might have two public relations humps: advertising for requisitioners in the press; and the difficulty of any subsequent extraordinary general meeting. I do not know how the Prudential Regulator would view the activities that occur there. One of the other issues is that it is very difficult to find out who the members of financial institutions are. If you are a member of a community based mutual, apart from your immediate neighbours who might attend the credit union or small friendly society you might not even know who the members are in order to ask 100 of them for their names and addresses.

A hundred is, for many organisations, quite a hurdle because you cannot find out who the people are who you ought to be approaching, without some form of public advertising campaign. So a hundred is quite a hurdle in many cases. It is quite different from the circumstances where, in a listed public company, you can have a parcel of shares and just divide them up amongst your current executive committee and their friends. You know who they are. But if you are forced to seek people who are already members it is actually quite difficult. So a hundred members is

quite a fair ask. I think the circumstances are that there have been very few examples of that being used. As I said before, I have not found any.

CHAIRMAN—What about an option, perhaps, applying the square root rule but with a minimum and a maximum number as well?

Mr Sibree—Any sliding scale like that could work. If you have 100,000 members, the square root of 100,000 is around 300-odd, which is not vastly dissimilar from 100. That would be achievable. I do not know what you are actually achieving, other than making it a bit more complex, a bit more uncertain, as to exactly what the rule is. You would have to have some form of regulation requiring management to publicise how many members were members of that institution so that at least the requisitioners could work out how many members they needed.

Senator WONG—Isn't that the case with the five per cent rule too?

Mr Sibree—It is the case with the five per cent rule.

Senator WONG—It is just a bit more mathematically simple.

Mr Sibree—Yes. Some mutuals might not know how many members they had.

CHAIRMAN—Is that not a regulatory requirement?

Mr Sibree—It is a regulatory requirement to have a register but not necessarily to publicise how many people are recorded on the register.

CHAIRMAN—I understand that it is not necessary to publicise, but they would know how many they have, surely?

Mr Sibree—One would hope so. In response, I do not see the square root thing as being such a hurdle. It would be feasible. But I still think a hundred members is quite an ask. If you place some responsibility on those requisitioners to stand up and be counted—that is, if you are going to requisition this meeting—you might have to bear some of the cost of the meeting unless it is successful or it achieves a certain degree of support. It would cause many people to think twice.

CHAIRMAN—Do the mutuals have any comment on the other initiatives in the legislation?

Mr Sibree—At the beginning I referred to the fact that I was coming at it more from the practical governance point of view. Certainly, the 20-member rule, with regard to annual meetings, would be quite consistent with the proposals that have been put in the submission that I have made. The other proposals seem to be quite sensible, but, frankly, we have no position on those.

Senator WONG—Just to recap, who do you actually represent, Mr Sibree? I do not mean that rudely.

Mr Sibree—No, that is fine.

Senator WONG—Is this a view that a number of the large mutuals support?

Mr Sibree—It would be a view that would be opposed by the managements of many mutuals because it would make their lives more difficult.

Senator WONG—Your view?

Mr Sibree—Yes, and I say that having been one.

CHAIRMAN—Having been a manager.

Mr Sibree—Yes.

Senator WONG—As opposed to having been difficult.

Mr Sibree—Yes. Now I am on the other side of the fence and one has a different point of view.

CHAIRMAN—A poacher turned gamekeeper!

Senator WONG—Essentially, you are saying that five per cent is unrealistic for the large membership base. Your proposal is a bond. If we are not minded to go that way, you would look at some sort of sliding scale around the modified square root rule or something like that?

Mr Sibree—That is right. The bond thing has the virtue of asking people to put their money where their mouth is, really. It would have some implementation consequences. It may even be able to be dealt with by regulation, because the transferring financial institutions in particular can be subject to regulation targeted at them as transitional from the 1999 arrangements—that is, when financial institutions joined the Corporations Act world. In the course of that transition, various provisions were put in the Corporations Act allowing the government of the day to proclaim regulations smoothing that transition and dealing with specific features of those mutuals that were transferring. I have a copy—I could see you afterwards.

The regulations are quite extensive, particularly those dealing with the circumstances of credit unions where the customer is the same as the member. They were very sensitive about their membership lists because they did not want their competitors to be able to see who their customers are and steal them, basically. I think that is a reasonable concern. As to who I represent, I represent my small business, which is largely speaking a one-man business. I see that there is a future in the medium term for assisting members to realise their rights with their mutuals. If I can help in that process, all the better. So there are not many votes on this side of the table in the first instance.

Senator WONG—Diversity of views is encouraged!

CHAIRMAN—Thank you very much for your appearance before the committee and for your contribution to our inquiry.

[11.58 a.m.]

BOTTOMLEY, Professor Stephen, Director, Centre for Commercial Law, Australian National University

CHAIRMAN—I now welcome the representative from the Centre for Commercial Law at the Australian National University. As I said earlier, this is a public hearing and therefore the committee prefers that all evidence be given in public. But if at any stage of your evidence you wish to give evidence in camera, you may request that of the committee and we will consider such a request. Having said that, I invite you to make an opening statement, at the conclusion of which we will move to questions.

Prof. Bottomley—My written submission addresses the proposal to amend section 249D by removing the 100-members threshold from the procedure for the requisition of special general meetings. Put simply, I see no reason for that amendment to be made. There is no evidence of widespread abuse of the right of 100 members to request a special general meeting. My submission refers to research that I undertook involving 217 companies drawn from a list of the top 500 public companies in Australia. That research collected information about extraordinary general meetings that were held between 1998 and 2002. The information I received was that there were only five special general meetings requisitioned by shareholders during that time. That includes meetings requisitioned by either the 100-members rule or the five per cent rule. My data was not able to differentiate between those two.

My concern is that the drive to repeal the 100-member rule is driven more by anecdote than by fact. To my knowledge, over the past six years there have been only four examples where the use of the 100-member rule has been considered to have caused some controversy. Those are examples that are probably well known to the committee. It seems to me that those few instances are driving the move to amend this provision.

The debate about the 100-member rule is not just a debate about numbers, whether it be 100 members, five per cent of the square root or any other configuration. It is, I believe, fundamentally a debate about the appropriate model of corporate governance. The debate is becoming polarised between two models. One we might describe as a shareholder dominance model, which would argue that shareholders should control the company. The other we might describe as a managerial model, which argues that the shareholders should take a back seat and let the managers and directors get on with the job of running the company. That latter seems to be the model that is preferred by many, but not all, critics of the 100-member rule. Neither of those models on its own is practicable, desirable or reflected in legal principle. The best option is a combination of those two extremes. This is a balance that the law has sought to strike for many years. I believe that in the absence of evidence of widespread abuse of the 100-member rule the balance seems to be working.

In my submission I have not addressed the other reforms that are proposed in the draft bill. I will now add a comment about the proposed amendment to section 249N dealing with the capacity of members to submit resolutions to a general meeting. The draft bill proposes to reduce the threshold in that section from 100 to 20 members, and that is being offered as a quid pro quo

for the change to section 249D. If section 249D is not changed, as I argue, then arguably there is no need to amend the threshold in section 249N. I am not aware of any evidence that the current threshold in section 249N is thought to be overly restrictive. I have some comments about the proposed amendment to section 250A on proxy voting, which I am happy to take up in questioning if the committee wishes. That ends my opening comments.

CHAIRMAN—Professor Bottomley, you indicated your research showed that there have been only five examples of what you described as controversial—or what others might describe as frivolous or whatever—use of the 100-member rule. I think earlier the Business Council said they had three examples. Whether it is three or five, the point they made was that, in all of the examples they were aware of that might be regarded as an inappropriate use of the 100-member rule, there was absolutely no chance of the issue being raised in terms of requisitioning the meeting having success when the broad body of shareholders considered it. Although you say it has been rarely used, the fact is that it has been used in a way that the majority of shareholders regard as inappropriate. Is that not an argument for lifting the threshold?

Prof. Bottomley—My view is that it would be an unfortunate thing to amend the law to affect the 1½ million other companies that are registered in Australia to address problems that have been felt by a mere handful of companies. I am not aware of the details of the situations in these three, four, five or whatever number of examples it is. I do not know the ins and outs of what the issues were, other than what I read in the press that in some situations they involved mining companies and therefore these were environmental issues that were being raised at a special general meeting. I certainly do not know what led up to the requisitioning of that meeting by that group of shareholders. I do not know what negotiations there were prior to the shareholders taking that action.

That seems to me to be what is important in this debate—that is, to put the operation of section 249D in context. It operates in the context of a number of other provisions, all of which are aimed at facilitating communication between directors and shareholders. In my submission I make the point that you can conceive of that as an escalating set of strategies and responses. One would hope that where shareholders have concerns their first step would be some form of informal communication with management—with directors—and, where that does not get a response, questions at general meetings or using the power that they have to put resolutions on the agenda of the next general meeting.

Where you find evidence of shareholders going straight to the power under section 249D that speaks to me of some deep problems within that particular company. That, indeed, reflects some of the responses that I obtained in interviews in my study. Some directors put to me the proposition that the virtue of section 249D is that it reminds directors of the need to be sensitive to the interests of shareholders and to respond to their interests in an interested and creative way rather than simply allowing it to get the stage where it goes straight to the requisitioning of a special meeting.

CHAIRMAN—When you say that you are not aware of the circumstances of the five examples that your research showed up and that you are not aware of the processes that may have been gone through that led up to the requisitioning of the EGM, is it not important to know that, if we are making a judgment on the appropriateness of the use of the 100-member rule?

Prof. Bottomley—Certainly, yes.

CHAIRMAN—Is it not important to know whether in fact the procedures were followed and whether those seeking the EGM were simply implacable in their position, irrespective of what negotiations the company undertook with them prior to that?

Prof. Bottomley—I agree that it is important to know exactly what has happened in those situations and to know whether those examples speak of much larger problems. The evidence I have does not suggest that that is the case; the evidence that I have suggests that these were five isolated instances across many years and out of many companies.

CHAIRMAN—Given the general view that shareholder activism is on the rise in Australia, do you think in the absence of these proposed amendments to the legislation that there could be more use of the 100-member rule and therefore the potential for more abuse of it?

Prof. Bottomley—It is hard to predict. It is interesting that the debate about the 100-member rule has now been in the public domain for quite a number of years and across that number of years we have not seen any spike occurring in the use of the rule. There has been no evidence that shareholders have been awakened to the possibility and have started using it. Whether there is a rise or not in shareholder activism is something that is difficult to determine, but if there is then that need not necessarily be a bad thing.

Senator WONG—Your study confirms, I think, what we have already been told; that is, the actual usage of the 100-member requisitioning provision is minimal and arguably the abuse—if one takes the perspective that it is abuse—is minimal as well. A number of the business groups this morning put this principle to us: why should a company and its shareholders be put to the expense of an EGM for a resolution that has no prospects of success, is that an efficient and an appropriate framework for regulation and is that the right balance between the need for engagement and the right of shareholders to express dissent as opposed to the obvious costs for shareholders and the company for holding the meeting?

Prof. Bottomley—Again, part of the answer to that question is the evidence that not many companies are being put to the expense of an EGM in those circumstances. But the prospect that a company might be put to that expense should occupy a place in the minds of directors when dealing with the concerns of shareholders. When I say that, on the evidence I have, section 249D has not been used a great deal in the past four or five years, what I cannot say is the extent to which section 249D has formed part of the backdrop to negotiations and dealings between shareholders and directors—and in my view that is an appropriate way for corporate governance to be conducted.

Senator WONG—Sure. I do not disagree with that. Compliance is only one aspect. The possibility of having to comply is obviously another behavioural motivator. What do you say to the proposition that there ought to be some minimum economic interest associated with exercising those rights on the basis that the reason shareholders have certain rights is that they have a certain economic interest in the company and from that flows certain principles about their right to question directors and have some say in how the company is being run? If one takes that perspective, should it not extend also to the requisitioning of an EGM?

Prof. Bottomley—There is no doubt that shareholders can be described as those who have an economic interest in the running of the company. From that, you can draw the conclusion that the size of an individual economic interest therefore ought to dictate the extent to which that person can have an input into and an influence on the way the company conducts itself. But it is also the case that many shareholders have interests in addition to their economic interests in the company. Not much work has been done in either Australia or overseas that I am aware of which has actually assessed what it is that shareholders see their shareholdings as bringing them. We do know that for the most part shareholders tend to be quite passive about these things but, from time to time, issues arise that do cause them concern. Whilst economic factors clearly ought to be taken into account, my view is that they should not be solely determined by these matters. The fact that a group of shareholders who, compared to other shareholders, have a small economic stake in the company perceive an issue is worth debating or worth bringing forward to the attention of the company needs to be judged not on the size of the shareholding but on the merits of the issue itself. Ten shareholders can raise an issue that is very important for the company just as well as one shareholder who has a much larger stake in the company.

In the precursor to the current section 249D there was a minimum shareholding requirement, and I know that there are proposals around to reintroduce something along those lines. But I go back to my initial proposition that, aside from one or two particular examples, there is no evidence that the current rule is causing massive disruption to the operation of corporations in Australia, and to start to tinker with it, I think, would invite problems.

Senator WONG—We were just trying to get the history of the previous minimum economic stake. Can you elaborate on that?

Prof. Bottomley—You have caught me there. No, I would not be able to recall it properly.

Senator WONG—We are talking pre 1999, presumably?

Prof. Bottomley—Yes.

Senator WONG—You have not done any research on the effect of those provisions? Obviously, it was in a slightly different context then.

Prof. Bottomley—No, my research is all post 1999.

Senator WONG—I missed your answer to the chairman about the reduction from 100 to 20 in the number of members required to put a resolution at an EGM. Did you express a view about that?

Prof. Bottomley—If there is no change to section 249D then my view would be that there is no need to make the quid pro quo amendment and we would leave it as it is.

Senator WONG—Arguably, it is not a quid pro quo situation anyway.

Prof. Bottomley—Arguably. My view is that there is a balance to be achieved between the operation of the current provisions. There is no strong evidence that that balance has been upset in any significant way. My concern is that, by beginning to move these sections around, there

will be greater concern. I can easily see in the amendments that are being proposed that there will be much greater use of the mechanisms in 249D and 249P, which I understand from a number of the submissions is not something that is widely supported. My proposition is: leave it the way it is.

Senator WONG—Do you have any comment to make on the proxy voting requirements, or was that outside the scope of your submission?

Prof. Bottomley—I have one comment. I support the proposal to deal with the problem of cherry-picking by proxy holders. My comment, though, is that I do not think it goes far enough. I urge the committee to consider going one step further by providing that all proxy holders are required to vote on a poll and to vote as directed by the person who has given them the proxies. I do not see the point in having a distinction drawn between the chair and non-chair proxy holders. To have a situation where non-attending shareholders can be disenfranchised because the proxy holder decides, for whatever reason, not to vote on a poll is not a sustainable proposition.

CHAIR—Thank you very much for appearing before the committee and for your contribution to our inquiry.

Proceedings suspended from 12.16 p.m. to 1.35 p.m.

SPATHIS, Mr Phillip Arthur, Executive Officer, Australian Council of Superannuation Investors Inc.

CHAIRMAN—I call the committee to order and I welcome the representative of the Australian Council of Superannuation Investors. The committee prefers all evidence to be given in public, but if at any stage of your evidence you wish to give evidence in camera you may request that of the committee and we will consider such a request. We have before us your submission, which we have numbered 9. Are there any alterations or additions you wish to make to your submission at this stage?

Mr Spathis—There is a very slight one. On page 2, in the seventh paragraph, there is a reference to 29 March 2004. We ask that 2004 be amended to 2005.

CHAIRMAN—We will accept that change. I now invite you to make an opening statement, at the conclusion of which I am sure we will have questions.

Mr Spathis—Thank you. I would like to start by making some general observations and to say at the outset that ACSI supports the federal government's approach to corporate law reform, particularly in relation to corporate governance regulation. We applaud the government, and the opposition parties for that matter, for getting the balance right between what is colloquially known as black letter law and the principle based approach to corporate governance regulation. The ink now needs to dry on a range of these legislative reforms, so we take the view that it is now time to allow regulations to settle and apply. Over the last few years, ACSI has played a role to equip superannuation trustees to vote their shares, and to use this increasing ability to vote their shares as a platform to constructively engage with corporations on issues that impact on their investments. I would like to reiterate the perspective that we take as an organisation: that a constructive approach to engagement with corporations is in the best interests of our members. We therefore regard the law as a mechanism to assist with engaging with corporations.

I will very quickly turn to the Corporations Amendment Bill (No. 2) 2005. ACSI supports the proposals contained in the bill. However, we have cited in our submission two concerns, which I will go straight to now. Our first one relates to section 249D. We understand the rationale for amending section 249D. These provisions currently allow a small number of shareholders with a potentially small shareholding to call a general meeting of a company. We recognise that special interest groups could utilise these provisions to call a general meeting and effectively exercise a power that is disproportionate to their overall economic interest in a company. We are aware of the significant expenses that could arise in these sorts of circumstances. As mentioned this morning, there have been only a few occasions where these provisions have been utilised. Nevertheless, we agree that the 100-member shareholder test provision in 249D could be subject to abuse and should be modified. We are, however, concerned that the federal government's proposal does not exactly strike the necessary balance, as espoused in the explanatory memorandum, between corporate interests and the interests of minority shareholders—particularly smaller ones. The proposal takes us from one extreme, where it is relatively easy to call a general meeting, to another where it becomes virtually impossible for a significant number of shareholders to be able to call a general meeting.

Our submission takes you to an actual example of a financial services company listed on the Australian Stock Exchange that has 1.8 billion ordinary shares distributed among 250,000 shareholders. As at March 2005, these shares were trading at $20.50. In order to achieve that five per cent shareholding threshold test, this would require the support of shareholders who hold 90 million shares, whose total value is just over $1.8 billion. If we look at the report of the company, 52.43 per cent of shareholders in this company currently own fewer than 1,000 shares. This represents 3.18 per cent of overall shareholdings in the company, well below the five per cent threshold being proposed by the federal government. We are concerned, therefore, that the five per cent threshold will make it virtually impossible for small shareholders to ever utilise these mechanisms and will challenge some institutional investors to meet these requirements, especially in some widely held companies that are listed on the Stock Exchange.

We support refining the 100-member rule to minimise the potentiality for abuse but not with an outcome that introduces a virtually impossible benchmark for a number of shareholders. We are aware of previous proposals—and there was some discussion on those today—where both the federal government and the opposition had previously considered a compromise position. I think it was the Hon. Joe Hockey who actually put forward the compromise position that would have resulted in a test based on a numerical square root of the total number of members of a public company. We support this approach, but we will add something further to it. I do not want to sound like a Demtel ad, but we support the square root approach with an added requirement that each shareholder would need to have a minimum 1,000 shareholding that must have been held by the shareholder for the preceding 12 months.

In our example—the example in relation to the financial services company—the shareholder test calculated on the square root threshold would be 502 shareholders. This is a reasonable numerical amount, particularly given the minimum shareholding requirement. We believe that this provides a more reasonable scale to get a tougher requirement for shareholders and to muster more significant levels of support amongst bona fide shareholders who have genuine concerns in relation to a company and have sought as a last resort to call a general meeting to address critical matters of concern. Once again, I would like to reiterate that such mechanisms should only be used as an extreme last resort.

The second area that I would like to very quickly comment on relates to disclosure of information filed overseas. I refer to the proposal to delete section 323DA, which currently requires companies to provide disclosure information filed by Australian companies overseas to the ASX. Our overriding concern relates to ensuring that companies that make a disclosure overseas are required to replicate such a disclosure in Australia for the benefit of all Australian shareholders. They currently do so add at a minimal cost of emailing a PDF version to the ASX. In the absence of these provisions, the ASX listing rules as they currently stand would not capture all the information currently disclosed to overseas markets by Australian companies to the Stock Exchange. Currently the Stock Exchange listing rules at 3.1 require the disclosure of any information that would have a material effect on the price or value of company securities. The note to listing rule 3.1 provides that disclosure under listing rule 3.1 would include:

> A copy of a document containing Market sensitive information that the entity lodges with an overseas stock exchange or other regulator which is available to the public.

The parliamentary joint committee has previously asserted that any additional information under 323DA disclosed to foreign exchanges would not be price sensitive and would not be material to

the Australian market. Materiality of information tends to relate to short-term price sensitivity. In some respects, it has an element of subjectivity with different investors placing slightly different weight on different types of information. Our submission cites an example of an Australian company that discloses executive contracts under the SEC rules and to the ASX. Some shareholders consider this information to be important. Other submissions relate to the disclosure of the EEC triple bottom line requirements, and there are also circumstances where Australian companies have provided Australian shareholders with remuneration reports because they may be required to do so under the London Stock Exchange listing rules.

In the absence of the Corporations Act provisions and under the current ASX listing rule regime, Australian shareholders in the company will no longer be able to keep abreast of information disclosed by the company anywhere in the world, as they currently do, by simply reviewing the constantly updated list of ASX announcements. Australian investors would have to monitor not only ASX company announcements but also SEC disclosures in the US and possibly other disclosures made to other exchanges and regulatory bodies overseas.

Given the modest expense incurred by the company making an identical disclosure to the ASX by a PDF electronic filing, the potential benefits to shareholders, particularly those who have adopted a responsible approach to corporate governance, would outweigh the minimal costs of complying with section 323DA. We note the position of the Securities Institute. They said in their submission:

> ... to ensure consistent disclosure practices, the ASX should amend the Listing Rules to contain a specific obligation for listed companies to disclose information to the market that has been reported to overseas exchanges.

We would support this position as a fall-back should the committee proceed with the recommendation to remove section 323DA of the Corporations Act.

CHAIRMAN—Earlier, we heard that anyone can give a rationale for the reduction in the number of members required to list an item on the agenda at an AGM from 100 to 20 as a sort of trade-off for the removal of the 100-member rule in substitution for the five per cent rule. You do not want to introduce the five per cent rule; you want an alternative to that. But you still want to retain the proposal to reduce from 100 members to 20 members the AGM listing requirement.

Mr Spathis—In our view, there is no pressing need to amend the provisions in relation to putting a resolution forward at an AGM or in relation to distributing a statement. The way we understand it is along the quid pro quo type approach. We do find it somewhat curious that, on the one hand, attempts may be made to stamp out interest groups who potentially could put the company to great expense by calling an extraordinary general meeting but then, on the other hand, potentially allowing these same groups to frustrate the goings-on of an annual general meeting by putting forward matters that may not necessarily deal with corporate governance issues. We are on the record as supporting the government's proposal. The way we positioned that was in response to the quid pro quo type approach if the government seeks to proceed with amending section 249D. We are not heavily wedded to reducing the 100-shareholder provision to 20. We do not see a real pressing need.

CHAIRMAN—I understand the point you are making when you cite your company example and say that, in financial terms, you are looking at shareholders who are holding just under $2

billion worth of shares to get a special meeting up under the proposed five per cent rule—they look to be very large figures in monetary terms.

Mr Spathis—It is a lot of money.

CHAIRMAN—But they still represent only five per cent of the shareholding. Isn't it the case that, if a group of shareholders cannot get at least five per cent to support the requisitioning of a meeting, the chances of the issue they want to raise at that meeting having any success are virtually negligible? Therefore, it is simply putting the company, and in essence the shareholders of the company, to enormous expense with no outcome achieved.

Mr Spathis—The experience to date would support that, but I still submit that a provision like this should be made available to shareholders as an extreme last resort. It would at least make those directors and executives, who are entrusted to deal with the capital that is handed over by shareholders, aware that there are, beyond points of proxy voting and engagement, still last points of call that provide reasonable benchmarks for calling an extraordinary general meeting, so that it does not become virtually impossible for the majority of shareholders in many of the widely held publicly listed companies. So, to reiterate, we see this as a point of last resort.

CHAIRMAN—Do you have any view on how mutuals should be treated under the proposed legislation? Should they have a different formula applying to them than applies to corporations?

Mr Spathis—I am sympathetic to the submission put forward earlier today, but that is beyond the terms of reference of the Council of Superannuation Investors.

Senator WONG—Going back to the five per cent change, a lot of focus is being given to the prospects of success of a resolution at an EGM as a basis for determining the validity of calling it, and I think that that has certainly been the view put by the business panel this morning. I suppose the other argument would be that it is important as a last resort to have mechanisms whereby a dissenting view to that of those who manage and run the company should be put. That may well generate dialogue or discussion and the test of success is not simply whether the resolution gets up. Is that a reasonable proposition, do you think?

Mr Spathis—I will use a different sort of analogy that is along those lines. Virtually all resolutions that are put at annual general meetings that are endorsed by the board are successful. But that is not to say that shareholders should not organise to deal with contentious corporate governance issues, for example, that may relate to specific propositions. There have been numerous examples over the last two or three years when, yes, some of the larger institutional shareholders have supported remuneration arrangements for executive directors that have failed appropriate benchmarks with regard to share options, performance, and so forth. On some occasions the proportion of no votes has been somewhere in the order of 20, 25 per cent, even 35 per cent more recently. I have to say that those companies that have had such a close call have come back generally to shareholder groups and organisations and have sought in a constructive way to find out what our views are and what our position is with respect to our concerns. To ask whether a proposition will be successful or not is not the right question. The question that should be asked is: what sort of benchmark and requirement do you make of shareholders to be able to submit a proposal in order to engage with the corporation? Going back to my earlier point, using

a mechanism such as this provides a point of engagement, a catalyst, with which we can constructively and more positively impact on corporate behaviour.

Senator WONG—I refer to the example you set out at page 2—the financial services company. When I put to the business panel the issue of how the five per cent rule in practice would work in relation to companies with a very large shareholder base, the view was still that five per cent is appropriate. I do not want to verbal them but I think that is a reasonable summation of what they said. Is this an unusual situation? Is the example you raised the only and the most extreme example or is it your view that that may well be replicated across a number of companies?

Mr Spathis—This is a midtier ASX S and P 100 company. At least in the top 100, I would be surprised if the outcome were vastly different from the one submitted.

Senator WONG—So five per cent is a very substantial shift.

Mr Spathis—It is.

Senator WONG—You have proposed a two-limbed test, the five per cent or the square root rule, which is predicated on the number of shareholders. Is there any other formulation that you can think of in relation to the five per cent—for example, capping? If you retain the five per cent as the primary test, is there another formulation rather than going to essentially what is a modified square root rule? Yours is a bit different. Is there any other formulation for the five per cent rule that can deal with the problem at the top end of the scale?

Mr Spathis—At the moment we have essentially a shareholder test and a shareholding test. We need to clarify which approach is reasonable. We would prefer a combination of both a shareholding test, which is what a percentage figure introduces, and a tougher minimum shareholder test.

Senator WONG—You want a combination of shareholding and shareholder?

Mr Spathis—We would prefer a combination of a shareholding and a shareholder test—the current application of the five per cent shareholding test and a tougher but reasonable shareholder test to apply in the Corporations Act.

Senator WONG—The current proposal is five per cent of the votes that may be cast at a general meeting.

Mr Spathis—Correct.

Senator WONG—So what would your difficulty be with having a ceiling on that formulation, as opposed to the dual formulation proposal?

Mr Spathis—How would the ceiling work?

Senator WONG—Five per cent of the votes that may be cast but not in excess of that. You said a maximum, so let us say out of 1,000, 500 or 200.

Mr Spathis—Would that include the proxy votes?

Senator WONG—I am raising issues here.

Mr Spathis—I would not be averse to looking into that. Our focus has been more or less on the proposals that are contained in the bill. I really have not conferred with our committee as to their view in relation to that.

Senator WONG—In terms of whom ACSI has communicated with about your dual proposal, has there been much discussion with the business community—directors et cetera?

Mr Spathis—Our focus with the business community has more or less been on issues that deal with the day-to-day running of their businesses. However, we have had some informal discussions with various groups where we have shown some sympathy in relation to the arguments for dealing with the current threshold test. We think that we have taken a reasonable middle-of-the-road approach and an approach that takes into account the needs of business, deals with the issues of expenses that might arise out of a situation like this but does not introduce a sledgehammer to crack a peanut with respect to reasonable shareholder rights.

Senator WONG—In relation to some companies the example you give is a very substantial shift.

Mr Spathis—That is right.

Senator WONG—The problem I perceive with the second limb of your test would be the difficulty in identification. It is complex for a shareholder or a group of shareholders to identify who qualifies. You would need to have access to knowledge of how many shares people hold and for how long they have held them. Do you see any difficulties with some of the information that is essentially implicit in your proposition?

Mr Spathis—As I understand it, companies do hold that information.

Senator WONG—I am aware that companies do, but a shareholder might not have that.

Mr Spathis—That is right. I guess there is some onus on shareholders to make sure that they have crossed the t's and dotted the i's in order to do this. It is not an approach that is dissimilar to that which exists with some US regimes and a minimum shareholding in order to put forward a resolution. So it is a system that works. It works in the US, and I think it is capable of being applied here.

Senator WONG—What I was trying to suggest is that implicit in this is a requirement on the company to provide this information.

Mr Spathis—Correct.

Senator WONG—One of the witnesses this morning suggested that some institutional investors might be reluctant to support perceived minority issues because of their ongoing

relationship with the company or various other reasons that were postulated. Do you think that is a valid concern, and do you think it is a concern also applicable to superannuation trustees?

Mr Spathis—It is a concern, and it is one of the reasons why the superannuation trustees in the last few years have taken a more independent approach to corporate governance. For many years superannuation trustees have relied solely on fund managers from many of these institutions to provide not only investment advice but also advice on corporate governance issues. The very reason ACSI was formed four years ago was to provide independent research and advice to superannuation trustees to not only watch the companies but also watch the watchers, watch the fund managers.

So we see the process as very much a collaborative one with the fund managers and the corporations. But it is very important for at least the superannuation trustees to have developed their own policies and their own approaches to corporate governance. We have had examples of this in relation to both input on the ASX Corporate Governance Council and situations such as that which arose last year with regard to News Corporation. We took a position that we were concerned at the time with the Delawarisation of corporate governance standards and we expressed those concerns quietly, behind closed doors.

Senator WONG—'Delawarisation' is a new word, isn't it?

Mr Spathis—It is around. So we expressed our concern behind closed doors and we met on a number of occasions with News Corp. As a last resort, after not being able to get anywhere, we were able to harness the support internationally of super funds and fund managers on these corporate governance issues. Again, I guess that typifies the approach that we would take in utilising these laws. We see them as a platform to engage.

Senator WONG—You raised an issue earlier that the success or otherwise, or the utility or otherwise, of the vision should not just be measured in whether a resolution to an EGM gets up, because there are consequent discussions and possibly a changed position that might be associated with a request to go to an EGM. Do you have any particular examples of that which you could provide the committee?

Mr Spathis—Not off the top of my head but, going back to that same theme, there might be a broad impasse, there might be a situation in which those whom we entrust to run the company cannot do that. Just over a year or so ago a major financial organisation was tearing itself to bits, and it took an eventual general meeting to really put some pressure on the board to address its internal governance issues.

Senator WONG—Advocates of the five per cent rule would say that something that bad would have got five per cent.

Mr Spathis—It may well have but, again, you need a mechanism—a carrot and a stick, I guess—to be able to bring people to the table. That is one mechanism. From our point of view, the overriding mechanism is to quietly put our position forward—to use Teddy Roosevelt's maxim, to 'walk softly and carry a big stick'. We would like to think the stick is one of persuasion rather than the use of a legislative blunt instrument, but that does not mean that legislative instruments should not be made available as a last resort.

Senator WONG—I understand from your submission that you support the proxy voting changes, but are there any particular additional improvements from ACSI's perspective which could be made in relation to proxy voting?

Mr Spathis—We welcome the changes that have emerged from CLERP 9 in relation to electronic proxy voting. In many respects we have a quasi direct-voting arrangement in place whereby, within a 28-day period after a notice goes out, super trustees are able to analyse and understand a proposal and give a considered position based on the advice they receive from advisers—from ACSI and from other organisations. They are able to use electronic platforms to more or less flick the switch and provide instructions to their custodians to vote in favour of or against specific resolutions. So I think the general direction of change in relation to proxy voting has been overwhelmingly welcomed by our sector.

Senator WONG—Are there any other legislative or policy changes that you would point to which would ensure that investing institutions participate more actively in company decision-making processes?

Mr Spathis—At the outset, we take the view that investors or superannuation trustees should not be running a company. We pay reasonable amounts to directors and to executives to basically run companies. We have to respect that and we have to trust them with that. We have no desire to become shadow directors of these corporations but, at the same time, we do want to have a say in specific circumstances where we think the approach of a corporation may impact on long-term investments. So there is no desire to run the company. Our position is one where we are able to provide a pretty frank assessment of the way we see a company being run and whether or not it is being run in the best interests of all investors.

Senator WONG—On the foreign exchange reporting requirements for the exchange of information—I think you mentioned this before—your view is that that should be retained, and your preference is to retain it in the act rather than in the ASX listing rules because of the more limited nature of the information required under the rules. Is that right?

Mr Spathis—Unless the ASX listing rules are amended to be able to scoop up the non-material matters that may be disclosed in foreign exchanges.

Senator WONG—And the basis of that is the principle that investors across jurisdictions would have access to the same information.

Mr Spathis—That is right. Australian shareholders should have access to the same information that foreign shareholders receive.

Senator WONG—The only issue really is information that is determined to be non-material.

Mr Spathis—That is correct.

CHAIRMAN—There being no further questions, thank you very much, Mr Spathis, for your appearance before the committee.

[2.09 p.m.]

KEEVES, Mr John Storrie, Chairman, Corporations Committee, Business Law Section, Law Council of Australia

CHAIRMAN—I welcome the representative of the Law Council of Australia. The committee prefers that all evidence be given in public, but if at any stage of your evidence you wish to give evidence in camera, you may request that of the committee and we will consider such a request. We have before us your submission, which we have numbered 6. Are there any alterations or additions you wish to make to the written submission?

Mr Keeves—There are no specific alterations or additions.

CHAIRMAN—I now invite you to make an opening statement, at the conclusion of which we will have some questions.

Mr Keeves—The Corporations Committee is a specialist committee of the business law section of the Law Council and the Law Council is the peak body of lawyers in Australia. I just want to start by providing some context, and I guess it is a very basic context. It is just to remind myself as much as anyone else that the primary purpose of a corporation is to provide goods and services and, in so doing, create wealth for the shareholders and to provide employment opportunities at the same time to, amongst other things, fund retirement incomes et cetera. The purpose of corporate governance mechanics that we see in the Corporations Act, in the ASX listing rules and elsewhere is to make sure the company works best at doing this as its primary purpose. In turn, the primary purpose of shareholder meetings is to review the stewardship of directors in relation to matters which are relevant to the interests of shareholders as shareholders. That means essentially their economic interests as shareholders, not their interests as customers or members of the community.

In my own view—and this does not necessarily represent the view of the committee—if shareholders wish to act in relation to matters involving corporate social responsibility, there are other and better mechanisms that need to be pursued. Given the recent reference to CAMAC, that is a discussion that is ongoing. I should say my own view is that the mechanisms of tort law, the impact of consumer markets rather than securities markets and government regulation are somewhat better mechanisms than relying on the company in general meeting as an effective regulator in these circumstances in all cases. I point out, in a little bit of a digression, that one of the more recent issues involving James Hardie certainly did not require a requisition of shareholders to bring that to the attention of various bodies.

We also need to see the discussion about convening shareholder meetings in the context of legally enforceable continuous disclosure obligations and the operation of the discipline of the stock exchange. We have had legally enforceable continuous disclosure obligations since 1994. I think they are broadly regarded as being generally effective in Australia. Some of the problems that might have been evident in the past that might have required shareholders to raise issues at AGMs or indeed seek to convene EGMs I think are dealt with through the discipline of continuous disclosure and the consequent discipline of the market. I also wonder, by way of

background, how often these days a small shareholder or a small group of shareholders will have better access to information in terms of how the company ought to be run than will the directors of that company and what issues cannot be ventilated at an annual general meeting by way of question or statement that are not otherwise dealt with by the operation of the market. That is by way of background.

One more preliminary comment I would make is that, as a matter of philosophy, the Corporations Committee would generally support regulation that is as light-handed as possible and, ideally, as simple and clear as possible rather than something that is prescriptive or complex with many different cases and exceptions.

With that in mind, our general submission is support for the removal of the 100-member rule, based really as a matter of principle. We have concerns about what we have referred to as the 20-member rule. There is a concern that obtaining the support of 20 shareholders for moving a motion at an AGM may well be too easy. We consider that the measures should be applied to managed investment schemes, although I do acknowledge that managed investment schemes do not have a requirement for an AGM, so there is a difference in the existing symmetry, but the concern does arise from the number of entities that have staple securities. And having different regimes applying to the corporate slice of the staple as opposed to the managed investment slice does not appear to be logical and to us may cause problems.

We support the amendment in relation to cherry picking of proxies, although we think there could be some technical drafting changes to improve those amendments. In relation to the amendment to section 232D(a), I do not think the committee has strong views on this. I would probably say that as a matter of good disclosure practice companies ought to be disclosing material that they are filing with overseas exchanges, and we do not have a strong view either way. I think the other people giving evidence have supported changes to the listing rule. Certainly, if the ASX listing rules are amended to include that sort of requirement, I do not think our membership would have any objection to that.

In relation to section 250J and the disclosure of proxy voting, we note that that is a replaceable rule and we query the relevance of all that but, once again, we do not really have a strong view on that. I should add that, based on some of the evidence that has been given today—there have been statements and questions involving direct voting and other measures—I think we would very much support that being looked at in some more detail in terms of developing the mechanics of direct voting, but certainly in principle we have no objection to there being further alternatives for shareholders to be involved in voting processes.

I have one observation about mutuals: in our submission we have said that, if people think that mutuals ought to be treated differently—and there is a respectable view that that might be so—there is a mechanism that exists already in the legislation in terms of 249D(1)(a), in the sense that regulations can be enacted to deal with companies or classes of companies and that, rather than trying to fashion a complex general rule, there should be a simple general rule and then a confined and specified exception with the flexibility of the regulation-making power. In that regard, I do note that the sorts of arguments about the economic interests that have been raised today obviously do not apply in the same way to mutuals. Having said that, it does seem quite extraordinary that 100 members of a large mutual can call a meeting; on the other hand, with the

implication of requiring five per cent of a large mutual to call a meeting, there does not seem to be a simple answer there.

In terms of the five per cent rule, it needs to be seen in context and I think this has been touched on earlier today. If you look at most share registers, it is not a simple arithmetic calculation of: there are a million shareholders, therefore you need to get 50,000 of them. It is much more likely that, if you start with the larger shareholders, you are going to reach five per cent relatively quickly on most share registers at least. If you cannot get support from the large shareholders in order to collect five per cent, one wonders whether there is a problem that is relevant to the economic interests of shareholders rather than some sort of collateral issue. They are my opening remarks, and I am happy to answer any questions.

CHAIRMAN—Thank you very much. You make the point in your submission—and it was also in your opening statement:

> The principal likely result of the removal of the 100 member rule is significantly reducing the ability of special interest groups to raise issues that are not relevant to the economic interests of company shareholders—in effect misusing the mechanism under section 249D for a purpose unconnected with the policy foundation of the provision.

Is it possible that the sorts of issues that a small group might want to raise might not have immediate economic impact on the affairs of the company but could later on be of economic relevance and therefore early attention to them might be advantageous? Is that an argument for the retention of the 100-member rule?

Mr Keeves—Yes, that is an argument. There is at least one example I can think of, from the fairly distant past, where there was some shareholder agitation followed much later by a recognised economic impact on the company. That is an argument. With all of these measures there needs to be balance. It is a question of where on the spectrum you end up. The concerns that were expressed generally by the committee members and those involved in the preparation of the submission were that in their judgment putting it down at the 100-member end of the spectrum is not the right balance of cost-benefit et cetera. Although I do acknowledge that is possible, I should qualify that by saying it is unlikely, in my view, that a small number of shareholders with a small economic interest are going to have better access to information than the market generally or corporate management. One would hope that if valid concerns were raised by a small group of shareholders, they would be dealt with. There are other mechanisms, of course: directors' and officers' duties. If a matter were raised with a company and there were evident problems that the company was not addressing or should be addressing differently, one would think that the mechanisms do exist—that if those issues were disregarded there could be consequences for company management. As with a number of these issues, it has to be dealt with in a fairly holistic way, having regard to the other corporate governance mechanisms that exist.

CHAIRMAN—Your submission argues against the removal of section 250J(1A) with regard to requiring the chair of an AGM to disclose the intentions of proxy votes that have been given to the chair. Arguments we have heard today, and other submissions in favour of repealing this provision, have made the point that disclosure of proxy votes prior to voting at the meeting has the potential to influence the votes of shareholders in attendance at an AGM and consequently distort the outcome, given that most matters are decided by a show of hands. What is your response to that?

Mr Keeves—There are a number of ways of looking at this. There is a view that the disclosure of the proxy voting is likely to stifle discussion or debate or make people feel that they are not relevant. One response to that is that if the result of the disclosure is to inform people of the likely voting outcome then all that is doing is basically stating the obvious or stating the facts. It is indeed the case that most small shareholders are necessarily passive investors who cannot individually influence the outcome of a resolution. I am not convinced by arguments that people should be given the impression they have a bigger say than they in fact do. I am personally attracted to the view that says that not disclosing the likely proxy voting outcome is potentially misleading because it basically would let debate proceed on an uninformed or misinformed basis. I would regard that an almost implicit part of the duty of the chairman of a meeting is to inform the meeting of the position of the proxies. It is probably something that a chairman ought to do notwithstanding any statutory provision one way or the other.

Senator WONG—This is a submission from the Corporations Committee of the Law Council, that I presume has not effectively been endorsed by the council itself.

Mr Keeves—No, the Corporations Committee is a specialist committee of the Law Council. The Law Council, as you are no doubt aware, is actually made up of the constituent bodies of the law societies and so on of the various states. This submission does not necessarily represent the view of the Law Council or the constituents—the law societies, law institutes et cetera of the various states.

Senator WONG—I presume the Corporations Committee is made up primarily of people who practice in the area and whose client bases would generally be corporate Australia.

Mr Keeves—Yes, although the Corporations Committee is diverse in its membership. It includes members from the academic sphere and there is a broad representation. It is not made up only of people who are representing the top 50 or the top 100 or the top 200.

Senator WONG—I said corporate Australia. I meant corporate with a small 'c'.

Mr Keeves—There is a diverse base. That does mean that on occasion there are different views expressed. In some cases, there are bipolar or sometimes even tripolar views, as was the case in relation to mutuals. There were different views, including extreme apathy.

Senator WONG—Maybe because you don't act for them! Presumably some people must.

Mr Keeves—Some act for them and those who act for them had views. The views were various.

Senator WONG—You make this statement in the submission to which the chairman referred:

> The principal likely result of removal of the 100 member rule is significantly reducing the ability of special interest groups to raise issues that are not relevant to the economic interests of company shareholders—

which you say is in effect a misuse of the provision. I presume you were here for Professor Bottomley's evidence.

Mr Keeves—Yes, I was.

Senator WONG—I have to say that his position appears to be consistent with the BCA's submission; that is, that evidence of misuse—at least in the sense of EGMs actually being called and that expenditure having occurred—is fairly minimal.

Mr Keeves—I do not think we can point to systemic abuse. As a general principle I would certainly prefer to be able to point to systemic abuse before imposing far-reaching and significant changes. But in the context of this measure I do not regard it as one that is likely to have a large economic impact in the sense of potentially adversely affecting a large part of corporate Australia. Approaching this as a matter of principle, admittedly in the absence of a large body of evidence of abuse, the principle should be that this should primarily focus on the economic interests of shareholders and not provide a mechanism for collateral interests to be pursued in a shareholder medium, because that is not what shareholder meetings are for. There may be good cause for raising those issues with companies as customers, consumers and members of the community but not using the forum of a shareholder meeting to do that.

Senator WONG—As I understood his evidence, between 1998 and 2002 there were only five EGMs relying on 249D. You do not disagree?

Mr Keeves—I cannot comment. I have not actually seen the professor's study.

Senator WONG—His suggestion is that there have been only five meetings in that time frame with this provision being utilised. The BCA submission gave three examples, two of which dealt with what can be regarded as particular campaign matters relating to Jabiluka and forest industry issues, but one of which related to an assertion that a termination payment should be the subject of shareholder approval. I would have thought that on that topic you could reasonably argue some sort of economic interest from shareholders, and clearly it has been an issue within the CLERP reforms. I suppose I was a little bit wary of that assertion in your submission, given that evidence.

Mr Keeves—It is unfair given that Professor Bottomley is not present, but what we do not have is evidence of whether or not any of those requisitions would have been made had there been a five per cent test.

Senator WONG—We do not have that—that is true.

Mr Keeves—As to the one example that you give in relation to the termination payment, I would suggest that either the requisite support may have been present using the five per cent rule or, if it was not present, the meeting should not have proceeded. If that gives you four remaining examples of where it has been used and none of them relate truly to the economic interests of the enterprise, at least directly and proximately, you actually have a 100 per cent strike rate, which suggests that the provision ought to be changed. It is unfortunate that there are not 100 examples.

Senator WONG—We are working off a small database, I know.

Mr Keeves—Yes. It is hard to draw a line between four data points.

Senator WONG—One of the concerns which people have wrestled with over the years, as you know, is the application of the five per cent rule or a square root rule when it comes to companies with a large shareholder base. You would have heard, if you were here, the ASX's evidence, which included the example of what was described as a mid-range ASX 100 company, where a five per cent shareholding threshold test would result in around 91,000 shares being required. I just raise this because it seems to me that, notwithstanding cogent arguments about an economic interest being required and the potential for misuse, that is a very substantial shift, at least in the legislative framework.

Mr Keeves—I think there are a couple of comments to be made. One is that that example is simply an implication of the existence of large companies in the Australian and, in fact, global economy. If we are trying to come up with a single rule to apply to all companies then at the extreme ends there are going to be some examples where there are perhaps some consequences that, in a perfect world, would not exist. I guess the point is that, if we are focusing on economic interest, five per cent of $38 billion—I think that is the market cap we are talking about roughly, or $36 billion—is still five per cent. If the issue concerned does not raise the interest of shareholders with that level of economic interest then one has to wonder whether it is something that we ought to be putting the company through. In that case, the expense would probably be in the seven-digit range rather than the six-digit range.

I come back to the point that, in most companies of any size, there would be institutional shareholders and the superannuation trustees and so on, so, if there is an issue of import that relates to the governance of the company and its performance as an enterprise, either you should be able to garner support from five per cent or it is probably not an issue that is deserving of taking to a shareholder meeting. In that context, I should say that there are other forums, including the AGM, for asking a question or making a statement. There are statutory opportunities for shareholders to ask questions in relation to the accounts and management and so forth. I am talking about an audit. So it is not as though shareholders do not have opportunities at appropriate times to raise issues. The question is: at what point do we say that we need to put the company to the expense of convening an extraordinary general meeting?

Senator WONG—I suppose the other way of looking at it too, though, is that it does provide an avenue for the small shareholders to get some attention for their issues.

Mr Keeves—Yes, indeed—it would provide that mechanism.

Senator WONG—I am saying that that is whether or not an EGM is in fact called. I assume that one of the ways this works in practice is that, if there is a dissenting group, they may put a view and the possibility of the requisitioning of an EGM may well be one of the things on the table. That seemed to be what the Business Council was alluding to. That might be a negative associated with the current framework but, on the other hand, it also does provide scope for that dissenting view to be put and engaged with as opposed to brushed off.

Mr Keeves—Yes. I would not suggest that any valid concerns ought to be brushed off, but there are two diverging streams there. The first is that, if you have a group that wants to raise an issue that is collateral to the business of the company and is pursuing an interest of that interest group, then, yes, having a power to convene a meeting if one does not get satisfaction for one's own vested interest, as it were, does give one a seat at the table that one would not otherwise

have. Views might differ as to whether that is a good thing or a bad thing, but as a matter of principle I would have grave concern if the justification for a 100-member rule was to give people a seat at the table in those circumstances. The second stream is that if we look at—

Senator WONG—You are taking the most extreme—nobody is defending that. What if their concerns are not collateral and they cannot seem to be dismissed as a vested interest? I think this whole debate is getting a bit clouded with a lot of prejudice about the assumption of who is pushing this. If we could just remove some of the concerns of the two examples that we have of particular environmental issues from this discussion for a moment, it would be useful. I am at the end of a day when I have heard the words 'vested interests' and 'special interests' endlessly. I do not think it is a useful discussion to have if we are constantly focusing only on that.

Mr Keeves—I am in heated agreement with you. The second part of my response was to address exactly that. Leaving aside that extreme example, which none of us will endeavour to support, if a small group of shareholders is unable to garner a wide range of support judged by weight of economic interest—and, when I say 'weight of economic interest', our view would be that the five per cent is the appropriate test there—then it is, as a matter of judgment, highly unlikely that that is a matter we ought to force a company to respond to in that way. I say 'in that way', because if their concerns are valid I think it is highly unlikely, at least in 2005, that those sorts of concerns will be brushed aside if the company is acting to what would be regarded in a court as the appropriate community standards. But, once again, there is a great spectrum of approaches, and we would say that, as a matter of policy, we cannot come up with a form of legislation that is going to provide a perfect solution to that entire spectrum. We have to come up with something that works most of the time in most cases but is as simple as possible.

Senator WONG—The assumption that you are proceeding on—and, I think it is fair to say, that the business panel proceeded on—is the logical connection with regard to 'If it is a valid issue, they would be likely to get five per cent; therefore, five per cent is not onerous.' I suppose one of my concerns is whether that will flow. Are there other reasons why a group of shareholders who have a legitimate concern could not get five per cent other than the illegitimacy of their concern? For example, one of the issues raised was the reluctance, perhaps, of some institutional investors to disrupt their relationship with the company. There is the logistical issue when you are talking about over 91,000 shares. Obviously not everybody is holding one share, but you can image that that is a reasonably large logistical task.

Mr Keeves—There are three points there. The first one was really in relation to whether there is a nexus. Does it follow that, if you have a valid concern, you can get five per cent as a matter of principle? I would ask if there is any evidence to show that there is a problem: if there are genuine concerns about corporate governance, are there occasions when people have not been able to get it when they should have?

Senator WONG—We have not had to test that, just as there is no evidence of widespread abuse of the 100-member rule. We are not going to get that evidence, because the threshold currently is far lower than most people would think is necessary.

Mr Keeves—That is absolutely correct, but I guess the point is that it is almost trying to prove a negative, so the only way we can approach that in the absence of evidence is on the basis of principle. The principle seems to us—or at least to me—to be reasonably clear.

The second point, I think, was in relation to institutional investors and whether there would be any reasons, unconnected with the validity of the concern, why they might not wish to get on board. It is possible to speculate that there could be all sorts of possibilities. I think there was one suggestion earlier today that perhaps there might be a conflict of interest, and there are other mechanisms for dealing with conflicts of interest. It does not seem to me to be appropriate to say, 'Well, it might not work, because someone might do something that they're not permitted to do by another legal rule; therefore this mechanism should be discounted.' I think that ought to be put to one side.

There are all sorts of possible reasons why institutional investors might wish to do things behind closed doors rather than jump on the bandwagon, so to speak, but, if they are not prepared to agitate for an EGM, are they likely to vote if the proposal actually comes forward? I think it proves too much to say that the institutional investor would not be prepared to get on the bandwagon, because, if they were not—if the large shareholders, when considering the issue, were saying, 'We're not prepared to push that'—the proposal would have obviously very little chance of succeeding. If they were not prepared to push it by convening the meeting, it is a matter of speculation, but I wonder whether they would be prepared to pursue it at the meeting.

Having said that, it just seems to me a matter of logic and principle that, if there is a valid concern that the company ought to be doing something differently—that management, the board, need to change what they are doing—then unless you can convince those institutional shareholders of the validity of your cause it is unlikely to be successful, and it will turn out to be a distraction. The third point related to the logistical issue. I fully acknowledge that it would be logistically difficult to get to 91,000 shareholders, I think it was.

Senator WONG—Shares.

Mr Keeves—I think that was a mathematical five per cent of the number of shareholders. But I still come back to the point that when you look at the distribution of a share register it is not flat; it usually has a big lump and a long tail. I would be very surprised if, in practice, in order to garner the appropriate level of support, people would need to do that. But in one sense it is kind of irrelevant to run those numbers. The numbers we should be running are: is it possible for them to gain five per cent economic interest? Given the distribution, it is much more likely that that can be done with a much smaller number, rather than just saying, 'There are this many shares, so it's an arithmetic average.'

Senator WONG—Do you support any alteration or amelioration of the application of the five per cent rule?

Mr Keeves—That is not something that we have given any consideration to, so I cannot really comment.

Senator WONG—Was it your submission that made the point about the regulation-making power?

Mr Keeves—Yes.

Senator WONG—The only issue there is obviously with the legislature, not the executive. It is much more difficult for us to gauge the total package in the absence of being able to see down which path a government would go for subordinate legislation.

Mr Keeves—That is obviously a very fair point. The basis of our submission was that, if it was considered that a special case needed to be made for mutuals—and, as I have said before, there may be a respectable view that that ought to be the case for a variety of reasons—the mechanism already exists. It was just an observation that there is no need for the exposure draft bill to be amended.

As a matter of philosophy, having the flexibility of the regulation-making power—rather than having to bring this back to the parliament if it needed to be changed—I can see some benefits, in a practical sense, in terms of being able to deal with specific cases. That does exist. It could be appropriate to deal with large mutuals as a class and small mutuals as a class and to change those rules from time to time. I am not submitting that that ought to be the case, but it may be.

Senator WONG—You made the point that, if there are dissenting views, there are other mechanisms aside from requisitioning an EGM that ought be utilised. Do you have a view about any additional avenues that we ought be looking at legislatively or in practice in terms of what companies should be doing, or is that not something to which you have turned your minds?

Mr Keeves—There is an issue which we have turned our minds to which I think is relevant in one sense to your question, although indirectly, and that is whether the operation of shareholder meetings in certain circumstances can effectively deal with some corporate governance issues. There are examples where a board may be unable to communicate as clearly and openly about what they believe to be the circumstances surrounding a particular issue for fear of defamation proceedings, and although qualified privilege would ordinarily exist there may be some practical problems with the application of that in those circumstances. I guess the reason that came to mind was that, equally, if one is relying on other ways of communication for shareholders to raise their issues with other shareholders or in an annual general meeting, then clearly the effective operation of defences or the implications of the defamation laws are something that needs to be considered carefully so that appropriate discussion and debate is not adversely influenced. That is not really an answer to your question, but it is a relevant issue.

Senator WONG—So you are talking about extending qualified privilege in that context?

Mr Keeves—Our committee is actually currently working on a submission which deals with the circumstances in which it may or may not be appropriate for directors of a public company to be removed otherwise than by a shareholder meeting. That submission is a long way from being made final and there is a lot of discussion within the committee about how best to progress that, but one of the issues that has come out of that has been that there have been examples where the defamation issues have been relevant and may have made the operation of some of the mechanisms less effective than they would otherwise be.

In terms of other mechanisms, there was the BCA's paper which came out last year on engagement with shareholders. The ASX Corporate Governance Council is looking at other issues. How companies should be engaging with shareholders is something that will continue to be on the agenda. Certainly there are valid concerns. It would be a very brave board and a very

brave chair who would dismiss out of hand a valid concern raised by a shareholder out of session, because it would be open for the shareholder to turn up to the AGM and say, 'On 28 April I wrote you this letter raising this issue and I did not hear anything back.' So practically there are mechanisms for issues to be raised and dealt with, and the AGM in that sense is important. I guess my sense of it is that the mechanisms that exist within the AGM currently are quite satisfactory for issues to be raised and debated that are relevant to the enterprise.

Senator WONG—So your position is to support the retention of the current 100-member rule for putting a resolution to the AGM?

Mr Keeves—Yes. That is right.

Senator WONG—You do not want an additional requirement but you do not support the move to 20?

Mr Keeves—No. I think the view is that the balance is about right. We would probably agree with what was expressed earlier: getting the support of 100 members would demonstrate that the issue is something worth dealing with at the AGM that has already been called rather than at a different meeting that would have to be called anew.

Senator WONG—Thank you.

CHAIRMAN—Thank you, Mr Keeves, for your appearance before the committee. It has been another valuable contribution to our inquiry.

Proceedings suspended from 2.51 p.m. to 3.02 p.m.

NIGRO, Mr Lenny, Policy Analyst, Corporations and Financial Services Division, Department of the Treasury

RAWSTRON, Mr Michael, General Manager, Corporations and Financial Services Division, Department of the Treasury

CHAIRMAN—Welcome. The committee prefers all evidence to be given in public but if at any stage of your evidence you wish to give evidence in camera you may request that of the committee and it will consider your request. I now invite you to make an opening statement, at the conclusion of which we will proceed to questions.

Mr Rawstron—We do not propose to make an opening statement.

CHAIRMAN—What is the rationale behind the change from the 100-member rule to the 20-member rule for people being able to list items for a company's AGM? Generally, the evidence we have received seems to say that there is no need for change in that aspect of the Corporations Law. What is the rationale behind it?

Mr Rawstron—Basically, the issue was put before the general public. We were consulting on both the initial proposals back in 2002 and these current ones. However, in the interim we have attempted to think of how we could balance what effectively seem to be two competing schools of thought. We received a lot of support for the removal of the 100-member rule from the general obligations in calling an extraordinary general meeting. At the same time we spoke to quite a few people from interest groups who expressed their desire to maintain some ability to have their views considered by meetings of companies. We thought one way of addressing that—following the government's policy and the recommendations of the parliamentary committee—would be to remove the 100-member rule element from the calling of EGMs and, at the same time, provide a lower threshold to allow smaller shareholders who wish to put resolutions on the agenda of an annual general meeting to put those matters forward. We thought that might be a neat way of balancing the competing interests.

CHAIRMAN—Do you think there is a possibility or a danger of AGM agendas getting clogged up with relatively minor issues and the substantial issues that are perhaps of concern to the larger number of shareholders, such as the economic affairs of the company, not getting adequate attention as a result?

Mr Rawstron—Certainly, in the submissions we have received that view has been put. But, at the time we developed the idea and gained the government's agreement for it to be submitted for consultation, our view was simply to find an avenue which imposed minimal costs on the company—and we have seen enough newspaper reports about the costs that different companies have incurred when they have had extraordinary general meetings called—while at the same time allowing an avenue for smaller shareholders to have their views expressed. As to the concern about the agendas being overly long, unwieldy or unmanageable, sure, that would be a risk and it is one of the things we would need to take into account when we consider the submissions and give our advice back to government.

CHAIRMAN—The other issue is that of mutuals. The exposure draft legislation proposes to, again, remove the 100-member rule and apply a five per cent rule. In the case of mutuals you are dealing with five per cent of members rather than five per cent of the shareholding, which potentially means that you are actually requiring a much larger number of people to requisition a special meeting of a mutual than of a corporation. Can I explore with you the rationale for applying exactly the same rules to mutuals as you are applying to corporations.

Mr Rawstron—I will let Mr Nigro give the details for that. When developing and looking at these ideas, it is true to say our focus has been on the corporate sector rather than on the mutuals sector. Up until recently we have not had a lot of feedback from the mutuals sector about how these changes may impact on them. This is one of the issues that have now come up in submissions. It will be one of the matters we will be considering.

Mr Nigro—Also, the focus in developing the policy was not just on mutuals. There were some proposals early on that suggested a separate rule for mutuals. One of the problems we encountered when first looking at that was that this problem with the 100-member rule being abused is not just limited to mutuals; potentially it can affect a lot of other large corporates. Also, there is no definition of mutual in the act. A lot of people use the term, but it may be problematic to invent a definition just for this purpose. Another issue is that the policy justification that we are using to support the removal of the rule does not just cover mutuals. The rule would still be out of step with comparable overseas jurisdictions for corporates. We thought that by just trying to look for a solution for mutuals it would be imperfect. Having said that, may I say that looking at the differences between mutuals and other corporates is a bigger issue. It is not just the requisition of meetings that this causes problems with, so it is something we are going to have a closer look at and then put to government.

CHAIRMAN—Looking at our original report from October 1999, when we first proposed the change from the 100-member rule to the five per cent rule, I note paragraph 15.22 says:

Large mutual companies such as the NRMA are in a special position and may need different provisions.

You are now looking at that issue?

Mr Nigro—Not just in terms of whether it is for separate rules for requisition of company meetings.

CHAIRMAN—In a more broad context?

Mr Nigro—In a broader context.

Senator WONG—Mr Rawstron, can I clarify the 20-member proposal. Was that actually generated by any particular interest group sector or is it a Treasury response to trying to balance the different interests with which we are dealing here?

Mr Rawstron—Mr Nigro can correct me if I am wrong, but that was an idea generated internally. We used the number 20 because that is mentioned in several places within the Corporations Act. We could have picked a different number, but we wanted to provide a balance

between removing the 100-member rule for calling EGMs while at the same time perhaps giving a softening of the requirement to put matters of resolutions before annual general meetings.

Senator WONG—Can I ask something about the timing of this. This issue has been around for quite a number of years—well before I was elected to this parliament; we are talking about the 1999 PJC report. Why is the government now proceeding on the five per cent rule? Is it just the political circumstances? What I am trying to clarify is whether there has been an increase in the perceived abuse of the rule.

Mr Rawstron—It is true to say that there have been a number of instances since the rule came in where people have argued that the rule has been abused. There is nothing special in the timing. It is a matter of the windows of opportunity that a policy department can get in terms of the government's agenda—there are a lot of things on the agenda and not just corporate law or business law issues. It has taken a bit of time to consider both the submissions—

Senator WONG—But it was not included in CLERP 9, which was surprising. I think this committee commented on that.

Mr Rawstron—From the policy point of view, we had a set of ideas that we wanted to develop in CLERP 9. Once you start populating it with other issues, from my experience, you run the risk of totally destroying the timetable you set for yourself. We wanted to keep it focused on that, knowing that we had this bill in its first version out 18 months or two years ago and were working on a second version.

Senator WONG—Sure. At one point there was the modified square root proposal floating around. Can you cast any light on why that has not been proceeded with and why five per cent has been proceeded with?

Mr Rawstron—Again, Mr Nigro can give the details, but we were trying to find a simple solution. It is true to say that we are not pleased that no-one has actually agreed with the simple solution we have come up with. There are many options you can choose.

Mr Nigro—The square root proposal was, I think, first put forward by Joe Hockey in 2000 when he was the Minister for Financial Services and Regulation. Prima facie that proposal had merit. It was a sliding scale that seemed to take note of the size differences between companies, but it came under criticism for some anomalies that arose when companies got to the two ends of the spectrum. Eventually a modification was proposed, which you are probably aware of, where you have a cap and a floor. Eventually it did not find support. It was criticised as being too complex. Many people commented that it was simply too complex. Other arguments were that once you impose a cap and a floor you really only have a sliding scale for a certain percentage of companies. For companies outside the cap and floor what you have done is just proposed another arbitrary numerical threshold, albeit a different number.

Senator WONG—But all of these are arbitrary thresholds.

Mr Nigro—Five per cent is not.

Senator WONG—It is an arbitrary threshold. This is just a decision made as to what the appropriate threshold is. There is no science around this, is there?

Mr Nigro—No, there is no science, but you do see five per cent in other places in the act. It is considered a significant shareholding.

Senator WONG—In regard to the thinking that led to the modification of the square root rule, which is, in part, that its application to very large companies might be problematic, is Treasury or the government considering some amelioration of five per cent for a similar scenario? In other words, where you have a very large shareholding, there would be an argument that the change from the current rule to five per cent in practical effect would be a very substantial increase. Is there any consideration of ameliorating the impact of five per cent for larger companies?

Mr Rawstron—When we have looked at the issue, most of the submissions we have received in the two rounds of consultation have largely supported sticking with five per cent. We did think internally about alternative measures, including the square root rule, a sliding scale, a floor and a cap et cetera. I suppose what has discouraged us is the concern about introducing a level of complexity into the Corporations Act and how courts would interpret it and whether in fact it would make shareholder participation more ambiguous because of the need to interpret this new provision and how a court may interpret it.

The short answer is no. Beyond taking on board what has been put to us in submissions this time around—and obviously what may come out of this committee's deliberations—we will probably simply look at the current five per cent and whether that needs to be modified in line with submissions that we have received to date.

Senator WONG—Is there some merit in having a cap?

Mr Rawstron—There may well be.

Senator WONG—The point about complexity—which I think is a valid criticism of the modified square root rule, notwithstanding most people's mathematical abilities—is that it could perhaps be reasonably dealt with if you had a five per cent rule but also had a cap on its application. In other words, if five per cent was beyond X, then X should apply. That is a reasonably simple proposition.

Mr Nigro—It is, I guess. I hope I am not drawing too long a bow, but I think at one point in time in corporate Australia 100 might have seemed like quite a few shareholders in comparison to size. As companies grow larger and larger, you might have to keep revisiting that cap, and it may be the source of contention again somewhere down the track—

Senator WONG—I am not suggesting that 100 be the cap. Otherwise, there would be no point in putting five per cent in the act.

Mr Nigro—No, I know, but if you suggest, for instance, 500 or another number, the debate could then shift to the 500 at some later point. We saw the problems associated with a number—

be it 100 or 200—and we thought that five per cent would be both simple and something that could be applied to all companies.

Senator WONG—So you do not have any concern with the practical effect of the application of five per cent on some very large companies?

Mr Nigro—We have concerns and we are considering all the arguments, but we felt that five per cent was the most appropriate.

Mr Rawstron—Obviously, from the Treasury perspective, we look at economic interests, and a percentage measure based on the size of a company is probably equally as valid a way to go as any other. Hence, we have been largely attracted to those types of measures. I concede your argument that you could pick a cap if you wished to, but the problem is working out what the cap should be, given the nature of the sector. I would probably have to get some advice, but I suspect that there may not be sufficient uniformity or shareholding structure in the Australian listed sector to allow you to actually come up with a cap which would give you some reassurance about providing shareholder participation in the larger companies while, at the same time, ensuring that you did not make it too easy in smaller companies.

I know the market capitalisation, and the ASX looks like a cliff face because of the nature of it. It is dominated by a handful of companies in the market. I suspect that, if you look at the shareholder base across the listed sector, it may be exactly the same. It has not been raised directly in submissions, but it is certainly something that Treasury could go back and look at. All I am saying is that I think it would be very difficult to come up with a robust cap that would be any better than picking a number like 50, 100 or 200.

Senator WONG—They are all picking a number, really. You raise the issue of minimum economic interest. I do not think anyone disagrees with that. The issue seems to me to be about what you do with companies that have a very large number of shares. If you apply a five per cent rule and if you look at what that might mean in terms of how many shareholders someone would have to get, it is a very substantial shift from the current 100-member rule. Is there an appropriate way of ameliorating that at the upper end?

Mr Rawstron—I do not really have an easy response to your proposition. I suspect the reality is, given the way in which the Australian listed sector is dominated by institutional investors, any realistic matter would need the support of some large block of shareholders anyway.

Senator WONG—That is the issue, isn't it? There is one issue about the abuse, and I have to say it does not seem to me that there is substantial evidence of systemic abuse, but I accept the possibility of this provision being abused. If we could put that to one side, I think the more problematic issue is about how you avoid excessively disenfranchising your small investors. When a five per cent rule is imposed in certain companies, they may simply not have the capacity to organise the level of shareholder support needed to requisition a meeting, for logistical or other reasons.

Mr Nigro—We have tried to concentrate on the other mechanisms that are available. One mechanism, which is in the bill itself, is to look at the resolutions cast at meetings. I think that is a reflection on whether calling an extraordinary general meeting is the most appropriate means

of communicating with a company for a minority or special interest—someone who cannot garner the five per cent.

Senator WONG—I have not heard anyone today supporting your 20-member proposition, and I assume that is reflected in your submission. Is that your only mechanism for small shareholders to engage or to put a dissenting view? In the event that the government does not proceed with that—which, given the lack of support for it, looks highly likely—do you have other options? You say you want to change the requisitioning rule, but can you point to other mechanisms by which the mum and dad retail shareholders can put a view, if they have a concern, and have it dealt with appropriately?

Mr Nigro—I can point to other mechanisms that are not necessarily in the legislation. A lot of companies provide means for shareholders to engage with them: they have shareholder offices et cetera. There is a provision in the legislation that enables shareholders to ask questions at general meetings. And then there are unusual ways, the ancillary methods—the media and publicity—which people generally use. I am not saying that we are behind every one of these mechanisms, nor that we should put them in the law; I am saying that there are other mechanisms out there.

Senator WONG—What is the timetable for this? When does the Treasury consultation end?

Mr Rawstron—Submissions closed at the beginning of this month. We are now in the process of considering and summarising those submissions, and looking at the common themes. We will be looking to put something to the government within the next couple of months.

CHAIRMAN—Thank you for your appearance before the committee.

Subcommittee adjourned at 3.23 p.m.