



CHARTERED SECRETARIES
AUSTRALIA

Leaders in governance

Expressing the voice of shareholders

A move to direct voting

A discussion paper

Chartered Secretaries Australia

Chartered Secretaries Australia (CSA) is the peak professional body delivering accredited education and the most practical and authoritative training and information on governance, as well as thought leadership in the field. We are an independent, widely-respected influencer of governance thinking and behaviour in Australia and an expert commentator on issues affecting governance and legislation. The preferred provider of lifelong learning in governance, we are the centre of excellence in the provision of relevant and up-to-date public training and tailored in-house learning.

Our Graduate Diploma in Applied Corporate Governance sets the standard for entry into the profession. This is also the gateway to membership of Chartered Secretaries Australia and the Institute of Chartered Secretaries and Administrators (ICSA), the only global association for governance professionals. Our active membership base of more than 8,000 governance professionals means that Chartered Secretaries Australia is in a position to assess and actively contribute to the latest issues and standards in the evolving area of governance.

Members of Chartered Secretaries Australia deal on a day-to-day basis with regulatory bodies and the government and have a working knowledge of the *Corporations Act*. Given the diverse roles our members play in the business community and their expertise in governance, Chartered Secretaries Australia sees this initiative as fulfilling its mission of the promotion and advancement of effective governance and administration.

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The views contained within this paper are solely those of Chartered Secretaries Australia and the above-listed individuals. In no way do the views expressed in this paper represent those of their employers or the organisations they represent.

Request for submissions

This discussion paper outlines various issues identified by Chartered Secretaries Australia regarding the need for the introduction of direct voting.

In preparing the paper, members of Chartered Secretaries Australia in both listed and unlisted companies supplied practical, applied and authoritative knowledge of the process of providing for shareholders to exercise their voting rights.

The paper aims to generate discussion as to how best to provide for shareholder participation in the company in the twenty-first century. The path forward provides opportunities and responsibilities for corporations and shareholders alike. If direct voting is adopted, shareholders can use their enhanced influence to engage further with corporations in constructive dialogue to advance the prospects of their companies.



As the individuals responsible for advice to boards on the implementation of governance in organisations, company secretaries and other governance professionals see an opportunity to improve governance practices and increase the opportunities for shareholder participation by encouraging informed discussion on the introduction of direct voting.

Chartered Secretaries Australia invites submissions on all of the matters raised in this paper. Likewise, respondents are invited to raise any further issues related to the need for direct voting that are not canvassed in this paper.

In addition, respondents are invited to complete the questionnaire contained in Appendix C of this paper, which contains discussion questions on specific issues that Chartered Secretaries Australia has identified as being central to the debate. Chartered Secretaries Australia will carefully consider all submissions received before releasing a further discussion paper.

All respondents should be aware that all submissions received will be treated as being in the public domain, unless an express indication to the contrary is communicated to Chartered Secretaries Australia.

Please send submissions either by email to tim.sheehy@CSAust.com or in hard copy to:

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If sending a hard copy, please also include, if possible, a disk containing your submission in Microsoft Word.

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Closing date for submissions

Please forward submissions by **20 April, 2006**.

Further copies

Further copies of this discussion paper are available on the Chartered Secretaries Australia website (<http://www.CSAust.com>) or by contacting Chartered Secretaries Australia on (02) 9223 5744.

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Executive summary

If Australian companies wish to encourage greater shareholder participation, one way is to investigate direct voting and introduce this mechanism into their constitutions. This paper sets out what direct voting is, why it is the next central plank in corporate governance and how companies can implement it.

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

The appointment of a proxy to cast a vote interposes the law of agency between the shareholder and the corporation and is therefore by its nature indirect. This is currently seen as the only model for absentee voting, yet at a time of renewed interest in shareholder participation it is difficult to see how appointing a proxy as the *only* form of absentee voting at general meetings assists shareholder democracy.

The process of appointing a proxy to register a vote has the potential for abuse, as shareholders temporarily transfer to another party some of the rights attached to their membership, especially their right to attend a meeting and vote, or choose not to vote.

Direct voting improves the exercise of voting rights because it removes the intermediary between the shareholder and the company. Shareholders need no longer transfer some of their rights to another party.

If direct voting is implemented, cherry picking, that is, voting some but not necessarily all shares covered by the proxy, will not be a possibility. The integrity of the collection and accumulation process through the share registry will be assured. All votes will be counted. The problems with tracking votes because of the presence or absence of intermediaries will not apply.

Legislative change is not required to effect direct voting. The *Corporations Act* as it is now worded does not exclude members voting directly. If a company's constitution provides for it, direct voting is already feasible.

No company needs to wait for legislative reform before working to ensure that shareholders can exercise their voting rights in this manner.

Chartered Secretaries Australia recommends that Australian companies provide for direct voting in their constitutions to encourage greater shareholder participation and to remove the problems associated with appointing proxies.



Part 1: Direct voting

What is direct voting?

Direct voting enables shareholders to exercise their voting rights without the need to attend meetings (which may not always be practicable) or to appoint proxies or representatives over whom they may have no control.

Like all other types of voting, a shareholder completes a voting form which can be lodged by post, by fax or electronically and must be lodged, as for proxies, 48 hours before the meeting. However, unlike a proxy, direct voting constitutes a binding instruction to the company and its registry which cannot be either altered or misinterpreted by any other person.

Appendix A contains a sample Voting Form.

The link between direct voting and shareholder participation

If Australian companies wish to encourage greater shareholder participation in corporate governance, one way is to investigate direct voting and introduce this mechanism into their constitutions. This paper sets out what direct voting is, why it is the next central plank in corporate governance and how companies can implement it. Chartered Secretaries Australia has prepared this discussion paper to assist Australian companies understand how direct voting can improve shareholder participation, identify the benefits of introducing direct voting and implement it in their constitutions.

Fifty-five per cent of the Australian adult population owned shares in 2004, either directly or indirectly. Of these, 44 per cent or 6.4 million held shares directly. People living in regional areas were just as likely to own shares as those in metropolitan areas, with almost one in two of metropolitan and regional dwellers being direct shareholders.¹

What is direct voting?

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

Of even greater interest in the analysis of Australian share owners is the healthy proportion of direct investors indicating their intention to participate further in the marketplace², which means that the question of shareholder participation will only grow in importance. Encouraging more shareholders to become involved in company governance is a matter of importance for shareholders and companies alike.

In June 2000, the Companies and Securities Advisory Committee released a report noting that:

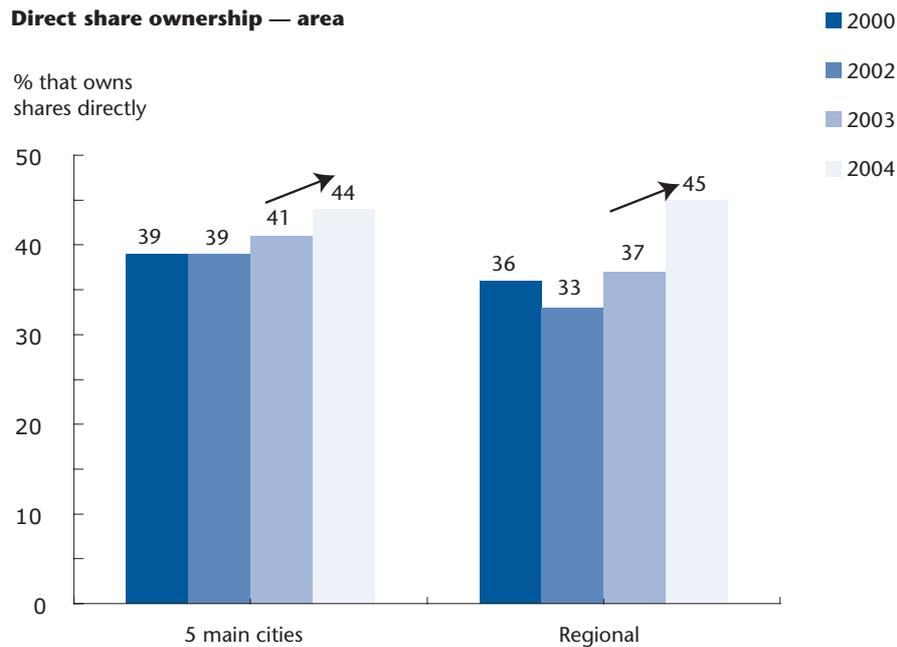
'Proxy voting has long been recognised as a key element in shareholder decision making, given that many shareholders do not attend meetings....Another possibility not yet specifically recognised in the Corporations Law is to permit shareholders who do not attend a physical meeting to vote directly rather than by proxy, either electronically or by post. These additional methods of voting may further encourage shareholders to be involved in corporate governance without having to attend meetings.'³

The issue of direct voting raised at that time did not progress. In part, this has been because there has been insufficient discussion on what the introduction of direct voting actually means. It has also been, in part, because the concentration in various reforms to

the *Corporations Act* since 2000 has been on audit and disclosure reform in reaction to corporate failure.

While we talk about shareholders in companies listed on the Australian Stock Exchange in this paper, the implications of utilising or not utilising direct voting are the same for members of unlisted public and private companies.

Australia's share ownership



Base: All Australian adults aged 18 years + (2000 n=1200, 2002 n=2401, 2003 n=2402, 2004 n=2402)

Source: Australian Stock Exchange, Australia's Share Owners: An ASX Study of Share Investors in 2004

Part 2: Problems with the proxy system

Why was voting by appointing a proxy introduced?

The old law of corporations recognised that 'the voting privilege [is] in the nature of a personal trust, committed to the discretion of the member, and hence not susceptible of exercise through delegation'.⁴ Therefore, at common law, shareholders had no right to appoint a proxy to vote.⁵ Instead, the power was granted through the contract between the members and the company, the constitution.

The 1929 consolidation of the Companies Act (UK) recommended that the articles of association allow the appointment of a proxy to vote and allow anyone to be appointed as a proxy (previously, only other members of the company could be so appointed).

Therefore, the introduction of the appointment of a proxy to vote, as a central plank of shareholder participation, is relatively modern.

The reason the codification of voting by proxy was recommended was that, at the time, most companies required the proxy also to be a member of the company. This limited members, and particularly smaller investors, from participating in the general meeting, as for some small shareholders, management may have been the only other member they knew.⁶

In the UK members received a statutory right to appoint a proxy to attend and vote at the general meeting on their behalf in s 5 of the Companies Act 1947 (UK). The introduction of this provision was designed to solve the problems identified by the Cohen report by allowing a member to appoint a person regardless of membership of the company. Being a mandatory requirement for companies having a share capital, a company's articles of association could not contract the members out of this right.

The uniform companies legislation adopted by the Australian states in 1961 included a provision in similar terms to s 5.⁷ Under that provision, the statutory right to appoint a proxy extended to a company not having a share capital. However, members of that type of company, and of a proprietary company, could only appoint non-member proxies where permitted to do so under the articles of association. All



subsequent amendments and consolidations in Australia and the United Kingdom have included a provision allowing members of a public company to appoint a proxy who, in the case of a public company having a share capital, need not be a member of the company.

Since 1 July 1998, members of a public company not having a share capital have also had a statutory right to appoint a non-member proxy.⁸

How voting by appointing a proxy currently works in Australia

Shareholders may elect to appoint up to two proxies to attend and vote on their behalf at general meetings.

Appointing a proxy refers to the issuing, authentication and submission of proxy forms by and to the corporation. The *Corporations Act* deals with proxies in ss 249X to 250D. Appointing a proxy allows a member who does not intend to attend a general meeting to appoint another person to attend and exercise all or some of the member's rights at that meeting. In this process, the member temporarily transfers some of the rights attached to their membership to another party, who is deputed as their agent.

The appointment of a proxy to cast a vote interposes the law of agency between the shareholder and the corporation and is therefore by its nature indirect.

Difficulties with voting by appointing a proxy

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

Given that the appointment of a proxy to cast a vote interposes the law of agency between the shareholder and the corporation, it is by its nature indirect. At a time of renewed interest in shareholder participation, it is difficult to see how retaining the appointment of a proxy, corporate representative or attorney as the *only* form of absentee voting assists shareholder democracy. Under current legislation, a shareholder can appoint a proxy to vote and direct the vote, but the proxy holder can elect not to vote (apart from the chairman, who is obliged to vote as instructed). Chartered Secretaries Australia acknowledges that the Corporations Amendment Bill (2006) seeks to address this anomaly, but loopholes still remain.

Examples of abuse

Appointing a proxy is not voting

When appointing a proxy, shareholders are temporarily transferring to another party some of the rights attached to their membership, especially their right to vote. The major misunderstanding is that many shareholders believe that they are actually casting their vote via the proxy appointment process. However, a proxy holder has the same rights as a shareholder (subject to a company's constitution) to:

- attend the meeting (and any adjournment of that meeting)
- speak at the meeting
- vote, or decide not to vote (but have regard to the shareholder's direction, if any)
- join in the demand for a poll.

It is a common misapprehension that appointing a proxy to exercise the shareholder's vote is a direct vote. Shareholders do not necessarily appreciate that they are temporarily only transferring some of the rights attached to membership to another party, especially the right to vote or to make a decision not to vote. Voting by appointing a proxy does not provide the most transparent vehicle for expressing the voice of shareholders.

Failure to call a poll

The fact that the collection of proxy votes is carried out by the issuer itself often gives issuers a clear indication of voting trends ahead of voting at a general meeting. It has been known for chairmen of meetings to rely on a vote on a show of hands, to avoid an outcome they consider unfavourable to their interests that calling for a poll would bring about. In such instances, unless members or the chairman calls for a poll, voting can be conducted on a show of hands alone, even if the results are not clear-cut. Clearly, this type of situation goes against the majority view of shareholders. The chairman has an obligation to ensure that the wishes of the majority of shareholders are reflected in any vote.

For example, in the 2005 annual general meeting (AGM) season, approximately 70 per cent of the proxies submitted in respect of the resolution to approve Novogen Limited's (Novogen) remuneration report were directed against the resolution. At the AGM, the resolution was carried on a show of hands and no poll was called despite the high dissenting vote evidenced in the proxies. ASIC took issue with Novogen, as the failure to call a poll was 'contrary to the duty of a chairman of a meeting (in the absence of a valid request to do so) to call a poll when it is clear that it would produce a different result from a vote on a show of hands'.⁹

ASIC also noted that in a Novogen release to the market the no-vote was presented as a proportion of the issued share capital, rather than as a proportion of the numbers of votes received. The release said there had been a majority vote on a show of hands in favour and the 12.5 per cent proxy vote against was noted by the chairman for this non-binding resolution. As a result, ASIC noted, the no vote was presented as 12.5 per cent, instead of 70 per cent, creating a different perception of the level of disapproval with the report.

In the company's defence, the chairman noted in a formal apology to shareholders that he had not called a poll because he had understood (incorrectly) that the purpose of an advisory resolution was to give shareholders an opportunity to discuss and challenge Novogen's remuneration policies. The chairman noted that he believed that, if those views were acknowledged by the company and recorded, then the resolution would have achieved its advisory purpose.¹⁰ Furthermore, the company's review of the against vote revealed that a shareholder representing about 98 per cent of the proxy vote against the resolution advised the company that 'the vote was made in error by its third party independent proxy voting agent.'¹¹

Nonetheless, both in terms of the problems that can be caused by a failure to call a poll, and the problems attached to an intermediary being interposed between the member and the company, this example illustrates the difficulties attached to appointing proxies as the sole means of exercising absentee members' votes.

Another example also occurred in the 2005 AGM season. Investa Property Group failed to disclose all valid proxies received at the AGM and then later to ASX (concerning the non-binding shareholder vote on the remuneration report). The instructions to proxy holders to vote against or abstain from voting on the resolution constituted 34 per cent of the votes received.

Again, in the company's defence, the chairman knew that a shareholder with 30 per cent of the shareholding base was physically present at the general meeting and that this shareholder was intending to vote for the resolution. The chairman knew that this would see the resolution passed. As a result, the chairman called for a show of hands, rather than calling a poll.

Notwithstanding this, the failure to call a poll resulted in a lack of transparency in the voting process. As will be explained later in this paper, direct voting, while it might not alter the outcome of such meetings, would result in more transparency in the voting process.

Macquarie Dictionary

Proxy: 1 the agency of a person deputed to act for another; 2 the person so deputed; an agent; a substitute; 3 a written authorisation empowering another to vote or act for the signer



Chartered Secretaries Australia notes that these examples are rare events. The majority of chairmen call for a poll if the vote is close or, more likely, to reflect the wishes of the majority of members.

Cherry picking

Under the current provisions of the *Corporations Act*, proxy holders (other than the chairman) who vote in any capacity on a poll need not vote all of the directed or undirected proxies they hold. There is no means of enforcing the casting of votes which are contrary to a proxy holder's personal view. Non-chair proxy holders with instructions to vote both for and against a resolution may decide to abstain from voting at all or choose to vote directed proxies for a resolution to the exclusion of directed proxies against the resolution (or vice versa), thus depriving all or some of the members giving the proxies of their vote on the matter.

The object of directors and the company must be to reflect the wishes of the members as a whole. Therefore, the objective is to encourage all members to exercise a vote. The Organisation for Economic Co-operation and Development (OECD) in its paper on corporate governance¹² noted that the corporate governance framework should ensure that proxies should be voted in accordance with the direction of the beneficial holder and that disclosure should be provided in relation to how undirected proxies will be voted.

**Appointing a proxy is not
the same as voting**

*Appointing a proxy means
that shareholders
temporarily transfer to
another party some of the
rights attached to their
membership, especially their
right to attend and vote, or
choose not to vote.*

In *ASIC v Whitlam* at first instance¹³, ASIC alleged that Mr Whitlam (the chairman) did not properly vote against a resolution (which he supported) as instructed by the shareholders who had appointed him proxy.

Mr Whitlam failed to sign the poll papers which constituted the no votes of 3,973 members. Under the NRMA's Articles of Association those votes were consequently rendered invalid. While the votes were not initially counted, the returning officer obtained advice that the votes should be counted despite the procedural failure by Mr Whitlam to sign the poll papers. Ultimately, the votes were counted and the resolution was defeated, although too late to stop publication of newspaper advertisements to the contrary.

The trial judge found that Mr Whitlam had deliberately failed to sign the poll paper, and this was a breach of the section in the *Corporations Act* requiring the person given the proxy to vote in the way directed. However, in *Whitlam v ASIC*, the Court of Appeal overturned this finding (for reasons outside the scope of this paper).¹⁴ On appeal, the High Court confirmed the Court of Appeal decision.

NRMA Motoring & Services uses a direct voting system independent of general meetings for board of director elections. However, in respect of general meetings the organisation uses the usual proxy system, and in 2003 the independent returning officer reported that some members in respect of resolutions related to constitutional reform 'cherry picked' directed proxies by utilising 'no' directions and abstaining 'yes' directions.

Chartered Secretaries Australia notes that the Corporations Amendment Bill 2006 seeks to address the issue of 'cherry-picking' of proxy votes. While it has been accepted by both Treasury and the Parliamentary Joint Committee on Corporations and Financial Services that it is not possible to oblige proxy holders to vote all proxies they hold (they may have left a meeting early, or be ill and unable to attend the meeting on the day), Chartered Secretaries Australia understands that that it may become an offence not to vote all proxies as directed if the proxy holder votes. However, as noted earlier, loopholes will remain.

Solicitation of proxies and proxy forms

Solicitation of proxies occurs frequently, particularly in relation to the election of directors. For example, parties seeking election at NRMA have handed out proxy forms at railway stations, shopping centres and in clubs. There is nothing wrong with solicitation by candidates (at their expense), but when combined with the capacity to issue individual proxy forms, it can create a problem.

Under the current legislation, anyone seeking election and soliciting votes may issue an individual proxy form (which complies with the minimum requirements set out in s 250A). There is no obligation to utilise the company-issued proxy form. In such instances, members may lodge multiple variations of proxy forms. Furthermore, the solicitation process may include a request to members to return their proxy form to the person seeking election, rather than to the company or share registry (if one is utilised). In such a process, there is no means of clarifying the integrity of the collection process from a third party other than the registry.

When Coles Myer held its 2002 AGM, Mr Solomon Lew issued his own proxy form when seeking re-election to the board of directors, and those proxy forms were returned to him rather than to the company. Mr Lew's proxy forms were lodged with the share registry shortly before the cut-off time, thus ensuring that they took precedence over any earlier proxies lodged by the shareholders concerned. At the AGM, Mr Lew left the meeting without voting the proxies in his favour, noting he 'had been distracted at the time the proxies were being collected'¹⁵ when a poll was called. As noted in the media at the time, 'In his haste to avoid the media, Mr Lew apparently left the meeting with the proxies in his pocket and realised his mistake when he returned to his office.'¹⁶ The proxies were voted after the deadline. The chairman exercised his discretion and accepted the 117 million 'late' votes. Legal advice noted that the chairman's discretion could have been exercised either way, and had the chairman not accepted the votes, those shareholders would have been disenfranchised.

Lodgement of proxies involves multiple handling

The largely paper-based system in place for the lodgement of proxies has led to institutional investors not always being able to track their votes, even when they do vote.

For example, in 2006, AMP Capital Investors noted that it had decided to investigate 'missing votes' after meeting results reported by many companies to the stock exchange showed fewer total votes against resolutions than AMP alone had lodged via proxy. A representative of AMP noted that 'errors could occur at many points in the "cumbersome, manual" voting process, which he said involved at least six pairs of hands'.¹⁷

It should be noted that this related to AMP's custodian(s) not lodging votes with the registry and not the registry processing the votes.

Part 3: What direct voting brings

Democratic participation

Currently, in voting in the political process, it is possible to engage in direct voting. Citizens are not permitted to transfer their voting rights to another person in order to have their say. However, it is accepted that many voters will not be in their electorate on election day, and provision is made for their votes to be cast and received in advance of the election in such a way that it does not influence the carriage of the election.

The essential requirements for recording people's views when voting are:

- the need to record information and to have the results available quickly (timeliness)
- the need to have a system that is accessible to all and easy to use (accessibility)
- the need to ensure secrecy of what takes place (secrecy) – except where open elections are called for



- the need for voting to be undertaken seriously, after due deliberation (deliberation)
- the ability to ensure that each individual's vote is recorded and counted accurately (accuracy)
- the need to guard against manipulation and interference with information once recorded (security)
- the need to ensure that individuals cannot be impersonated (authentication)
- the need to verify what has taken place through the use of traceable information trails (verifiability).¹⁸

No agent or proxy is involved in direct voting. In corporations law, this would mean that the only legal relationship is between the shareholder and the corporation. Providing shareholders with the right to cast a valid vote prior to a general meeting allows the shareholder to participate fully in the exercise of their rights, as there is no transfer of rights.

Advantages of direct voting

Absence of an intermediary

If shareholders are unable to attend a meeting physically, they will not be required to transfer their voting rights to a third party in order to have their say. No intermediary is involved in direct voting, and the law of agency is not interposed between the shareholder and the corporation. The relationship is a direct one, as envisaged when the words 'shareholder democracy' are used.

In the absence of an intermediary, shareholders will be guaranteed that their votes are counted. Cherry picking will not be a possibility. All votes will be counted.

Above all, greater transparency in the voting process and greater empowerment of shareholders is achieved.

The ease of counting direct votes

Software that enables shareholders in any location to vote and allows companies and their registries to tally votes easily facilitates direct voting and already exists. However, direct voting need not be via electronic means. It can be carried out by post, fax and telephone as well.

Direct voting ensures that all votes are taken into account. As in a general election in a democratic system, each vote per share is recorded and counted accurately. This in turn leads to the capacity to verify what has taken place through the use of traceable information.

The problems with tracking votes because of the presence or absence of intermediaries will not apply.

Improved integrity of system

Direct votes will have to be lodged with the company or share registry and will not be able to be lodged with a person soliciting votes (there will be no hindrance to any person soliciting votes). Thus the integrity of the collection and accumulation process is assured.

Voting on a show of hands is frequently undertaken in a desire to keep the meeting progressing and not have shareholders waiting disproportionate amounts of time while votes are counted on a poll. Ensuring that all votes are lodged with the company or share registry will expedite counting votes on a poll.

What direct voting will not do

Direct voting will not lead to virtual meetings

Commentators have argued that direct voting would be a step toward virtual meetings, that is, meetings without shareholders being present. Some investors have expressed concerns that electronic-only meetings would deprive them of the opportunity to meet with company representatives face-to-face. Such a loss would interfere with the capacity of investors to better express their positions, to question directors in their role as stewards of the company and the opportunity for management and the board to listen more closely when communications are made in person.

However, the provision of direct voting for shareholders does not need to lead to virtual meetings, any more than the appointment of proxies to lodge votes, including by electronic means, leads to virtual meetings. Direct voting does not replace the physical meeting.

Direct voting will not replace the appointment of proxies

Direct voting is not a substitute for the issuing of proxy forms and the appointment of proxies. However, shareholders should have a choice as to which form of participation they wish to invoke. The *OECD Principles of Corporate Governance* state that 'Shareholders should be able to vote in person or in absentia, and equal effect should be given to votes whether cast in person or in absentia'.¹⁹ Currently, when the member cannot attend a general meeting, the appointment of a proxy or representative is the only means of exercising a member's right to vote. Shareholders are not able to vote in absentia; they can only transfer their right to vote to another party.

Direct voting improves certainty that voting rights will be exercised. The existence of a provision for the appointment of a proxy alongside direct voting accommodates the degree of participation that a shareholder would like to initiate.

Breakdown or overload of technology

There is concern that an over-reliance on technology will cause difficulties in voting transparency, as the technology may fail. However, technological means to count votes lodged by proxy are already in use and the use of technology in this way has not caused a problem.

The *Corporations Act* clearly already provides for technological advances and the use of electronic means for voting. In s 250A(1), those entitled to vote at meetings may do so either by signing an appointment or by otherwise authenticating an appointment in a manner prescribed by the Corporations Regulations 2001.

Corporations Regulation 2G.2.01 allows for electronic authority appointment, specifying that the authorisation must include a method for identifying the member and an indication that the member's appointment of the information is communicated.

The Act also provides for a company to hold a meeting of its members in two or more venues using technology that gives the members as a whole a reasonable opportunity to participate (s 249(5)).

Under Australian corporations law, a company may collect votes or members may vote electronically if it is provided for in the company's constitution. There is no statute which makes such a practice illegal. Section 249(3) of the *Corporations Act* permits shareholders to request that notices of meetings be sent to them via email. The CLERP 9 Act further facilitates the electronic distribution of notices of meetings by broadening the electronic means by which a shareholder may receive the notice.

Furthermore, direct voting would not be limited to electronic voting but would also encompass postal voting and voting by fax and telephone.

The AGM will not be jeopardised

It has been argued that shareholders will not bother turning up to general meetings if they have already had their say through direct voting. There is a fear that if direct voting is introduced meetings will become faceless. However, if that were the case, the appointment of proxies would have already made this occur.

Objective of direct voting

The objective of direct voting is to make it easy for a shareholder to vote and to have their vote counted. Otherwise, improvements in shareholder participation will be difficult to achieve. Appointing a proxy is not direct and may result in shareholders being disenfranchised. Direct voting will empower shareholders.



Part 4: Direct voting in practice

Legislative change is not required

The *Corporations Act* as it is now worded does not exclude members voting directly when not in attendance at a meeting.

If a company's constitution provides for it, direct voting is already feasible. For example, NRMA, among others, successfully introduced direct elections of directors some years ago. AWB Ltd's constitution also provides for direct voting as well as the appointment of proxies.

The sample rules set out in this paper (see Appendix B) indicate that a member who votes directly cannot vote in person at a meeting or by proxy. However, as a replaceable rule under the Act, or in its constitution, a company could provide that a member who has cast a direct vote on a resolution will have that vote counted on a poll unless the member appoints a proxy (or corporate representative) or personally attends the meeting.

Multiple options still exist

Members who do not lodge a direct vote can still appoint a proxy or attend and vote at the meeting.

Direct voting need not dispense with the current system of voting by appointing a proxy or corporate representative. The two systems can operate simultaneously.

A company can provide for only one voting system in its constitution. For example, the direct election provisions of NRMA Motoring & Services' constitution provide that members can only directly vote by post, telephone or the Internet and the vote is independent of the general meeting. This is possible because the provision that requires a director to be elected by resolution of the general meeting is a replaceable rule (s 201G) that will not apply if the company's constitution specifies otherwise.

The procedures for lodging, verifying and counting direct votes will be identical to the company's current system for proxies and the same registry would be responsible for receiving and counting both the direct votes and those lodged by proxies. No additional costs need be incurred, as the direct voting and appointment of a proxy can be included as alternatives on one voting form.

No change to meeting procedures

A motion is put forward at the time of the issue of the Notice of Meeting. With very limited exceptions, an existing motion cannot be changed nor a new motion introduced. The chairman can only withdraw a motion. Proposing or altering a motion at a meeting is therefore not a concern.

Chartered Secretaries Australia notes that there are different views as to the legality of accepting an amendment to a resolution at a meeting on other than a technical basis.

Part 5: The path forward

Chartered Secretaries Australia is of the view that the current system of appointing a proxy as the sole means of absentee voting has a number of deficiencies. The system of shareholders exercising voting rights can be improved.

Direct voting improves the exercise of voting rights because it removes the intermediary between the shareholder and the company. Shareholders need no longer transfer some of their rights to another party but can vote directly.

This also eliminates the problems that currently exist with the so-called 'chairman's box' (Listing Rule 14.2.3), which effectively disenfranchises a shareholder who authorises the chairman to vote on his or her behalf but who fails to mark the box.

If direct voting is utilised, cherry picking will not be a possibility, the integrity of the collection and accumulation process will be assured and all votes will be counted. The problems with tracking votes because of the presence or absence of intermediaries will also not apply.

These improvements can have a substantial impact. No company needs to wait for legislative reform before working to ensure that shareholders can exercise their voting rights. Companies can amend their constitutions to achieve the benefits now.

Chartered Secretaries Australia strongly encourages companies to implement direct voting. Those companies that proceed in this direction will be seen to be at the forefront of good governance practice in Australia and will be doing what they can to improve shareholder participation.

Notes

- 1 Australian Stock Exchange, *Australia's Share Owners: An ASX Study of Share Investors in 2004*, p 4
- 2 *ibid*
- 3 Companies and Securities Advisory Committee, *Shareholder Participation in the Modern Listed Public Company: Final Report*, June 2000, paras 4.4 and 4.119
- 4 *Walker v Johnson* 17 DC App 14
- 5 *Harben v Phillips* (1883) 23 CH D 14, 35-36
- 6 Committee of Company Law Amendment, Parliament of the United Kingdom, Report of the Committee of Company Law Amendment (Cohen Report 1945), (1945) para 133
- 7 s 141
- 8 s 249X(1)
- 9 ASIC media release, *ASIC asks Novogen to set the record straight on director pay vote*, Thursday 3 November 2005
- 10 Novogen Limited, Letter to shareholders from the Chairman of Novogen Limited, Thursday 3 November 2005, <<http://www.novogen.com/news/news0501.cfm?mainsection=05&subsection=03&newsid=188>>
- 11 Novogen Limited, Review of the Remuneration Report, Friday 16 December 2005, <<http://www.novogen.com/news/news0501.cfm?mainsection=05&subsection=03&newsid=195>>
- 12 Organisation for Economic Co-operation and Development, *OECD Principles of Corporate Governance 2004*
- 13 *ASIC v Whitlam* (2002) 42 ACSR 407
- 14 *Whitlam v ASIC* (2003) NSWCA 183
- 15 Evans, S and Shand, A, 'Lew bungle hits 170,000 Coles voters', *Australian Financial Review*, 22 November 2002, p 1
- 16 *ibid*
- 17 Buffini, F, 'AMP investigates missing votes', *Australian Financial Review*, Thursday 2 February 2006, p 3
- 18 Smith, R, 'Electronic voting: Benefits and Risks', *Trends and Issues in Crime and Criminal Justice*, April 2002, Australian Institute of Criminology
- 19 Organisation for Economic Co-operation and Development, *OECD Principles of Corporate Governance 2004*



Sample Voting Form

The Sample Company
ABN 00 000 000 000

All correspondence to:
Sample Company Limited
{address}
{address}
Enquiries (within Australia) XXXXXX
(outside Australia) XXXXXX
Facsimile XXXXXX
{website}

Mark this box with an 'X' if you have made any changes to your address details

MR_JOHN_SAMPLE
FLAT 123
123 SAMPLE STREET
THE SAMPLE HILL
SAMPLE ESTATE
SAMPLEVILLE VIC 3030

Securityholder Reference Number (SRN)

{insert barcode}

Direct Voting

Completing a Direct Vote ▼

Vote on the following Business Items (Use Black or Blue ink)

Place an "X" in the box corresponding to your wishes for each item. By marking the boxes you are directing the company and its registry to record your votes strictly in accordance with these instructions.

	For	Against
Item 1		
This is a test	<input type="checkbox"/>	<input type="checkbox"/>
Item 2		
This is a test	<input type="checkbox"/>	<input type="checkbox"/>

Please sign here ▼

This section *must* be signed in accordance with the instructions overleaf to enable your directions to be implemented.

Individual or Securityholder 1	Securityholder 2	Securityholder 3
Sole Director Sole Company Secretary	Director	Director/Company Secretary

Contact Name	Contact Daytime Telephone	Date

Documents may be lodged using the reply paid envelope or:
IN PERSON Registered Office – 123 Sample Street, SAMPLEVILLE NSW 0000 AUSTRALIA
BY MAIL Registered Office – 123 Sample Street, SAMPLEVILLE NSW 0000 AUSTRALIA
BY FAX XXXXXX

Sample rules for votes of members at general meetings

1 Votes by members

1.1 Means of voting

Votes by members at a meeting may be given:

- (a) personally at the meeting;
- (b) by proxy, representative or attorney at the meeting; or
- (c) by a valid notice of their voting intention (Direct Vote).

1.2 One vote

A member may only vote by one of the permitted methods in Rule 1.1 in respect of a share.

If a member casts a Direct Vote on a particular resolution they are taken to have revoked the authority of their proxy, if any, to vote on their behalf on that resolution.

1.3 Priority of votes

If a member attempts to cast more than one vote on a particular resolution in respect of the same share, only the first vote received by the returning officer is to be taken to have been cast irrespective of whether that vote is formal or informal.

2 Direct Votes

2.1 Voting Directly

Pursuant to rule 1.1 a member is entitled to cast a Direct Vote prior to the relevant general meeting. Every member who is entitled to attend that general meeting is entitled to cast a Direct Vote.

2.2 Direct Voting instrument

If sent by post or fax, the Direct Vote must be signed by the member or, if the member is a corporation, either under seal or by a duly authorised officer, attorney or representative.

If sent by electronic transmission the Direct Vote is to be taken to have been signed if it has been signed or authorised by the member in the manner approved by the directors or specified in the notice of meeting.¹

A Direct Vote includes any form of vote that the directors may prescribe or accept including by any electronic means.

2.3 Deposit of instrument

At least 48 hours before the time for holding the relevant general meeting, the adjourned meeting or the poll at which a person proposes to cast a notice of their voting intention, there must be received at the Office or such other place as is specified for that purpose in the notice of meeting, or be transmitted to a facsimile number at the Office or a facsimile number or electronic address specified for that purpose in the notice of meeting:

- (a) notice of their voting intention; and
- (b) any authority or power under which the Direct Vote was signed or a certified copy of that power or authority.

2.4 Form of the Direct Vote

A notice of their voting intention is valid if it contains the following information:

- (a) the member's name and address or any applicable identifying notations such as the holder identification number or similar approved by the directors or specified in the notice of meeting; and
- (b) the member's voting intention on any or all of the resolutions to go before the meeting.

¹ This is intended to include online or telephone voting or similar use of PIN identification process or similar.

2.5 Validity

A vote cast in accordance with a Direct Vote is valid even if before the vote was cast the member:

- (a) died;
- (b) became of unsound mind; or
- (c) wishes to change their vote,

unless written notification of the relevant event is received at the Office before the meeting, adjourned meeting or the taking of the poll in respect of which the Direct Vote was to have been cast.

2.6 Chairman's decision

The Chairman's decision as to whether a Direct Vote is valid is conclusive.

2.7 Attendance by member who has cast a Direct Vote

A person who has cast a Direct Vote is entitled to attend the meeting. However, they are not able to vote in respect of the shares the subject of the Direct Vote at that meeting.

3 Counting of direct votes

3.1 Count

If a vote is taken at a meeting on a resolution on which a Direct Vote was cast, the Chairman of the meeting must:

- (a) on a vote by show of hands, count each member who has submitted a Direct Vote for or against the resolution in accordance with their Direct Vote; and
- (b) on a poll, count the votes cast by each member who has submitted a Direct Vote directly for or against the resolution.

3.2 Call for a poll

The Chairman of a meeting must call for a poll on a resolution where he or she believes that having regard to the Direct Vote cast that the result may differ from that obtained on a show of hands.

3.3 Certificate of direct votes cast

The Chairman of a meeting must ensure that a certificate signed by the returning officer of Direct Votes received is available at the meeting ahead of any vote being taken.

Questionnaire

Chartered Secretaries Australia welcomes all submissions on all relevant issues arising from this discussion paper. The inclusion of this questionnaire is intended to stimulate thought, ideas and debate. The questionnaire highlights some of the areas recognised by Chartered Secretaries Australia as being central to the debate of this important issue. Submissions debating the topics not covered by the questionnaire are most welcome. The following questions are in no way intended to limit the scope of any submission in relation to this discussion paper.

- [Q.01] Do you agree, in principle, with the need for an addition to the current system of appointing proxies as the sole means of providing for shareholder participation if shareholders are unable to physically attend the general meeting?
- [Q.02] Do you think that the proposal to introduce direct voting would increase shareholder participation?
- [Q.03] Do you believe there are further advantages attached to the introduction of direct voting than have been outlined in this paper?
- [Q.04] Can you point to any disadvantages attached to the introduction of direct voting?
- [Q.05] Do you believe that there will be unintended consequences to the law of meetings that might be introduced if direct voting were provided for in companies' constitutions?