



# Rethinking the AGM

**A discussion paper**



**CHARTERED SECRETARIES  
AUSTRALIA**

*Leaders in governance*

**Blake Dawson**

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# Introduction

## a. Background

In February 2008, Chartered Secretaries Australia and Blake Dawson convened a Roundtable on Rethinking the AGM (the Roundtable) to discuss how shareholder engagement and participation at annual general meetings (AGMs) could be improved.

This discussion paper outlines various issues identified by the Roundtable regarding the need for legislative reform to improve shareholder engagement and participation at AGMs. The paper also puts forward ideas for the management of AGMs that the Roundtable believes will improve their effectiveness.

The paper aims to generate discussion as to how best to provide for shareholder engagement and participation in the AGMs of the 21st century. The Roundtable sees an opportunity to improve governance practices and increase the opportunities for shareholder participation by encouraging informed discussion on improving the AGM.

## b. Structure of the paper

This introduction provides the context for the formation of the Roundtable and gives an overview of both the problems it seeks to address in suggesting reforms to the AGM and the suggested solutions.

Part 1 describes in greater detail the problems with the AGM as a forum for engaging shareholders.

Part 2 examines the functions of the AGM in terms of reporting to shareholders and enhancing the accountability of directors.

Part 3 explores voting at meetings, looking both at the process of deliberation leading up to the decision as to how to vote and the mechanics of casting a vote.

Part 4 contains the Roundtable's suggestions for reform, and raises a number of questions on which your views are sought.

## c. Request for submissions

Chartered Secretaries Australia, Blake Dawson and the Roundtable invite submissions on all of the matters raised in this paper. Likewise, respondents are invited to raise any further issues related to the need for legislative reform in relation to the management of AGMs that are not canvassed in this paper.

In addition, respondents are invited to complete the questionnaire contained in Appendix A of this paper, which contains discussion questions on specific issues that the Roundtable identified as being central to the debate. 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.

Please send submissions either by email to [tim.sheehy@CSAust.com](mailto:tim.sheehy@CSAust.com) or in hardcopy to:

Mr Tim Sheehy  
Chief Executive

Chartered Secretaries Australia, Level 10, 5 Hunter Street, Sydney NSW 2000

If sending a hardcopy, please also email your submission as a Microsoft Word file.

Phone: (02) 9223 5744

Fax: (02) 9232 7174

## d. Closing date for submissions

Please forward submissions by **2 July 2008**.

## e. Roundtable convenors

### *Chartered Secretaries Australia*

Chartered Secretaries Australia 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 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 2001*. Given the diverse roles our members play in the business community and their expertise in governance, Chartered Secretaries Australia sees this discussion paper as fulfilling its mission of the promotion and advancement of effective governance and administration.

### *Blake Dawson*

Blake Dawson is regularly called upon to advise on issues at the forefront of corporate and commercial law. Our focus is on getting to the heart of our clients' legal needs and delivering commercially astute and practical solutions. We provide legal services to many of Australia's ASX-listed companies and their boards in all areas of law, such as mergers and acquisitions, capital raising and company law and governance, including on the conduct of AGMs. We thrive on cutting-edge work and are currently acting as Australian law advisers to BHP Billiton on its all-share offer for Rio Tinto, the world's second largest takeover bid, and the largest takeover offer involving an Australian company. Our top-tier rankings in *Asia Pacific Legal 500, 2007–2008* and *IFLR1000 2008* confirm our status as one of Australia's pre-eminent corporate and commercial legal advisers.

Blake Dawson takes a proactive interest in issues affecting Australia's major companies and in recent years has undertaken major surveys of AGMs with the support of the Business Council of Australia and Chartered Secretaries Australia. These surveys have provided valuable data on the conduct of AGMs at major Australian companies.

## f. Roundtable members

Chartered Secretaries Australia and Blake Dawson would like to acknowledge the assistance of the following people who participated in the consultation at the Roundtable:

- Professor Elizabeth Boros, Sir Keith Aikin Chair of Company Law, Monash University
- Tony D'Aloisio, Chairman, Australian Securities & Investments Commission
- David Frecker, Partner, Blake Dawson
- Belinda Gibson, Commissioner, Australian Securities & Investments Commission
- David Gonski AC, Chairman, Investec Bank (Australia) Limited; Coca-Cola Amatil Limited, UNSW Foundation; and Sydney Grammar School; Director, Westfield Group, Singapore Airlines and ASX Limited; Chancellor of the University of New South Wales
- Justin Grogan, General Manager, Investor and Corporate Affairs, Leighton Holdings
- Elizabeth Johnstone, Partner, Blake Dawson
- Anne Keating, Director, Goodman International Limited; Macquarie Leisure Operations Limited; Macquarie Leisure Management Limited; Spencer Street Station Redevelopment Holdings Limited; STW Communication Group Limited; Member, ABN AMRO Advisory Council
- Stephen Mayne, Founder, *Crikey*
- Jane McAloon, Company Secretary, BHP Billiton
- Peter Morgan, Co-founder and Investment Director, 452 Capital
- David Potts, Editor, Personal Finance, *The Sun-Herald*
- Barbara Ward, Chairman, Country Energy; Director, Lion Nathan Limited and Multiplex Funds Management Limited; Trustee of the Sydney Opera House Trust
- David White, Director, Zentricity Pty Limited

The views contained within this paper are those contributed by the participants at the Roundtable. Ideas in the paper should not be attributed to any particular individual.

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# Executive summary

The AGM has long been the forum where shareholders and directors can interact and which allows for the exchange of information and the examination of profit and performance-related issues. It provides the opportunity, enshrined in both statutory law and frequently in company constitutions, for shareholders to ask questions of the board of directors about the performance of the company and express their position on board stewardship. As such, it is a longstanding and valued element of the governance framework.

Shareholders, both institutional and retail, are demanding greater engagement with the companies in which they invest. However, paradoxically, despite the AGM being the main forum for retail shareholders in particular to meet and question the directors, research shows that shareholder attendance at AGMs is declining and shareholders are not engaging with the rights that were introduced by in the past decade.

This paper contends that there is a question as to whether the AGM is achieving the objective for which it was intended, and that in order to facilitate constructive shareholder participation at general meetings — a key element in the governance framework — the AGM needs a ‘rethink’.

This paper sets out suggestions for reform, including:

- separating the deliberative and decision-making functions of the AGM through legislative amendment
- providing for different meeting rules for public listed companies and unlisted public companies
- extending the statutory time frame for holding an AGM
- making the AGM more meaningful for shareholders by:
  - encouraging committee chairmen to report to shareholders and answer questions on the report
  - encouraging directors standing for re-election to answer relevant questions from shareholders.

A questionnaire is attached to the paper as Appendix A, highlighting some of the areas recognised by participants at the Roundtable on Rethinking the AGM as being central to the debate on this important issue.

# PART 1

## Why does the AGM need a rethink?

The AGM has long been the forum where shareholders and directors can interact and which allows for the exchange of information and the examination of profit and performance-related issues. It provides the opportunity, enshrined in both statutory law and frequently in company constitutions, for shareholders to ask questions of the board of directors about the performance of the company and express their position on board stewardship. As such, it is a longstanding and valued element of the governance framework.

### 1.1 Demand for shareholder engagement

Shareholders, both institutional and retail, are demanding greater engagement with the companies in which they invest. Given the significant proportion of superannuation fund investments in the Australian equity market, the long-term viability of publicly-listed companies has a direct bearing on the value of investments and, ultimately, retirement incomes.

Shareholders are a diverse group, dispersed geographically (including internationally) and, in many large companies, can number in the thousands, if not the millions. With dynamic and global investment strategies, shareholders may include an individual resident in Australia planning for his or her retirement, a large institution with billions of dollars under management, a foreign investor, a global hedge fund, and an investor with no interest in the company beyond a short-term trade. The traditional retail investor in Australian equities may represent a small proportion of the capital of a large ASX-listed company.

As noted in the Chartered Secretaries Australia publication *Effective AGMs* (2007):

Engagement can be considered as the extent to which shareholders:

- are aware of the company and its performance and prospects
- support the plans of the board and executives for its growth and success
- are prepared to stay shareholders to be part of that growth and success
- will continue to support the board if and when the company may hit bumps in the road and suffer setbacks in volatile and highly competitive times.

Institutional and retail shareholders both wish to engage with the companies in which they invest in the manner outlined above. Retail shareholders advise that they, in particular, see the AGM as the main forum to review and discuss company results; gain access to the directors to question them on those results as well as plans for the future; elect the directors and, when the office is vacant, the auditor; and be exposed to information concerning any important developments in the previous financial year and in the year to come.

However, paradoxically, despite the AGM being the main forum for retail shareholders in particular to meet and question the directors, Chartered Secretaries Australia's research over eight years shows that shareholder attendance at AGMs is declining. Equally significantly, Blake Dawson's research on shareholder engagement at AGMs shows that shareholders are not taking full advantage of their rights to ask questions at AGMs.

## 1.2 Declining attendance

In 2007, barely 10 per cent of the top 200 companies — which comprise companies with very large shareholder bases, and frequently large retail shareholder bases — attracted 300 or more shareholders to their AGMs.<sup>1</sup>

**Table 1: Number of AGMs attracting 300 or more shareholders 2001 – 2007**

	2001	2003	2005	2007
Top 200 companies attracting 300+ shareholders to AGM	35.7%	34.3%	27.9%	11.1%

The marked decline in shareholder attendance at the 2007 AGM continues a trend evident over some years. It also suggests that the AGM in its current form is not engaging shareholders. While it could be speculated that the lack of shareholder engagement over the past few years may be due to the buoyancy of the market, it does raise questions as to whether the AGM is achieving the objective for which it was intended.

Raising further questions about whether shareholders are participating in and engaged at the general meetings of the top 200 companies, Chartered Secretaries Australia's survey results in 2007 also show that the number of AGMs attracting fewer than 100 shareholders continues to increase.

**Table 2: Number of AGMs attracting fewer than 100 shareholders 2001 – 2007**

	2001	2003	2005	2007
Top 200 companies attracting fewer than 100 shareholders to AGM	23.2%	22.4%	38.2%	41.3%

To ascertain more exactly the degree of engagement or otherwise of shareholders with the AGM, the top 200 companies were asked in 2007 to report not only on the number of shareholders who attended the AGM, but also on the percentage of members attending. The survey results graphically confirm that very few shareholders engage with companies via the general meeting, with only one and a half per cent of shareholders of large companies attending the AGM, and less than one per cent of medium-sized companies attending.<sup>2</sup>

**Figure 1: Percentage of members of top 200 ASX-listed companies who physically attended the 2007 AGM**



1 All figures relating to shareholder attendance at AGMs are from Chartered Secretaries Australia, *Benchmarking Governance in Practice in Australia*, 4th Survey, April 2008

2 *ibid.* The *Benchmarking Governance in Practice in Australia* survey notes that large companies comprised 57.7 per cent of survey respondents, with a market capitalisation of more than \$3 billion, while medium-sized companies comprised 38 per cent of survey respondents with a market capitalisation of between \$500 million and \$3 billion. The remaining survey respondents had a market capitalisation of less than \$500 million and the results were not reported due to the small base size

### 1.3 Lack of shareholder engagement with rights introduced in past decade

In 2005 and 2006, Blake Dawson Waldron (now Blake Dawson) undertook a major survey of AGMs, with a particular focus on shareholder engagement and the impact of the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (otherwise known as CLERP 9). Blake Dawson released two reports, in 2006 and 2007, providing a detailed assessment of the practical elements of shareholder engagement at the AGM, including reporting on the key questions of whether companies were calling for questions from shareholders prior to the meeting and whether shareholders were answering the call; whether shareholders were engaging with the non-binding vote on the remuneration report; and whether they were exercising their rights to submit questions to the auditor prior to the meeting. Blake Dawson's research over two years suggests that, apart from the non-binding vote on the remuneration report, shareholders are not engaging with the rights specified above that were introduced by CLERP 9.<sup>3</sup>

### 1.4 A call for a 'rethink'

With the AGM remaining the main forum for retail shareholders in particular to interact with directors and question them on the company's accounts, the directors' report and the company's position and prospects, as well as to exercise their voting rights on who the directors will be, how much those directors will be paid and whether to amend constitutions or pass or defeat other resolutions dealing with special items of business, the declining attendance rates clearly suggest that the AGM is no longer achieving the objective for which it was intended. It is dying a slow and painful death.

In order to facilitate constructive shareholder participation at general meetings — a key element in the governance framework — the AGM needs a 'rethink'. The central question this discussion paper poses is: What is the best method or methods to prescribe for:

- the reporting function of AGMs and the concomitant questioning of directors as to their stewardship
- the deliberative function of AGMs, including exploring the for and against arguments behind significant resolutions and
- the decision-making function of AGMs, including the appointment, dismissal and reward of directors and auditors?

<sup>3</sup> Blake Dawson Waldron, *2005 AGMs: Review and Results*, May 2006 and *2006 AGMs: Review and Results*, May 2007



# PART 2

## Reporting function and the questioning of directors

### 2.1 Reporting

The financial reporting function of an AGM is largely anachronistic, given both the time lag between the release of results and the general meeting, and the current continuous disclosure environment. When the AGM was originally conceived, it was in an era of horse and coach, pen and ink, limited printing, and a fledgling postal service, and the general meeting constituted the moment of disclosure. With the advent of continuous disclosure and the technology to facilitate such ongoing disclosure, there is no longer any substantive information in the annual report that is market-sensitive in any respect at the time of the AGM.

The current requirements under the *Corporations Act 2001* in relation to the release of the results and the general meeting are:

- lodgment of accounts with the Australian Securities and Investments Commission (ASIC) three months after the end of the company's financial year for listed public companies and disclosing entities; and four months after the end of the company's financial year for large proprietary companies and non-disclosing public companies (s 319(3))
- provision of reports to members 21 days prior to the AGM for public companies and disclosing entities, or four months after the end of the company's financial year, whichever is earlier (s 315(1)); and four months after the end of the company's financial year for large proprietary companies (s 315(4))
- public companies must hold an AGM once a year no later than five months after the end of the company's financial year (s 250N); proprietary companies have no obligation to hold an AGM unless the constitution requires it
- a minimum of 28 days notice for a shareholders' meeting for listed companies (s 249HA); and a minimum of 21 days notice for unlisted companies.

In practice, this means that for the majority of listed companies (those with a 30 June balance date) the results are issued at the end of August and the AGM is held on a day in the period from November to December. With the majority of companies' end of financial year coinciding, this results in the majority of AGMs occurring within the same two-month period of the year. This introduces constraints into the system, as the overlapping of AGMs precludes the attendance by even those shareholders who wish to or can physically attend.

### 2.2 Questioning of directors — accountability

However, while tabling the accounts three months after the results are released to the market and analysts are briefed might no longer serve a useful disclosure purpose, this should not detract from the need for the real-time questioning of directors as to their stewardship. The AGM provides shareholders, particularly retail shareholders, with the opportunity to make an assessment of the chairman and the directors of the companies in which they invest. Indeed, for many shareholders, it is the only opportunity they have to see and hear directors personally. Accordingly, both directors and shareholders perceive that the AGM can be a powerful motivator and influencer of a company's approach to governance.

Throughout the year, and not just in the lead-up to the AGM, many institutional investors meet with the company and discuss issues relating to performance and prospects. Sophisticated and targeted communication with institutional investors via analyst briefings provides a stream of engagement with institutional investors, who do not rely on the general meeting as the prime forum for engagement with the companies in which they invest. Any information discussed at such meetings that is market-sensitive is required to be released to the market immediately, to ensure that all investors and stakeholders have timely and equal access to information that could affect, either favourably or unfavourably, the price or value of their holdings. These meetings with institutional investors constitute respect for those owners of the company with large holdings, as they provide a forum for the questioning of directors.

However, apart from the Australian Shareholders' Association representatives, retail shareholders do not meet with the directors and discuss issues relating to performance and prospects until the AGM, which occurs once a year. Retail shareholders desire similar information as is given to analysts, but in a much more concise form. The information issued by a company is lodged with the Australian Securities Exchange (ASX) but shareholders find that examining the information on a website is different from being able to hear the information presented and put questions in person to directors and management. The AGM has been described as a means of demonstrating respect for the retail owners of the company or those owners of the company with small holdings.

In the continuous disclosure environment, there is no division in the information made available to investors, be they institutional or retail. However, there is a difference in the forum for delivering the information. The reporting function of an AGM may be anachronistic, but answering questions from investors at an AGM continues to provide a useful function of making directors accountable.

# PART 3

## Voting at meetings

### 3.1 Deliberation by shareholders

An AGM provides not only a forum for reporting by and questioning of the directors, but also the mechanism by which shareholders exercise their right to vote. The formal business requiring shareholder resolution can include: amending the company's constitution; approving the issues of shares to executives under long-term incentive plans; the election of directors; the appointment of the auditor; structural changes to the company's capital; and the disposal of major assets.

To facilitate the exercise of a right to vote, deliberation and discussion that might persuade the shareholder as to how they might vote are required. Currently, the deliberative function of the AGM (that is, reporting, discussion and questioning) is coupled with the decision-making function (that is, the voting process). This has the following ramifications.

- Votes cast by proxy must be received at least 48 hours before the meeting (s 250B(1)). Given that the majority of investors, including institutional investors, vote by appointing proxies, and that institutional investors represent the greatest percentage of shares, this means that the majority of votes are submitted prior to the discussion of the issues to which they relate at the AGM.<sup>4</sup>
- Proxy advisory firms submit their recommendations to institutional investors ahead of the 48-hour cut-off for the receipt of proxies, which in turn means that influence regarding how votes might be cast is received well before the AGM at which discussion on the issues takes place.

Put concisely, for the majority of shareholders, the deliberation on the matters to be put to a vote occurs before the AGM, which is where the discussion on those matters takes place. While many institutional investors view AGMs via the webcast (where webcasts are provided), which allows them to follow the discussion even if they are not physically present, the reality is that their votes have already been decided prior to the holding of the general meeting.

Commentators have noted that providing for the discussion after the vote at AGMs is akin to holding an election debate after the general election has been held in a political context.

The few shareholders physically present at the general meeting have the opportunity to discuss and deliberate on the issues before voting, but numerically their votes are unlikely to be able to affect the outcome of the decision.

In relation to a general discussion concerning company performance and prospects, the formality of proceedings can also hinder a lively exchange of information. Of the shareholders who are physically present at the AGM, many can feel that questions must be confined to the accounts, the directors' report and the remuneration report.

<sup>4</sup> Chartered Secretaries Australia's *Benchmarking Governance in Practice in Australia*, 4th Survey shows that, as a percentage of shareholders, only 14 per cent lodged proxies at the most recent AGMs. In regard to what those proxies represented as issued capital, 47 per cent lodged proxies, indicating that it continues to be institutional investors who are participating more fully in voting on resolutions at general meetings than retail investors

## 3.2 Voting — decision-making

Very few shareholders attend AGMs, as has been detailed above. However, all shareholders are entitled to exercise their right to vote at the AGM. At present, appointing a proxy is currently seen as the only model for absentee voting in the Corporations Act.

When appointing a proxy, shareholders are temporarily transferring to another party some of the rights attached to their membership. 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 transferring some of the rights attached to membership to another party, especially the right to vote or to make a decision not to vote.

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 because the member temporarily transfers some of the rights attached to their membership to another party, who is deputed as their agent.

Chartered Secretaries Australia issued a discussion paper on direct voting in 2006, and sought comment from all relevant parties. The discussion paper noted that legislative amendment 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. Having reviewed the responses from both the corporate community and investors to the discussion paper, CSA issued *A Guide to Implementing Direct Voting* in 2007. This paper was designed to assist companies to amend their constitutions and adopt 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. 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 in order to cast a vote if they are not physically present at the general meeting.

In 2007, 13 per cent of the top 200 ASX-listed companies had amended their constitutions to provide for direct voting, with a further 39 per cent considering adopting it.<sup>5</sup> However, even the adoption of direct voting does not provide those shareholders who are unable to attend the AGM with an opportunity to participate in the deliberative function of the AGM prior to voting.

<sup>5</sup> *ibid*

# PART 4

## Suggestions for reform

### 4.1 Separate the deliberative and decision-making functions of the AGM

This paper suggests that the deliberative function of the AGM could be separated from the decision-making function.

Decoupling the deliberative and decision-making functions of the AGM would enable shareholders, particularly retail shareholders, to have the opportunity, even if they are physically unable to attend the meeting, to reflect on the questions posed at the AGM, the directors' responses to those questions and any other issues that were raised on the day, prior to voting.

Once the deliberative and decision-making functions of the AGM are separated, shareholders could exercise their right to vote, having had the benefit of reflection on the information discussed at the general meeting. Their decision-making would be fully informed, and would not be dependent on whether they could or could not physically attend the meeting.

In order to decouple the discussion, information exchange and questioning from the formal voting process, this paper suggests that voting could open at the commencement of a general meeting and stay open for a further set period at the close of the meeting. Currently, voting commences when the chairman puts the relevant motion to the vote rather than at the commencement of the meeting.

Keeping the polls open would provide shareholders with the opportunity to consider the information raised at the meeting before voting. It would also provide the opportunity for a lively exchange of information without the pressure to bring proceedings to a vote during or by the end of the meeting.

#### ***4.1.a How would formal voting work if it was not completed by the close of the meeting?***

Polls on each resolution would open at the start of the AGM. The polls would stay open, after the close of the meeting, for a further set period, which could be 48 hours, one week or two weeks.

Shareholders would be entitled to attend the meeting to engage with the directors on each resolution as well as on other issues that arise on the day. Those shareholders in attendance could vote at any time during the meeting, or at the close of the meeting. They could also vote after the meeting, as long as their vote is received by the close of voting.

Those shareholders who are unable to physically attend the meeting would have access to the deliberative function of the meeting either via a webcast of the discussion at the AGM, other information available on the company's website or reports in the media, and could exercise an absentee direct vote either during the meeting, at the close of the meeting or after the close of the meeting, subject to their vote being received by the close of voting.

A shareholder who is not physically present at the meeting casts an absentee direct vote. An absent shareholder can still appoint a proxy to attend the meeting to listen to the discussion, and to vote on their behalf at the meeting. If the shareholder decides to lodge a direct vote as well, the direct vote would override the vote lodged by proxy.

#### ***4.1.b What is the optimal time to keep polls open after the meeting?***

This paper suggests that three options can be considered for extending the voting period after the close of the meeting: 48 hours; one week; or two weeks.

The advantage of extending the voting for 48 hours is that the formal process of decision-making is not extended greatly beyond the deliberative aspect of the meeting, providing shareholders with the opportunity to exercise their voting rights quickly once they have reflected on the discussion held at the meeting.

However, any extension of the voting period also needs to accommodate the complex process of seeking investor direction from beneficial owners via nominees and custodians as well as from registered holders. Australian custodians have to seek voting instructions from investors globally and more than 48 hours could well be required for an efficient and effective voting process. This paper suggests that many institutional investors, as well as retail investors, are likely to delay voting until after the meeting, as they can reflect on the information and discussion held at the meeting before casting a vote. Providing sufficient time for institutional shareholders to exercise their voting rights is essential in any separation of the deliberative from the decision-making function of the AGM. On this basis, one or two weeks could be required for the extension of the voting period.

In terms of publicising the vote, this paper suggests that larger companies could advertise in national newspapers and all companies could disclose the vote to the ASX.

#### ***4.1.c Would the separation of the deliberative and decision-making functions be mandated?***

This paper suggests that the decoupling of the information exchange/discussion aspect of the AGM from the formal voting could be effected through amendments to the Corporations Act and could be mandated for all public listed companies. These amendments would also provide for direct absentee voting, so that companies would not need to amend their constitutions to achieve this.

This would ensure that all public listed companies meet the same requirements in relation both to providing a forum for discussion and a voting process that follows on from the discussion. Not mandating the separation has the potential to confuse and possibly disenfranchise shareholders, as each company of which they are a member could potentially adopt different rules and inconsistent meeting practices.

However, another possibility that is open for discussion is that the requirement to separate the deliberative and decision-making functions of the AGM could be embedded as a recommendation in the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations*, against which all public listed companies report. If companies do not extend the voting for a set period after the close of the meeting, they would be asked to explain why they did not give shareholders the opportunity to listen to all the arguments before they voted, and why prescribing voting at the same time as holding the discussion was considered good governance.

#### ***4.1.d Should chairmen be required to disclose votes received by proxy prior to the discussion on resolutions?***

If the information briefing and discussion function of the AGM is decoupled from the decision-making function, a question arises as to whether chairmen should be required to announce proxies received prior to discussion on each resolution. Currently, the chairman must inform the meeting of how votes lodged by proxy are to be cast before the vote is held (s 250J(1A)).

One argument for disclosing the proxies at the commencement of the discussion is that such disclosure could reveal that, where institutional shareholders have already voted, there may not be consistent support for a company's position on a particular resolution. This could assist the discussion at the AGM, clarifying which areas of company performance or action require further clarification through questioning of the directors.

An argument against disclosing proxies at the commencement of the meeting is that many institutional investors are likely to delay voting until after the close of the meeting, to take advantage of the benefit of being able to reflect on the issues raised at the meeting. By separating the deliberative and decision-making functions, it could be expected that institutional investor behaviour, as well as retail investor behaviour, will change, resulting in the majority of shareholders considering the discussion at the AGM before exercising their right to vote. On this basis, it would be expected that any proxies received prior to the AGM that are then disclosed at the start of the meeting could well be so small in number as to be negligible, and possibly misleading.

#### **4.1.e Extending the voting would dispense with voting by a show of hands**

If voting is extended beyond the meeting, votes could no longer be decided by a show of hands, but only by a poll. To decide a vote on a show of hands would disenfranchise all the shareholders who were physically unable to attend the meeting, and undermine the rationale for separating the deliberative and decision-making functions in order to provide further opportunities for shareholder engagement.

At present, voting on a show of hands is frequently referred to by retail shareholders as the only means available to express a position to directors. However, if the deliberative and decision-making functions of the AGM are separated, all shareholders have the opportunity to consider and reflect upon the issues raised at a general meeting. All shareholders have the opportunity to exercise their right to vote after considering the discussion at the AGM, and the expression of shareholder position therefore takes into account all information raised at the meeting. It has been noted that this approach changes the AGM from an examination to the preparation for an examination for directors; that is, it allows greater opportunity for the expression of positions by shareholders.

#### **4.1.f Should webcasting of the AGM be mandated?**

In order for those shareholders who are physically unable to attend the AGM to access the discussion at the meeting, they need access to a record of the meeting. It has been suggested that shareholders should be able to access a webcast of the discussion at the meeting and that it should be maintained on the company website for the extended period of voting after the close of the meeting.

However, the investment in webcasting to provide this service is not necessarily feasible for all companies, particularly smaller listed companies. Mandating a webcast of an AGM could impose prohibitive costs on smaller listed companies.

Chartered Secretaries Australia's research shows that 73 per cent of large companies (in the top 200 ASX-listed companies) provide webcasting of AGMs at present, but only 45 per cent of medium-sized companies do so.<sup>6</sup> However, only 38 per cent of medium-sized companies consider that they would be unlikely to introduce webcasting in the future, which seems to suggest both that the cost of technology has come down and that shareholders themselves are more comfortable engaging with companies electronically.

**Table 3: Use of webcasting for AGMs in top 200 companies 2001 – 2007**

<i>Size of company</i>	<i>2001</i>	<i>2003</i>	<i>2005</i>	<i>2007</i>
Large companies	47.0%	57.0%	70.0%	73.1%
Medium-sized companies	15.0%	29.0%	18.5%	45.0%

6 *ibid*

Another option that has been suggested is that companies could explore providing a summary of material information that was not previously disclosed prior to the AGM, or access to the discussion at the AGM via transcripts of the discussion posted to the company website, where webcasting is not feasible. However, there are costs attached to the provision of transcripts, and also time delays would apply as it is not real-time coverage of a discussion.

Where matters are contentious, media reporting will also provide a means of informing shareholders of issues raised at the meeting.

#### ***4.1.g Should a specified minimum time be required for discussion on each resolution at the AGM?***

At the moment s 250S provides that the chairman of an AGM must allow a reasonable opportunity for the members as a whole at a meeting to ask questions or make comments on the management of the company.

It has been suggested that, if the deliberative and decision-making functions of the AGM are separated, it could be mandated that shareholders have the right to discussion and questions of the directors for a specified minimum time. This specified minimum time could be 30 minutes, or 60 minutes or 90 minutes. The chairman of the meeting would not have the right to close down the discussion within that time if shareholders were still interested in asking questions.

## **4.2 Different meeting rules for public listed companies and unlisted public companies**

This paper asks if the one-size-fits-all approach is suitable as a means of facilitating shareholder engagement in the 21st century.

Currently, the Corporations Act requires every public company to hold an AGM. However, not all public companies are public listed companies. A number of public companies in Australia are companies limited by guarantee, of which a substantial percentage are not-for-profit organisations.

A major survey conducted by the Centre for Corporate Law and Securities Regulation at the University of Melbourne, with support from Philanthropy Australia Inc. confirmed that the company limited by guarantee structure is used exclusively by not-for-profit organisations or quasi-not-for-profit organisations.<sup>7</sup>

The survey revealed that the factors behind the choice of legal form included: being a 'national or multi-state organisation'; the 'scale of trading activities'; a preference for ASIC 'rather than state regulator'; and 'public perception and status', the latter supporting anecdotal evidence that 'serious' or 'more sophisticated' not-for-profit organisations are companies rather than incorporated associations.

Members of not-for-profit companies are not investors seeking to examine the accounts to ascertain the deployment of and return on their investment. Rather, members are seeking to ascertain whether the quality of the services provided by the not-for-profit company is fulfilling the company's mission and values.

<sup>7</sup> Centre for Corporate Law and Securities Regulation, University of Melbourne, *Accountability and Corporate Governance in Not-for-Profit Companies*, <http://cclsr.law.unimelb.edu.au/activities/not-for-profit/>. Respondents to the survey ranged from very small organisations (annual income of less than \$500) through to large not-for-profit companies (income of more than \$10 million and assets of more than \$10 million), with a good spread of all sizes. The majority could be said to be small to medium in size: 72 per cent of respondents had fewer than 20 employees and 60 per cent had fewer than 100 members

This paper asks whether separating the deliberative and decision-making functions of the AGM provides any additional benefit to members of a company limited by guarantee and whether such a separation would facilitate member engagement in such companies.

Other public unlisted companies could be wholly owned or closely held subsidiaries of the holding company.

In circumstances like those described above, there may in fact be an added administrative burden in the decoupling suggested by this paper, with the certainty of closure following the AGM being postponed without any additional benefit being gained. This paper accordingly suggests that, if mandating the decoupling the deliberative and decision-making functions of the AGM is supported, it should be mandated only for public listed companies.

### **4.3 Extend the statutory timeframe for holding an AGM**

This paper suggests that extending the statutory period for holding the AGM by one month, and therefore providing a three-month window for the interaction of shareholders with directors instead of the current two-month window, could improve shareholder engagement and participation.

This paper does not suggest that any extension should be granted to companies to present their results to shareholders beyond that already contained in the Corporations Act. However, as noted above, the information contained in the annual report is already out-of-date by the time the AGM is held, due to the time-lag and the continuous disclosure environment. If the AGM is reconceived as a shareholder briefing at which shareholders can consider information both on performance (historical information) and prospects (forward-looking information), with the opportunity to vote after having heard from and question the directors, the AGM becomes more than a re-presentation of the results contained in the annual report.

On that basis, extending the statutory period for holding the AGM by one month could ameliorate the current difficulty of close to 1,500 AGMs being held within the period from November to December. Providing an additional month for the holding of AGMs could facilitate greater engagement not only by retail shareholders, but also institutional shareholders who could envisage attending AGMs either in person or by webcast to hear the discussion and exchange of information. At present, it is virtually impossible for institutional shareholders to attend the AGMs of, say, 200 companies in which they have an interest.

### **4.4 Encourage committee chairmen to report to shareholders and answer questions on the committee report**

A fundamental aspect of this paper is to suggest means by which the AGM can be made more meaningful to shareholders.

Accordingly, this paper suggests that it would improve shareholder engagement if all directors sat on the dais. This would provide shareholders with the opportunity to make an assessment of the chairmen and directors, given that the AGM is often the sole opportunity for retail shareholders in particular to see and hear directors personally.

This paper also suggests that the chairmen of board committees could speak to their committee reports. Furthermore, to encourage informed discussion at the AGM (on the basis that it is a deliberative meeting, with voting to follow), the chairmen of board committees could also take questions from shareholders on the committee report as appropriate.

This paper recommends that the chairman of the meeting should still receive all questions and refer them to the appropriate committee chairman and retain the discretion to refer the questions or not, as appropriate.

This paper does not recommend that it should be mandated that committee chairmen report to shareholders and answer questions on the committee report.

## 4.5 Encourage directors standing for re-election to answer questions

This paper suggests that directors standing for re-election could be encouraged to speak to their candidature and answer relevant questions from shareholders. For example, relevant questions could relate to the directors' tenure on the board and their shareholdings. A relevant question on a director's shareholdings could relate to the director being one of the largest shareholders in this company, with shareholders interested to know if the director has any margin loans on their shares, or whether they intend selling their shares. Another relevant question on the director's shareholding could be to ask if the director is a committed long-term shareholder if re-elected.

This paper does not suggest that questions on the director's personal life are relevant questions.

This paper does not recommend that it should be mandated that directors standing for re-election speak to their candidature and answer questions from shareholders. This paper recommends that the chairman of the meeting should retain discretion as to whether this is appropriate and, if so, what questions are appropriate.

# APPENDIX A

## Questionnaire

The Roundtable 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 the Roundtable 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.

- 1 Should the deliberative function of the AGM be separated from the decision-making function? How do you believe this would improve shareholder engagement and participation at general meetings?
- 2 If you agree that decoupling the discussion from the formal voting is reform that would improve shareholder engagement and participation in general meetings, do you believe that the polls should stay open for 48 hours, or one week or two weeks after the close of the meeting? Why do you believe that one of these periods is more suitable than another?
- 3 Should the decoupling of the deliberative function from the decision-making function be mandated via amendment to the Corporations Act or should it be a recommendation in the ASX Corporate Governance Council guidelines against which listed companies must report? Please provide your reasons for recommending one option or the other.
- 4 Should there be a requirement on chairmen to announce proxies received prior to discussion on each resolution if voting is extended beyond the close of the meeting? Why do you believe such a requirement should or should not apply?
- 5 If voting is decoupled from deliberation, should there be an expectation that the meeting be webcast, and maintained on the website for all investors to look at until voting closes? Should webcasting be encouraged rather than mandated, given that the cost of investment in webcasting may be prohibitive for smaller companies? Please give your reasons for your recommendation.
- 6 Should a specified minimum time be required for discussion on each resolution at the AGM if the discussion is separated from the voting? If you think that a minimum time should be mandated, what is the appropriate time? Please provide your reasons why a specified minimum time would improve shareholder engagement. If you do not think that a specified minimum time should be mandated, please provide your reasons.

- 7 Should the statutory period for holding the AGM be extended by one month, to provide a three-month window instead of the current two-month window? Please clarify how you think this would improve shareholder engagement if you support an extension of time, and how you think it would undermine shareholder engagement if you do not support an extension of time.
- 8 Is the one-size-fits-all approach to AGMs suitable for all public companies? Please provide your reasons why you believe the one approach should be taken for all public companies, or why you believe different approaches are required.
- 9 Should all directors be encouraged to sit on the dais? Should committee chairmen be encouraged to present the report of their respective committees, and also take questions on the committee report as appropriate? Why do you believe this practice should be encouraged? Alternatively, why do you believe it should not be encouraged?
- 10 Should directors standing for re-election answer relevant questions from shareholders? How do you think this would facilitate shareholder engagement? How do you think it would work against improving communication between shareholders and directors?

