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## Proxy Voting Trends: Funds Managers in the United States of America and Australia

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Kathryn Watt

## **Abstract**

This paper will examine the current differences between the voting practices of Australian funds managers and those of mutual funds in the United States at company meetings, and the potential impact of voting on the corporate governance practices of investee companies. Discussion will be limited to funds managers voting their domestic equities.

**KEYWORDS:** proxy voting, funds managers, United States, Australia, corporate governance, mutual funds

# PROXY VOTING TRENDS: FUNDS MANAGERS IN THE UNITED STATES OF AMERICA AND AUSTRALIA

*Kathryn Watt\**

## **Introduction**

This paper will examine the current differences between the voting practices of Australian funds managers and those of mutual funds in the United States ('US') at company meetings, and the potential impact of voting on the corporate governance practices of investee companies. Discussion will be limited to funds managers voting their domestic equities.

The US is moving towards an increasingly prescriptive regulatory regime. On January 23 2003, the Securities Exchange Commission ('SEC') approved a proposal for new rules, which require US mutual funds to report to the SEC, and disclose information about how they have exercised each vote.

Developments in funds management policies in Australia, along with progressions in corporate governance practices have often followed a few years behind our US counterparts. Current developments in the US may be indicative of future changes in the Australian funds management industry.

## **Industry Statistics**

Australia's funds management industry manages more than AUD 650 billion for over nine million Australian investors, in superannuation and non superannuation managed investments (unit trusts, or managed funds) and life insurance products. Appendix 1 lists more detailed statistics on the Australian industry. Australian superannuation funds are rapidly growing in size, largely because of the superannuation guarantee policy, which currently requires 9% of any employees' income to be invested in superannuation.

Some 95 million Americans invest in USD 7.5 trillion worth of mutual funds – the equivalent of Australian managed funds.<sup>1</sup>

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1 John C. Bogle 'Just When We Need It Most... Is Corporate Governance Letting Us Down?' <[http://www.vanguard.com/bogle\\_site/sp20020214.html](http://www.vanguard.com/bogle_site/sp20020214.html)>.

In both Australia and the US, funds managers have significant holdings in most large companies listed in their own countries. US mutual funds hold 52% of the stock in US companies.<sup>2</sup> Investment in the Australian domestic market by Australian funds managers accounts for nearly 25% of the capitalisation of the Australian Stock Exchange.<sup>3</sup> The extent of holdings varies; for example Australian company Coles Myer is very widely held with many individual shareholders, largely because of a shareholder discount scheme. The breadth of that holding was relevant in the proxy fight leading up to the 2002 Coles Myer AGM. By comparison, 85% of Coca Cola (America) is held by institutions.<sup>4</sup>

## Voting

Amy Domini, the founder of US ethical fund Domini Social Investments ('Domini') summed up a commonly held view:

'Proxy voting is the most direct means by which individual investors – either directly or through financial intermediaries like mutual funds – can play an active role in influencing corporate behaviour'.<sup>5</sup>

Funds managers throughout the world deal with other peoples' money, but there is a disparity of views regarding the extent of their fiduciary responsibilities to investors, and whether that responsibility extends to exercising proxy votes. In the US, voting appears to be accepted as being a responsibility that goes with managing equities. The general industry belief is that prudent voting will contribute to maximizing investment returns.<sup>6</sup>

Investors have the opportunity to express their views regarding issues which impact corporate governance practices, such as

- board and board committee composition;
- the selection of directors;
- the selection of auditors; and
- payment of senior executives and board members,

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2 John C. Bogle 'Just When We Need It Most... Is Corporate Governance Letting Us Down?' <[http://www.vanguard.com/bogle\\_site/sp20020214.html](http://www.vanguard.com/bogle_site/sp20020214.html)>.

3 <[www.ifsa.com.au](http://www.ifsa.com.au)>.

4 *Shareholder Voting Rights and Practices in Europe and the United States* Ed T Baums and E Wymeersch (1999), p 364.

5 Quoted at p 4 of the Social Investment Forum's submission to the SEC. <[www.sec.org](http://www.sec.org)>.

6 Submissions to the SEC on Proposal s7-36-02, requiring mutual funds to disclose their votes. This assumption was referred to in many industry submissions.

by exercising their votes either in person or through exercising proxies at a company's Annual General Meeting ('AGM'). Other issues which have potential to impact share value may be dealt with at an Extraordinary General Meeting ('EGM'), where shareholders also have a vote. Strict notice provisions apply, to allow shareholder's votes to be taken into account.

Statistics have led to accusations that Australian funds managers vote far less often. Recent corporate scandals have added to the pressure on superannuation fund trustees and funds managers to exercise their votes, and have heightened investor awareness of their funds managers' voting rights.

If it is accepted that good corporate governance practices contribute positively to share value, then votes are themselves a fund asset. Funds managers may also engage directly with a company's senior management and board members regarding corporate governance issues. Direct engagement with a company's board may not be feasible where a portfolio comprises stocks in hundreds or even thousands of investee companies. It is also time consuming, and therefore costly.

Holders of very small parcels of shares often take a 'rationally apathetic' approach to voting: that is, not bothering to vote, with the awareness that their vote will have minimal impact, leaving voting activities to professional investors with larger holdings. As such voting statistics usually relate to activities of funds managers and retirement funds.

A recent study of the views of investment managers conducted by McKinsey's; *The 2002 Global Investor Opinion Survey*<sup>7</sup> had three key findings:

- Corporate Governance is at the heart of investment decisions;
- Financial disclosure is a pivotal concern; and
- It is believed that reform priorities must focus on rebuilding the integrity of the system.

Clearly corporate governance issues are of increasing importance in the investment arena. Widespread publicity over corporate collapses and consequential community pressure has led to some corporate governance principles being moved from the 'best practice' arena into black letter law. The same may happen with voting.

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<sup>7</sup> <<http://www.mckinsey.com/practices/corporategovernance/PDF/GlobalInvestorOpinionSurvey2002.pdf>>.

## **Outsourced Management of Funds**

Many superannuation funds outsource the management of their portfolios to external funds managers. American pension funds operate in a similar manner, with funds management businesses predominantly operating through mutual funds. Many funds also operate individual retirement funds for their investors.

If a superannuation fund or pension fund wants to have extensive control over a portfolio, they will enter into an investment management agreement, which will prescribe how their separate account is to be managed. This may be more expensive than investing in a pooled unit trust or mutual fund, and some large US mutual funds, such as Fidelity Investments ('Fidelity') will only rarely offer this service, as it removes economies of scale. In Australia however this is a common practice. The superannuation fund retains beneficial ownership of the assets, and if they choose to change funds managers, an *in specie* transition of stocks can be made to a new manager without capital gains tax being incurred.

With a separate account, the superannuation fund can vote its own proxies, direct the manager to follow the fund's voting policy, or may adopt the manager's policy. Voting by the manager will be transparent, as the superannuation fund's own custodian will report on all activities relevant to the stocks being held.

Funds managers are selected by investors on the basis that they can deliver performance against selected targets – usually index benchmarks. A pooled fund, be it an Australian managed fund or a US mutual fund will only attract investors if it performs well. By investing in such a fund, the investor is paying for the expertise of the investment manager, trusting them to invest wisely, so as to maximise returns. Investors generally know very little about the stocks selected, and have no control over the selection of investments. Having placed this level of trust in the investment management ability of the funds manager, the question arises: how much information about the investment process should the investor be entitled to? Should they, for example, be provided with comprehensive lists of stocks held, or of voting decisions?

## **Proxy Voting and Corporate Governance**

A US commentator recently made the following statement:

'2002 clearly marked the end of the nearly 20-year era in which corporate governance has come of age. Activism has graduated from gadflies to institutions, shareholders have established a role in corporate decision making, board structure and responsibilities have been substantially re-defined, and corporate governance standards have been codified in new federal legislation. The 2003 proxy season

may arrive too soon to respond to these new laws and regulations, but it will be a year that sees the start of a new era in corporate governance and shareholder activism.’<sup>8</sup>

Not long after this, Fidelity was picketed by angry unit holders, seeking increased disclosure of their funds’ proxy voting decisions. An unlikely scenario if these issues had ‘come of age’.

US pension and mutual funds have a proven track record in exercising their votes, and influencing board decisions, and some industry participants have taken very active roles in campaigns to influence corporate behaviour.

Australian commentators in 1995 noted that overseas institutional investors

‘.....have placed increasing pressure on boards to ensure that managers are managing in the interests of shareholders and are driving the companies forward to create wealth in the most effective way. Australian institutional shareholders were somewhat slower than their northern hemisphere counterparts in taking an active role in corporate governance but they are now moving rapidly in the same direction.’<sup>9</sup>

Australian institutional investors continue however to lag behind their contemporaries in the US, with regard to voting. Proxy voting statistics regarding votes exercised by Australian superannuation funds and fund managers indicates roughly half the level of participation than that of equivalent organisations in the US.

In the 2002 Australian proxy voting season<sup>10</sup>, 41% of proxies were exercised.<sup>11</sup> This figure stood at 35% in 1999 and 32% in 1998, indicating a slight trend toward increased voting.

In the US, some 80% of proxies were exercised in the most recent voting season. <sup>12</sup> A web search revealed that it is not usual practice for Australian funds managers

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8 Annual Corporate Governance Review 2002 Georgeson Shareholder  
<<http://www.georgesonshareholder.com/pdf/02wrapup.pdf>>.

9 *Corporate Practices and Conduct* produced by the working committee representing the AICD, ASCPA, BCA, LCA, ICAA and SIA Chaired by Henry Bosch. 3rd edition (1995), p 1-2.

10 1 July 2002 to 4 December 2002, sample of 124 meetings.

11 AGM Monitor, December 2002. Produced by Corporate Governance International.  
<[www.cgi.com.au](http://www.cgi.com.au)>.

12 AGM Monitor, December 2002. Produced by Corporate Governance International.  
<[www.cgi.com.au](http://www.cgi.com.au)>.

disclose their proxy voting policies on their websites.<sup>13</sup> Several, but not all, US websites checked had an easily accessible policy statement.

### **Voting in the US**

There are a number of reasons that more proxy votes are exercised in the US than in Australia.

Typical US companies require a quorum of a majority; that is 50% +1 of the company's voting capital to hold a shareholder meeting. Because of this requirement, proxy solicitation services are both active and successful in the US. Companies such as Georgeson Shareholder<sup>14</sup> assist US companies in putting their cases to shareholders, and getting resolutions passed. Such services run call centres and direct mail campaigns, and contact mutual funds managers directly to lobby for votes.

Many American shareholders have their stocks held in the name of broker-dealers or other financial institutions, to allow for easy transfer. It is common for these institutions to provide for default voting on resolutions, and to have standing authorisation from the client to do so. That is, if they do not receive specific instructions from their clients within a prescribed number of days before a shareholder meeting, then the institution will vote in accordance with its policy.

US pension funds are required to exercise proxy votes under the *Employee Retirement Income Security Act* ('ERISA'), regulated by the US Department of Labor. If exercised by external managers, voting decisions will be disclosed to pension plan trustees. ERISA does not include any requirement to disclose voting decisions, or even voting policies to members or the SEC.

As indicated by the picket line at Fidelity, a current controversial issue in the US is the extent to which mutual funds and advisors disclose their proxy voting decisions to investors. This is yet to be raised as an issue here in Australia. Given the time lag in issues becoming relevant here, Australian funds managers should be ready for this debate to arise in the future.

### **Collective Industry Views: IFSA and the ICI**

Most Australian fund managers are members of the Investment and Financial Services Association 'IFSA', whose members manage approximately 97% of the industry's funds under management. IFSA is a national not-for-profit organisation which represents the funds management industry. IFSA has over 100 members

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13 28 sites searched, listed in bibliography.

14 <<http://www.georgesonshareholder.com/pdf/02wrapup.pdf>>.



who are responsible for investing approximately AUD 650 billion on behalf of over nine million Australians.<sup>15</sup>

The US equivalent to IFSA is the Investment Company Institute (ICI). Its members manage USD 6.216 trillion, on behalf of 95 million investors. Like IFSA, its activities include lobbying the government regarding reform.

IFSA has a set of member standards and guidelines, and boards of directors of IFSA member companies are required to attest annually to their compliance with the IFSA standards. Exceptions must be explained, and failure to comply without a reasonable explanation may lead to expulsion from IFSA.<sup>16</sup>

One of the IFSA guidelines states that managers should exercise their votes. To assist in this process, IFSA provides a corporate governance guide known as the IFSA 'Blue Book'. Notably this is currently a guideline, not a standard, so no compliance attestation from directors is needed. Given the current level of interest in issues of corporate governance, this may change in the future.

### **IFSA Corporate Governance Guidelines**

The fourth edition of IFSA's 'Blue Book' Corporate Governance Guidelines was released in December 2002, having been updated to reflect current international views. IFSA recommends that managers use these guidelines as a basis for their voting decisions, and refers companies to them as a reference tool for developing their corporate governance principles. The Blue Book states that fund managers should have a written corporate governance policy, including a proxy voting policy, and that they should vote *'on all material issues at all Australian company meetings where they have the voting authority and responsibility to do so'*.

IFSA also recommends that fund managers report to clients on their voting decisions *'wherever a client delegates responsibility for exercising proxy votes'*. This statement appears to be referring to clients who engage fund managers to run separate accounts. Most IFSA members run registered managed investment funds, where it is clear that the manager as 'responsible entity'<sup>17</sup> of the fund would be responsible for exercising proxy votes. It is curious that IFSA makes no distinction between the two ways investment management services are offered, in the context of reporting to members.

Issues covered in the Blue Book include, amongst other things:

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15 <[www.ifsacom.au](http://www.ifsacom.au)>. There is no relevant distinction between wholesale and retail funds.

16 No IFSA member has yet been expelled for failure to comply.

17 Chapter 5C *Corporations Act 2001*

- Board and board committee composition and competency of members;
- That a board should be composed of a majority of independent directors;
- That the chair should be an independent director;
- The structure of key board committees;
- Election of board members;
- That the board should develop a performance evaluation process;
- Company meeting procedures, including that votes should be by poll;
- The form in which disclosure of voting results should be reported to the ASX; and
- Types of information which should be subject to full disclosure.

Since the last version of the Blue Book, IFSA have updated their guideline on the composition of board committees, stating that the audit committee should be comprised totally of independent directors. Previously, the guideline stated that a majority of audit committee members should be independent directors, which is the standard IFSA still applies to remuneration and nomination committees.

Two Australian organisations provide corporate governance research, and voting advisory services. Both refer to the IFSA guidelines as their starting point for corporate governance standards. The Blue Book strongly influenced the drafting of the Corporate Governance Council's Principles of Good Corporate Governance and Statements of Best Practice published in 2003.

## **Context**

There have been a number of corporate collapses in recent times, including Enron and Worldcom in the US, and HIH and One-Tel in Australia. This has moved board conduct to the front page, and has provoked lively debate.

In a somewhat heavy handed legislative response, the US *Sarbanes-Oxley Act* of 2002 has enshrined many principles of good governance into black letter law. Changes to listing rules in the US and Australia have also served to make grey areas both clear and enforceable.

*Sarbanes-Oxley* provides strict rules for the conduct of financial and audit activities, including amongst other things, provisions regarding;

- audit committee structure and obligations;
- conflicts of interest – for example the CEO, CFO or equivalent must not have worked for the company's audit firm during a 12 month period leading up to the audit;
- the prohibition of personal loans to executives;

- disclosure of transactions involving management and principle shareholders; and
- retention of relevant documents for minimum periods of time.

The *Sarbanes-Oxley Act* has been criticized for imposing its rules beyond US territorial boundaries. A recent news article reported that the London Stock Exchange ('LSE') is taking advantage of the fears of regulatory cost and complications, openly encouraging international companies to list in London rather than New York because of the '*rapidly moving regulatory environment in the US, with its inevitable cost consequences.*'<sup>18</sup> LSE chairman Don Cruikshank stated that the *Sarbanes-Oxley* 'hard rules' made the US '*far less attractive and welcoming to foreign issuers*' and would lead to avoidance devices being developed, arguing that the UK 'principles based' approach was better for business.

The UK corporate governance code is voluntary and only applies to companies incorporated in the UK. Its requirements cover disclosure of issues rather than set rules. 21 Australian companies are currently listed in London, compared to only 10 in New York.

One of the issues the US union movement organisation, American Federation of Labor and Congress of Industrial Organizations ('AFL-CIO') has been agitating, is whether mutual funds have been voting in favour of companies listing outside the US, and thus moving beyond the control of US authorities. One of the unintended consequences of an increasingly strict regulatory regime may be that more companies list offshore.

The *Sarbanes-Oxley* provisions apply to the overseas operations of US companies, which will often lead to conflict. An example is that German law requires auditors to be appointed by shareholders at the company's general meeting, and that the audit committee must include a workplace representative. *Sarbanes-Oxley* requires an independent audit committee to appoint auditors. Depending on the corporate structure in place, it may be impossible for a German based subsidiary of a US parent company to meet the requirements of both regimes.

### **Superannuation Funds and Funds Managers – A Distinction Between their Roles**

As previously stated, US pension funds are required to exercise proxy votes under the *ERISA* legislation. Investment managers of *ERISA* assets are required to keep records of proxy votes exercised, and to provide those records to the named beneficiary of the plan, usually a corporation providing the fund for their employees. The named beneficiary has an obligation to monitor the managers'

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18 Lenore Taylor 'Sarbanes-Oxley gives UK an edge' *Australian Financial Review* 24 December 2002.

proxy voting activities. Information is not required to be provided to plan members or to the SEC.

The *Taft-Hartley Labor Act* (1947) enabled union managed pension funds to be established. Arrangements are a result of collective bargaining, and cross many employers. These funds have been active in bringing shareholder resolutions, not always concerned with corporate governance. Some Australian superannuation funds have attempted to take the line of pension funds in the US, but funds managers have kept quiet so far.

Australia's largest superannuation fund is CSS PSS, (Commonwealth Superannuation Scheme, and Public Sector Superannuation), the commonwealth public service scheme. They have AUD 3 billion invested in Australian equities.<sup>19</sup> They appear to be starting to follow the lead of US governance activist pension fund, the State of California pension fund. Their website makes the following statement:

'Governance' is considered to be the next frontier in risk management. It recognises that poor environmental, corporate and social practices can lead to a decline in investment value as much as financial risks. It is a holistic approach to creating sustainable investment value and thereby safeguarding the long-term interests of members. We have all seen the effects of poor governance. Well before the collapses of companies such as Enron, HIH, and OneTel hit the news, the CSS Board was already applying the principles of governance to its risk management.

CSS PSS employ Westpac Investment Management, to engage with the boards of companies they invest in, but do not specify their voting policy on their web page.

One of the significant differences between superannuation funds, and managed or mutual funds, is choice. All commonwealth public servants must become members of CSS PSS, but they can choose their own managed funds.

### **Proxy Advisory Services**

There are two Australian research service providers providing research and voting recommendations. Corporate Governance International ('CGI') was established in 1993 and provides corporate governance information about companies listed on the S&P/ASX 200 Index. Another company, Sustainable Investment Research Institute Pty Ltd, 'SIRIS' have recently launched a similar service, provided in

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19 [www.csspss.com.au](http://www.csspss.com.au)

conjunction with Institutional Analysis, which provides specialist corporate governance advice.<sup>20</sup>

Issues considered include

- board composition;
- board committee composition;
- remuneration;
- financial disclosure;
- audit independence; and
- accounting policy.

In the US, one of several research service providers, Institutional Shareholder Services, Inc ('ISS') provides institutional investors, including pension funds, with proxy voting services, research and consulting services.

In both countries, funds managers' holdings are usually held by custodians, who have legal title to the equities, effectively as bare trustees. Company notices are sent to the custodian. In Australia, managers must instruct the relevant custodian of their fund or clients' portfolio as to their decision regarding each proposed resolution. While research might be outsourced, they will need to instruct the custodian themselves.

US mutual fund managers have access to more comprehensive services, through which they can outsource voting decisions and provision of instructions to custodians. This raises the question of whether an appropriate level of delegation is taking place. If voting is taken to be a fiduciary responsibility, outsourcing decision making may be inappropriate. The Investor Responsibility Research Centre ('IRRC') Proxy Voting Service is based in Washington, and one service offered is described as follows:

'Vote decisions: IRRC provides customized voting decisions based on client guidelines for each ballot proposal. The client always maintains the option to review and amend votes before they are cast.'

<sup>21</sup>

In their submission to the SEC regarding disclosure of voting decisions, the ICI argued that these services would be increasingly relied on by mutual funds should disclosure become compulsory. They identified a risk that

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20 Institutional Analysis is a company founded by Geof Stapledon, who has written extensively in this area.

21 IRRC service overview <[www.irrc.org](http://www.irrc.org)>.

'those firms that funds retain to give recommendations on proxy votes will themselves become subject to greater pressure from corporate management and outside groups as their market share and influence increases.' <sup>22</sup>

### **Corporate Governance Ratings Services**

Corporate Governance ratings services are a relatively new phenomenon<sup>23</sup> in the US, which may also be utilised in the future by those responsible for determining voting decisions. In the US, ratings services are provided by ISS and Standard and Poor's. Companies included in the main stock indices are analysed, and a simple rating number is applied.

Standard and Poor's rating takes into account 250 governance related issues that fall within four categories:

- Ownership structure and influence
- Financial stakeholder rights and relations
- Financial transparency and disclosure; and
- Board structure and process

Like other Standard and Poor's ratings, the organisation being rated pays. The system therefore relies on the companies perceiving that they need to be rated. This payment methodology works for bond issuers, which pay to be rated, but it is yet to be seen whether it will work for companies issuing equities.

### **SEC Ruling: Disclosure of Voting Decisions**

While some US funds have engaged in very public shareholder activist campaigns, others refuse to disclose how they have voted, even to their investors. It has been argued that this lack of transparency and accountability is at odds with the very principles that fund managers are requiring companies to demonstrate. This was hotly debated in the US, as industry organisations resisted the move to compulsory disclosure of their voting decisions and processes.

On September 19 2002, the SEC issued proposed rule S7-36-02<sup>24</sup> requiring mutual funds to disclose their votes. The proposal was approved on January 23 2003.

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22 Investment Company Institute: Submission to SEC 6 December 2002 <[www.ici.org](http://www.ici.org)> footnote 35.

23 <http://www.georgesonshareholder.com/pdf/ratingsgame.pdf>.

24 <<http://www.sec.gov/rules/proposed/33-8131.htm>>. The five member commission put the proposal unanimously.

The costs involved in the proposed extent of disclosure formed the basis of much opposition to the proposal.

The summary described the proposal as follows:

'The Securities and Exchange Commission is proposing amendments to its forms under the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Company Act of 1940 to require registered management investment companies to provide disclosure about how they vote proxies relating to portfolio securities they hold. Under the proposed amendments, registered management investment companies would be required to disclose the policies and procedures that they use to determine how to vote proxies relating to portfolio securities. The proposals also would require registered management investment companies to file with the Commission and to make available to their shareholders the specific proxy votes that they cast in shareholder meetings of issuers of portfolio securities.'<sup>25</sup>

The proposal followed rulemaking petitions put to the SEC by Domini,<sup>26</sup> AFL-CIO, and the International Brotherhood of Teamsters. Each of these organisations has also been involved in shareholder activist campaigns.

Some 7,200 individual investors, wrote to the SEC in support of the proposed requirement that mutual funds disclose their votes.<sup>27</sup> Websites operated by Domini and other actively involved organisations set up standard form letters of support, which could be easily completed and submitted through their websites. With over 95 million Americans investing in mutual funds, 7,200 submissions is a small minority.<sup>28</sup>

When questioned about this development in the US, the ASX Corporate Governance Council stated that disclosure of voting practices is not yet on its agenda 'but was likely to crop up next year.'<sup>29</sup>

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25 <<http://www.sec.gov/rules/proposed/33-8131.htm>>.

26 <[http://www.domini.com/common/pdf/SEC\\_Proxy\\_Rule\\_Letter.pdf](http://www.domini.com/common/pdf/SEC_Proxy_Rule_Letter.pdf)>.

27 <<http://query.nytimes.com/gst/abstract.html?res=F20715FF355E0C778DDDAB0994DA404482>>.

28 ICI Comment Letter on the SEC Paperwork Reduction Act burden estimates March 13 2003 [www.ici.org/statements/cmltr/03\\_sec\\_proxy\\_est\\_com.html](http://www.ici.org/statements/cmltr/03_sec_proxy_est_com.html)

29 Jemima White 'Managers split on disclosure of proxies' *Australian Financial Review* 6 December 2002.

### **What is Required?**

From July 1 2003, Mutual Funds will be required to disclose in their SEC filings their policies and procedures for voting, including how they manage conflicts of interest.

Each fund will also have to lodge a new form, N-PX with the SEC, detailing its complete voting record, on an annual basis. Details will be required regarding the issue voted on, who proposed the resolution (that is, the company, or shareholders), how the fund voted, and whether the vote was for or against management. The first report will be due on August 31, 2004, for the 12 months ended June 30 2004.

Reports to mutual fund investors must state that investors can be provided with information about the funds' policies and procedures by calling a toll-free number, or through the funds' or the SEC's website. Investors must also receive reports regarding the filing of reports to the SEC, and that the fund's voting record is available on the SEC's website, and from the fund, either on request or on their website.<sup>30</sup>

Disclosure is by fund, rather than by security. It is yet to be seen how this will appear on websites, presumably it should be possible to search data to determine how a manager has voted particular stocks.

### **Industry Response to the SEC Proposals**

The ICI supported the concept of open disclosure of voting policies, but strongly opposed the proposal that they be required to disclose detailed lists of voting decisions to their investors. The SEC appear to have taken these concerns into account when determining the extent of reporting required. Submissions by large ICI members were consistent with the ICI submission, while adding further details about their own activities.<sup>31</sup>

ICI ensured that they delivered a message that they supported the concept of funds exercising their votes. The introductory paragraph states:

‘...we would like to make clear one essential point: mutual funds and their advisers take and have always taken, the responsibility to vote proxies very seriously. Advisers to mutual funds, as part of their

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30 SEC Release 10 June 2003. [www.sec.gov/news/press/2003-12.htm](http://www.sec.gov/news/press/2003-12.htm)

31 For example, submissions by Merrill Lynch Investment Management, Fidelity, and Vanguard Group Inc., <[www.sec.gov](http://www.sec.gov)>.



fiduciary responsibilities, must exercise proxy voting solely in the best interests of the fund.’<sup>32</sup>

They went on to argue that disclosing all resolutions would politicize the voting process, and benefit special interest groups, who would not always have the economic interests of investors in mind.

ICI also argued that mutual funds have been singled out as the only sector of the financial services industry which would be required to disclose their votes. Investment advisers to pension funds and hedge funds, broker-dealers, insurance companies, bank trusts and pension plans, all fall outside the requirement.<sup>33</sup>

Conflicts of interest by mutual funds exercising their proxies were raised as one reason that mutual funds should provide extensive information about the way they exercise their votes. The ICI responded that there is no evidence of any such conflict.

One of the SEC proposals was that specific disclosure should be made of votes that are inconsistent with the mutual funds proxy voting policy. The imputation is that there may be circumstances in which the policy is ignored where there may be a conflict of interest – and different standards may be applied. The ICI argued that such a requirement would merely lead to overly broad voting policies being adopted.<sup>34</sup>

An example of such a conflict is conceivable in Australia, where large banks usually have a funds management arm. The CEOs of the four biggest banks in Australia are some of the most highly remunerated executives in the country. In the 2002 National Australia Bank (‘NAB’) AGM<sup>35</sup> a generous options package for the CEO, Frank Cicutto, was approved by shareholders, despite a AUD 3.1 billion dollar write off during the year following the NAB’s unfortunate investment in the US operation, ‘Homeside’. MLC, which is now owned by the NAB, and has taken over the NAB managed funds did not comment on whether or how they voted, but this provides an example of the kind of conflict that organisations could face.

### **Arguments Against Disclosure: Cost**

The SEC proposal did not prescribe how mutual funds should report to their members, but they did include estimates of the costs of disclosure, stating that this would be an average of USD 2,408, per investment company, per year. Their

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32 ICI submission to SEC 6 December 2002 <[www.ici.org](http://www.ici.org)>.

33 ICI submission to SEC 6 December 2002 <[www.ici.org](http://www.ici.org)>.

34 The ICI submission to SEC 6 December 2002. <[www.ici.org](http://www.ici.org)> warned of the ‘dumbing down’ of mutual fund proxy voting policies and procedures.

35 Held on 19 December 2002.

estimates were supported by information from rule-making petitioner, Domini, and would include the costs of:

- Web based vote disclosure announcements;
- disclosing inconsistent votes;
- disclosure of guidelines and procedures; and
- semi annual and annual reports.

ICI and its members' submissions disputed the calculations, stating their estimate of the cumulative cost to the industry over 20 years to be USD 839 million. All, including the SEC agreed that the costs of disclosure would be borne by investors. It is unclear whether the SEC cost estimate included voting for international equities, the ICI costing did.

The costs involved in disclosing resolutions to investors will be significant. Placing information on a website will involve significant establishment costs. It was feared that there would be a requirement to report in hard copy to investors, via postal mail, which would have been extremely expensive. Most fund managers offer a variety of investment portfolios, and many investors in turn choose a variety of fund mixes, to meet their personal asset allocation objectives. Mailing the relevant selection of reports to different investors would have resulted in a large and costly mailout.

One US fund manager with 17 million investors estimated that it will have to report on 200,000 resolutions each year<sup>36</sup>, to fulfill the SEC's proposed requirements to disclose by fund. It also commented on the cost of votes being made public, with consequential media and public interest, stating that

‘...it would be particularly distracting and wasteful for funds to commit key management personnel to address high profile and sensitive matters that do not materially impact the investment management process.’

Both Merrill Lynch and Fidelity, in their SEC submissions referred to the costs incurred by investors in dealing with the press, and enquiries from the public following activist campaigns.

Voting in itself involves cost to investors. Most investment managers subscribe to a proxy advisory service, and larger funds will employ staff to research resolutions and to undertake the work involved in voting. Custodians charge a fee per stock for votes to be recorded, and staff will also spend time on developing and reviewing voting policies. It can be assumed that many highly paid people will spend time putting policies into practice.

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36 Vanguard Group Inc submission to the SEC <[www.sec.org](http://www.sec.org)> p 5.

### **Arguments Against Disclosure: Front-Running**

'Front-running' was also raised as an issue. The ICI had previously made a submission to International Organisation of Securities Organisations ('IOSCO'), that investment managers regularly assess the performance of companies, and revealing disagreements with various boards over proposals could publicly expose the intention to sell down stocks, providing an opportunity for market manipulation. This claim was not however made in the ICI submission to the SEC, perhaps because of the proposal's requirement that disclosure only take place after voting takes place.

Domini and the AFL – CIO both anticipated that the ICI submission would cover this, and raised counter arguments. This issue may be relevant in the future.

### **Arguments Against Disclosure: Confidentiality of Votes**

One of the arguments against disclosure of voting decisions was that confidentiality needs to be maintained in order for votes to be freely cast. The ICI submission argued that confidential voting is a *'fundamental shareholder right'* which is *'a critical way to improve corporate governance and promote accountability.'*<sup>37</sup>

The AFL-CIO mounted a convincing counter-argument, based on the ability of proxy solicitations services to determine how many stocks are held by particular managers. They also stated that 73% of the largest 500 companies in the US have not adopted confidential voting policies: the companies themselves will look at how votes have been cast,<sup>38</sup> but fund investors did not have access to this information.

Confidentiality of voting will vanish with the proposed level of disclosure. A funds manager holding stocks in a company whose employee retirement plan they administer may be placed in a difficult position if they wish to vote against management. They may, for example believe the company's corporate governance practices to be inadequate, and vote against directors' re-election. Pressure could be significant. Even where there is no conflict of interest, funds may need to employ additional staff just to deal with lobbyists.

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37 Eg Vanguard submission to the SEC. p 4 <[www.sec.gov](http://www.sec.gov)>.

38 AFL-CIO, in SEC submission quoting IRRC Corporate Governance Service 2002 Background Report F <[www.sec.org](http://www.sec.org)>.

### **Whose Intellectual Property?**

In the US, fund managers file lists of their investments with the SEC, twice per year, but this information is not made publicly available. An argument that was **not** used against disclosure of proxy votes relates to the commercial confidentiality of information regarding portfolio construction. Australian fund managers have claimed that this is competitive information in the smaller Australian market.<sup>39</sup>

The SEC will also be dealing in the near future with a proposal that mutual funds disclose stock holdings on a quarterly basis to the SEC and to their investors. Currently they are required to do so, on a six monthly basis. Mutual funds have objected on the basis that the additional expense would be borne by investors.

Unlike Australian funds, the composition of portfolios of US mutual funds is already publicly accessible.

### **The Role of Independent Directors**

The ICI submission, and those of some of its members, proposed the involvement of independent directors in overseeing proxy voting decisions.

The role of independent directors of US mutual funds is quite prescribed, and different to any Australian equivalent. The board of directors of a US mutual fund supervises the fund's business operations, monitoring fund performance, contracts, costs and operations, and their obligation is to protect the interests of shareholders. The ICI has published a comprehensive code of conduct for independent directors, which details how they should carry out their responsibilities.<sup>40</sup>

Independent Directors must not be affiliated with the fund, and must not have a

‘material business or professional relationship with the fund, its executive officers, or another fund having the same adviser or distributor or its executive officers.’<sup>41</sup>

Section 80a-10(a) of the US *Investment Companies Act* (‘ICA’) provides that at least forty percent of a fund's directors must be independent, and the ICI

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39 Jemima White *Managers split on disclosure of proxies* *Australian Financial Review* 6 December 2002

40 <[www.ici.org](http://www.ici.org)>

41 VE Schonfeld and TMJ Kerwin, Organization of a Mutual Fund *The Business Lawyer*; 107

recommends that two thirds be independent. Under the ICA, people with a record of criminal or other misconduct may not serve as directors.

In their submission to the SEC regarding proxy voting, one mutual fund<sup>42</sup> proposed that independent directors be given additional responsibilities in relation to overseeing voting policies and procedures, and determining votes where conflicts arise.

### **Activist Groups' Response to the SEC Proposals**

Domini has been disclosing its votes since 1999.<sup>43</sup> Their view is that investors have the right to know

‘which fund managers ...are doing their part to encourage greater corporate accountability, and those who simply rubberstamp management to the detriment of shareholders....’<sup>44</sup>

It is notable that Domini manages USD 1.2 billion in assets – a very small proportion of the USD 3 trillion managed by the mutual fund industry in the US.

They argued that:

‘If proxy voting is a fiduciary duty of a fund’s investment adviser – and it clearly is- then it necessarily follows that there must be disclosure of the fund’s proxy-voting policies, procedures and voting record.’<sup>45</sup>

They go on to argue that compulsory disclosure of voting decisions will *‘introduce ...investors to the importance of proxy voting for the first time’* and that increased disclosure will in turn increase the likelihood of matters such as ‘green’ shareholder issues gaining mainstream support. They supported the concept of the SEC imposing strict guidelines on what policies must cover, and that each fund should state how it will deal with questions of corporate social and environmental performance. They give these issues as examples where investment managers may have conflicts of interest in casting their votes, as such resolutions are ‘uniformly opposed by corporate management.’<sup>46</sup> Uniformity in the way disclosure of votes is made was also on Domini’s list, on the grounds that this would prevent confusion amongst investors seeking information.

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42 SEC submission: Vanguard Group, Inc. <[www.sec.org](http://www.sec.org)>

43 <[http://www.domini.com/common/pdf/SEC\\_Proxy\\_Rule\\_Letter.pdf](http://www.domini.com/common/pdf/SEC_Proxy_Rule_Letter.pdf)>.

44 <[www.domini.com/about-domini/shareholde/index.htm](http://www.domini.com/about-domini/shareholde/index.htm)>.

45 <[www.domini.com/about-domini/shareholde/index.htm](http://www.domini.com/about-domini/shareholde/index.htm)>.

46 <[http://www.domini.com/common/pdf/SEC\\_Proxy\\_Rule\\_Letter.pdf](http://www.domini.com/common/pdf/SEC_Proxy_Rule_Letter.pdf)>.

More practically they argue that web-based disclosure would be scalable. This would effectively require mutual fund managers to reveal the composition of their portfolios, not just to their investors and the SEC, but to anyone accessing their website. They argued that the proposals should be strengthened to increase disclosure obligations, and that summaries showing when a fund has voted for and against management should be provided.

They also recommend that funds disclose when they have relied on research from an external supplier to make their decision. This would be interesting data, as many managers are supplied with recommendations by proxy advisory services, and there is little information available regarding how many managers adopt those recommendations without further consideration of the issues.

### **Fidelity: a Target of Activism**

On December 4 2002, the Boston headquarters, and 19 other offices of Fidelity Investments was picketed by AFL-CIO members, protesting against the Fidelity and ICI submissions regarding disclosure.

A particular issue raised by the AFL-CIO was whether Fidelity and others had supported US companies shifting their headquarters away from the US to minimize their exposure to legal and US tax liabilities.<sup>47</sup> Presumably the unions' members' interests would be better served if companies remained US based, but this raises the question of whether this particular issue is relevant to the economic value of the shares. Protection of members' retirement savings is clearly very relevant to their activities; the AFL-CIO pension fund lost USD 3.3 billion through the Enron and WorldCom bankruptcies.<sup>48</sup>

The protestors sought information from Fidelity regarding how votes had been cast in relation to selection of directors, and executive compensation at earlier Enron and WorldCom AGMs. AFL-CIO's own press release trumpeted the protests as a great success, and reported that mainstream acceptance of the proposals was increasing:

'Since the period for comment ended December 6, AFL-CIO President John J. Sweeney and New York Attorney General Eliot Spitzer held a Washington, D.C. news conference to urge the SEC to quickly adopt this rule. On Monday, House Financial Services Committee Chairman Michael Oxley and Capital Markets Subcommittee Chairman Richard Baker announced that they urged the SEC to

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47 <[www.ethicalinvestor.com.au](http://www.ethicalinvestor.com.au)> 12 December 2002.

48 Aaron Pressman 'Fidelity pressed to come clean' Australian Financial Review Friday 6 December 2002 p 66.

require proxy vote disclosure..... and now the movement gained powerful momentum from the Hill. <sup>49</sup>

Fidelity responded that special interest groups would put pressure on fund managers to vote for reasons other than maximizing investor return, and that outside agendas would be focused on.

### **Fidelity and the Tyco Case**

The AFL-CIO submission to the SEC recommended strengthening provisions relating to disclosure of votes where conflicts arise. They argued that carefully worded policies would enable managers to avoid having to disclose inconsistent votes in most situations. A further amendment suggested by AFL-CIO is that all conflicts be disclosed, such as where a fund manager provides services to the company whose shares are being voted, and that the fees earned for those services should also be disclosed.

They gave an example of an alleged conflict of interest, involving Fidelity. In 1998 there was a shareholder resolution calling for a majority of independent directors on the Tyco board. Fidelity cast its votes against the resolution, and at the time were paid administrators for the Tyco employee benefit plan. Their fee during 1999 was USD 2 million.

Tyco's share value later plummeted by 70%, and serious allegations of financial wrongdoing and improper accounting practices have been pleaded in SEC litigation. The summary of the SEC Complaint, issued in the United States District Court, Southern District of New York against three previous Tyco directors included the following

1. 'This is a looting case. It involves egregious, self-serving and clandestine misconduct by the three most senior executives at Tyco International Ltd. From at least 1996 until June of 2002, (the defendants) took hundreds of millions of dollars in secret, unauthorized and improper low interest or interest-free loans and compensation from Tyco...they later pocketed tens of millions of dollars by causing Tyco to forgive repayment of many of their improper loans. ...(at the same time they) ...regularly assured investors that 'Tyco's disclosure remains second to none.'
2. (They also) 'violated, or aided and abetted violations of, the proxy rules, reporting requirements and record keeping provisions of the federal securities laws...' <sup>50</sup>

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49 <<http://www.aflcio.org/mediacenter/prsptm/pr12172002.cfm?RenderForPrint=1>>.

50 *Securities and Exchange Commission v L Dennis Kozlowski, Mark H Swartz and Mark A Belnick* <[www.sec.gov](http://www.sec.gov)>.

This case involved blatant fraud, and a conspiracy amongst senior executives which enabled that fraud to be hidden. It is not a normal situation, and involved directors deliberately lying. *Sarbanes-Oxley* provisions may provide independent checking mechanisms, and assist in preventing some such situations from arising, but it is difficult to prevent people from deliberately committing crimes. There is no suggestion that any mutual fund acted improperly, or was implicated in any wrong doing. Fidelity appear to have applied a policy under which they chose rarely to vote against the recommendations of the existing boards. It is not surprising that voting policies have become more robust in recent times.

The ICI and Fidelity SEC submissions hotly denied that mutual funds have any conflicts of interest in exercising their voting rights. They will however be subjected to pressure from large companies. In April 2002, the SEC investigated whether Hewlett-Packard had improperly exerted pressure on fund managers to vote in favour of a takeover of Compaq.

### **Criticism of Mutual Funds' Actions**

A recent article criticized the mutual funds for their reluctance to disclose their votes, describing their views as 'Byzantine'.<sup>51</sup> The comparison was made between mutual funds and pension funds. Suggested reasons include:

- Preference for short term investing;
- The costs involved in voting;
- The ability to 'free ride' the efforts of others.

The article states that 40% of equity funds have a portfolio turnover in excess of 100% each year, indicating a tendency for a short term approach.

Index funds, which manage portfolios designed to reflect various stock market indices, operate with a 'buy and hold' investment approach, and do not have the option of selling stocks where they are not happy with a company's performance. In their case, voting is logical, but as they usually charge lower fees than active managers, they are more likely to oppose a costly disclosure regime. A large index fund operator in the US sent a sternly worded letter in August 2002 to the CEOs of 500 companies regarding their expectations regarding companies' attention to corporate governance issues. This mailout was to companies held in its actively managed funds as well as index funds, in which the manager held more than 3% of shares on issue.<sup>52</sup>

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51 Abbott Martin 'The Swing Votes'  
<[www.issueatlas.com/content/free/mutualfund/mutualfund02.html](http://www.issueatlas.com/content/free/mutualfund/mutualfund02.html)>.

52 Vanguard submission to the SEC. p 6 <[www.sec.gov](http://www.sec.gov)> Letter annexed.



### Alternative Ways to Exert Influence

In both countries, many funds managers engage directly with board members and senior management of investee companies, to seek information about, and discuss companies' corporate governance practices. The IFSA Blue Book recommends '*direct contact with companies including constructive communication...about performance, Corporate Governance and other matters affecting shareholders' interests.*'<sup>53</sup>

A Fidelity spokesman, in defending the concept that votes should remain confidential, made the following statement:

'We've long believed in quiet diplomacy, where we work directly with companies to exert influence for the best interest of our mutual fund shareholders.'<sup>54</sup>

In response to this, the CIO-AFL made a strong allegation:

'...mutual fund investors have no way of knowing whether these closed door conversations are good faith efforts by their fund companies to represent shareholder interests, or schemes to trade proxy votes in order to win business managing the company's 401(k) plan.'

Of course to engage in any such activity would be in breach of the manager's responsibility to act in the best interests of investors. This obligation is set out clearly in Chapter 5C of the *Corporations Act*, in relation to the management of funds in Australia, and in the US *Investment Companies Act*.

Domini's response to Fidelity's statement was that this is a separate opportunity to influence companies, and that the public disclosure of votes is no impediment to such dialogue. They further state that shareholders have the right to know what these discussions involve – and that disclosure of votes would provide that information.

Direct engagement with the board presents a slight risk of liability being incurred to the manager through shadow directorship. Section 9 of the *Corporations Act* 2001 includes in the definition of 'director' as:

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53 IFSA Corporate Governance Guidelines 'Blue Book' <[www.ifsa.com.au](http://www.ifsa.com.au)>.

54 Justin Pope, Quoting Vin Loporchio of Fidelity: '*With deadline approaching, mutual fund companies under pressure on proxies*', Associated Press, 4 December 2002. Cited in the AFL-CIO submission to the SEC. <[www.sec.gov](http://www.sec.gov)>.

'a person who is not validly appointed as a director if .... (ii) the directors of the company .... Are accustomed to act in accordance with the person's instructions or wishes'.

Insider trading provisions also limit the amount of commercially sensitive information that fund managers should have access to.

### **Criticism From an Industry Insider**

American commentator John Bogle<sup>55</sup> recently published a strongly worded exhortation to owners of shares, especially mutual funds, to ensure that they make good use of their voting power:

'If we can't rely on the directors to govern, who can we rely on? Why, the stockholders! The owners of the corporation themselves. And as investing has become institutionalized, these owners now have the real—as compared with the theoretical—power to exercise their will. While stocks were once owned largely by a diffuse and inchoate group of individual investors with relatively modest holdings, the ownership of stocks—for better or worse—is today concentrated among a remarkably small group of potentially powerful institutions. The mutual funds controlled by the 75 largest fund managers alone own \$2.9 trillion of U.S. equities, equal to 20% of the \$14.4 trillion market capitalization of the stock market at the beginning of 2001.

But the power of mutual fund managers is in fact far greater than that. For the pension funds and other institutional accounts run by these 75 managers hold an additional \$3.4 trillion of stocks, bringing their total holding to \$6.3 trillion, and the voting power to 44%. And if we expand the list to include non-fund managers in the "Institutional Investor 200," the total rises to \$7.5 trillion or 52%. A majority of the stock. Absolute control over corporate America. Together, this small number of large institutional investors constitutes the great 800-pound gorilla who can sit wherever he wants to sit at the board table.'

<sup>56</sup>

Bogle founded the second largest Mutual Fund in the US, Vanguard Group, Inc. whose CEO is currently an ICI board member.<sup>57</sup> Bogle now runs a research centre for Vanguard, and despite the fact that his comments are contrary to the

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55 John C. Bogle, 'Just When We Need It Most... Is Corporate Governance Letting Us Down?' [http://www.vanguard.com/bogle\\_site/sp20020214.html](http://www.vanguard.com/bogle_site/sp20020214.html)

56 <[http://www.vanguard.com/bogle\\_site/sp20020214.html](http://www.vanguard.com/bogle_site/sp20020214.html)>.

57 <[www.ici.org](http://www.ici.org)>.

company's own submission to the SEC; his speeches may be accessed from the Vanguard web site.<sup>58</sup>

Shortly after the SEC proposal submission date, Bogle wrote a column in the *New York Times*, in support of mutual funds disclosing their votes. He stated that disclosure of votes was consistent with 'the ideal enshrined in the preamble to the Investment Company Act of 1940: that mutual funds should be managed in the interest of their shareholders rather than in the interest of their managers'. Bogle's language in describing his decision to support the proposal was emotive, as he spoke of 'casting my lot in opposition to the industry that I've been part of for more than a half-century.'<sup>59</sup>

Apart from this, there seems to have been very little industry support for the SEC proposal.

### **Australian Superannuation and the 'Sole Purpose Test'**

The 'Sole Purpose Test', expressed in section 62(1) of the *Superannuation Industry Supervision Act* requires that regulated superannuation funds must meet the core purpose of providing retirement benefits for fund members. Case law supports this.<sup>60</sup> Investments must be made with the objective of providing benefits for members in their retirement years, and it logically follows that voting should also be conducted with the objective of promoting and maintaining the economic interests of the fund members. There is no equivalent provision in Chapter 5C of the *Corporations Act*, which governs managed funds. While superannuation funds commonly invest in managed funds, there have been no 'sole purpose test' challenges to date regarding the appropriateness of such an investment.

For Australian superannuation funds to vote along activist lines could open the funds to sole purpose test challenges. Directing votes in support of good corporate governance practices is easily defended on the basis that it is in the best economic interests of companies and their shareholders. Many of the activities of US union pension funds would be open to challenge in our regime.

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58 <[www.vanguard.com](http://www.vanguard.com)>.

59 <<http://query.nytimes.com/gst/abstract.html?res=F20715FF355E0C778DDDA B0994DA404482>>.

60 See *Scott v Commissioner of Taxation* (No 2) (1966) 40 ALJR 265, *Mahoney v Commissioner of Taxation* (1965) 39 ALJR 62, *Raymor Contractors Pty Ltd v FCT* (1991) 91 ATC 4259, *Compton v Commissioner of Taxation* (1966) 40 ALJR 366, *Commissioner of Taxation v Roche* (1991) 105 ALR 95.

### **Australia: Solomon Lew and Coles Myer**

During 2002, a very public proxy fight took place amongst Coles Myer shareholders. Incumbent director Solomon Lew spent an estimated AUD 10 million campaigning for the votes of institutional investors and ordinary Australians holding Coles Myer shares. Eight other directors recommended that Lew be voted off the board.<sup>61</sup> They gave no reason, although assumptions may be made. Lew's own history in relation to corporate governance issues is the stuff of Australian corporate legend. CGI criticised all parties for lack of disclosure.

Some superannuation funds publicly disclosed their voting decisions, others did not. Maple Abbott Brown, a funds manager holding some 5% of the company's shares did not disclose its vote. Georgeson Shareholder re-engineered custodial records to establish the extent of holdings by particular fund managers, and arranged meetings between managers and Lew. A funds management company owned by Lew bought stock to increase the number of votes he was able to control, in the lead up to the AGM. It also engaged in extensive stock borrowing activities, paying institutions to borrow their stock for a fee, thus acquiring voting rights for those equities for the relevant period.

Lew sought and obtained a court order enabling him to view proxy votes lodged by institutional investors, on the day before the Coles Myer AGM. This was too late to exert any influence over votes to be cast, so it is unclear why such a costly and intrusive legal exercise was embarked upon.

The lack of public discussion regarding conflicts and confidentiality of votes indicates the immaturity in the Australian market. In the context of US discussions regarding disclosure of votes, it would be interesting to consider how the US market would have dealt with such a situation.

### **Will Voting Become a Requirement in Australia?**

In March 2002, there was a brief, quiet and failed attempt to require the Australian industry to follow the US example of disclosing votes. The proposal, put by Senator Conroy, the Shadow Minister for Finance, Small Business and Financial Services has not yet been widely debated, and did not survive its first airing. There did not appear to be any pressure being placed on the industry, as there was in the US.

There is however an apparent trend for investors, industry groups and even the media, to require fund managers and superannuation funds to exercise votes.

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61 Coles Myer letter to shareholders enclosed with notice of AGM.

It is yet to be seen whether this will become a legislative requirement in Australia, and whether disclosure of voting decisions and practices will be required.

A recent Australian news article 'Managers split on disclosure of proxies'<sup>62</sup> sought opinions from various fund managers, and received varied feedback as to what each was currently doing and disclosing. Most stated that they vote, but gave no details about their policies. ASIC have to date remained silent on the issue of proxy voting by fund managers.

Managed Investments schemes are regulated under Chapter 5C of the *Corporations Act*. Section 601FC states that the responsible entity of a scheme is required to:

- (b) exercise the degree of care and diligence that a reasonable person would exercise if they were in the responsible entity's position; and
- (c) act in the best interests of the members and, if there is a conflict between the members' interests and its own interests, give priority to the members' interests.....'

Is it reasonable for a responsible entity to comply with its own industry association's guidelines? A legal challenge to a responsible entity's failure to vote is unlikely.

Many funds management companies will appoint an External Compliance Committee.<sup>63</sup> This committee will operate as an independent monitor, and part of their role is to ensure that unit holders' interests are protected. Their responsibilities are broad, and not prescribed in detail, and as yet, there is no indication that these committees will insist that managers exercise their votes.

### **Would Laws Requiring Funds Managers to Vote be Enforced?**

The data regarding proxy voting by Australian companies is compiled using information which is supposed to be lodged with the Australian Securities and Investments Commission (ASIC) under Section 251AA of the *Corporations Act*. This requirement was introduced as one of the corporate governance reforms under the *Company Law Reform Act 1998*. When CGI prepared their 2002 report on proxy voting, 13 out of 124 companies did not contain required information, but as yet there has been no attempt at enforcement.

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62 Jemima White 'Managers split on disclosure of proxies' *Australian Financial Review* 6 December 2002.

63 Chapter 5C of the *Corporations Act* requires an External Compliance Committee be appointed if the board does not comprise a majority of independent directors.

If proxy voting were to be made a legal requirement in Australia, there would need to be some kind of reporting, otherwise enforceability would be impossible. Penalties would be difficult to impose, and it would be an enormous task to require that all proxies be voted.

If an Australian equivalent of the *ERISA* legislation was introduced, it is questionable whether ASIC and superannuation regulator, APRA would be inclined to spend their scarce resources enforcing these laws. With no direct threat to investors' interests, they may prefer to use their funding to pursue the many perpetrators of fraudulent investment products.

### **Other Issues**

Matters of corporate governance will not be the only issues that are dealt with through companies' annual general meetings.

In Australia's 2002 proxy voting season, the Wilderness Society put resolutions to the AGMs of the National Australia Bank and the Commonwealth Bank, proposing to change those companies' constitutions to prevent any investment in or lending to companies engaged in old growth logging. The impact of these resolutions, had they been passed, would have been significant, given that both of those banks have valuable managed funds businesses, which would be prevented from investing freely.

In the US such resolutions are common, a US shareholder resolution regarding old growth logging had the effect of stopping a hardware chain from selling timber harvested from old growth forests.<sup>64</sup> A business selling timber may have been a more realistic target for activists than a business with such broad interests as a bank.

### **Voting Proxies for International Equities**

In their submission to the SEC, the ICI referred to impracticalities that arise in attempting to exercise votes attached to equities from non-US countries. Logistical obstacles must be overcome, for example adequate notice may not be given, translations and disclosure may also be an issue

The question arises of whether Anglo- American views of 'good' corporate governance should be applied to other countries. Many large Chinese corporations are still predominantly family owned concerns, and will fail to meet benchmarks regarding numbers of independent directors. In Hong Kong, many votes are held

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64 <[http://www.domini.com/common/pdf/SEC\\_Proxy\\_Rule\\_Letter.pdf](http://www.domini.com/common/pdf/SEC_Proxy_Rule_Letter.pdf)>.

by poll rather than on a 'one share, one vote' basis.<sup>65</sup> This is also still possible under Australian law, although motions by show of hand are less common, and are opposed under the IFSA guidelines.

Emerging market economies will need investment to develop, and may need to adopt western practices in order to receive funding. ISS reports on companies around the world, imposing western views. The largest US mutual funds does not vote extensively outside the US<sup>66</sup>, and international equities are a small proportion of their holdings. Australian funds managers hold approximately 8% international equities as a proportion of funds under management.<sup>67</sup>

Voting for international equities is likely to be an impending matter for discussion, as more questions are asked by investors about the companies in which their funds are invested.

It is unclear how many Australian funds managers vote their international equities.

### **Conclusion**

Australian fund managers will eventually be faced with pressure from informed investors to vote the proxies they control. It is inevitable that disclosure of votes will become an issue in the Australian investment community, but it is yet to be seen whether this suggestion will be made in the economic interests of investors, or by activists with a particular social agenda.

In exercising their proxies funds managers will be doing no more than meeting a minimum standard in protecting their investors' assets. By disclosing their voting policies, they will be demonstrating a level of transparency that they expect from investee companies.

Disclosing votes by resolution is likely to be vehemently opposed by the industry, but that industry would do well to set a reasonable benchmark of its own, to prevent pressure from investors imposing a regime which requires specific disclosure.

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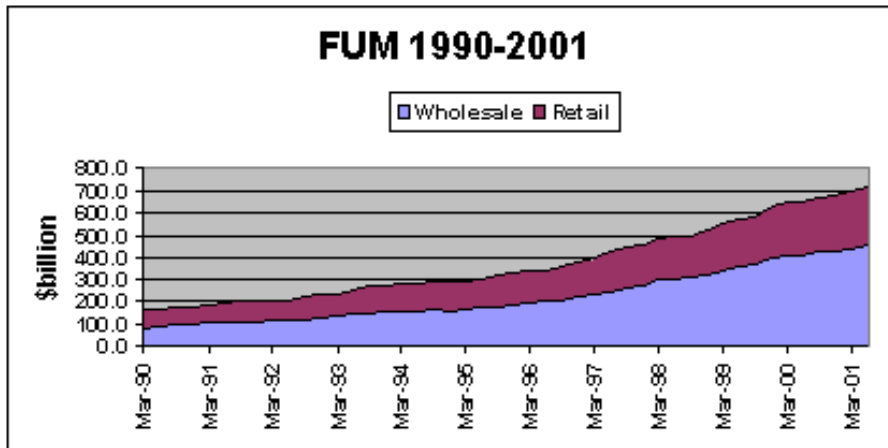
65 <[www.website.com](http://www.website.com)>.

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## Appendix 1

### Australia's Fund Management Industry



### Where Retail Funds are Invested

Domestic equities	12%
International equities	8%
Australian fixed interest	10%
International fixed interest	1%
Property	2%
Cash	19%
Multi sector funds*	48%

\* Multi sector funds will usually include Australian equities

Source: ABS and Assirt



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