

The Future of the AGM

**– don't throw the baby out
with the bathwater –**

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1. Introduction

The advent of the 2016 annual general meeting season for corporate Australia has also witnessed the common choir of criticism and questioning of the underlying contemporary value of the AGM as a vital instrument of effective corporate governance.

Before joining the chorus of this apparent discontent, it is worth analysing exactly what is the underlying concern of shareholders, investors and corporations. Without such root cause analysis there is risk that reaction to the expressed discontent may prejudice the workings, or even the continuance, of an historically important element of Australia's corporate governance landscape.

2. Purpose of an Annual General Meeting

Traditionally the annual general meeting of a corporation has served the following purposes:

- (a) for those charged with the governance and management of the organisation to account for:
 - the performance of the organisation over the last year;
 - the intended strategic direction and prospective performance of the organisation going forward;
 - their past and continuing stewardship of the organisation.
- (b) for the members of the organisation to exercise their voting rights concerning the decisions relating to the organisation and its governance and management that are reserved to the organisation's members by the organisation's constitution, or at law. These usually include:
 - the appointment of board members of the organisation;
 - the appointment of the organisation's auditor;
 - any proposed changes to the organisation's constitution;
 - any proposed significant issues of new share capital or changes to existing share capital;
 - any proposed significant transactions that may materially impact the scale or nature of the organisation's operations;
 - any proposed transactions where the counterparty to the transaction is a "related party" (ie. one or more of the board members of the organisation or their "associates").
- (c) for those charged with the governance and management of the organisation to acquit their past stewardship of the organisation and to express their credentials for remaining in office.
- (d) for the organisation's members to critically ask questions concerning:
 - the organisation, its past performance and its future prospects;
 - the stewardship of those charged with the governance and management of the organisation.
- (e) for the organisation's member personally to see and engage with those charged with the governance and management of the organisation so as to assist those members in forming judgement as to:
 - the exercise of their voting rights;
 - the continued investment, or divestment, of their interests in the organisation.

3. Shareholder / investor gains over recent decades

Also before focusing on the criticisms levelled at the corporate AGM, it is worth reflecting on what it is that shareholders and investors have gained over recent decades in the accountability and transparency of their boards and companies, perhaps at the expense of the relative importance of the AGM, as well as those elements of the AGM itself which have stayed much the same in the context of their governance relevance.

3.1 The Gains

- (a) Enhanced corporate governance practices generally promoted by more robust legislative and regulatory requirements:
 - Corporations Act and Regulations;
 - ASX Corporate Governance Council Principles and Recommendations (now in 3rd Edition);
 - ASX Listing Rules.
- (b) Enhanced reporting accountability and transparency of companies and their boards including due to:
 - ASX Listing Rule changes and clarifying ASX Guidance Notes;
 - Corporations Act changes and ASIC Regulatory Guides;
 - Australian Accounting Standards changes and practices.
- (c) Enhanced professional practice standards and continuing professional development of directors and officers including through:
 - AICD;
 - Governance Institute.
- (d) Materially improved quality and timeliness of disclosure of material price sensitive information including through:
 - continuous disclosure regulatory requirements (ASXLR 3.1 and Corporations Act s.674);
 - more vigilant ASX surveillance of market announcements;
 - more vigilant enforcement of regulatory requirements (ASIC and ASX);
 - the evolution of securities' based class action litigation (including with litigation funding support).
- (e) Enhanced regulatory requirements concerning remuneration reports and shareholder voting on remuneration reports:
 - Corporations Act and ASX Listing Rule changes;
 - Accounting Standards changes;
 - ASX Corporate Governance Council Principles and Recommendations (3rd Edition)
 - enhanced governance practices generally.
- (f) Contemporary communications technology giving timely and easier access to annual reports, published financial statements and AGM materials including agendas, resolutions and associated explanatory memoranda.

- (g) The mandated presence of the company auditor at AGMs giving assured opportunity for shareholders to ask questions on audit related matters directly of the auditor.

3.2 Elements which have stayed much the same

- (a) Shareholder opportunity to receive the benefit of “in person” addresses from the Chair and CEO, to personally meet the Board, to ask probing questions, and to hold the Board to account.
- (b) Board opportunity to personally meet and speak with those shareholders who attend the AGM to account for their past stewardship of the company and to explain the basis of the company’s forward strategy.

4. Contemporary Criticisms of the effectiveness of the AGM

Table A below seeks to describe in summarised form:

- in column 1, aspects of Australian public company AGM's attracting criticism from certain shareholders, investors and corporate commentators;
- in column 2, commentary on whether the issue is really attributable to a deficiency in the structure or manner of conduct of the AGM.

Table A

#	Column 1	Column 2
1.	Very little information is imparted at the AGM which is not already available in the market place through other sources.	This is not a failing or shortcoming of the AGM but rather a consequence of increased timely disclosure of corporate information through enhanced continuous disclosure obligations and expectations.
2.	Annual reports including directors’ report, remuneration report, corporate governance statement, auditors report and financial statements are all becoming more complex and difficult to understand (not clear and concise).	This is not a failing or shortcoming of the AGM but rather a consequence of increased regulatory requirements and the threat of regulatory penalties and shareholder/investor litigation risk if reporting deficiencies arise through summarised or less legally precise wording.
3.	Institutional shareholders gain more frequent and better quality access to relevant company officers and information than do retail shareholders.	This is not a failing or shortcoming of the AGM. In fact the AGM gives retail shareholders equal access and opportunity with institutional shareholders (who often do not attend AGMs in any event) to hear from and speak with the Board and the CEO.
4.	Most shareholders by number and % holding, especially institutional shareholders, have voted by proxy before the AGM, therefore rendering meeting deliberations as having no material bearing on the outcome of the resolutions of the AGM.	This is a matter of relevance in considering the future of the AGM (refer further commentary under section 4 following)

5. Contemporary suggestions as to how the AGM, its structure and/or its processes, might be improved

Shareholders, investors, companies, directors and corporate commentators have noticed the relative decline in the importance and role of the AGM, especially in its historical practice form, and have come up with a raft of suggestions as to how the institution of the AGM may be revitalised. Many of these suggestions appear below with brief commentary against each.

(a) Multiple venue and virtual AGMs for shareholder convenience

With the enablement of contemporary communication technology, the AGM be held simultaneously at multiple venues, including virtual venues, to improve the convenience of attendance for shareholders and to encourage greater shareholder participation and engagement.

Commentary

A laudable suggestion that is being utilized by some companies.

On the negative side, AGM holding costs could increase unless the law was changed to relieve the need to have a physical meeting at all (in which case the loss of opportunity for the board, CEO and shareholders to engage, speak and question one another in person may be a detriment).

(b) Disconnect information flow from voting

Disconnect the presentations of information at the AGM from the voting on the resolutions by say 48 hours, to allow opportunity for greater engagement, more rigorous, informed and shared deliberations, and reflection by shareholders on the issues discussed before the shareholders' vote is taken.

Commentary

This would necessitate significantly enhanced processes (perhaps technology enabled) to allow all shareholders the opportunity to either participate in or receive the deliberations of the initial meeting (and any virtually connected collateral meetings), and thereafter vote at the succeeding meeting. Proponents of this model commonly also recommend voting reform (perhaps via direct voting) to save the need for a second formal meeting (refer below).

(c) Direct Voting

Direct voting by shareholders on resolutions proposed at shareholder meetings including e-voting using technology enabled means rather than the need for physical completion and return (by mail, scanned email or fax) of proxy forms.

Commentary

This initiative has the potential to relieve significant administrative cost in the distribution, return, collection, collation and counting of "hard-copy" voting and/or proxy forms. It also has the potential to deliver greater assurance of integrity in the voting process and the exercise of proxy voting authority by proxy-holders.

(d) All voting by poll

All voting at general meetings, at least on substantive rather than minor procedural motions, should be by way of formal poll rather than by show of hands so as to deliver greater assurance of integrity in the voting outcome and declaration of the result of meeting resolutions by the meeting chair.

Commentary

Some commentators have suggested that at times of closely contested voting on contentious resolutions some chairs whose governance standards may lack robustness, may declare a resolution outcome on a show of hands of those present at the meeting, notwithstanding a majority (or relevant threshold excess) of proxy votes to the contrary, the weight of which would carry the day if the matter was put to a poll.

On the other hand, sending all resolutions to a formal poll would demand additional meeting time and administrative inconvenience even on resolutions which are not contentious, which have the overall support of all votes on the floor and with the chair (as proxy appointee) and which could otherwise be dealt with more expeditiously with a “show of hands”.

(e) Timing of disclosure of proxy voting

A range of differing suggestions have been made as to when the outcome of proxy voting on the meeting's resolutions should be disclosed. These include:

- (i) at the beginning of the meeting, or prior to commencement of discussions on each relevant resolution, so everyone knows what the prospective outcome of the meetings' resolution(s) are likely to be before they decide whether or not to even speak on the motion to be put;
- (ii) after deliberation on the relevant resolution and before the matter is put to the vote by the meeting, so as not to discourage proper discussion and deliberation on the resolution at the meeting even if the weight of proxies assure a result one way or the other, irrespective of any votes on the floor of the meeting that may be influenced by those discussions and deliberations;
- (iii) after voting on the resolution has taken place, so that the result of the proxies has no influence at all as whether or not, and how, shareholders may speak and/or vote on the relevant resolution.

Commentary

It is believed that the consensus of good governance practice on this issue is that described in paragraph (ii) above, although alternate approaches are sometimes evident in practice. Perhaps with continuing professional development of good governance practices for shareholder meetings, company chairs could be better educated to adopt the currently prevailing consensus (i.e. paragraph (ii)) which appears to strike a fair balance between the alternatives.

(f) Improvements to meeting information flow

Improvements in the quality, relevance and succinctness of information being provided to shareholder meetings. An array of suggestions have emerged within the umbrella of this theme:

(i) Pre-meeting information protocols

Companies might convene a series of information briefings, webcasts or podcasts leading up to the holding of a shareholders' meeting which shareholders and other interested parties could connect to so that more detailed information could be shared with those persons wanting the extra information, than would otherwise be convenient for the shareholders generally at a shareholders' meeting (refer also 5(b) above).

Commentary

There appears to be merit in this suggestion although if adopted, the proof will be in the number of shareholders to actually link in to the sessions having regard to the administrative costs involved. Continuous disclosure compliance assurance, by way of ASX announcement release of the content of these sessions, would also be prudent.

(ii) Plain English notice of meeting

Improve the quality, clarity, succinctness and “plain English” virtues of the notice of meeting and explanatory notes and information accompanying the notice of meeting papers.

Commentary

It is difficult to argue with such a proposition although the need for technically correct legal expression, and compliance with prescriptive regulatory requirements, often runs counter to this objective, especially given the increasing risk of litigation funded securities’ class actions for those who may get it wrong.

(iii) Improved meeting presentations

Improved use of audio/visual technology including infographics and video screening may be useful tools for speakers and presenters to more effectively communicate with meeting attendees rather than traditional pre-typed reports read verbatim from the podium.

Commentary

It is difficult to argue with such a proposition although the caveats expressed in (ii) above need to be considered.

(iv) Greater focus on future prospects

Shareholders would value more time being taken to explain the company’s future direction and prospects, its strategy and risks, and the plans for addressing such matters (subject of course to commercial in confidence constraints), rather than dwelling too much in detailed historical reporting (unless of course questions of adequacy of accountability arise).

Commentary

Although such an approach could be valuable, many companies and their boards are cautioned by legal counsel to be circumspect with respect to forward looking statements and to ensure that there is a reasonable basis for them, or else incur the odium of the regulator and the risk of potential litigation funded securities’ class action litigation. ASIC guidelines as to forward looking statements, to ensure that the company and its board have a reasonable basis for the statement to be made, have probably resulted in a more conservative approach being taken by companies and their boards.

(v) Clarity of remuneration report

The comments in (ii) above particularly apply to the Remuneration Report, with need for greater clarity of information, in lay terms, as to the connection between the reported levels of executive remuneration, their actual take home pay, and the nature of the KPI’s that need to be satisfied by the senior executive officers to show their linkage with corporate performance and shareholder value.

Commentary

The commentary expressed in (ii) above applies equally here.

(vi) More information on directors standing for election

Far greater information should be provided about the skills, experience and attributes of the board members, especially those standing for election/re-election, as well as the requisite skills, experience and attributes of the board as a whole, and what is being done with respect to board succession planning to address any perceived gaps. In addition, directors standing for election or re-election should be asked to say something about themselves at the meeting to re-assure the meeting as to their suitability for office.

Commentary

This aspect is starting to receive more attention especially following the introduction of the 3rd Edition of the ASX CGC Guidelines and Recommendation (2014). It is hard to argue that such an initiative is not reasonable and is not appropriate.

(g) Improvements to meeting conduct

Improvements in the manner in which shareholder meetings are conducted. An array of suggestions have emerged within the umbrella of this theme:

(i) Meeting speakers extend beyond Chair and CEO

Currently it is accepted to be good governance practice for the CEO to be the primary spokesperson on behalf of the company and the Chair to be the primary spokesperson on behalf of the board, perhaps with the chair of audit committee and/or chair of remuneration committee being asked to respond to some questions and queries from shareholders/investors within the limited scope of their respective committees.

To allow shareholders a greater appreciation of the abilities and attributes of the directors who sit on the board (not just the CEO and Chair), it has been suggested that where appropriate other directors at least be given the opportunity to respond to shareholder questions and/or otherwise display their abilities and attributes to those who elected them to office so a better appreciation may be gained by the shareholders as to the capability of those directors to “add value” to the company and help deliver enhanced shareholder value.

Commentary

Contemporary good governance practice recommends only the CEO and Chair respectively being the primary spokesperson on behalf of the company. This ensures consistency of message, but does not give opportunity for broader exposure of other directors to display their “value offering” for the benefit of the company. It might reasonably be asked why should CEO’s and Chair’s fear their fellow directors having a role to play in speaking on behalf of the company unless there was a lack of confidence in their ability to fairly discharge that responsibility (and if so, then questions legitimately may arise as to their suitability for senior office as a board member).

(ii) Questions on notice in advance of meeting

At present if questions are raised at shareholder meetings which involve some complexity in giving a reasonably informed response, the question is “taken on notice” and a response either given in person, or posted to the company’s web-site,

“off-line” several days after the meeting. A suggested initiative is for companies to inform and encourage shareholders to give advanced notice to the company secretary of any questions they propose to raise at a shareholders’ meeting. This will allow the company the opportunity to research the matter and give a reasonably comprehensive and informed response for the timely benefit of the shareholders and others attending the shareholders’ meeting.

Commentary

A laudable suggestion that is being utilised by some companies already, with no materially foreseeable adverse risks attaching to it.

(iii) Improved skills and meeting management by Chair

Where appropriate, shareholder meeting chairs should undertake training to enhance their skills in conducting an efficient and effective meeting which meets good governance practice standards. Concern has been expressed that at some shareholder meetings:

- the business of the meeting is not dealt with in an appropriate and timely manner;
- meeting time management causes frustration and dis-engagement by some shareholders;
- the attitude of the chair and other company officers is “dismissive” of respect for the rights of shareholders to hold their elected representatives to account.

Commentary

A laudable suggestion which may be instigated through a board/governance evaluation review (including review of the role and performance of the Chair as a key member of the board), and follow up professional development to address any opportunities for improvement in governance practice identified as part of that review.

(iv) Greater involvement of auditor

Although the company’s auditor is required to attend at annual general meetings of public companies (refer s 250T of the Corporations Act) and to be available to respond to questions from shareholders concerning their audit, in practice the level of enquiry to the auditor is generally low. Of note however, new Accounting Standards that generally will apply to Australian companies with a 30 June financial year end from 30 June 2017, will require the auditor to be more detailed in expressing the material operating risks that are likely to impact the future prospects of the company and that have been relevant in their audit of the company’s financial statements. This may be a trigger for a much higher level of enquiry and questions from shareholders to the auditor.

Commentary

In the interests of accountability, transparency and assurance, shareholders should be prepared to ask questions of the auditor. The forthcoming change to the Accounting Standards from 30 June 2017 is likely to increase this practice.

(h) Better Shareholder Engagement

Suggestions for improvement are not necessarily only from the shareholder/investor side of the fence. Nor do they necessarily directly relate to the AGM itself, although they may

well have impact with respect to improvement to the governance value of the AGM
Suggested improvements from Company boards, their chairs and a number of corporate commentators include:

(i) Better institutional shareholder engagement

Institutional shareholders need to engage more directly with their investee companies and be more active in participating in AGM's at risk of the loss of a valuable institution of corporate governance accountability (i.e. the AGM). Shareholders get a quality of AGM consistent with their own commitment to ensure value is derived from the AGM. Apathetic non-participation by key shareholders, with over reliance on proxy advisors, rather than institutional shareholders taking the time and effort to directly monitor their investments and actively hold the company board to account, does not foster strong governance for the benefit of shareholders generally.

Commentary

It is difficult to argue with such a proposition although the suggestion does present as the classic "chicken or the egg" conundrum given the apparent lack of general uptake of many of the other suggestions made by shareholders/investors referred to previously to restore some vitality to the AGM.

(ii) Shareholder support to Chair in meeting management

Where there are special interest activist shareholders acting in a manner to disrupt the proper business of shareholder meetings for their own purposes, rather than for the benefit of shareholders as a whole, then the other shareholders at the meeting need to support the meeting chair to appropriately censure and deal with such disruptive influences.

Commentary

The true "owners" of an AGM are the shareholders of the company as a whole, with certain authority vested in the meeting chair as the servant of the meeting. It is their opportunity to hear from those they have elected to direct and manage the affairs of the company and to hold them accountable for their stewardship. The meeting is not "owned" by the board and the chair. It is up to the general body of shareholders to ensure that they get the quality of meeting they want. Accordingly they should be supportive of genuine efforts by the meeting chair to maintain good order at the meeting to deliver this result.

(iii) Proxy Advisors

Proxy advisor firms are playing a more instrumental role in public listed company governance in Australia, especially around the time of the AGM and especially with respect to the significant and influential shareholdings of institutional shareholders. Proxy advisor firms are perhaps most influential with respect to matters such as board succession, board and executive remuneration and corporate governance practices. The services of proxy advisor firms are in no way regulated, nor is there necessarily transparency in the advice and proxy recommendations they make to their institutional shareholder clients. Notwithstanding their increased influence and power, they are not reposed with fiduciary duties to act in anyone's best interests and their reports to their clients are largely commercial in confidence. A number of senior company directors have expressed concern that often there is little consultation with the company concerning the facts, circumstances and

assumptions upon which their advice is based, and their advices from time to time appear to lack a sufficient appreciation of the industry or circumstances in which the relevant company is operating. Suggestions abound as to why proxy advisory firms are not regulated (either formally through the legislative process or at least informally through industry association codes of conduct and disciplinary processes) given the significant and influential role they play.

Commentary

This paper is not the place to explore this issue in depth. That would be a work in itself. There are reasonably compelling arguments to support a regulatory solution although whether those arguments withstand scrutiny against COAG based principles of regulatory “red tape reduction” is moot. Interestingly the rise of the intermediation role of proxy advisors between the company and its shareholders appears to be correlated with the level of dissatisfaction of shareholders as to the reporting they are otherwise receiving from their investee companies, as well as the plethora of analysis that an institutional investor/shareholder would otherwise need to undertake across the full range of its portfolio of investments. Yet at the same time, with advances in technology and communications, “disintermediation” is becoming the disruptive vogue in so many other service sectors and industries. It will be an interesting and developing space to watch.

6. Shareholder Activism

To date in Australia shareholder activism has primarily manifested itself where a shareholder(s) with nominal shareholding in the company, in order to give legitimacy of status to attend and speak at shareholder meetings, raises issues and questions the board and management on aspects of the company’s day to day operations which may be causing perceived offence to a socially or politically active group within the community (e.g. anti-liquor, pro animal welfare, anti-gambling, anti-smoking, pro-environmental protection, anti-child labour practice abuse etc).

These minority shareholders have the potential to materially disrupt shareholder meetings from addressing the business of the meeting in favour of their own social or political agenda outcomes.

Suggestions to address this risk have included:

- (i) increasing minimum threshold shareholdings before a resolution can validly be proposed at a shareholder meeting to discourage such activists acquiring a nominal number/value of shares merely to gain status to propose resolutions, speak at, and disrupt the proper business of a shareholder meeting;
- (ii) chairs taking a stronger, more disciplined and perhaps more formal approach in the conduct of the meeting;
- (iii) security personnel being present to assist the chair in addressing any unruly behaviour at shareholder meetings and maintaining good order at the meeting (an important inherent function and power of meeting Chairs);
- (iv) the remaining shareholders supporting the Chair in his/her endeavours to appropriately deal with the disruptive/activist element.

Perhaps lessons concerning future trends in shareholder activism can be gained by reviewing the extent to which “shareholder activism” is impacting shareholder meetings in the USA. In particular there is an increasing class of “shareholder activists” who acquire a material shareholding in a company, and then seek to exert the influence and voting power of that shareholding to challenge

and disrupt the board, the company's strategy, its performance and its delivery of shareholder value, often with a view to:

- gaining seats on the board
- removing existing board members
- changing the company's strategy
- removing the company's CEO
- increasing dividend returns
- disaggregating and selling off business units and divisions within the company
- vending other assets under the control of the activist shareholder into the company
- acquiring discrete operating divisions from the company.

Whether or not this form of shareholder activism is in the best interests of the company and its shareholders as a whole, or rather in the best interests of the activist shareholder, is moot.

Suffice to say though that this trend is likely to trickle down to Australia over the coming decade and may pose a new array of challenges and recommendations to address as part of shareholder meeting good governance practice, including the AGM.

7. Conclusion

Shareholder meetings, especially the annual general meeting, are established avenues of corporate governance practice including to assure accountability of the board to its shareholders.

Emerging improvements and changes in the corporate regulatory landscape delivering more regular and reliable information flow to shareholders, in communications technology, in the prevalence and concentration of share voting power in the hands of "institutional" compared with "retail" shareholders, and in the rise of influence of proxy advisors, have all co-incided to lessen the relative importance of shareholder meetings, especially the AGM, compared with by-gone years.

Arising from these factors, some commentators have raised the question as to whether or not the AGM in its current form should be persisted with at all. Many, if not most commentators have suggested means by which shareholder meetings may be improved. Many of those suggestions are included in this paper.

It is submitted that shareholder meetings generally, and the AGM in particular, retain valid and important roles in sound corporate governance practice, although it is acknowledged that the application of a number of the foregoing suggestions for their improvement should be implemented to ensure their future governance effectiveness and vitality.

In the call for the review of the future of the AGM, care must be taken not to throw the baby out with the bathwater.

Steven Cole
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