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# Australia

## Summary of Current Shareowner Rights

*Percentages cited reflect information gathered by GMI Ratings about 202 companies in Australia as of 31 August 2012.*

Although shareowners in the Australian market generally have robust rights, the terms for members of corporate boards are staggered and managing director appointments are usually not subject to shareowner approval. Only shareowners can remove board members, not the board, and the board may not alter the company's constituent documents without shareowner approval.

<b>Issue</b>	<b>Current Standard or Usual Practice</b>	<b>Level of Practice Adoption, Exceptions to Usual Practice, and Trends (if any)</b>
What is the average percentage of independent board members on public company boards (% independent board members)?	70%	
What percentage of companies have fully independent audit committees?	74.8%	
What percentage of publicly traded companies have a controlling shareowner (e.g., family, government, majority block holder)?	4%	Relatively rare in the Australian market
Is voting by proxy permitted?	Yes	Always allowed
Must shares be deposited or blocked from trading in order to vote?	No	
Are there share ownership limitations in this market?	No, mostly	Share ownership limitations are not common but do apply in sensitive industries, such as media, telecommunications, and aviation.
Are there (other) common restrictions on the rights of shareowners to vote in person or by proxy?	No	Proxy voting is unrestricted.
Do companies adhere to a majority voting standard in the election of board members?	Yes	This practice is standard in Australia.

(continued)

<b>Issue</b>	<b>Current Standard or Usual Practice</b>	<b>Level of Practice Adoption, Exceptions to Usual Practice, and Trends (if any)</b>
Do companies allow for cumulative voting in the election of board members?	No	This type of voting is not the practice in Australia.
Are shareowners able to affect a company's remuneration policy through shareowner approval (binding or non-binding) of the remuneration committee report, the proxy's Compensation Discussion and Analysis section, or something comparable?	Yes	Under Australia's "two-strikes" rule, if 25% of shareholders vote against a company's remuneration report at two consecutive annual general meetings, the entire board may have to stand for re-election within three months. Key management personnel, and parties related to them, are not permitted to vote in the original vote on executive pay but may vote concerning board elections. Therefore, it is possible that shareowners may "spill" a board with a second-strike vote only to have that board reappointed by insiders.
Are shareowners able to affect remuneration policy through binding shareowner approval of specific equity-based incentive plans or something comparable?	Yes, sometimes	Approval by shareowners of non-board member executives' incentive plans is not required in Australia. Share plans for board members (including executive board members) are subject to shareowner approval, although a company can acquire shares for a board member in a non-dilutive purchase without shareowner approval. Of the companies researched for this manual, 45% have sought shareowner approval for equity-based incentive plans.
Are shareowners permitted to introduce dissident resolutions (binding or nonbinding) at an annual meeting?	Yes	This right is standard.
Do shareowners have a right to convene a general meeting of shareowners outside the annual meeting process (e.g., an extraordinary general meeting or special meeting) if only 10% or less of the shares are represented in the group requesting the meeting?	Yes	Shareowners holding a minimum of 10% of shares (or 100 shareowners) may call an extraordinary general meeting.
What percentage of companies include golden shares in their capital structure?	0.5%	
Are shareholder rights plans (poison pills) allowed in this market?	No	No companies have poison pills.
If shareholder rights plans are in use, do they have to be approved by shareowners?	na	

Issue	Current Standard or Usual Practice	Level of Practice Adoption, Exceptions to Usual Practice, and Trends (if any)
Do all shareowners have the right to approve significant company transactions, such as mergers and acquisitions?	Yes	This right is a legal requirement.
Do companies require a supermajority vote to approve a merger?	Yes, in many cases	Acquisition bids can be successful at the 50% level to gain control, and the bidders are generally able to continue on to full acquisition by compulsion once the bidder reaches 90%. Mergers by schemes of arrangement are also possible and are more common for listed trusts. These mergers require approval by 75% of shareowners in a general meeting.
Are companies subject to a fair price provision, either under applicable law or as stated in company documents (such as the charter or bylaws)?	Yes	This is a legal requirement.
Are class action suits commonly used in this market?	No	Although not unheard of, they are uncommon.
Are derivative suits commonly used in this market?	No	Although not unheard of, they are uncommon.

na = not applicable.

## Current Engagement Practices and Shareowner Rights Developments

In Australia, the shareowner engagement process is reasonably mature. The most prominent body in corporate engagement is the Australian Council of Superannuation Investors, which represents many major superannuation (pension) funds when it approaches listed companies seeking governance changes. In addition, engagement consultants are increasingly prominent in Australia. Increased engagement in recent years is the product of reasonably strong shareowner rights, pressure on investment managers to vote their shares, and the introduction of a shareowner vote on compensation.

All boards are staggered over a three-year rotation process in Australia. This approach has been standard practice in Australia for decades and is unlikely to change. Although this process may entrench boards, the ability of shareowners to remove board members without cause by calling an extraordinary general meeting (EGM) does mitigate the effect of staggered board terms. New board members may be appointed to fill vacancies between annual

general meetings, but their names must be submitted for approval by shareowner election at the next available general meeting (annual or extraordinary). Managing directors (CEOs) are appointed by the board, typically for a contract of several years; these appointments are not subject to shareowner approval.

Australia's takeover rules, which prohibit poison pills, are not a major deterrent for bidders and serve as added pressure on companies to perform. The Takeovers Panel (a quasi-judicative body that was established as the arbiter of disputes relating to takeovers under the Corporations Act and is charged with overseeing mergers and acquisitions) is largely composed of market-based practitioners. Although the Takeovers Panel is empowered to take action to ensure fairness in bids, it generally favors minimal intrusion and allowing the market to determine the success or failure of a bid. The result is a bid process in Australia that is fairly open in comparison with the processes in most other markets.

Australian companies are subject to continuous disclosure rules and cannot make selective briefings to certain shareowners. This requirement is seen as a deterrent to shareowner communication by some but not as a reason to avoid engaging with companies.

Takeover legislation that might address those situations when shareowners gather to discuss collective action against a company is pending. The Australian market regulator, the Australian Securities and Investments Commission (ASIC), has issued a class order to protect against an inadvertent breach of the takeover legislation when investors are discussing voting intentions for a shareowner meeting. How this class order relates to discussions outside the context of an upcoming vote is unclear. Until clarified, such discussions remain a potential source of liability for those involved in corporate engagement because the class order has not been fully tested in any legal action.

In June 2008, the Parliamentary Joint Committee on Corporations and Financial Services published "Better Shareholders—Better Company: Shareholder Engagement and Participation in Australia." This report offers suggestions for enhancing the engagement process in Australia. Recommendations include the following:

- Abolishing the 100-member rule for calling an EGM
- Clarifying shareowners' ability to meet and discuss their intentions outside the context of an upcoming vote
- Improving disclosure of derivative positions
- Preventing proxy holders with different vote recommendations from vote "cherry picking"

## ■ Prohibiting vote renting<sup>1</sup>

In 2010, the Australian Stock Exchange (ASX) Corporate Governance Council released amendments to the second edition of the Corporate Governance Principles and Recommendations related to diversity, remuneration, trading policies, and briefings. The main changes to the principles and recommendations affected by the 2010 amendments concern Principle 3 (diversity) and Principle 8 (remuneration). The principles are based on an “if not, why not”—or a “comply or explain”—philosophy.

In 2011, the Australian government adopted a “two-strikes” rule concerning executive pay that may allow activism pertaining to compensation issues to gain traction. The Corporations Amendment Bill 2011 strengthened the nonbinding vote on remuneration by giving shareholders the opportunity to remove directors if the company’s remuneration report has received a “no” vote of 25% or more at two consecutive annual general meetings. In such instances, shareholders would vote on whether to “spill” all board members, and if at least 50% of eligible votes cast were in favor of spilling, a spill meeting to elect directors would be required within 90 days.

In the 2011 proxy season, 25 companies in the S&P/ASX 300 Index earned their first strike. In the 2012 proxy season, only 15 companies in the index received a strike and only two received their second strike. Spill resolutions at both companies were voted down. Only two companies in the broader Australian Stock Exchange saw their boards spilled.

## Legal and Regulatory Framework

Key shareowner rights are included in the Corporations Act, which embodies all corporate laws and takeover provisions affecting Australian companies. The Corporations Act is administered by ASIC, which has wide-reaching enforcement powers. Disclosure and key market regulations are also found in the listing rules of the Australian Securities Exchange, which have legislative backing. ASIC can get involved in listing issues if criminal activity is discovered. The takeover provisions of the Corporations Act are also overseen by the Takeovers Panel, which is largely composed of industry practitioners and takes a market-based approach to the provisions with the aim of ensuring fairness in the takeover process.

A number of mechanisms are available in Australia for shareowner engagement and activism. The one-share, one-vote system is fully entrenched in Australia, and despite the rare attempts by some companies to work around it, it is still the standard requirement. Shareowners also have strong rights when it comes to calling meetings outside the annual general

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<sup>1</sup>Vote renting refers to the borrowing of shares in order to vote on a transaction to secure a desired outcome.

meeting. An EGM of shareowners may be called by shareowners representing 10% of shares or totaling 100 shareowners. This meeting may be used to put forward a resolution to change the memorandum of association (equivalent to the certificate of incorporation in some markets) or articles of association (equivalent to bylaws), neither of which can be changed by the board or management; they can be changed only by a resolution of the shareowners.

An EGM can also be used to remove a board member from office. Board members may be removed without cause in Australia but only by shareowners in a general meeting; they cannot be removed by the board, which gives shareowners considerable clout because it reinforces the sense that the board is subject to the will of shareowners. Furthermore, all board members are subject to election on a periodic basis by majority vote and must resign before submitting themselves for re-election at an annual general meeting.

Shareowners can issue proxies for general meetings without restriction and are not required to block shares in order to vote. Recently, market participants have raised concerns that renting shares and other activities could separate economic interests from voting interests. These issues are included in the report by the Parliamentary Joint Committee on Corporations and Financial Services and are expected to be the subject of legal or regulatory reform in the near future.

## Key organizations with information relevant to shareowner rights in Australia include the following:

Australian Securities and Investments Commission ([www.asic.gov.au](http://www.asic.gov.au))

Australian Securities Exchange ([www.asx.com.au](http://www.asx.com.au))

Australian Council of Superannuation Investors ([www.acsi.org.au](http://www.acsi.org.au))

Australian Institute of Company Directors ([www.companydirectors.com.au](http://www.companydirectors.com.au))

Chartered Secretaries Australia ([www.csaust.com](http://www.csaust.com))

Centre for Corporate Law and Securities Regulation ([www.law.unimelb.edu.au/cclsr](http://www.law.unimelb.edu.au/cclsr))

Australasian Investor Relations Association ([www.aira.org.au](http://www.aira.org.au))

Australian Institute of Superannuation Trustees ([www.aist.asn.au](http://www.aist.asn.au))

Takeovers Panel ([www.takeovers.gov.au](http://www.takeovers.gov.au))

Corporations and Markets Advisory Committee ([www.camac.gov.au](http://www.camac.gov.au))

Australian Treasury ([www.treasury.gov.au](http://www.treasury.gov.au))