

Committee Secretary  
Standing Committee on Economics  
PO Box 6021  
Parliament House  
Canberra ACT 2600  
via Upload Submission

## **Cover statement**

For the attention of the Committee Secretary,

Please note that I have included a link to my working paper in my submission which directly addresses this topic. I did not append it as the submission guidelines stated that ‘once a submission is received by a committee, you cannot publish or disclose it to any other person unless or until the committee has authorised its publication.’ Given that I am currently in the process of submitting my working paper for publication, I was not sure whether this would be in line with the guidelines. If it is acceptable, I would be happy for you to append the PDF working paper to my submission, given that it provides context to the suggestions below.

## **Submission: Inquiry into the implications of common ownership and capital concentration in Australia**

I refer to my working paper on this topic, which forms part of the University of Cambridge Faculty of Law Legal Studies Research Paper Series, and can be accessed at:

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3768856](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3768856)

This paper details new empirical research examining the extent of capital concentration and common ownership of public companies within the ASX 20 and ASX 50, the increasing degree of institutional ownership, and the divergence between registered as opposed to beneficial ownership. Based on this empirical analysis, a number of the consequences and policy implications which flow therefrom are then discussed in section 5 of the paper.

In attempting to specifically address the policy responses which may follow from this data for the purposes of the inquiry, one important step in the Australian context is to seek further information and/or improve disclosure across two areas in particular. The first area that I would suggest we need to know more about is in relation to beneficial share ownership within Australian publicly listed companies. For example, a registry which systematically provides this information would be useful to have in Australia, given that such information can increase the effectiveness of subsequent policy and regulatory strategies. Indeed, understanding the parameters of beneficial share ownership (e.g. in terms of ultimate identities, geographic locations, degree of controlling interest etc.) will assist our understanding of the key regulatory challenges arising from the increase in common share ownership observed.

The second area that I would suggest we need to know more about (complete datasets where possible) is substantial shareholder activism. That is, do shareholders possessing the voting rights to 5% or more of a company's shares impact governance in Australian listed companies? Further, if governance is impacted, by what mechanism(s) does this occur? My attached paper draws upon various disparate data sources in attempting to answer these questions, but ultimately my analysis is restricted by the incomplete data in this area. Regarding the types of activism, it would be useful to know whether interventions occur e.g. through the exercise of voting power, shareholder resolutions, director appointments or removals, board spills, or by other means. This is discussed in section 5.2 of the paper. Drawing upon international experiences, the information asymmetries in these two areas may be addressed by disclosure regulation, listing rules, soft law, and/or a government-led registry or reports which aggregate and analyse share data.<sup>1</sup>

Ultimately, a better understanding of beneficial share ownership and the parameters of institutional shareholder activism will also serve to inform discussions around how to facilitate stewardship. In this regard, my paper makes the suggestion (in section 5.1) that Australia could benefit from the implementation of one, uniform federal stewardship code, or even consider mandatory disclosure requirements related to stewardship (as has been implemented in the EU<sup>2</sup>). Irrespective of whether hard or soft law is pursued in this regard, understanding the above two issues will help to make provisions more relevant: required disclosures can then be based upon what will be most useful for institutional investors and their beneficiaries.

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For example, in the UK context, the Office for National Statistics releases a biennial statistical ownership bulletin detailing the value of ordinary shares held in UK publicly listed companies by sector of beneficial ownership, with a geographical breakdown of shares owned outside the UK. The report methodology involves measuring beneficial share ownership using data from Euroclear (CREST), the electronic settlement system for equity share trading, and additional analysis of share registers.

<sup>2</sup> See e.g., Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector, Arts 2, 8-11, 20.

# Legal Studies Research Paper Series



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## The Dynamics of Shareholder Dispersion and Control in Australia

*Jenifer Varzaly*

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*Working Paper, January 2021*

## **The Dynamics of Shareholder Dispersion and Control in Australia**

**Jenifer Varzaly\***

### **Abstract**

There is ongoing academic interest in understanding share ownership and control dynamics in publicly listed companies, given the corporate governance and regulatory implications arising therefrom. This article presents a new dataset and analysis of shareholder information, focusing on the largest 50 publicly listed companies in Australia, filling a striking gap in the existing literature. Specifically, the following issues are addressed: 1. The level of institutional ownership within the largest 20 shareholders in each of the 50 companies; 2. The concentration of that ownership based on the percentage of issued capital owned by the largest three shareholders; 3. The control of that ownership, to determine whether ownership and control diverge; and 4. Where ownership and control diverge, substantial shareholding information is collected and analysed, in order to provide a more complete picture of share ownership patterns in the Australian context. The implications arising from the empirical findings are then discussed.

1. Introduction .....	2
2. The Relevant Literature.....	7
3. The New Data: Share Ownership Patterns .....	14
3.1. Methodology .....	14
3.2. Institutional Shareholdings .....	15
3.3. Ownership Concentration .....	15
Table 1 – Shareholder Concentration.....	17
3.4. Ownership Control .....	18
Table 2 - Largest Shareholders .....	19
4. Substantial Shareholdings: Relevant Law and Theory .....	22
4.1. Empirical Findings .....	24
Table 3 – Substantial Shareholders: Voting Rights .....	25
Table 4 – Recurring Substantial Shareholders .....	27
4.2. Revising the La Porta et al Analysis.....	28
5. Discussion and Implications.....	29
5.1. An Institutional Separation between Ownership and Control .....	33
5.2. A Monitoring and Governance Gap? .....	38
6. Conclusion .....	43

## 1. Introduction

Prevailing patterns of corporate share ownership have been described as the ‘most conspicuous’ of the numerous factors that help to shape the development of corporate law around the world.<sup>1</sup> Indeed, shareholding patterns are thought to impact numerous fundamental features of corporate law, independent of the jurisdiction studied, thus making it important to understand both ownership and control in practice.<sup>2</sup> From a functional perspective, share ownership patterns may affect the legal and regulatory strategies which are deployed in a given jurisdiction, and may complement the methods of enforcement of those laws, as well as the institutions which support such enforcement.<sup>3</sup> Moreover, share ownership patterns provide the framework for understanding the core interest groups which are likely to influence corporate governance practices and reform efforts.<sup>4</sup> Additionally, this information allows for an analysis of the likely sets of agency costs which arise from, for example, an identified separation between ownership and control to be highlighted in any ensuing policy and regulatory discussions.<sup>5</sup>

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<sup>1</sup> Reinier Kraakman, John Armour, Paul Davies, Luca Enriques, Henry B. Hansmann, Gérard Hertig, Klaus J Hopt, Hideki Kanda, Mariana Pargendler, Wolf-Georg Ringe, and Edward B Rock, *The Anatomy of Corporate Law* (3rd edn, Oxford University Press 2017), 25.

<sup>2</sup> *ibid*; Brian R Cheffins, ‘Corporate Governance Convergence: Lessons from Australia’ (2002-2003) 16 *Transnational Law* 13, 15.

<sup>3</sup> Reinier Kraakman, John Armour, Paul Davies, Luca Enriques, Henry B. Hansmann, Gérard Hertig, Klaus J Hopt, Hideki Kanda, Mariana Pargendler, Wolf-Georg Ringe, and Edward B Rock, *The Anatomy of Corporate Law* (3rd edn, Oxford University Press 2017), 25, 46; Jenifer Varzaly, ‘The Enforcement of Directors’ Duties in Australia: An Empirical Analysis’ (2015) 16 *European Business Organization Law Review* 281.

<sup>4</sup> Reinier Kraakman, John Armour, Paul Davies, Luca Enriques, Henry B. Hansmann, Gérard Hertig, Klaus J Hopt, Hideki Kanda, Mariana Pargendler, Wolf-Georg Ringe, and Edward B Rock, *The Anatomy of Corporate Law* (3rd edn, Oxford University Press 2017), 24-25.

<sup>5</sup> See e.g., Ronald J Gilson and Jeffrey N Gordon, ‘The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance’ (2013) 113 *Columbia Law Review* 86; Lucian A Bebchuk and Scott Hirst, ‘Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy’ (2019) 119 *Columbia Law Review* 2029; Lucian A. Bebchuk, Alma Cohen, and Scott Hirst, ‘The Agency Problems of Institutional Investors’ (2017) 31 *Journal of Economic Perspectives* 89; Ian Ramsay and Mark Blair, ‘Ownership Concentration, Institutional Investment and Corporate Governance: An Empirical Investigation of 100 Australian Companies’ (1993) 19 *Melbourne University Law Review* 153.

In the Australian context, prior research has found some (limited) support for the existence of the efficiency effect of share ownership structures.<sup>6</sup> That is, where law reform is instituted as a result of inefficiencies which arise from the dominant pattern of corporate ownership in place.<sup>7</sup> However, little evidence has been found to support the distributional effect of share ownership patterns, namely, where dominant interest groups are thought to exercise political power in order to influence law reform.<sup>8</sup> Rather, the common theme in Australian corporate law reform has been shareholder empowerment through broadly consultative legislative change.<sup>9</sup> As such, the dynamics of share ownership and control (especially in the case of institutional and substantial holdings) are important to understand, particularly given the ability of shareholders to harness the high level of existing shareholder powers and protections available.<sup>10</sup>

Further to this, institutions with large holdings can theoretically overcome collective action problems and reduce the coordination costs associated with monitoring, stewardship and enforcement activities. Certainly, where institutional investors are dominant, they have the ability to impact markets, improve the oversight of managers, as well as overall corporate performance.<sup>11</sup> This is because, at least notionally, institutional investors are able to take a more active approach than dispersed individual investors, and can thereby influence corporate governance practices.<sup>12</sup> This is bolstered by their ability to, in principle, coordinate their activities, reduce collective action problems, access relevant company information, and

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<sup>6</sup> Vivien Chen, Ian Ramsay, Michelle Welsh, 'Corporate Law Reform in Australia: An Analysis of the Influence of Ownership Structures and Corporate Failure' (2016) 44 Australian Business Law Review 18, 18-20, 23-32.

<sup>7</sup> *ibid*, 18-20. That is, corporate law may respond to the structure of share ownership in order to enhance overall welfare- termed an 'efficiency effect': Reinier Kraakman, John Armour, Paul Davies, Luca Enriques, Henry B. Hansmann, Gérard Hertig, Klaus J Hopt, Hideki Kanda, Mariana Pargendler, Wolf-Georg Ringe, and Edward B Rock, *The Anatomy of Corporate Law* (3rd edn, Oxford University Press 2017), 24, 25.

<sup>8</sup> *ibid*.

<sup>9</sup> Vivien Chen, Ian Ramsay, Michelle Welsh, 'Corporate Law Reform in Australia: An Analysis of the Influence of Ownership Structures and Corporate Failure' (2016) 44 Australian Business Law Review 18, 31, 33-34.

<sup>10</sup> *ibid*; Reinier Kraakman, John Armour, Paul Davies, Luca Enriques, Henry B. Hansmann, Gérard Hertig, Klaus J Hopt, Hideki Kanda, Mariana Pargendler, Wolf-Georg Ringe, and Edward B Rock, *The Anatomy of Corporate Law* (3rd edn, Oxford University Press 2017), 27.

<sup>11</sup> Stuart L Gillan, Laura T Starks, 'Corporate Governance, Corporate Ownership, and the Role of Institutional Investors: A Global Perspective' (2003) 13 Journal of Applied Finance 4; Lucian A Bebchuk and Scott Hirst, 'Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy' (2019) 119 Columbia Law Review 2029, 2042, 2043.

<sup>12</sup> Lucian A Bebchuk and Scott Hirst, 'Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy' (2019) 119 Columbia Law Review 2029; Ronald J Gilson and Jeffrey N Gordon, 'The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance' (2013) 113 Columbia Law Review 86; Stephen M Bainbridge, 'Director Primacy and Shareholder Disempowerment' (2006) 119 Harvard Law Review 1735.

exercise their voting power.<sup>13</sup> Given that they typically own large blocks of shares, and are incentivised to expertly monitor investments, they are theoretically better able to bring management to account for actions which are contrary to overall shareholder welfare, thus reducing agency costs.<sup>14</sup>

Yet, real world data on company shareholdings is required in order to understand the impact of share ownership patterns in practice. While there has been a focus on doing so from an Anglo-American perspective, such discussion is sparse within Australian academic literature, particularly subsequent to the increasing prominence of institutional investors. Although the Australian system of share ownership has been viewed as potentially significant from a comparative corporate governance perspective, it has been largely overlooked in cross-border literature.<sup>15</sup> Moreover, while Australia has been described as a ‘promising candidate for analysis’ given its Anglo-American orientation, the extent of shareholder dispersion is viewed as uncertain due to limitations in the existing data.<sup>16</sup> Further to this, academic calls have been made for additional empirical evidence on Australian share ownership patterns, given the clear gaps present in outmoded research, and the difficulty expressed in drawing strong conclusions therefrom.<sup>17</sup>

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<sup>13</sup> Brian Cheffins, ‘The Rise and Fall (?) of the Berle–Means Corporation’ (2019) 42 Seattle University Law Review 445, 447; Lucian A Bebchuk and Scott Hirst, ‘Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy’ (2019) 119 Columbia Law Review 2029, 2042; Stephen Mark Bainbridge, ‘Shareholder Activism and Institutional Investors’ (2005) UCLA School of Law, Law-Econ Research Paper No. 05-20, accessed at: <https://ssrn.com/abstract=796227>; OECD, Corporate Governance Factbook (2019), 17: However, it should be noted that ‘institutional investors vary considerably with respect to their ability and economic incentives to actually exercise their shareholder rights’.

<sup>14</sup> Theoretically, institutional activism can respond to the agency problem between directors and shareholders, see e.g., Marcel Kahan and Edward B Rock, ‘Hedge Funds in Corporate Governance and Corporate Control’ (2007) 155 University of Pennsylvania Law Review 1021, 1042; Ronald J Gilson and Jeffrey N Gordon, ‘The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance’ (2013) 113 Columbia Law Review 86; Lucian A Bebchuk and Scott Hirst, ‘Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy’ (2019) 119 Columbia Law Review 2029; Stuart L Gillan and Laura T Starks, ‘Corporate governance proposals and shareholder activism: the role of institutional investors’ (2000) 57 Journal of Financial Economics 275.

<sup>15</sup> Brian R Cheffins, ‘Corporate Governance Convergence: Lessons from Australia’ (2002-2003) 16 Transnational Law 13, 19.

<sup>16</sup> *ibid*, 19, 20-21; Olivia Dixon and Jennifer Hill, ‘The Protection of Investors and the Compensation for their Losses: Australia’ (2018) European Corporate Governance Institute (ECGI) - Law Working Paper No. 421/2018, 6-7; Richard Mitchell, Anthony O'Donnell, Ian Ramsay, Michelle Welsh, ‘Shareholder Protection in Australia: Institutional Configurations and Regulatory Evolution’ (2014) 38(1) Melbourne University Law Review 68; Vivien Chen, Ian Ramsay, Michelle Welsh, ‘Corporate Law Reform in Australia: An Analysis of the Influence of Ownership Structures and Corporate Failure’ (2016) 44 Australian Business Law Review 18, 22-23.

<sup>17</sup> *ibid*.

Indeed, an understanding of Australian share ownership patterns has important implications for corporate governance in general, as well as the associated regulatory and governance strategies which will thus complement the system.<sup>18</sup> This understanding is also of primary importance to ongoing debates regarding the role of institutional investors in corporate governance and stewardship, as well as the appropriate forms of regulation and policy guidance which are pursued.<sup>19</sup> Yet, a rigorous analysis of these core issues cannot proceed in the absence of empirical evidence of share ownership patterns, the prevalence of institutional investors, the types of institutions which are predominant, the extent to which shareholdings are concentrated/dispersed, and the degree of control exercised by significant shareholders.<sup>20</sup> Furthermore, outdated and varying results from previous shareholder studies are used to support many current discussions in Australian corporate law, making new empirical work all the more critical in this area.<sup>21</sup>

From a research design perspective, share ownership and control can be investigated within individual companies, as well as within share indices as a whole. Both levels of analysis are important, given the distinctive, interrelated implications which arise from the findings. At

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<sup>18</sup> Ian Ramsay and Mark Blair, 'Ownership Concentration, Institutional Investment and Corporate Governance: An Empirical Investigation of 100 Australian Companies' (1993) 19 Melbourne University Law Review 153, 189; Jenifer Varzaly, 'The Effectiveness of Disclosure Law Enforcement in Australia' (2020) Journal of Corporate Law Studies, DOI: 10.1080/14735970.2020.1791534, 42; Reinier Kraakman, John Armour, Paul Davies, Luca Enriques, Henry B. Hansmann, Gérard Hertig, Klaus J Hopt, Hideki Kanda, Mariana Pargendler, Wolf-Georg Ringe, and Edward B Rock, *The Anatomy of Corporate Law* (3rd edn, Oxford University Press 2017), 25; Ronald J Gilson and Jeffrey N Gordon, 'The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance' (2013) 113 Columbia Law Review 863, 868.

<sup>19</sup> Jennifer Hill, 'Good Activist/Bad Activist: The Rise of International Stewardship Codes' (2018) 41 Seattle University Law Review 497; Ian Ramsay and Mark Blair, 'Ownership Concentration, Institutional Investment and Corporate Governance: An Empirical Investigation of 100 Australian Companies' (1993) 19 Melbourne University Law Review 153, 189; Ronald J Gilson and Jeffrey N Gordon, 'The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance' (2013) 113 Columbia Law Review 863, 868; Lucian A Bebchuk and Scott Hirst, 'Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy' (2019) 119 Columbia Law Review 2029, 2043.

<sup>20</sup> Ian Ramsay and Mark Blair, 'Ownership Concentration, Institutional Investment and Corporate Governance: An Empirical Investigation of 100 Australian Companies' (1993) 19 Melbourne University Law Review 153, 189, 190.

<sup>21</sup> See e.g., Michael Jefferies, 'The Third Wave of Shareholder Influence and the Emergence of Informational Activism in Australia' (2019) 34 Australian Journal of Corporate Law 305; Tim Bowley and Jennifer Hill, 'Stewardship and Collective Action: The Australian Experience' (2020) European Corporate Governance Institute - Law Working Paper No. 491/2020, 4; Olivia Dixon and Jennifer Hill, 'The Protection of Investors and the Compensation for their Losses: Australia' (2018) European Corporate Governance Institute (ECGI) - Law Working Paper No. 421/2018, 6; Richard Mitchell, Anthony O'Donnell, Ian Ramsay, Michelle Welsh, 'Shareholder Protection in Australia: Institutional Configurations and Regulatory Evolution' (2014) 38(1) Melbourne University Law Review 68; Vivien Chen, Ian Ramsay, Michelle Welsh, 'Corporate Law Reform in Australia: An Analysis of the Influence of Ownership Structures and Corporate Failure' (2016) 44 Australian Business Law Review 18, 22-23; Alan Dignam, (2008) 'The Globalisation Of General Principle 7: Transforming The Market For Corporate Control in Australia and Europe?' (2008) 28 Legal Studies 96, 106.



the company level, it is firstly important to understand the degree of concentration of share ownership. The higher the level of concentration found, the greater the degree of control that shareholders within the company will be able to exercise, *ceteris paribus*. Equally, understanding whether share ownership is concentrated within a single dominant blockholder, a coalition of large shareholders, or some other identifiable pattern, will likewise be instructive from an agency cost perspective. Moreover, it is important to examine whether the largest shareholders are institutions as opposed to individuals. If institutions are prevalent, identifying the type of institution is relevant to understanding whether control rights are likely to be present, the possible degree of institutional involvement in governance, whether there is a long or short term investment horizon, and the type of beneficial owners involved.

At the share index level, analysing the degree of ownership concentration is important from the perspective of determining whether the same large shareholders have substantial holdings across companies within the index, as this may impact their incentives to engage in stewardship.<sup>22</sup> Additionally, the presence of recurring substantial shareholders across share indices may influence the focus of corporate law and governance reform,<sup>23</sup> and is likewise relevant to discussions around potential anticompetitive effects arising from horizontal shareholdings in competing companies within concentrated industries.<sup>24</sup> Thus, understanding these core issues within companies and across indices has significant implications from a corporate governance and an agency costs perspective, and is consequential for both policy and regulatory design.

In light of the foregoing, this research seeks to take an important step forward by providing much needed data to the existing body of knowledge, through an empirical analysis of shareholder ownership and control within the largest Australian publicly listed companies. To date, there are no studies which have undertaken an in-depth analysis of ownership and control within the 50 largest companies by market capitalisation in Australia utilising post 2004 data, despite the existence of dynamic changes to shareholder structures over this time.<sup>25</sup> As

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<sup>22</sup> Lucian A Bebchuk and Scott Hirst, 'Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy' (2019) 119 *Columbia Law Review* 2029.

<sup>23</sup> Reinier Kraakman, John Armour, Paul Davies, Luca Enriques, Henry B. Hansmann, Gérard Hertig, Klaus J Hopt, Hideki Kanda, Mariana Pargendler, Wolf-Georg Ringe, and Edward B Rock, *The Anatomy of Corporate Law* (3rd edn, Oxford University Press 2017), 25.

<sup>24</sup> Einer R Elhauge, 'How Horizontal Shareholding Harms Our Economy - And Why Antitrust Law Can Fix It' (2020) 10 *Harvard Business Law Review* 207.

<sup>25</sup> This has not been done since the seminal La Porta et al 1999 study: Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert Vishny, 'Corporate Ownership Around the World' (1999) 54 *Journal of Finance* 471; although, Lamba and Stapledon examine non-institutional blockholders and control, using data up

such, in order to address the clear gap within the current body of knowledge, a dataset of the largest 50 publicly listed companies within the Standard and Poor's (S&P)/Australian Securities Exchange (ASX) 20 index (ASX 20) and the S&P/ASX 50 index (ASX 50) has been constructed for the 2016 financial year period.<sup>26</sup> Drawing upon the dataset this research analyses the following issues: 1. The level of institutional ownership within the largest 20 shareholders in each of the ASX 20 and ASX 50 companies; 2. The concentration of that ownership based on the percentage of issued capital owned by the largest three shareholders; 3. The control of that ownership, to determine whether ownership and control diverge; and 4. Where ownership and control diverge, substantial shareholding information is collected and analysed, in order to provide a more complete picture of share ownership patterns in the Australian context. The implications arising from this research are then discussed, prior to concluding.

## **2. The Relevant Literature**

The seminal work of Adolf Berle and Gardiner Means in 1932, highlighted the predominance of widely held companies in the US context, where share ownership is dispersed among many shareholders, and managers ultimately control the company.<sup>27</sup> Their assertion that ownership was separate from control in the largest American corporations has had an 'enduring legacy',<sup>28</sup> both within and beyond the US. Similarly, a key implication arising from this claim, that the interests of managers diverge from those of shareholders, has informed an understanding of the structure of corporate law and regulation for the decades which have followed.<sup>29</sup> Indeed, without using the term 'agency' theory, Berle and Means indicate a clear awareness of the

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to and including 2004 in their 2014 article: Asjeet S Lamba and Geof Stapledon, 'What Motivates Block Share Ownership?' (2014) 11 *Corporate Ownership & Control* 349.

<sup>26</sup> This timeframe captures dynamic changes to shareholding structures post 2004 (the time of the last major empirical study of ownership and control in Australia), and post the sizable growth of the Australian pension market, the significant increase in managed funds, and the expanding influence of index funds both within Australia and globally. Future work plans to track the evolution of ownership data over time, which will include effects post 2016 as relevant data becomes available.

<sup>27</sup> Adolf A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property* (Macmillan 1933) (1932).

<sup>28</sup> Brian Cheffins, 'The Rise and Fall (?) of the Berle–Means Corporation' (2019) 42 *Seattle University Law Review* 445.

<sup>29</sup> Adolf A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property* (Macmillan 1933) (1932); George J Stigler and Claire Friedland, 'The Literature of Economics: The Case of Berle and Means' (1983) 26 *The Journal of Law and Economics* 237; Olivier Weinstein, 'Firm, Property and Governance: From Berle and Means to the Agency Theory, and Beyond' (2012) 2 *Accounting, Economics, and Law* 1; Michael Jensen and William Meckling, 1976, 'Theory of the firm: Managerial behavior, agency costs, and ownership structure' (1976) 3 *Journal of Financial Economics* 305.

possible divergence of interests between directors and managers, on one hand, and the ultimate owners of the company, on the other.<sup>30</sup>

Yet, there is little systematic evidence regarding such ownership patterns in practice, particularly from an international perspective.<sup>31</sup> With the aim of filling this gap, two of the most significant studies in this area were those conducted by La Porta, Lopez-de-Silanes, Shleifer, and Vishny (La Porta et al) in 1998 and 1999, respectively, which collect and analyse data on shareholding dispersion. The first of these studies, ‘Law and Finance’, examines first level ownership within the ten largest publicly traded firms across 49 countries, but does not look beyond this to find the ultimate owners from a control perspective.<sup>32</sup> For each country, the authors calculated the average and the median ownership stake of the three largest shareholders with the ten largest publicly listed companies.<sup>33</sup> The lowest mean and median degrees of ownership concentration, when grouped on a legal origin basis (English origin),<sup>34</sup> were found to exist in the UK (0.19 mean), US (0.20 mean), followed by Australia (0.28 mean).<sup>35</sup>

Following this, in their 1999 study, ‘Corporate Ownership Around the World’, La Porta et al collect and analyse data within the largest 20 companies by market capitalisation across 27 countries with developed economies.<sup>36</sup> This research analyses share ownership patterns with the goal of identifying the controlling shareholders within each of the companies studied, in order to provide a comparative perspective on the relevance of the Berle and Means description of corporations.<sup>37</sup> The authors use both a 20% and 10% metric of control to determine the existence of substantial shareholders, with the 20% metric indicating the degree of voting

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<sup>30</sup> Murray Weidenbaum and Mark Jensen, Introduction to *The Modern Corporation and Private Property* (2<sup>nd</sup> edn, Transaction Publishers 1991), ix.

<sup>31</sup> Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert Vishny, ‘Corporate Ownership Around the World’ (1999) 54 *Journal of Finance* 471, 472.

<sup>32</sup> Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert Vishny, ‘Law and Finance’ (1998) 106 *Journal of Political Economy* 1113.

<sup>33</sup> *ibid*, 1146.

<sup>34</sup> La Porta et al classified countries based on the legal origin of their commercial laws, due to the fact that they considered legal origin to be correlated with the level of shareholder protection found. Common law origin was defined as originating from the English common law: Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert Vishny, ‘Corporate Ownership Around the World’ (1999) 54 *Journal of Finance* 471, 479.

<sup>35</sup> Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert Vishny, ‘Law and Finance’ (1998) 106 *Journal of Political Economy* 1113, 1147.

<sup>36</sup> Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert Vishny, ‘Corporate Ownership Around the World’ (1999) 54 *Journal of Finance* 471.

<sup>37</sup> *ibid*, 472.

power needed to effectively control the company.<sup>38</sup> Where significant owners are found within companies, the authors seek to find out who they are. Their main contribution is thus to find the identities of the ultimate owners of capital and voting rights, where this is possible.<sup>39</sup>

The findings of this study show that the UK, Japan, the US, Australia, and Ireland, form the group of countries with the highest proportion of publicly listed companies without a 20% controlling shareholder in the study.<sup>40</sup> At the more restrictive 10% level of control, the UK, US, and Australia have the three highest rates of shareholder dispersion, although the UK and US figures are outliers in this regard.<sup>41</sup> More specifically, 13 of the 20 largest publicly listed companies in Australia did not have a 20% (or greater) controlling shareholder, and 11 of the 20 largest publicly listed companies in Australia did not have a 10% (or greater) shareholder, accordingly being classified as widely held at both levels of control.<sup>42</sup> The UK figures at the 20% and 10% levels of control were, respectively, 20 out of 20 and 18 out of 20, and the US figures were 16 out of 20 at both levels of control.<sup>43</sup>

In addition to these pivotal studies, while there is not a great deal of academic research regarding share ownership patterns which has been undertaken in the Australian context over the last 30 years, the relevant empirical studies are discussed as follows. First, Ramsay and Blair examine ownership concentration within a sample of 100 Australian companies in the All Ordinaries Index of the ASX.<sup>44</sup> The company data included was reported between June 1990 and November 1991, with the authors analysing the percentage of ordinary shares held by the largest five, ten, and twenty shareholders within each of the sample companies. However, this study focuses on ownership concentration as opposed to assessing control.

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<sup>38</sup> *ibid*, 477.

<sup>39</sup> *ibid*, 472.

<sup>40</sup> *ibid*, 492; John Armour and Jeffrey N Gordon, *The Berle-Means Corporation in the 21<sup>st</sup> Century*, Working Paper (2008), at <http://www.law.upenn.edu>, 8.

<sup>41</sup> Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert Vishny, 'Corporate Ownership Around the World' (1999) 54 *Journal of Finance* 471, 493; John Armour and Jeffrey N Gordon, *The Berle-Means Corporation in the 21<sup>st</sup> Century*, Working Paper (2008), at <http://www.law.upenn.edu>, 8. Australia was closely followed by Switzerland, Canada and Japan, with each of these countries having 10 out of the 20 largest publicly listed companies without a 10% (or greater) shareholder.

<sup>42</sup> *ibid*, 492-493.

<sup>43</sup> *ibid*.

<sup>44</sup> Ian Ramsay and Mark Blair, 'Ownership Concentration, Institutional Investment and Corporate Governance: An Empirical Investigation of 100 Australian Companies' (1993) 19 *Melbourne University Law Review* 153.

Second, Stapledon collects ownership control data at the firm level, seeking to determine the degree of substantial shareholders present in the All Ordinaries Index companies as at 31 August 1996.<sup>45</sup> He finds that 97% of the companies studied had at least one substantial shareholder, and regarding institutional ownership, institutions were the largest or only substantial shareholders in 34% of the companies studied.<sup>46</sup> Additionally, 45% of the companies had a non-institutional shareholder which controlled 20% or more of the ownership.<sup>47</sup> The identity of the non-institutional shareholders were predominantly families, entrepreneurs, overseas companies, and other Australian listed companies.

Third, Marshall, Anderson and Ramsay analyse empirical evidence regarding the sustained growth of managed funds in Australia, which indicates that the amount of equity under management through institutional investors has increased markedly over time.<sup>48</sup> In relation to the proportion of the equity of publicly listed companies which is held by institutional investors, the relevant empirical evidence indicates that the average shareholdings of institutional investors remained relatively constant over the 1990s, standing at around 37%.<sup>49</sup> Nonetheless, this study only considers ownership and does not seek to assess control.

Fourth, Lamba and Stapledon analyse ownership structures within the largest 200 publicly listed companies in Australia over the 2000-2004 period, finding that blockholders are prevalent in the firms studied.<sup>50</sup> While they focus on non-institutional investors and exclude foreign companies, their analysis indicates that over the study period, 39-45% of the sample firms have a 10% or greater shareholder, 22-30% have a 20% or larger shareholder, and 8-9% of the sample firms have a 50% or greater shareholder.<sup>51</sup> While this study contributes to the

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<sup>45</sup> G P Stapledon, 'Share Ownership and Control in Listed Australian Companies' (1999) 2 Corporate Governance International 17.

<sup>46</sup> *ibid.*

<sup>47</sup> *ibid.*

<sup>48</sup> Shelley Marshall, Kirsten Anderson and Ian Ramsay, 'Are Superannuation Funds and Other Institutional Investors in Australia Acting Like 'Universal Investors'?' (2009) University of Melbourne Legal Studies Research Paper 463 [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1570879](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1570879), accessed 3 December 2019, 5. Australian fund managers were found to be responsible for a sizable volume of the overall amount of money being managed in the market for equities. Such fund managers were overseeing around \$343 billion as of 2006, equating to 27.9% of the total assets being managed in the equities market.

<sup>49</sup> *ibid.*, 6. Although, this is not as significant as, for example, the UK equivalent holdings, which were measured at over 60% of the equities market in 1991: G Stapledon, *Institutional Shareholders and Corporate Governance* (Clarendon Press, Oxford 1996), 25.

<sup>50</sup> Asjeet S Lamba and Geof Stapledon, 'What Motivates Block Share Ownership?' (2014) 11 Corporate Ownership & Control 349.

<sup>51</sup> *ibid.*

literature regarding both blockholders and corporate control, the focus is on what motivates block ownership in relation to data regarding non-institutional investors. Further, while the authors collect data on 5% or larger blockholdings, they use a dummy variable in the analysis as opposed to measuring the precise shareholding of the largest shareholders in each of the companies studied.<sup>52</sup>

Fifth, research which analysed share ownership patterns in Australia from 2002-2011 evinced additional growth in institutional investors in the Australian market.<sup>53</sup> The research results indicated that small shareholders reduced their direct ownership of shares in Australian companies over the period of the study.<sup>54</sup> Notably, the ownership percentage reportedly declined from 15.1% to 9.9% over the period 2002-2011.<sup>55</sup> In contrast, the ownership percentage of institutional shareholders increased over the same period from 84.9% to 90.1%.<sup>56</sup> Additionally, institutional investors increased their shareholdings across the ASX 300.<sup>57</sup> For example, within the 20 largest companies by market capitalisation in Australia, institutional shareholders owned 74.8% of the issued capital, although they only comprised 2.9% of the number of company shareholders.<sup>58</sup> Correspondingly, retail investors owned 25.2% of issued capital and represented 97.1% of company shareholders.<sup>59</sup> Lastly, as company size by market capitalisation decreased, institutional investors held increasing percentages of company

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<sup>52</sup> *ibid*, 353. This is a deliberate choice by the authors because of the theory they test, namely, that a company is more likely to have a controlling blockholder when private benefits of control are large, as opposed to looking into the precise shareholding stake actually held.

<sup>53</sup> Dr Carole Comerton-Forde and Ian Matheson, ‘Analysis of Share Ownership in Australia from 2001-2011’ (February 2013) Australasian Investor Relations Association. The research utilised annual report data sourced from Morningstar regarding shareholders, to document the composition of share ownership in Australia during the period 2001-2011. The sample included companies in the S&P/ASX 300 Index during the period which reported details of their shareholders (around 60% of these companies). Individual holdings of more than 10,000 shares were categorised as institutional shareholders.

<sup>54</sup> Small shareholders were defined in the study as those holding less than 10,000 shares in any company. These results are consistent with the latest share ownership study released by the ASX: The Australian Share Ownership Study (2014), available at: <http://www.asx.com.au/documents/resources/australian-share-ownership-study-2014.pdf>, accessed 17 February, 2018. Noting that while Australia continues to have one of the highest share ownership levels in the world (36%), retail share ownership had declined by 2% over the study period (2012-2014).

<sup>55</sup> In an average company in any of the assessed index groupings. Dr Carole Comerton-Forde and Ian Matheson, ‘Analysis of Share Ownership in Australia from 2001-2011’ (February 2013) Australasian Investor Relations Association.

<sup>56</sup> *ibid*.

<sup>57</sup> *ibid*, these are the 300 largest listed companies measured by market capitalisation.

<sup>58</sup> *ibid*.

<sup>59</sup> *ibid*.

shares.<sup>60</sup> That is, in the ASX 51-100 companies studied, institutional investors owned 87.9% of issued shares and comprised 17.4% of shareholders.<sup>61</sup> Similarly, in the average ASX 201-300 company index, institutional ownership was reported at 92.2% of share capital and these institutions represented 29.7% of shareholders.<sup>62</sup> Again, while this is valuable information regarding institutional shareholdings and their changes over time, this study does not assess the control of these shareholdings.

Sixth, more recent corporate governance research conducted by the Organisation for Economic Co-operation and Development (OECD) provides indications of international share ownership patterns, stating that Australia is one of four countries which are generally classified as having substantially dispersed ownership structures.<sup>63</sup> Further, the OECD indicates that the majority of shares in the largest 200 publicly listed companies in Australia are held by institutions operating in the finance industry, that these holdings are usually dispersed, and seldom surpass 10%.<sup>64</sup> Given the summarised nature of the reports, no company level data or additional detail is provided on either point, necessitating further information and analysis, particularly from a control perspective.

Consequently, it can be observed from the results of numerous studies that Australia holds a notable international place from a shareholder dispersion perspective, which is worthy of further investigation.<sup>65</sup> Augmenting this analysis with more recent and detailed shareholder data is of particular relevance given that ownership structures are not static; by contrast, they are likely to change over time due to various political, legal and regulatory forces.<sup>66</sup> For example, the widely observed growth in institutional investor holdings is integral to any present-day discussion of shareholding patterns, and is likely to influence our understanding of the impact of such patterns.<sup>67</sup> Without a doubt, from an international perspective, institutional

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<sup>60</sup> *ibid.*

<sup>61</sup> *ibid.*

<sup>62</sup> *ibid.* As such, it can be seen that small shareholders constituted the vast majority of all shareholdings over the study period, but this ownership was comprised of a declining percentage of issued capital over this timeframe.

<sup>63</sup> OECD, *Corporate Governance Factbook* (2017), 11; OECD, *Corporate Governance Factbook* (2019), 17.

<sup>64</sup> OECD, *Corporate Governance Factbook* (2017), 12.

<sup>65</sup> Brian R Cheffins, 'Corporate Governance Convergence: Lessons from Australia' (2002-2003) 16 *Transnational Law* 13, 19, 22.

<sup>66</sup> Stuart L Gillan, Laura T Starks, 'Corporate Governance, Corporate Ownership, and the Role of Institutional Investors: A Global Perspective' (2003) 13 *Journal of Applied Finance* 4.

<sup>67</sup> OECD, *Corporate Governance Factbook* (2019), 17, 72, indicating that institutional investors are now the largest category of shareholders in publicly listed companies, holding 41% of global market capitalisation as at the end of 2017. These were found to primarily be profit-maximising intermediaries who invest on behalf of

investors are now prominent players in financial markets across countries and are crucial to the economic interests of corporate participants.<sup>68</sup> As Cheffins pertinently discusses, the original Berle-Means analysis of public companies should take into account the increasing prominence of institutional investors in order to maintain a contemporary relevance.<sup>69</sup> Indeed, the extent to which shareholder dispersion and managerial control are applicable in Australian companies has equally been deliberated upon in light of this change.<sup>70</sup> For example, if institutional shareholders are more prominent within publicly listed companies, at least theoretically, they may coordinate and collaborate in order to actively engage in corporate governance and bring executives to account.<sup>71</sup> Conversely, they might act as passive investors from a governance perspective, and may therefore have little impact on the performance and autonomy of management.<sup>72</sup> Thus, quantifying their degree of prevalence is an important component of understanding share ownership patterns in practice.

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their ultimate beneficiaries, with the most important institutions being mutual funds, pension funds, and insurance companies. See also Shelley Marshall, Kristen Anderson, and Ian Ramsay, 'Are Superannuation Funds and other Institutional Investors in Australia Acting Like 'Universal Investors'?' (2009) 51 *Journal of Industrial Relations* 439; Richard Mitchell, Anthony O'Donnell, Ian Ramsay, Michelle Welsh, 'Shareholder Protection in Australia: Institutional Configurations and Regulatory Evolution' (2014) 38 *Melbourne University Law Review* 68; Vivien Chen, Ian Ramsay, Michelle Welsh, 'Corporate Law Reform in Australia: An Analysis of the Influence of Ownership Structures and Corporate Failure' (2016) 44 *Australian Business Law Review* 18 in the Australian context.

<sup>68</sup> Stuart L Gillan, Laura T Starks, 'Corporate Governance, Corporate Ownership, and the Role of Institutional Investors: A Global Perspective' (2003) 13 *Journal of Applied Finance* 4; OECD, *Corporate Governance Factbook* (2019), 17.

<sup>69</sup> Brian Cheffins, 'The Rise and Fall (?) of the Berle–Means Corporation' (2019) 42 *Seattle University Law Review* 445, 447.

<sup>70</sup> Richard Mitchell, Anthony O'Donnell, Ian Ramsay, Michelle Welsh, 'Shareholder Protection in Australia: Institutional Configurations and Regulatory Evolution' (2014) 38(1) *Melbourne University Law Review* 68; Vivien Chen, Ian Ramsay, Michelle Welsh, 'Corporate Law Reform in Australia: An Analysis of the Influence of Ownership Structures and Corporate Failure' (2016) 44 *Australian Business Law Review* 18, 22-23.

<sup>71</sup> Brian Cheffins, 'The Rise and Fall (?) of the Berle–Means Corporation' (2019) 42 *Seattle University Law Review* 445, 447.

<sup>72</sup> *ibid*; Richard Mitchell, Anthony O'Donnell, Ian Ramsay, Michelle Welsh, 'Shareholder Protection in Australia: Institutional Configurations and Regulatory Evolution' (2014) 38 *Melbourne University Law Review* 68; Vivien Chen, Ian Ramsay, Michelle Welsh, 'Corporate Law Reform in Australia: An Analysis of the Influence of Ownership Structures and Corporate Failure' (2016) 44 *Australian Business Law Review* 18.



### 3. The New Data: Share Ownership Patterns

#### 3.1. Methodology

Data was collected in relation to the 50 largest publicly listed companies in Australia, which comprise the ASX 20 and the ASX 50.<sup>73</sup> These two indices are composed and ranked by reference to float-adjusted market capitalisation, and include the most prominent and liquid stocks in Australia.<sup>74</sup> Within each of the 50 companies, shareholding information was analysed in relation to the 20 largest shareholders. Beyond this, information was sought regarding the existence, identity, and ownership levels of any substantial shareholders (possessing 5% or greater voting power) within each of the companies. This information was obtained from each of the ASX 50 individual company annual reports for the 2016 financial year period.<sup>75</sup>

While all of the ASX 20 companies also feature in the ASX 50, distinct observations are made regarding each index in the discussion which follows, particularly where the analysis results in interesting and differentiated results across the indices. Maintaining this distinction is additionally thought to be important given that the ASX 20 alone comprises 49.14% of the total Australian equities market, thus warranting a detailed analysis.<sup>76</sup> Looking beyond the ASX 20 to the ASX 50, the 50 largest companies comprise 64.53% of the total equities market,<sup>77</sup> hence the overarching analysis covers a significant proportion of Australian share ownership patterns and their associated control.

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<sup>73</sup> Data was taken from the ASX website in relation to the ASX 20 and ASX 50 indices: <http://www.asx.com.au/products/capitalisation-indices.htm>, and the ASX 20 and ASX 50 individual company annual reports for the 2016 financial year were accessed in order to obtain specific data regarding the largest shareholders from each company. Historical data was accessed through: <https://www.asx20list.com/> and <https://www.asx50list.com/>.

<sup>74</sup> Float adjusting an index means that market capitalisation is calculated by multiplying the share price by the number of shares readily available to the public.

<sup>75</sup> From 1 July 2015 to 30 June 2016.

<sup>76</sup> This figure was calculated as at September 2020 using ASX historical market statistics regarding total Australian equity by market capitalisation: <https://www2.asx.com.au/about/market-statistics/historical-market-statistics#end> and ASX 20 market capitalisation data accessed from S&P Global: <https://www.spglobal.com/spdji/en/indices/equity/sp-asx-20/#data>.

<sup>77</sup> This figure was calculated as at September 2020 using ASX historical market statistics regarding total Australian equity by market capitalisation: <https://www2.asx.com.au/about/market-statistics/historical-market-statistics#end> and ASX 50 market capitalisation data accessed from S&P Global: <https://www.spglobal.com/spdji/en/indices/equity/sp-asx-50/#data>.

### **3.2. Institutional Shareholdings**

The dataset of shareholding information indicates that 17 of the ASX 20 companies have only institutional shareholders within their group of 20 largest shareholders. That is, in these 17 companies, institutional investors comprise 100% of the 20 largest shareholders. Within the remaining three ASX 20 companies, each of these companies has one non-institutional shareholder and 19 institutional shareholders, which comprise their group of 20 largest shareholders. That is to say, within the entire ASX 20, when examining the groups of 20 largest shareholders, non-institutional ownership is (in totality) 0.75%. Put another way, institutional ownership comprises 99.25% of the ASX 20 groups of 20 largest shareholders. Examining the ASX 50 as a whole, non-institutional ownership is (in totality) 2.2% across the ASX 50 groups of 20 largest shareholders. That is, 97.8% of the ASX 50 groups of 20 largest shareholders are institutions.<sup>78</sup> This dominance across both indices is consistent with OECD findings which indicate that institutional investors are now the largest category of shareholders in publicly listed companies globally.<sup>79</sup> However, as a second step in the analysis, it is useful to look beyond the prevalence of institutional ownership in order to determine the degree of ownership which is held by the largest institutional shareholders as a percentage of issued capital. That is, to determine the extent to which ownership is concentrated within the ASX 20 and ASX 50.

### **3.3. Ownership Concentration**

In order to evaluate the concentration of institutional shareholdings, the ownership percentages of the three largest shareholders within each company were identified, as a proportion of overall issued capital. The concentration ratio, an empirical method for measuring shareholder concentration within a company, was calculated for each of the ASX 50 companies (based on

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<sup>78</sup> Here, the term institution is used to denote all corporate shareholders, that is, shareholders who are not natural persons. In some instances, it was possible to look beyond corporate holdings, e.g. where a corporation was set-up to act as a trustee company for a discretionary trust, which was created on behalf of a family or prominent individual investor. If the investigation uncovered a family or individual standing behind the corporate investment vehicle, the shareholder was categorised as non-institutional. Where no background information was available, and a corporation was listed as the shareowner, the shareholder was categorised as institutional. This issue regarding opacity of shareholder identity was only encountered in the ASX 50 analysis; within the ASX 20, it was clear that all institutional shareholders were traditional corporate investors.

<sup>79</sup> Corporate Governance Factbook (2019), 17, 72, holding 41% of global market capitalisation as at the end of 2017.

the three largest shareholders) in order to determine the degree of concentration/dispersion of these holdings.<sup>80</sup>

The results in table 1 below indicate that the shareholder concentration within the ASX 20 is as follows: eight of the 20 companies have concentration ratios of between 50% and 80% of issued shares, with the highest being 70.65%. This indicates a moderate degree of shareholder concentration. The remaining 12 companies have three-shareholder concentration ratios of below 50%, with the lowest of these being 33.73% and the highest being 47.58%, indicating a low degree of concentration. No companies are above the 80% threshold, which is considered to be a high level of shareholder concentration. Additionally, the mean level of concentration across the ASX 20 is 47.53%. Looking beyond the ASX 20 to the ASX 50 as a whole, the highest degree of concentration is 74.99%, the lowest level is 22.76%, and the mean level of concentration across the ASX 50 is 53.87%. Thus, none of the ASX 50 companies have a high level of shareholder concentration (>80%). Overall, the mean level of shareholder concentration across the ASX 20 is considered to be low (<50%), and the mean level within the ASX 50 represents a moderate degree of concentration (50-80%).

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<sup>80</sup> The Herfindahl–Hirschman Index (HHI), was also calculated to cross-check the findings regarding concentration. The major difference between the HHI and the concentration ratio is that the HHI assigns more weight to very large shareholdings, because the shareholdings are squared prior to being summed. This method is best applied where the entire population of shareholders and associated holdings is known. Here, the results are correlated with each other across both methods.

**Table 1 – Shareholder Concentration**

Company	Concentration Ratio			Result (%):
ASX 20				
AMP Limited	28.72	11.32	6.95	46.99
ANZ Banking Group Limited	20.24	13.62	7.09	40.95
BHP Billiton Limited	19.92	14.15	6.43	40.5
Brambles Limited	39.53	18.83	12.29	70.65
Commonwealth Bank of Australia	17.22	10.65	5.86	33.73
CSL Limited	27.05	15.65	9.75	52.45
Insurance Australia Group Limited	18.26	12.96	8.13	39.35
Macquarie Group Limited	22.22	16.4	8.96	47.58
National Australia Bank Limited	21.14	12.73	5.18	39.05
QBE Insurance Group Limited	36.14	16.17	8.95	61.26
RIO Tinto Limited	28.72	16.94	5.7	51.36
Scentre Group Stapled	40.67	16.97	9.62	67.26
Suncorp Group Limited	20.92	18.1	8.46	47.48
Telstra Corporation Limited	15.29	13.47	7.78	36.54
Transurban Group Stapled	27.01	15.32	12.92	55.25
Wesfarmers Limited	17.01	12.89	6.34	36.24
Westfield Corporation Stapled	37.55	17.15	5.99	60.69
Westpac Banking Corporation	19.42	12.3	7.28	39
Woodside Petroleum Limited	23.81	13.28	13.04	50.13
Woolworths Limited	17.31	10.97	5.95	34.23
Remainder of ASX 50				
AGL	20.43	13.95	8.86	43.24
Ancor	31.75	23.54	11.7	66.99
APA Group Stapled	20.63	15.53	8.20	44.36
ASX Ltd	19.25	13.68	10.20	43.13
Aurizon Holdings Ltd	33.16	19.93	15.01	68.10
Coca-cola Amatil Limited	29.21	27.79	9.52	66.52
Computershare Limited	23.08	15.37	10.36	48.81
Caltex Australia Limited	40.02	21.11	7.14	68.27
Dexus Property Group Stapled	33.88	20.72	18.14	72.74
Goodman Group Stapled	31.17	29.46	12.28	72.91
GPT Group Stapled	41.16	15.97	13.38	70.51
Incitec Pivot Limited	40.22	17.51	6.99	64.72
James Hardie Industries PLC	33.85	24.54	14.38	72.77
Lendlease Group Stapled	21.50	16.06	12.39	49.95
Mirvac Group Stapled	36.60	20.88	13.87	71.35
Medibank Private Limited	18.08	14.57	7.19	39.84
Newcrest Mining Limited	38.52	22.18	14.29	74.99
Origin Energy Limited	21.94	17.74	8.99	48.67
Orica Limited	46.91	13.64	4.78	65.33
Oil Search Limited 10T	28.01	23.86	12.91	64.78
Qantas Airways Limited	26.78	18.36	12.96	58.10
Ramsay Health Care Limited	15.18	4.42	3.16	22.76
SOUTH32 Limited	20.48	16.8	6.92	44.2
Seek Limited	24.54	22.1	13.02	59.66
Stockland Stapled	30.48	18.39	14.82	63.69
Sonic Healthcare Limited	26.22	13.42	12.43	52.07
Santos Limited	20.28	12.83	11.01	44.12
Sydney Airport Forus Stapled	23.64	17.98	17.65	59.27
Treasury Wine Estates Limited	27.67	27.18	12.9	67.75
Vicinity Centres Stapled	27.71	15.77	9.76	53.24

### **3.4. Ownership Control**

It is moreover valuable to understand the composition of ASX 20 and ASX 50 company shareholders for the purpose of seeking to determine the degree of control, based on voting power, exercised by these shareholders. Further to this aim, the identities of the three largest shareholders of each of the 50 companies are displayed in table 2 and are discussed in additional detail below.

**Table 2 - Largest Shareholders**

Company	Largest Three Shareholders		
ASX 20			
AMP Limited	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	Citicorp Nominees Pty Ltd
ANZ Banking Group Limited	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
BHP Billiton Limited	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
Brambles Limited	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
Commonwealth Bank of Australia	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
CSL Limited	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
Insurance Australia Group Ltd	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
Macquarie Group Limited	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
National Australia Bank Limited	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	Citicorp Nominees Pty Ltd
QBE Insurance Group Limited	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	Citicorp Nominees Pty Ltd
RIO Tinto Limited	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	Citicorp Nominees Pty Ltd
Scentre Group Stapled	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	BNP Paribas Nominees Pty Ltd
Suncorp Group Limited	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
Telstra Corporation Limited	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
Transurban Group Stapled	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	BNP Paribas Nominees Pty Ltd
Wesfarmers Limited	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
Westfield Corporation Stapled	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	Citicorp Nominees Pty Ltd
Westpac Banking Corporation	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
Woodside Petroleum Limited	HSBC Custody Nominees Ltd	Shell Energy Holdings Aus Ltd	JP Morgan Nominees Ltd
Woolworths Limited	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
Remainder of ASX 50			
AGL	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
Amcor	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
APA Group Stapled	HSBC Custody Nominees Ltd	BNP Paribas Nominees Pty Ltd	JP Morgan Nominees Ltd
ASX Ltd	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	BNP Paribas Nominees Pty Ltd
Aurizon Holdings Ltd	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	Citicorp Nominees Pty Ltd
Coca-cola Amatil Limited	Coca-Cola Holdings Ltd	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd
Computershare Limited	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
Caltex Australia Limited	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	Citicorp Nominees Pty Ltd
Dexus Property Group Stapled	HSBC Custody Nominees Ltd	National Nominees Ltd	JP Morgan Nominees Ltd
Goodman Group Stapled	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
GPT Group Stapled	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	BNP Paribas Nominees Pty Ltd
Incitec Pivot Limited	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
James Hardie Industries PLC	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
Lendlease Group Stapled	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
Mirvac Group Stapled	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
Medibank Private Limited	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
Newcrest Mining Limited	HSBC Custody Nominees Ltd	National Nominees Ltd	JP Morgan Nominees Ltd
Origin Energy Limited	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
Orica Limited	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
Oil Search Limited 10T	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	AET Ltd
Qantas Airways Limited	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
Ramsay Health Care Limited	JP Morgan Nominees Ltd	AFIC Ltd	Sandhurst Trustees Ltd
SOUTH32 Limited	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
Seek Limited	JP Morgan Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
Stockland Stapled	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
Sonic Healthcare Limited	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
Santos Limited	HSBC Custody Nominees Ltd	Citicorp Nominees Pty Ltd	JP Morgan Nominees Ltd
Sydney Airport Forus	HSBC Custody Nominees Ltd	BNP Paribas Nominees Pty Ltd	JP Morgan Nominees Ltd
Treasury Wine Estates Limited	JP Morgan Nominees Ltd	HSBC Custody Nominees Ltd	National Nominees Ltd
Vicinity Centres Stapled	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd

In examining the information presented in table 2, the following points are evident: they are all institutions and, with the exception of five companies, they are all nominee/custodian shareholders. That is, 97% of the three largest shareholders within the 50 most significant companies in Australia are nominee/custodian shareholders. Moreover, the prevalence of the

same institutions across the ASX 20 and ASX 50 is striking: HSBC Custody Nominees (Australia) Ltd (HSBC Nominees) is one of the three largest shareholders in all but one company within the ASX 50 (98% of companies). Similarly, JP Morgan Nominees Australia Ltd (JP Morgan Nominees) is one of the largest three shareholders in all (100%) of the companies. In the same manner, National Nominees Ltd is one of the three largest shareholders in 32 companies within the ASX 50 (64%), Citicorp Nominees Pty Ltd is one of the three largest shareholders in 8 companies (16%), and BNP Paribas Nominees Pty Ltd is one of the three largest shareholders in 6 of the ASX 50 companies (12%). Indeed, when the above custodian and nominee institutions are taken out of the three largest shareholder analysis, Shell Energy Holdings Australia Ltd (Shell Energy), Coca-Cola Holdings (Overseas) Limited (Coca-Cola Holdings) (in its capacity as a holding company in relation to the Australian subsidiary), Australian Foundation Investment Company Ltd (AFIC), Australian Executor Trustees Limited (AET), and Sandhurst Trustees Limited (Sandhurst), are the only other companies which feature in the entire 50 company dataset. Certainly, what is striking is the prevalence of a small number of companies in this analysis, thus indicating a state of homogeneity regarding large shareholder identity across Australia's most significant companies (and industries) by market capitalisation.

Additionally, the finding regarding the dominance of nominee/custodian shareholders is deserving of further discussion and analysis. A nominee shareholder is an entity or individual contracted to hold shares in its own name on behalf of another person, the beneficiary, who is the registered share owner.<sup>81</sup> The nominee is therefore the legal owner and a member of the company in which the shares are held, with the shares being held on trust for the beneficiary.<sup>82</sup> While the nominee is entitled to vote as a registered member of the company, whether there is a general power to vote is subject to the terms of the appointment agreement.<sup>83</sup> That is, the

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<sup>81</sup> Geof P Stapledon, 'Institutional Investors: What are their responsibilities as shareholders?' in J Parkinson, A Gamble and G Kelly (eds), *The Political Economy of the Company*, (Hart Publishing 2000); M F Blue, 'Nominee Shareholding in Australia' (1975) 5 *Adelaide Law Review* 188, 188-189; Thomson Reuters Practical Law: (glossary): A beneficial owner of shares may decide to appoint a nominee because it does not want to have the shares registered in its own name, or it may be required to appoint a nominee under some circumstances. Nominee shareholders can be either individuals or corporations.

<sup>82</sup> *ibid.* Thus, the use of nominee/custodian shareholders signifies a structure under which shares are held on a bare trust for the client beneficial owners. Under a typical bare trust arrangement, the trustee (custodian/nominee) holds shares on behalf of the beneficial owner, without discretion over the property and with no active duties other than to transfer the property to the beneficiary as and when required.

<sup>83</sup> In the absence of an express term dealing with voting: 'It is doubtful whether, in general, the contract would be interpreted as authorizing or permitting such a power. This is supported by the fact that, in distinction to other trust relationships, it is the beneficiary who exercises the control over shares held by his nominee.' M F Blue, 'Nominee Shareholding in Australia' (1975) 5 *Adelaide Law Review* 188, 189.

nominee has the power to vote only as expressly directed by the beneficiary, as will be detailed within the contract of appointment, if this right exists at all.<sup>84</sup> Similarly, custodians are contracted to hold the shares of their clients, and to administer share accounts, collect dividends and interest payments, among other things. They are likewise not actively involved in company decision making. Custodians only process the proxy votes of the shares they hold on behalf of their clients. That is, they are instructed how to vote, if at all, depending on the interests of their clients. For example, in the case of financial intermediaries, broker firms commonly adopt the practice of creating a company to act as a nominee or custodian shareholder, in order to simplify the administrative requirements of buying and selling shareholdings on behalf of their clients.<sup>85</sup>

As such, it is difficult to engage in further analysis without understanding the underlying beneficial ownership of the shares. For example, it is incorrect to imply that because HSBC Nominees holds a 28.72% ownership stake in AMP Limited (AMP), it also has 28.72% of the votes. As stated above, as a custodian/nominee, HSBC Nominees only possess the proxy votes of their clients and is instructed how to vote. The real question relates to the composition/shareholdings of their clients, for example, these could be institutional investors, board members of AMP, or a small private company. Likewise, this shareholding could represent a large number of shareholders or a very small number of individuals. While there is a scarcity of relevant research in the Australian context, previous studies indicate that financial nominee companies in particular include superannuation funds, international institutional investors, and individual investors.<sup>86</sup> Reasons advanced for the increase in their prevalence and level of holdings include the significant growth of Australian superannuation funds and the greater level of international institutional investment which has occurred.<sup>87</sup> Numerous superannuation funds reportedly utilise nominee company services, and international institutional investors frequently use resident nominee/custodian companies to hold their shares and collect dividends/interest payments.<sup>88</sup>

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<sup>84</sup> *ibid.*

<sup>85</sup> Thomson Reuters Practical Law: (glossary).

<sup>86</sup> Ian Ramsay and Mark Blair, 'Ownership Concentration, Institutional Investment and Corporate Governance: An Empirical Investigation of 100 Australian Companies' (1993) 19 Melbourne University Law Review 153, 169.

<sup>87</sup> *ibid.*

<sup>88</sup> *ibid.*, 169, 185. One previous study which sought to identify the beneficial owners of financial nominee company holdings within the BHP Group Ltd found that superannuation funds were the major beneficial holders: P H Davies, 'Equity Finance and the Ownership of Shares' (1982) Australian Financial System Inquiry, Commissioned Studies and Selected Papers, Part 3. While superannuation funds were registered as the holders of 3.7% of BHP shares, their beneficial ownership was actually 12.9%. This is not publicly available



Despite the fact that it is not possible to obtain information regarding the identities of the beneficial owners of the shares, as this does not need to be disclosed by the nominees, it is possible to obtain information regarding substantial shareholdings. Where substantial shareholdings exist, these trigger disclosure requirements and thus must be released to the public within the annual report of a publicly listed company in Australia. Section 9 of the Corporations Act 2001 defines a 'substantial holding' within a body corporate to be 5% or more of the total number of votes attached to voting shares in the corporation. The aim of the provisions which deal with voting rights is to mandate the disclosure of significant shareholdings which may impact the corporation's affairs and strategic direction.<sup>89</sup> The relevant law and empirical findings are discussed below.

#### **4. Substantial Shareholdings: Relevant Law and Theory**

The requirement in Australia for publicly listed companies to disclose details of any substantial shareholdings is intended to ensure that investors are accurately informed about the identity, relevant ownership interests, and dealings of shareholders who may have the ability to influence or control the future direction of the company.<sup>90</sup> The relevant provision is set out in s671B of the Corporations Act 2001, which provides that a person must provide a substantial holding notice if, in relation to an entity that is a listed company or listed registered managed investment scheme, the person:

- (a) begins to have, or ceases to have, a substantial holding;
- (b) has a substantial holding and there is a movement of at least 1% in their holding; or
- (c) makes a takeover bid for securities of the listed entity.<sup>91</sup>

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information, Davies was able to ascertain this by contacting bank nominee companies and requesting further written information as part of the inquiry.

<sup>89</sup> ASIC Regulatory Guide 5, Relevant interests and substantial holding notices (November 2013), 7. Persons who, together with their associates, have relevant interests in voting shares representing 5% or more of the votes in a listed company, body or listed registered managed investment scheme, must disclose details of their relevant interest: Part 6C.1 Corporations Act 2001 (Cth).

<sup>90</sup> ASIC Regulatory Guide 5, Relevant interests and substantial holding notices (November 2013), 65.

<sup>91</sup> s671B(1), Corporations Act 2001; ASIC Regulatory Guide 5, Relevant interests and substantial holding notices (November 2013), 28. Further, it is possible for a person to be compelled to disclose details of any relevant interest in voting shares under s672A and 672B of the Corporations Act 2001. See ASIC Regulatory Guide 86, Tracing beneficial ownership (RG 86) (June 2007), 5: 'The purpose of the beneficial ownership tracing provisions is to promote a fully informed market and to provide a swift response to inquiries concerning the ultimate ownership of securities. The identity of the beneficial owners may give insights about the future of the entity or impact on its management. It also informs the market about whether the securities were acquired legally: see *Brunswick NL v Blossomtree Pty Ltd* (1992) 10 ACLC 658 at 667.'

ASX Listing Rule 4.10.4 further requires that information about substantial holdings is included in listed company annual report documents.

The historical source of the substantial holding disclosure requirements is the UK Board of Trade's Committee on Company Law Amendment (Cohen Committee Report 1945) which considered the underlying aim of the requirement to provide public access to a company's register of shareholders in light of the increasing use of nominee shareholdings.<sup>92</sup> Relevantly, the Committee noted that the intention of such access is 'to enable a shareholder to know who his co-adventurers are and the public to find out who control[s] the business in which they are contemplating investment or to which they are considering granting credit.'<sup>93</sup> Similarly, the Australian Company Law Advisory Committee to the Standing Committee of Attorneys-General (Eggleston Committee Report), highlighted a comparable aim of such regulation prior to its ultimate introduction in Australia.<sup>94</sup>

More broadly, the objective of this disclosure requirement is one of financial market integrity, through facilitating investor access to information regarding the existence of shareholders who may substantially influence companies and transactions in which they are investing.<sup>95</sup> Specifically, the substantial holding provisions aim to ensure that shareholders, directors, and the market have timely access to appropriate information about the identities of controllers of substantial percentages of voting shares; and information regarding any agreements, conditions or restrictions that may affect the way in which shares are voted or sold, among other things.<sup>96</sup> The concept of a 'substantial holding' is pertinently defined in s9 of the Corporations Act 2001, as a relevant interest in voting shares or interests carrying 5% or more of the total votes attached to all voting shares or interests. This is to be interpreted in

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<sup>92</sup> Board of Trade (UK), Report of the Committee on Company Law Amendment (Cohen Committee), Cmd 6659 (1945), par 77-82; ASIC Regulatory Guide 5, Relevant interests and substantial holding notices (November 2013), 65.

<sup>93</sup> *ibid.*

<sup>94</sup> Second interim report of the Company Law Advisory Committee to the Standing Committee of Attorneys-General (Eggleston Committee Report), Parliamentary Paper No. 43 (1969), par 4; ASIC Regulatory Guide 5, Relevant interests and substantial holding notices (November 2013), 66: '[S]hareholders are entitled to know whether there are in existence, substantial holdings of shares which might enable a single individual or corporation, or a small group, to control the destinies of the company, and if such a situation does exist, to know who are the persons on whose exercise of voting power the future of the company may depend'.

<sup>95</sup> ASIC Regulatory Guide 5, Relevant interests and substantial holding notices (November 2013), 66. Including, for example, substantial holdings acquired through securities lending or prime brokerage agreements.

<sup>96</sup> *ibid.*, 65.

conjunction with s608(1) of the Corporations Act 2001, which sets out the basic relevant interest rule, stating that a person has a relevant interest in securities if they:

- (a) are the holder of the securities;
- (b) have power to exercise, or control the exercise of, a right to vote attached to the securities;
- or
- (c) have power to dispose of, or control the exercise of a power to dispose of, the securities.<sup>97</sup>

Given the key nature of this obligation, a person who completes a substantial holding notice is required to provide full, as opposed to minimal or technical, disclosure to ASIC.<sup>98</sup> Relevantly, this should comprise details of ownership movements (of 1% or greater), as well as detailed information regarding the source and nature of any relevant interest or association relating to the shareholder's disclosed degree of voting power.<sup>99</sup>

#### **4.1. Empirical Findings**

Given that ASX Listing Rule 4.10.4 requires substantial holdings to be disclosed in the annual report of a publicly listed company, the annual reports of each of the ASX 20 and ASX 50 companies were analysed in order to find substantial shareholder information. Within the ASX 20, ten out of the 20 companies (50%) had at least one substantial shareholder. Within the ASX 50, by contrast, 38 out of the 50 companies (76%) had at least one substantial shareholder. It was additionally instructive to discern the identities and percentage shareholdings of each of the disclosed substantial shareholders, in order to determine both ownership and control. The findings across both indices are set out in table 3 below.

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<sup>97</sup> An expanded notion of power or control is set out in s608(2) of the Corporations Act 2001. Here, it is still necessary to analyse whether any power exists 'to exercise some true or actual measure of control' over voting or disposal: *Re Kornblums Furnishings Ltd* (1981) 6 ACLR 25 at 36; *Edensor Nominees Pty Ltd v ASIC* (2002) 41 ACSR 325 at [33]; ASIC Regulatory Guide 5, Relevant interests and substantial holding notices (November 2013), 11-12.

<sup>98</sup> ASIC Regulatory Guide 5, Relevant interests and substantial holding notices (November 2013), 65. Relevantly, under s671C(1) of the Corporations Act 2001, civil liability may ensue where s671B is contravened: A person who contravenes section 671B is liable to compensate a person for any loss or damage the person suffers because of the contravention.

<sup>99</sup> *ibid.*

**Table 3 – Substantial Shareholders: Voting Rights**

Company	Institutional?	5-10%	10-15%	>15%	Total
<b>ASX 20</b>					
Brambles Ltd	Yes	2	0	0	2
CSL Ltd	Yes	1	0	0	1
Macquarie Group Ltd	Yes	1	0	0	1
Rio Tinto Ltd	Yes	0	1	0	1
Scentre Group Stapled	Yes	3	0	0	3
Suncorp Group Ltd	Yes	2	0	0	2
Transurban Group Stapled	Yes	1	1	0	2
Westfield Corporation Stapled	Both	4	0	0	4
Woodside Petroleum Ltd	Yes	0	1	0	1
Woolworths Ltd	Yes	1	0	0	1
	<b>Total</b>	<b>15</b>	<b>3</b>	<b>0</b>	<b>18</b>
<b>Remainder of ASX 50</b>					
Company	Institutional?	5-10%	10-15%	>15%	Total
Amcor	Yes		1		1
APA Group Stapled	Yes		1		1
ASX Ltd	Yes	2			2
Aurizon Holdings Ltd	Yes	5			5
Coca-cola Amatil Limited	Yes			1	1
Computershare Limited	No	1			1
Caltex Australia Limited	Yes	3			3
Dexus Property Group Stapled	Yes	4			4
Goodman Group Stapled	Yes	4			4
GPT Group Stapled	Yes	3	1		4
Incitec Pivot Limited	Yes	1	1		2
James Hardie Industries PLC	Yes	4			4
Lendlease Group Stapled	Yes	2			2
Mirvac Group Stapled	Yes	5			5
Medibank Private Limited	Yes	1			1
Newcrest Mining Limited	Yes	2	1		3
Orica Limited	Yes	3	1		4
Oil Search Limited 10T	Yes	2	1		3
Qantas Airways Limited	Yes	4			4
Ramsay Health Care Limited	Yes			1	1
SOUTH32 Limited	Yes	2			2
Seek Limited	Yes	4			4
Stockland Stapled	Yes	3			3
Sonic Healthcare Limited	Yes	2			2
Santos Limited	Yes		1		1
Sydney Airport Forus	Yes	1		1	2
Treasury Wine Estates Limited	Yes	2			2
Vicinity Centres Stapled	Yes	3		1	4
	<b>Total</b>	<b>63</b>	<b>8</b>	<b>4</b>	<b>75</b>
	<b>ASX 50 (overall)</b>	<b>78</b>	<b>11</b>	<b>4</b>	<b>93</b>

As can be seen from the table, there are a total of 18 substantial shareholders across the ten ASX 20 companies which reported substantial shareholders. Fifteen of these shareholders had a relevant interest of between 5% and 10% of the voting rights conferred by ordinary shares within the company, three of these shareholders had holdings at the 10-15% level, and none had shareholdings with total votes of over 15%. From a shareholder identity perspective, 17 of

the 18 parties are institutional shareholders, with only one non-institutional holder: a family holding of the shares/voting rights (9.5% of Westfield Corporation).

In terms of the identities/types of the 17 institutions which are substantial shareholders, these have been disaggregated as follows: First, the largest retail bank in Australia, the Commonwealth Bank of Australia, is a substantial shareholder in three of these companies (Brambles Ltd, CSL Ltd, and Transurban Group Stapled). Second, financial services institutions, MFS Investment Management on behalf of Sun Life Financial Inc. and Perpetual Limited are each substantial shareholders in one company (Brambles Ltd and Woolworths Ltd, respectively). Third, investment management/advisory institutions are substantial shareholders as follows: the BlackRock Group (in three companies: Scentre Group Stapled, Suncorp Group Ltd, and Westfield Corporation Stapled), the Vanguard Group (in two companies: Scentre Group Stapled and Westfield Corporation Stapled), State Street Corporation in one company (Westfield Corporation Stapled), and FIL Limited in one company (Suncorp Group Ltd). Fourth, the Australian pension/superannuation fund, UniSuper, is a substantial shareholder in two companies (Scentre Group Stapled and Transurban Group Stapled). Fifth, oil and gas company, Shell Energy Holdings Australia Limited, is a substantial shareholder in one company (Woodside Petroleum Ltd). Sixth, the Macquarie Group Limited is a substantial shareholder of its own shares. Lastly, Shining Prospect Pte Ltd, a Singapore-based entity owned by Chinalco, the state-backed Aluminium Corporation of China Limited, is a substantial shareholder in one company (Rio Tinto Ltd).

Within the ASX 50, in totality, there were 93 substantial shareholders across 38 of the 50 companies, with 78 (83.9%) having holdings of between 5% and 10% of the voting rights conferred by ordinary shares. At the 10-15% level of control, 11 substantial shareholders (11.8%) had holdings within these parameters, and only four (4.3%) had shareholdings with total votes of over 15%. Notably, in relation to the final category of substantial shareholders (>15%), one of these companies was Coca-Cola Holdings (holding 29.21%), in its capacity as a holding company in relation to the Australian subsidiary; another was the Paul Ramsay Foundation<sup>100</sup> (32.16%) in relation to Ramsay Health Care Limited. Taking these two shareholders out of the analysis, the only non-related institutional holdings possessing more than 15% control/voting rights across the entire ASX 50 are the Gandel Group Pty Ltd (a

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<sup>100</sup> Disclosed in full as the Paul Ramsay Foundation Pty Limited as trustee for the Paul Ramsay Foundation. Paul Ramsay was the Chairman and founder of Ramsay Health Care. The Paul Ramsay Foundation is the largest charity in Australia by assets. Its grants are funded from the dividends of its Ramsay Health Care shareholding.

financial services/investment firm as a shareholder of Vicinity Centres) with 17.25%, and UniSuper (a pension fund as a shareholder of Sydney Airport) with a 16.36% holding. In relation to shareholder identity, across the entire ASX 50, only two of the 93 identified substantial shareholders (2.2%) are non-institutional.

Of further interest, within the substantial shareholder dataset, is the presence of recurring substantial shareholders across both indices. That is to say, there are a number of prominent institutions with substantial holdings across numerous companies within the ASX 20 and ASX 50. These are displayed in table 4 below, along with their associated levels of control.

**Table 4 – Recurring Substantial Shareholders**

Shareholder	5-10%	10-15%	>15%	Total
UniSuper	3	2	1	5
Capital Group	3	1		4
BlackRock	16	1		17
Vanguard	9			9
State Street	5			5
FIL Limited	4			4
CommBank	5			5

As is apparent from the table, the Australian pension fund UniSuper and the Commonwealth Bank of Australia (CommBank), are the major Australian substantial shareholders which feature across the ASX 50. Beyond this, international investment management institutions (all American), whether directly or through their Australian companies (in the case of Vanguard), dominate the recurring substantial shareholder list, generally at the 5-10% level of control.

Taking this analysis a step further, in respect of the ‘Big Three’ index funds, BlackRock, Vanguard, and State Street, the results indicate that they collectively hold 31 (one third) of the 93 substantial shareholding positions across the ASX 50. Utilising the ASX sector classifications, it is apparent that of BlackRock’s 17 substantial shareholder positions, 14 of these companies are in the financial sector, four are in materials, one is in energy, one is in health care, and one is in consumer staples.<sup>101</sup> Vanguard has its substantial holdings in eight companies in the financial sector, and one company in industrials. In respect of State Street, all

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<sup>101</sup> The ASX utilises the Global Industry Classification Standard (GICS), as developed by S&P Dow Jones Indices and MSCI, in order to categorise companies into sectors and industries.

five of its substantial holdings are within companies in the financial sector. Therefore, within the ASX 50, the holdings of the 'Big Three' are predominantly in the financial sector, with 27 of the 31 identified substantial holdings (87.1%) held in financial companies. This analysis thus provides a preliminary empirical foray into the relevance of the common ownership discussion in Australia.

#### **4.2. Revising the La Porta et al Analysis**

Importantly, the foregoing substantial shareholder analysis also allows for a revision of the pivotal La Porta et al 1999 study, utilising updated data for the 20 largest Australian companies.<sup>102</sup> That is, as in the La Porta et al study, a significant contribution of this research is to determine the identities of the ultimate owners of share capital and voting rights, insofar as this is possible.<sup>103</sup> Strikingly, now all of the 20 largest publicly listed companies in Australia can be classified as widely held (versus 13 in the 1999 study of La Porta et al), which is defined as not having a shareholder with 20% or more of shares in the company. At the 10% threshold of control, 17 out of the 20 largest publicly listed companies can be classified as widely held (versus 11 in the La Porta et al study).

Indeed, even if the La Porta et al analysis is replicated across the entire ASX 50, and related institutions/holding companies are not reclassified or removed from the analysis,<sup>104</sup> then strikingly, 48 of the 50 largest publicly listed companies in Australian can be classified as widely held at the 20% threshold of control. At the 10% level of control, 35 of the 50 companies can be classified as widely held, indicating a high degree of shareholder dispersion across the entire ASX 50 at both levels of control.<sup>105</sup>

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<sup>102</sup> See Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert Vishny, 'Corporate Ownership Around the World' (1999) 54 *Journal of Finance* 471.

<sup>103</sup> *ibid*, 472.

<sup>104</sup> That is, in the case of Coca-Cola Holdings (Overseas) Limited (holding 29.21%), in its capacity as a holding company in relation to the Australian subsidiary, and the Paul Ramsay Foundation (holding 32.16%) in relation to Ramsay Health Care Limited. If these related holdings are reclassified, then the figures regarding the number of widely held publicly listed companies are 50 out of 50 at the 20% level of control, and 37 out of 50 at the 10% threshold of control.

<sup>105</sup> That is, a high level of shareholder dispersion exists across the largest 50 companies which comprise 64.53% of the total Australian equities market.

## 5. Discussion and Implications

The first notable point which arises from the results of this study, is that equity ownership within the largest publicly listed Australian companies does not reflect the patterns of dispersed share ownership which were originally observed by Berle and Means in the early 1930s.<sup>106</sup> This study thus adds to the existing body of literature which questions the extent to which such ownership patterns are of any continuing contemporary relevance, whether within the US itself or beyond.<sup>107</sup> At the time of writing, Berle and Means referred to the dispersed and predominantly non-institutional shareholder composition of publicly listed companies, with largely individual owners unable to effectively monitor management or overcome coordination costs.<sup>108</sup> The empirical results of this study clearly establish that the principal identity of the largest shareholders across the ASX 50 is institutional. Additionally, these institutions hold relatively concentrated parcels of shares, given that the three firm concentration ratio has a mean level of 47.53% across the ASX 20, and 53.87% across the ASX 50 as a whole.<sup>109</sup>

It is thus worth exploring why the substantial degree of institutional holdings are present within the largest Australian companies, irrespective of whether that ownership is separate from control. A functional reason may be due to the fact that Australia has the fastest growing pension (superannuation) market in the world and allocates the greatest proportion of assets to equity,<sup>110</sup> hence contributing to the increase in institutional shareholders observed.<sup>111</sup> Relevantly, a key aspect of the Australian pension system is the mandatory nature of employer contributions, known as the Superannuation Guarantee (SG). The SG was introduced in 1992,

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<sup>106</sup> Adolf A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property* (Macmillan 1933) (1932).

<sup>107</sup> See e.g., Ronald J Gilson and Jeffrey N Gordon, 'The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance' (2013) 113 Columbia Law Review 863; Brian Cheffins, 'The Rise and Fall (?) of the Berle–Means Corporation' (2019) 42 Seattle University Law Review 445; A. De La Cruz, A. Medina and Y. Tang 'Owners of the World's Listed Companies' (2019) OECD Capital Market Series, Paris, 18.

<sup>108</sup> Adolf A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property* (Macmillan 1933) (1932); Brian Cheffins, 'The Rise and Fall (?) of the Berle–Means Corporation' (2019) 42 Seattle University Law Review 445, 447.

<sup>109</sup> Comprising the largest three shareholders in each company within the dataset.

<sup>110</sup> Willis Towers Watson, Global Pension Assets Study (2019), 8, 11, 14 (reporting that 47% of assets are allocated to equity).

<sup>111</sup> Michael Jefferies, 'The Third Wave of Shareholder Influence and the Emergence of Informational Activism in Australia' (2019) 34 Australian Journal of Corporate Law 305; Jennifer Hill, 'Good Activist/Bad Activist: The Rise of International Stewardship Codes' (2018) 41 Seattle University Law Review 497, 499.



and currently requires a compulsory 9.5% contribution to be made by employers.<sup>112</sup> Since this time, Australia has grown to become the 4th largest pension market in the world,<sup>113</sup> thus facilitating high levels of capital market investment through pension funds,<sup>114</sup> and increasing institutional holdings as well as influence within investee companies.<sup>115</sup>

Looking beyond what appears to be predominantly concentrated institutional holdings, and focusing on ownership identity, it is readily apparent that the largest three shareholders across both indices are almost exclusively nominee and custodian shareholders. The research results thus confirm the increasing importance of nominee and custodian institutions, both from a frequency and a shareholding concentration perspective, which were previously analysed in Ramsay and Blair's 1993 article.<sup>116</sup> In that study, the two most prominent nominee companies (National Nominees and ANZ Nominees) were one of the five largest shareholders in 53 and 46 companies, respectively, within the 100 company sample, predominantly holding between 5% and 10% of shares within each company.<sup>117</sup> Here, the two most prominent nominee companies (HSBC Nominees and JP Morgan Nominees) were one of the three largest shareholders in 49 and 50 companies, respectively, within the ASX 50 (98% and 100% of companies). Further, the concentration of their holdings is markedly higher than indicated in previously reported findings regarding the most prominent nominee companies in Australia.

The first point to note in relation to this finding is that these institutions are the registered shareholders (record holders), as distinct from the beneficial shareholders which stand behind the identified institutions. As such, it is unlikely that these concentrated institutional holdings are equated with control, unless the exercise of voting rights is expressly

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<sup>112</sup> Additionally, the Australian system allows flexibility in choice, with individuals able to choose between various investment options with different risk profiles and investment strategies employed.

<sup>113</sup> Willis Towers Watson, *Global Pension Assets Study* (2019), 18. Over the last thirty years, the total value of assets managed by Australian pension funds has grown from A\$73 billion in 1989 to A\$2.89 trillion, as reported by the Australian Bureau of Statistics in June 2019, achieving a compound annual growth rate of 13%.

<sup>114</sup> Deloitte Analysis Report, 'Dynamics of the Australian Superannuation System' (2019). The investment of current superannuation funds in Australian shares comprises approximately 35% of the ASX total market capitalisation. If funds continue to hold the same proportions through asset allocations to equity, this is expected to increase to over 60% by 2038 and therefore dominate ASX holdings.

<sup>115</sup> Michael Legg, 'Shareholder Class Actions in Australia – the Perfect Storm?' (2008) 31 *UNSW Law Journal* 669, 674.

<sup>116</sup> Ian Ramsay and Mark Blair, 'Ownership Concentration, Institutional Investment and Corporate Governance: An Empirical Investigation of 100 Australian Companies' (1993) 19 *Melbourne University Law Review* 153.

<sup>117</sup> *ibid*, 184-5, 193.

included in the nominee appointment agreement, which does not typically occur.<sup>118</sup> Therefore, this information, on its own, does not allow for a clear picture of beneficial ownership to be determined. Indeed, previous research indicates that the use of nominee institutions thus underreports the true level of beneficial interest associated with institutional shareholders such as superannuation funds in Australian capital markets.<sup>119</sup> Thus, this shareholding dynamic is important for policy makers and regulators to understand, particularly in light of common ownership discussions.

Consequently, it is at this juncture of the discussion that the substantial shareholding requirements enshrined in s671B of the Corporations Act 2001 and ASX Listing Rule 4.10.4 are of central relevance in moving the analysis forward. Given that ‘substantial holding’ denotes a relevant interest in voting shares of 5% or more of the total votes attached to all share capital,<sup>120</sup> examining this data allows for an understanding the incidence, identity, and concentration level of substantial holdings across both indices. This information, in turn, allows for an analysis of the extent to which the above institutional pattern of concentrated holdings is truly reflective of control (as distinct from registered ownership).

In respect of the foregoing, where substantial shareholders are present, the empirical results indicate that these shareholders predominantly have holdings at the 5-10% level of control. Specifically, there are 18 substantial shareholders across ten of the ASX 20 companies, 15 of which (83.3%) have holdings of between 5% and 10%, and none hold over 15% of the voting rights within the company. Within the ASX 50 as a whole, there are 93 substantial shareholders across 38 companies, with 78 (83.9%) holding between 5% and 10% of the voting rights, and only four (4.3%) with shareholdings of over 15%. As such, the data indicates that

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<sup>118</sup> Geof P Stapledon, ‘Institutional Investors: What are their responsibilities as shareholders?’ in J Parkinson, A Gamble and G Kelly (eds), *The Political Economy of the Company*, (Hart Publishing 2000). The securities are held on trust by the nominee shareholder for the beneficial owner’s benefit, and the existence of control must be conferred (if at all) by contract. The usual structure involves the use of a bare trust, under which the custodian/nominee holds shares on behalf of the beneficial owner, without discretion over the shares and without active duties, except to transfer the shares to the beneficiary when requested.

<sup>119</sup> P H Davies, ‘Equity Finance and the Ownership of Shares’ (1982) Australian Financial System Inquiry, Commissioned Studies and Selected Papers, Part 3, 343; Ian Ramsay and Mark Blair, ‘Ownership Concentration, Institutional Investment and Corporate Governance: An Empirical Investigation of 100 Australian Companies’ (1993) 19 Melbourne University Law Review 153, 169, 185. Davies sought to identify the beneficial owners of financial nominee company holdings within the BHP Group Ltd and found that superannuation funds were the major beneficial holders. While superannuation funds were registered shareholders of 3.7% of BHP shares, their beneficial ownership amounted to 12.9%.

<sup>120</sup> The full definition of a ‘substantial holding’ is found in s9 of the Corporations Act 2001, as a relevant interest in voting shares or interests carrying 5% or more of the total votes attached to all voting shares or interests. This is to be read in conjunction with s608(1) of the Corporations Act 2001, which sets out the basic definition of a relevant interest in securities.

the largest substantial shareholdings are significantly less concentrated than the nominee institutional shareholdings. Indeed, this finding confirms that insufficient control rights (if indeed any) have been conferred upon nominee institutions to trigger the 5% substantial shareholder disclosure requirements. Notably, none of the identified substantial shareholders are nominee or custodian institutions. So while institutions are key, overall there is a clear separation between ownership and control.<sup>121</sup>

Further, the prevalence of investment management institutions and the recurring presence of the ‘Big Three’ index funds as substantial shareholders (holding one third of the substantial shareholding positions across the ASX 50) is worthy of further discussion. This finding is likely due to a combination of factors: First, the concept of a ‘substantial holding’ found in s671B of the Corporations Act 2001 (the Act),<sup>122</sup> is defined in s9 of the Act as a 5% or greater relevant interest in shares, with ‘relevant interest’ defined in s608(1) of the Act as including the power to vote or the power to dispose of the shares.<sup>123</sup> Given that investment management agreements generally grant the investment manager both of these powers, the interest in the shares will therefore fall within the s608 definition.<sup>124</sup> Second, investment managers will often hold shares in a given company (Company X) on behalf of numerous clients. In the case of an investment manager such as BlackRock or Vanguard, their holding in Company X will typically be on behalf of hundreds of different clients. As a result, the average investment management institution is far more likely than the average client (beneficial owner) to have a 5% or greater relevant interest in the shares of a publicly listed company.

With regard to shareholding concentration, the share ownership within the dataset is widely dispersed, given that 100% of the ASX 20 companies can be classified as widely held at the 20% level of control. Similarly, 17 of the ASX 20 companies can be classified as widely held at the 10% threshold of control. This can be compared with the La Porta et al 1999 study figures, which are 13 out of 20 and 11 out of 20, respectively, across both levels of control. Therefore, the current analysis clearly indicates that the degree of shareholder dispersion has

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<sup>121</sup> Institutions comprise 97.8% of the identified substantial shareholders across the ASX 50, and 97.8% of the largest 20 groups of shareholders across the ASX 50.

<sup>122</sup> s671B of the Corporations Act 2001 sets out the applicable disclosure obligations in relation to substantial holdings.

<sup>123</sup> s608(1)(b) and (c), Corporations Act 2001.

<sup>124</sup> Although, over the past few years, the largest superannuation funds have been retaining their voting power, as opposed to delegating it to the investment fund manager. Nonetheless, the investment manager will still have a relevant interest in the shares through having the power to dispose of the shares: s608(1)(c) Corporations Act 2001.

increased over time, taking into account the identities of the ultimate owners of share capital and voting rights, wherever this is possible.<sup>125</sup> These results thus have implications from an agency costs perspective, as well as a regulatory and governance perspective, given that such strategies are frequently deployed to reduce identified conflicts of interest.<sup>126</sup>

### **5.1. An Institutional Separation between Ownership and Control**

Correspondingly, the importance of the distinction between ownership and control, which is a central concept within both the Berle and Means and the La Porta et al analyses, has continuing relevance.<sup>127</sup> That is, the empirical findings indicate that a clear separation between ownership and control exists within the largest Australian publicly listed companies, albeit as between institutional shareholders and managers.<sup>128</sup> Further, this must be coupled with the separation which exists between institutional investors as registered shareholders, and the ultimate beneficial owners of the shares.<sup>129</sup> In this respect, there is an added layer (or chain) of separation between (beneficial) shareholders and managers, conceptually comprising an additional set (or sets) of agency costs.<sup>130</sup> These are known as the agency problems of institutional investors, which have been termed ‘the agency costs of agency capitalism’.<sup>131</sup>

Consequently, there are a number of regulatory and governance strategies which are relevant to addressing each of these two fundamental sets of agency costs, resulting from the identified shareholding patterns. In relation to the high level of shareholder dispersion and the

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<sup>125</sup> Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert Vishny, ‘Corporate Ownership Around the World’ (1999) 54 *Journal of Finance* 471, 472.

<sup>126</sup> Reinier Kraakman, John Armour, Paul Davies, Luca Enriques, Henry B. Hansmann, Gérard Hertig, Klaus J Hopt, Hideki Kanda, Mariana Pargendler, Wolf-Georg Ringe, and Edward B Rock, *The Anatomy of Corporate Law* (3rd edn, Oxford University Press 2017); Ian Ramsay and Mark Blair, ‘Ownership Concentration, Institutional Investment and Corporate Governance: An Empirical Investigation of 100 Australian Companies’ (1993) 19 *Melbourne University Law Review* 153, 155.

<sup>127</sup> Adolf A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property* (Macmillan 1933) (1932); Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert Vishny, ‘Corporate Ownership Around the World’ (1999) 54 *Journal of Finance* 471.

<sup>128</sup> Whereas the Berle and Means analysis identified the separation between diversified shareholders and managers: Adolf A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property* (Macmillan 1933) (1932).

<sup>129</sup> Ronald J Gilson and Jeffrey N Gordon, ‘The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance’ (2013) 113 *Columbia Law Review* 863.

<sup>130</sup> *ibid.*, 876-78. As such, agency relationships exist along two margins: between the registered owner and the beneficial owner; and between the registered owner and the managers of the investee company. These agency relationships are present whether there is a chain of institutions between beneficial and registered ownership, or just one institution which is interposed between the beneficial owners and managers.

<sup>131</sup> *ibid.*

clear separation between ownership and control, one expected focal point is the mitigation of agency costs at the shareholder vis-à-vis manager level (managerial agency costs). Managerial agency costs arise from the existence of a separation between shareholders as owners of the firm on one hand, and the employed executives or managers on the other, resulting in a divergence of interests.<sup>132</sup> Under these circumstances, the goal is to ensure the interests of the managers are aligned with the interests of the shareholders by means of either regulatory or governance strategies, or a combination of both.<sup>133</sup> From a practical perspective, the existence (or implementation) of strong shareholder protection and informational rights, as measures to reduce conflicts of interest and information asymmetries, are particularly important.<sup>134</sup> Certainly, the strategies of substantial shareholders will be related to the shareholder rights granted under legislation, insofar as they may either facilitate or constrain any planned engagement.

In Australia, the existing regulatory framework is viewed as enabling shareholder protection and engagement.<sup>135</sup> For example, shareholders with 5% or more of a company's shares (with voting rights) can requisition a general meeting, and directors must call the meeting within 21 days of receiving a valid request.<sup>136</sup> Additionally, shareholders with 5% or more of the votes may move a resolution at a general meeting,<sup>137</sup> supported by the power to request that a statement be provided to all company members regarding the proposed

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<sup>132</sup> Reinier Kraakman, John Armour, Paul Davies, Luca Enriques, Henry B. Hansmann, Gérard Hertig, Klaus J Hopt, Hideki Kanda, Mariana Pargendler, Wolf-Georg Ringe, and Edward B Rock, *The Anatomy of Corporate Law* (3rd edn, Oxford University Press 2017), 29; Michael C Jensen and William H Meckling, 'Theory of the Firm: Managerial Agency Costs and Ownership Structure' (1976) 3 *Journal of Financial Economics* 305, identifying the divergence between shareholders as principals and managers as agents, as constituting a fundamental aspect of the corporate form; EF Fama, 'Agency Problems and the Theory of the Firm' (1980) 88 *Journal of Political Economy* 288, 288-297; EF Fama and M Jensen, 'Separation of Ownership and Control' (1983) 26 *Journal of Law and Economics* 301.

<sup>133</sup> *ibid.*

<sup>134</sup> Other examples include directors' duties and shareholder litigation. Regarding the existence and enforcement of these rights in the Australian context see e.g., Jenifer Varzaly, 'The Effectiveness of Disclosure Law Enforcement in Australia' (2020) *Journal of Corporate Law Studies*, DOI: 10.1080/14735970.2020.1791534; Jenifer Varzaly, 'The Enforcement of Directors' Duties in Australia: An Empirical Analysis' (2015) 16 *European Business Organization Law Review* 281.

<sup>135</sup> Richard Mitchell, Anthony O'Donnell, Ian Ramsay, Michelle Welsh, 'Shareholder Protection in Australia: Institutional Configurations and Regulatory Evolution' (2014) 38(1) *Melbourne University Law Review* 68; Gilbert and Tobin Shareholder Activism Report (2018), 4.

<sup>136</sup> s249D, Corporations Act 2001 (Cth). Alternatively, shareholders with at least 5% of the votes may convene one themselves: s249F.

<sup>137</sup> s249N, Corporations Act 2001 (Cth).

resolution.<sup>138</sup> Importantly, this includes a resolution to appoint or remove director(s), despite anything in the company's constitution or any contrary agreement between the company and the director.<sup>139</sup> These are thus key legal strategies for both protecting and facilitating shareholder involvement with corporate governance, and reducing agency costs.<sup>140</sup> Relevantly, the minimum required thresholds for triggering these powers are equivalent to the minimum required voting power to satisfy the substantial shareholder provisions (5% or more). Thus, in the 38 ASX 50 companies in which there is at least one substantial shareholder, such decisions to intervene may notionally be impacted by these facilitative powers.

Further, Division 9 of the Corporations Act 2001 provides for what is known as the two strikes rule, which provides the lowest international threshold for shareholders to spill the board (requiring directors to stand for re-election).<sup>141</sup> This is viewed as a globally distinctive regime, providing opportunities for activist shareholders to pressure the board and effectively force a response to shareholder concerns which go beyond the scope of the spill resolution.<sup>142</sup> It applies where at least 25% of shareholders vote against the company's remuneration report for two consecutive years at the AGM.<sup>143</sup> Following this, shareholders can put forward a spill resolution which must pass by majority vote at the latter of the two AGMs.<sup>144</sup> Subsequent to this, all

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<sup>138</sup> s249P, Corporations Act 2001 (Cth), or in respect of any other matter which may be properly considered at the general meeting.

<sup>139</sup> s203D, Corporations Act 2001 (Cth), in relation to public companies. Regarding the appointment of directors, see s201G and s201E, Corporations Act 2001 (Cth). These sections require ordinary resolutions which need only a simple majority (more than 50% of votes cast in favour of the resolution) to pass.

<sup>140</sup> Reinier Kraakman, John Armour, Paul Davies, Luca Enriques, Henry B. Hansmann, Gérard Hertig, Klaus J Hopt, Hideki Kanda, Mariana Pargendler, Wolf-Georg Ringe, and Edward B Rock, *The Anatomy of Corporate Law* (3rd edn, Oxford University Press 2017), 32, 37. From a practical perspective, there were a total of 44 activist board seats gained in Australia in 2018, with 22 of these seats won through voting, and the remaining 22 won by settlement: Activist Insight and Schulte Roth & Zabel, 'The Activist Investing Annual Review 2019', 35. Additional examples of shareholder activism utilising appointment and removal rights include the appointment of directors in order to implement a share buy-back (the targeting of Intrepid Mines by Quantum Pacific Capital), and an (unsuccessful) attempt to remove and replace an entire board (Lone Star Value Investors unsuccessfully attempting to replace the board of Antares Energy with a proxy and media campaign), both occurred in 2014: See e.g., Michael Jefferies, 'The Third Wave of Shareholder Influence and the Emergence of Informational Activism in Australia' (2019) 34 Australian Journal of Corporate Law 305.

<sup>141</sup> Michael Jefferies, 'The Third Wave of Shareholder Influence and the Emergence of Informational Activism in Australia' (2019) 34 Australian Journal of Corporate Law 305. See s250V Corporations Act 2001 (Cth).

<sup>142</sup> Gilbert and Tobin Shareholder Activism Report (2018), 10; Michael Jefferies, 'The Third Wave of Shareholder Influence and the Emergence of Informational Activism in Australia' (2019) 34 Australian Journal of Corporate Law 305; Martin Bugeja, Raymond da Silva Rosa, Yaowen Shan, Terry Stirling Walter, and David Yermack, 'Life after a Shareholder Pay 'Strike': Consequences for ASX-Listed Firms' (2016) CIPR Paper No. 130/2016: <https://ssrn.com/abstract=2876925>.

<sup>143</sup> See, Division 9, s250U Corporations Act 2001 (Cth).

<sup>144</sup> s250V Corporations Act 2001 (Cth).

company directors will cease to hold office and fresh elections will occur at a special meeting of members (the spill meeting), to be held within 90 days.<sup>145</sup> While few board spills have occurred in practice, these provisions have been found to result in reduced CEO pay and turnover, with likely reputational sanctions following therefrom.<sup>146</sup>

Regarding the agency costs of institutional investors, these arise because of the divergence of interests between investment fund managers and beneficial owners.<sup>147</sup> This is because registered institutional shareholders (such as superannuation funds and managed funds) invest the money of their beneficial shareholders, and not their own.<sup>148</sup> This raises questions relating to stewardship decisions, such as whether these investors are likely to make the same decisions as they would make if they were investing their own capital, or whether they are incentivised to take a divergent, suboptimal approach.<sup>149</sup>

From a definitional perspective, stewardship can be described as comprising activities which institutions take in order to increase the value of the companies they invest in.<sup>150</sup> This includes monitoring corporate managers, taking informed voting positions, and direct

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<sup>145</sup> s250V, s250W Corporations Act 2001 (Cth).

<sup>146</sup> Martin Bugeja, Raymond da Silva Rosa, Yaowen Shan, Terry Stirling Walter, and David Yermack, 'Life after a Shareholder Pay 'Strike': Consequences for ASX-Listed Firms' (2016) CIPR Paper No. 130/2016: <https://ssrn.com/abstract=2876925>; as at August 2016, the research findings included 306 first strikes, 51 second strikes, and 12 board spills, resulting in 8 director dismissals or resignations thereafter. Moreover, a recent example of an attempt to utilise the board spill provisions was in relation to Harvey Norman Holdings Ltd in November, 2019. The company received two consecutive strikes against its remuneration report, but avoided a board spill after institutional shareholders declined to support the spill resolution. See e.g., <https://www.afr.com/companies/retail/harvey-norman-s-australian-sales-return-to-growth-20191126-p53ed8>. While 50.6% and 47.5% of shareholders voted against the remuneration report, in two consecutive AGMs, only 11.1% of shareholders supported the spill resolution. Institutional shareholders reportedly followed the advice of proxy advisers Ownership Matters and CGI Glass Lewis in voting against the remuneration report, however, they did not support spilling the entire Harvey Norman board.

<sup>147</sup> Lucian A. Bebchuk, Alma Cohen, and Scott Hirst, 'The Agency Problems of Institutional Investors' (2017) 31 *Journal of Economic Perspectives* 89, 90.

<sup>148</sup> Geof P Stapledon, 'Institutional Investors: What are their responsibilities as shareholders?' in J Parkinson, A Gamble and G Kelly (eds), *The Political Economy of the Company*, (Hart Publishing 2000). In Australia, there may be a number of institutions interposed between the beneficial owners and registered shareholder, depending on the institution type. For example, in the case of AustralianSuper (the largest Australian superannuation and pension fund), in-house fund managers are used to manage equity investments in a variety of companies, which are registered in the name of their custodian, JP Morgan Nominees Australia Ltd (the registered shareholder). However, in the case of smaller superannuation funds, external fund managers are generally used to manage their equity investments, resulting in a chain of intermediary institutions. In this instance, the fund managers play a key role where the fund management agreement provides them with the power to exercise the voting rights attached to the shares (as is commonly the case).

<sup>149</sup> Lucian A. Bebchuk, Alma Cohen, and Scott Hirst, 'The Agency Problems of Institutional Investors' (2017) 31 *Journal of Economic Perspectives* 89, 93, 107.

<sup>150</sup> Lucian A Bebchuk and Scott Hirst, 'Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy' (2019) 119 *Columbia Law Review* 2029, 2044-45.

engagement, such as nominating directors for election or proposing shareholder resolutions.<sup>151</sup> In general, stewardship may be conceptualised as falling within two broad decision making categories: the amount which will be spent on stewardship; and the form of active engagement which will be pursued.<sup>152</sup>

In the Australian context, there are two key industry body stewardship codes:<sup>153</sup> the Australian Council of Superannuation Investors (ACSI) published the Australian Asset Owner Stewardship Code in May 2018 (the ACSI code);<sup>154</sup> and the Financial Services Council (FSC) published FSC Standard No 23: Principles of Internal Governance and Asset Stewardship in July 2017 (the FSC code).<sup>155</sup> Perhaps surprisingly, given the prevalence of institutional investors, these codes were only introduced relatively recently in comparison to other advanced economies.<sup>156</sup> In terms of application, the ACSI code is voluntary, with signatories required to periodically disclose their compliance with the code, or indicate why there has been a departure from one or more of the principles.<sup>157</sup> While the FSC code is mandatory for FSC Members who are asset managers,<sup>158</sup> this simply requires non-prescriptive disclosure, which likewise utilises a ‘comply or explain’ approach.<sup>159</sup> Consequently, while the principles across both industry

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<sup>151</sup> Lucian A. Bebchuk, Alma Cohen, and Scott Hirst, ‘The Agency Problems of Institutional Investors’ (2017) 31 *Journal of Economic Perspectives* 89, 95. In Australia, however, there are limitations regarding shareholder resolutions; these cannot seek to ‘usurp the powers’ of directors, nor can shareholders propose advisory resolutions: see e.g. *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia* [2015] FCA 785; and (2016) 248 FCR 280 (appeal judgment).

<sup>152</sup> *ibid.* This may include voting, communication with corporate managers or other shareholders, proposals to amend the company constitution or propose a shareholder resolution, or direct enforcement regarding suspected corporate governance breaches, among other things.

<sup>153</sup> The ACSI and the FSC are the two leading industry bodies in relation to asset owners and asset managers.

<sup>154</sup> With reporting requirements beginning 1 July 2018.

<sup>155</sup> Effective 1 January 2018.

<sup>156</sup> For example, in the UK the Financial Reporting Council (FRC) published the first version of the UK Stewardship Code in July 2010. It has been suggested that this may in part be due to the fact that Australia did not experience significant adverse results post the global financial crisis, which precipitated heightened investor scrutiny in other jurisdictions: Tim Bowley and Jennifer Hill, ‘Stewardship and Collective Action: The Australian Experience’ (2020) European Corporate Governance Institute - Law Working Paper No. 491/2020, 5. On the prevalence of international stewardship codes see e.g., Lucian A Bebchuk and Scott Hirst, ‘Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy’ (2019) 119 *Columbia Law Review* 2029, 2045; Dionysia Katelouzou and Mathias Siems, ‘The Global Diffusion of Stewardship Codes’ (2020) European Corporate Governance Institute- Law Working Paper No. 526/2020, accessed at: <https://ssrn.com/abstract=3616798>.

<sup>157</sup> The Australian Council of Superannuation Investors (ACSI) Australian Asset Owner Stewardship Code (May 2018), 5, 6.

<sup>158</sup> Or undertakes asset management activities.

<sup>159</sup> That is, asset managers are required to either describe the policy underlying their practices or explain why they are not relevant to them. The comply or explain approach has been criticised on the basis that it generally results in a failure to take compliance seriously, and in the event of non-compliance a superficial justification is



codes usefully highlight important stewardship practices and focus on their disclosure; the non-binding nature of both codes weakens their effect in practice.<sup>160</sup>

This has more recently been raised by the ASCI itself, in a 2019 policy paper entitled ‘Towards Stronger Investment Stewardship’.<sup>161</sup> Within this publication, the ASCI proposes a review of the approach to stewardship in Australia, arguing for the implementation of a regulatory framework, comprising minimum stewardship standards and reporting requirements, applicable to all institutional investors.<sup>162</sup> Indeed, in light of the results of this study confirming the significance of institutional investors, it seems sensible for uniform stewardship regulation to be developed in consultation with key industry bodies. Such an approach seems particularly appropriate as a means to avoid the narrow application of non-binding, fragmented principles inherent in the current codes.<sup>163</sup>

## **5.2. A Monitoring and Governance Gap?**

In respect of governance powers, it must be remembered that the vast majority of the identified institutional shareholders are registered owners, not beneficial owners, meaning that the presence of agency costs may result in a monitoring and governance gap, irrespective of

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typically provided: Brian Cheffins, ‘The Stewardship Code’s Achilles’ Heel’ (2010) 73 *Modern Law Review* 985, 1013.

<sup>160</sup> This may be compared with recommendation 42 of the Independent Review of the Financial Reporting Council (FRC) in the UK, led by Sir John Kingman (the Kingman Review), the report of which was published in December 2018. The findings relevantly include that the UK Stewardship Code, ‘whilst a major and well-intentioned intervention, is not effective in practice’ and that a ‘fundamental shift in approach’ is required to ensure that the revised Code more clearly focuses on ‘outcomes and effectiveness, not on policy statements’, concluding that ‘If the Code remains simply a driver of boilerplate reporting, serious consideration should be given to its abolition’, 46.

<sup>161</sup> ACSI policy, *Towards Stronger Investment Stewardship* (May 2019), available at: <https://acsi.org.au/policies/towards-stronger-investment-stewardship/>, accessed 15/10/2020. The policy proposals form part of ACSI’s broader response to the 2019 report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry in Australia.

<sup>162</sup> The ACSI submitted that the ‘benefits of a stewardship code that applies to a more comprehensive array of stakeholders are tangible’. In their view, a stewardship code within an appropriate regulatory framework, applicable to all institutional investors should be introduced. The ACSI suggests that this could be undertaken in consultation with key stakeholders such as, for example, the Australian Prudential Regulation Authority (APRA), an independent statutory authority that supervises banking, insurance and superannuation institutions, and promotes financial system stability in Australia; and the Financial Services Council (FSC), a leading industry body which sets standards and develops policy in Australia’s financial services sector, in relation to the regulatory aspects of stewardship.

<sup>163</sup> While the existence of regulatory or code-based measures may be expected to improve aspects of this governance relationship, it is unlikely that they alone can modify institutional reticence, to the extent that this is problematic. See e.g., Lucian A Bebchuk, Alma Cohen, and Scott Hirst, ‘The Agency Problems of Institutional Investors’ (2017) 31 *Journal of Economic Perspectives* 89, 108: To the extent that there is a problem with the incentives of institutional investors to spend on stewardship, a change in investment manager incentives will likely be more successful than aspirational principles or well-intentioned guidelines.

shareholder powers granted under the Corporations Act 2001 and the existing stewardship framework.<sup>164</sup> That is, given the divergence between the commercial incentives of institutional record holders and the interests of beneficial share owners, institutional investors are likely to underinvest in stewardship and are more likely to defer to corporate managers.<sup>165</sup> This is because institutions which serve as investment intermediaries generally focus on improving financial returns or selling their holdings, in preference to actively monitoring managers and exercising governance rights, even when this would be advantageous for beneficial owners.<sup>166</sup>

Accordingly, the above approaches may be selected because the costs and effort associated with engagement are likely to be higher than the alternative of selling.<sup>167</sup> Thus, this additional set of agency costs may decrease the (expected) benefits resulting from the increase in shareholder concentration, and therefore act as an obstacle to corporate governance improvements within publicly listed corporations.<sup>168</sup> Conversely, where holdings are significant, selling may have the effect of further driving the price down and exacerbating losses, making this an unsatisfactory strategy in some instances.<sup>169</sup> Further, in the case of an

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<sup>164</sup> Ronald J Gilson and Jeffrey N Gordon, 'The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance' (2013) 113 Columbia Law Review 863, 896.

<sup>165</sup> Lucian A Bebchuk and Scott Hirst, 'Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy' (2019) 119 Columbia Law Review 2029, 2035, 2037; Lucian A Bebchuk, Alma Cohen, and Scott Hirst, 'The Agency Problems of Institutional Investors' (2017) 31 Journal of Economic Perspectives 89, 90; Ronald J Gilson and Jeffrey N Gordon, 'The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance' (2013) 113 Columbia Law Review 863, 906.

<sup>166</sup> Ronald J Gilson and Jeffrey N Gordon, 'The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance' (2013) 113 Columbia Law Review 863, 865: This has the effect of undervaluing important shareholder governance rights and thus leaves institutional investors (as record holders) with little incentive to mitigate managerial agency costs. As such, when companies are performing poorly, institutions can obviously sell their shareholdings to exit, as opposed to intervening: Richard Mitchell, Anthony O'Donnell, Ian Ramsay, Michelle Welsh, 'Shareholder Protection in Australia: Institutional Configurations and Regulatory Evolution' (2014) 38 Melbourne University Law Review 68; Vivien Chen, Ian Ramsay, Michelle Welsh, 'Corporate Law Reform in Australia: An Analysis of the Influence of Ownership Structures and Corporate Failure' (2016) 44 Australian Business Law Review 18, 22.

<sup>167</sup> Richard Mitchell, Anthony O'Donnell, Ian Ramsay, Michelle Welsh, 'Shareholder Protection in Australia: Institutional Configurations and Regulatory Evolution' (2014) 38 Melbourne University Law Review 68; Vivien Chen, Ian Ramsay, Michelle Welsh, 'Corporate Law Reform in Australia: An Analysis of the Influence of Ownership Structures and Corporate Failure' (2016) 44 Australian Business Law Review 18, 22. Indeed, the logistics and effort associated even with voting are apparent in Australia, where institutional investors may have resolutions from upwards of 300 publicly listed company meetings per year that they must deal with. This is particularly the case in relation to superannuation funds and managed funds, which are typically broadly invested, including in small-capitalisation companies (small cap companies generally have a market capitalisation of between \$300 million and \$2 billion): AICD report, 'Institutional Share Voting and Engagement: Exploring the Links between Directors, Institutional Shareholders and Proxy Advisers' (September 2011), 3.

<sup>168</sup> Lucian A. Bebchuk, Alma Cohen, and Scott Hirst, 'The Agency Problems of Institutional Investors' (2017) 31 Journal of Economic Perspectives 89, 93, 107.

<sup>169</sup> Vivien Chen, Ian Ramsay, Michelle Welsh, 'Corporate Law Reform in Australia: An Analysis of the Influence of Ownership Structures and Corporate Failure' (2016) 44 Australian Business Law Review 18, 22;

index fund, for example, it is not possible for fund managers to express disapproval by selling shares within an underperforming company while it is still within the respective index.<sup>170</sup> In such cases, it might be expected that a more engaged approach will be taken by institutional shareholders, particularly given the significant size and long-term focus of many such investments, combined with the existence of strong shareholder rights under Australian legislation.<sup>171</sup> Indeed, notwithstanding the problems which have been identified regarding investment intermediaries engaging in governance, the concentration of share ownership in index funds has arguably resulted in markedly improved oversight than would be the case if these shares were held by non-institutional, highly dispersed investors.<sup>172</sup>

In relation to the empirical findings, where publicly listed companies have significant institutional shareholders, it may be anticipated that some form of stewardship may be engaged in, given the likely reduction in coordination costs associated with concentrated institutional shareholding positions within companies.<sup>173</sup> That is, institutional investors are theoretically better able to mitigate agency problems within the companies they invest in, in a manner which

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Richard Mitchell, Anthony O'Donnell, Ian Ramsay, Michelle Welsh, 'Shareholder Protection in Australia: Institutional Configurations and Regulatory Evolution' (2014) 38 Melbourne University Law Review 68; Stuart L Gillan and Laura T Starks, 'Corporate governance proposals and shareholder activism: the role of institutional investors' (2000) 57 Journal of Financial Economics 275, 278; John C Coffee Jr, 'Liquidity versus Control: The Institutional Investor as Corporate Monitor' (1991) 91 Columbia Law Review 1277.

<sup>170</sup> Richard Mitchell, Anthony O'Donnell, Ian Ramsay, Michelle Welsh, 'Shareholder Protection in Australia: Institutional Configurations and Regulatory Evolution' (2014) 38 Melbourne University Law Review 68; Michael Jefferies, 'The Third Wave of Shareholder Influence and the Emergence of Informational Activism in Australia' (2019) 34 Australian Journal of Corporate Law 305; Laurence Fink, Chairman and CEO of BlackRock discussed this in his 2019 Letter to CEOs- "In managing our index funds, however, BlackRock cannot express its disapproval by selling the company's securities as long as that company remains in the relevant index. As a result, our responsibility to engage and vote is more important than ever. In this sense, index investors are the ultimate long-term investors - providing patient capital for companies to grow and prosper."

<sup>171</sup> Michael Jefferies, 'The Third Wave of Shareholder Influence and the Emergence of Informational Activism in Australia' (2019) 34 Australian Journal of Corporate Law 305; Edward B Rock and Marcel Kahan, 'Index Funds and Corporate Governance: Let Shareholders be Shareholders' (2019) NYU Law and Economics Research Paper No. 18-39, 29-30, emphasising long-term value creation, at <https://ssrn.com/abstract=3295098>, accessed 6 June, 2019; Richard Mitchell, Anthony O'Donnell, Ian Ramsay, Michelle Welsh, 'Shareholder Protection in Australia: Institutional Configurations and Regulatory Evolution' (2014) 38 Melbourne University Law Review 68.

<sup>172</sup> Lucian A Bebchuk and Scott Hirst, 'Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy' (2019) 119 Columbia Law Review 2029, 2042.

<sup>173</sup> Lucian A Bebchuk, Alma Cohen, and Scott Hirst, 'The Agency Problems of Institutional Investors' (2017) 31 Journal of Economic Perspectives 89, 93; Brian Cheffins, 'The Rise and Fall (?) of the Berle-Means Corporation' (2019) 42 Seattle University Law Review 445, 447; Ronald J Gilson and Jeffrey N Gordon, 'The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance' (2013) 113 Columbia Law Review 863, 865.

is not possible where a dispersed, non-institutional shareholding pattern exists.<sup>174</sup> However, in respect of the results, it is perhaps unlikely that the three largest shareholders within each of the ASX 50 companies, 97% of whom are all designated as custodians or nominees, would significantly impact the corporate governance of these companies. That is, there is less likely to be coordinated shareholder activity where ownership is effectively in name only, without corresponding voting rights.<sup>175</sup>

Looking beyond nominee shareholders to the substantial shareholders in the dataset, it may be anticipated that in the 38 ASX 50 companies in which there is at least one substantial shareholder, corporate governance practices may notionally be impacted. That is, where institutional investors both hold and control sizable shareholdings, as is certainly the case where the findings indicate that there are substantial shareholders (5% voting rights or greater), it may be expected that forms of engagement or stewardship may be observed.<sup>176</sup> Perhaps the most obvious initial outlet in this regard, is in relation to the manner in which shareholder voting power is exercised. In the Australian context, it has been observed that institutional shareholders are increasingly active in voting their shares.<sup>177</sup> Further, a research report completed by the Australian Institute of Company Directors (AICD) likewise found that institutional shareholders have been progressively more active in voting the shares that they own.<sup>178</sup> More specifically, the findings indicated that institutional shareholders were prepared

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<sup>174</sup> Lucian A Bebchuk and Scott Hirst, 'Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy' (2019) 119 Columbia Law Review 2029, 2042; Lucian A. Bebchuk, Alma Cohen, and Scott Hirst, 'The Agency Problems of Institutional Investors' (2017) 31 Journal of Economic Perspectives 89, 93.

<sup>175</sup> Unless these are expressly granted by the appointment agreement.

<sup>176</sup> For example, this may (non-exhaustively) include voting for directors, against resolutions, and/or proposing constitutional amendments.

<sup>177</sup> Michael Chandler, 'Easy Does It: Shareholder Activism in Australia' (2019) Listed@ASX October issue, 39. See e.g., BlackRock Investment Stewardship, 'Corporate governance and proxy voting guidelines for Australian securities' January 2020, 4: 'We aim to engage with management or members of the board, as appropriate, on contentious and high profile issues before determining how to vote. Where we decide to vote against management or abstain from voting on a particular proposal we advise the company in advance whenever possible.' Similarly, AustralianSuper, Australia's largest superannuation and pension fund, issued the following statement in its quarterly share voting report (1 July 2020 to 30 September 2020): 'As a major institutional investor, AustralianSuper acknowledges it has responsibility to vote on its shares to ensure long-term value to shareholders and encourage companies to act as responsible corporate citizens.' Each quarter, detailed disclosure is provided regarding AustralianSuper's voting universe in respect of domestically held shares.

<sup>178</sup> AICD report, 'Institutional Share Voting and Engagement: Exploring the Links between Directors, Institutional Shareholders and Proxy Advisers' (September 2011), 4, 55, 56. Further data exists in the US context, where it has been found that there is a significantly greater likelihood that institutional shareholders will vote their shares, versus small non-institutional shareholders. Specifically, individual shareholders hold 30% of the shares in publicly listed companies, but only vote 28% of their shares. In contrast, institutional shareholders hold 70% of the shares and vote 91% of their shares. That is, institutional shareholders effectively cast 88% of votes in those companies, making them active participants in corporate governance when compared with small

to vote against company resolutions where it was in their interests to do so.<sup>179</sup> Additionally, the report found that superannuation funds have become more active in voting their shares, and that they have been increasingly casting the votes themselves, as opposed to leaving this task to managed funds to complete.<sup>180</sup>

Regarding the available evidence of engagement in practice, from a global perspective, Australia ranked second among non-US markets where interventional campaigns were planned in 2020.<sup>181</sup> Further, there were a record number of engagements in Australian publicly listed companies in 2018, with 78 companies targeted.<sup>182</sup> Specifically within the ASX 50, during the 2017-2018 financial year, there were eleven companies which faced at least one type of activism.<sup>183</sup> These ASX 50 interventions took the form of proposed resolutions and/or constitutional amendments.<sup>184</sup> While such reports do not state the activist shareholder identities, it is interesting to note the level of engagement observed. In general, between 2013 and 2016, data indicates that a minimum of 50 Australian publicly listed companies received some form of public demand from investors each year.<sup>185</sup> While there are thus promising signs of engagement, in order to avoid any monitoring shortfall associated with investment intermediaries, the understanding of investor incentive models and their relationship to responsible stewardship is key, despite the challenges inherent in such an analysis.<sup>186</sup> That is to

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non-institutional shareholders: Einer R Elhauge, 'How Horizontal Shareholding Harms Our Economy - And Why Antitrust Law Can Fix It' (2020) 10 Harvard Business Law Review 207, 233-4.

<sup>179</sup> AICD report, 'Institutional Share Voting and Engagement: Exploring the Links between Directors, Institutional Shareholders and Proxy Advisers' (September 2011), 4, 55, 56.

<sup>180</sup> *ibid.*

<sup>181</sup> Schulte Roth & Zabel, Activist Insight, and Okapi Partners, 'Shareholder Activism Insight Report' (September 2020), 16. There are also a number of prominent examples of hedge fund activism in Australia, including interventions by US-based hedge funds Glaucus, an activist short-seller, and Elliott Management, the world's leading activist by capital deployed: Gilbert and Tobin Shareholder Activism Report (2018). Another recent activism example is in relation to Rio Tinto's reckless destruction of an Aboriginal heritage site which resulted in superannuation funds and local activists pushing for greater accountability, leading to the replacement of management: <https://uk.reuters.com/article/us-rio-tinto-ceo-breakingviews/breakingviews-rio-tinto-rebellion-sets-new-esg-bar-idUKKBN2620KS>, accessed 12 December, 2020.

<sup>182</sup> Activist Insight and Schulte Roth & Zabel, 'The Activist Investing Annual Review 2019', 23. Almost 66.66% of the publicly listed companies targeted had market capitalisations of \$50 million or less (nano-caps), continuing an ongoing trend in the market.

<sup>183</sup> Gilbert and Tobin Shareholder Activism Report (2018), 23-4.

<sup>184</sup> *ibid.*, 16, 23-4.

<sup>185</sup> Activist Insight and Arnold Bloch Leibler, 'Shareholder activism in Australia: A review of trends in activist investing' (2016), 4, 5. In general, it was observed that 86% of intervention campaigns between 2013 and 2016 were led by Australian activists.

<sup>186</sup> In Australia, such intermediaries commonly include superannuation funds, managed funds, and index funds. See further, Lucian A Bebchuk and Scott Hirst, 'Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy' (2019) 119 Columbia Law Review 2029. Indeed, across jurisdictions, there has been a

say, knowledge of shareholding patterns informs an understanding of both the challenges and opportunities associated with dominant shareholder identities, and their associated powers of governance and control.

## 6. Conclusion

This article has provided much needed data to the existing body of knowledge regarding share ownership and control within Australia. It is the first in-depth analysis of ownership and control which has been undertaken utilising post 2004 data, collecting and evaluating information from the largest shareholders as well as substantial shareholders within the ASX 50. In taking a first step towards filling the existing gaps in this area, the main empirical findings of this article are summarised below.

First, the study findings provide a clear indication of the concentration of share capital in the hands of institutional shareholders in Australia. Within 17 of the ASX 20 companies in the dataset, institutional investors comprise 100% of the 20 largest shareholders. Across the entire ASX 20, non-institutional ownership is 0.75% within the ASX 20 groups of 20 largest shareholders. Within the ASX 50 as a whole, non-institutional ownership is (in totality) 2.2% across all 50 groups of 20 largest shareholders. That is, 97.8% of the ASX 50 groups of 20 largest shareholders are institutions, indicating an increase in their dominance as compared with previous research.

Second, the three-firm concentration ratio was calculated for each of the ASX 50 companies in order to determine the degree of concentration/dispersion of these holdings.<sup>187</sup> Within the ASX 20, the mean level of concentration is 47.53%, with the highest being 70.65% and the lowest being 33.73%. Looking to the ASX 50 as a whole, the highest degree of concentration is 74.99%, the lowest level is 22.76%, and the mean level of concentration across

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degree of inertia on the part of institutional investors engaging in corporate governance, despite the implementation of stewardship strategies: Ronald J Gilson and Jeffrey N Gordon, 'The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance' (2013) 113 Columbia Law Review 863, 896; Marc T Moore and Martin Petrin, *Corporate Governance: Law, Regulation and Theory* (Routledge 2017), 135; Tim Bowley and Jennifer Hill, 'Stewardship and Collective Action: The Australian Experience' (2020) European Corporate Governance Institute - Law Working Paper No. 491/2020.

<sup>187</sup> Based on the three largest shareholders within each company.

the ASX 50 is 53.87%.<sup>188</sup> This may be compared with the increasing levels of institutional shareholder concentration which have occurred within both the UK and the US.<sup>189</sup>

Third, 100% of the three largest shareholders in each of the ASX 50 companies are institutions, and 97% of these shareholders are nominee and/or custodian institutions. This thus revises our understanding of the both the prevalence and degree of holdings of nominee/custodian institutions in Australia, when contrasted with the lower levels reported by prior studies. Moreover, the prevalence of the same institutions across the ASX 20 and ASX 50 is striking. While beneficial share ownership information is not publicly available, substantial shareholding (5% of more voting power) data was obtained, given that this triggers disclosure requirements under the Corporations Act 2001 and denotes control.

Fourth, regarding substantial shareholdings, ten of the ASX 20 companies (50%) had at least one substantial shareholder, and there were 18 substantial shareholders across these ten companies. Within the ASX 50, 38 out of the 50 companies (76%) had at least one substantial shareholder. In totality, there were 93 substantial shareholders across the 50 companies, with 83.9% holding between 5% and 10% of the voting rights conferred by ordinary shares.<sup>190</sup> At the 10-15% level of control, there were 11 substantial shareholders (11.8%), and only four shareholders (4.3%) fell within the greater than 15% category of voting rights/control.<sup>191</sup> Additionally, the results of this study have a preliminary bearing on the relevance of common ownership theory within Australia. In relation to the 'Big Three' index funds, these institutions comprise 33.33% of the substantial shareholding positions across the ASX 50. Notably, 87.1% of these substantial holdings are in companies within the financial sector.

Fifth, now all of the 20 largest publicly listed companies in Australia can be classified as widely held (versus 13 in the 1999 study of La Porta et al) at the 20% level of control. At

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<sup>188</sup> It has similarly been observed that ownership concentration has been increasing in both the US and UK contexts due to institutional holdings: OECD, *Corporate Governance Factbook* (2019), 17; Brian Cheffins, 'Corporate Governance and Countervailing Power' (2019) 74 *The Business Lawyer* 1.

<sup>189</sup> See e.g., OECD, *Corporate Governance Factbook* (2019), 17; A. De La Cruz, A Medina and Y. Tang 'Owners of the World's Listed Companies' (2019) OECD Capital Market Series, Paris.

<sup>190</sup> Overall, comparing the two indices examined, it is evident that within the ASX 20 there is a greater preponderance of institutional investors, an overall greater degree of shareholder dispersion at both levels of control, there are fewer substantial shareholders, and the ownership of these substantial shareholders is less concentrated, when compared with the ASX 50.

<sup>191</sup> While the research results show that investment management institutions such as BlackRock, Vanguard and State Street are substantial shareholders in numerous ASX 50 companies, their ownership does not yet match the pervasiveness which has been observed in the US context: See e.g., Lucian A Bebchuk and Scott Hirst, 'The Specter of the Giant Three' (2019) 99 *Boston University Law Review* 721, 735.

the 10% threshold of control, 17 out of the 20 largest publicly listed companies can be classified as widely held (versus 11 in the La Porta et al study). The study results thus indicate an increase in shareholder dispersion over time.

The key implications arising from the empirical findings are that managerial agency costs and the agency costs of institutional investors are of fundamental importance in the Australian context. The clear separation between ownership and control highlights the divergent incentives of registered and beneficial share owners, as well as potential impediments to optimal levels of stewardship. Based on this understanding, there are two central messages for regulators and policy makers. First, corporate governance regulation must evolve in parallel to changes in share ownership and distribution.<sup>192</sup> Second, there is a need for complementarity between shareholder patterns and regulation which incentivises potential governance actors and mitigates identified agency costs.<sup>193</sup> Ultimately, the research findings demonstrate an important duality within share ownership patterns in the largest Australian listed companies: the increased concentration of institutional holdings, in parallel to the increased dispersion of controlling shareholders. That is, ownership often does not denote control amongst the largest shareholders within the ASX 50; and where there are controlled shareholdings, these are increasingly dispersed compared with previous studies. Thus, the findings are bidirectional, as are the regulatory and policy implications arising therefrom.

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<sup>192</sup> Ronald J Gilson and Jeffrey N Gordon, 'The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance' (2013) 113 Columbia Law Review 863, 868.

<sup>193</sup> *ibid*; Lucian A Bebchuk and Scott Hirst, 'Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy' (2019) 119 Columbia Law Review 2029, 2043.