Shareholder Engagement Inside and Outside the Shareholder Meeting

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Abstract

Important capital market, regulatory and technological developments have created greater investor appetite and capacity for engagement with public companies. This development is highlighted by investors' current efforts to engage with companies in various markets on material environmental, social and governance ('ESG') issues, such as climate change. Our paper explores the key engagement mechanisms and techniques employed today by public company shareholders. The paper's analysis yields several important insights. First, contemporary shareholder-company engagement is a multi-dimensional and evolving phenomenon. Shareholders use, to varying degrees, a wide range of engagement techniques. These include the shareholder meeting, behind-the-scenes interactions, public campaigns, and online technologies such as discussion boards and messaging apps. The latter technologies are particularly favoured by younger retail investors and have been used with remarkable effect to marshal the governance influence of such investors in recent high-profile cases. Second, shareholders often mix and match different engagement techniques in a synergistic manner to leverage their governance influence. Third, shareholders increasingly undertake their engagement activities collectively, highlighting the growing capacity of public company shareholders to overcome traditional collective action challenges. Finally, despite the engagement alternatives available to shareholders, the shareholder meeting remains an important engagement mechanism. Its formal, in-person and public nature sets it apart from other mechanisms and gives it unique potential as a forum for scrutiny and accountability. Although low attendance rates indicate that shareholders do not routinely utilise the meeting to maximum effect, we argue that the meeting is better conceived as having contingent significance. This is because its potential as an accountability mechanism may prove critical when a company experiences serious governance problems. These insights have important implications for understanding — and regulating — the governance of public companies. In particular, the multidimensional and evolving nature of contemporary shareholder-company engagement practices means that the processes which shape corporate decisions are becoming more diffuse and potentially less transparent. Ensuring accountability is a more complex issue in these circumstances and requires a careful focus on the various channels of influence-wielding.

Keywords: corporate governance, public companies, shareholder engagement, engagement techniques, shareholder meetings, activist shareholders, ESG

JEL Classifications: D23, D70, G23, G30, G 34, K22, K33, L21, L 22, N20, 016, Q01, Q56

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I INTRODUCTION

It is now more than 50 years since Albert O Hirschman published his groundbreaking book, *Exit, Voice and Loyalty*.[1] Hirschman argued that dissatisfied members of an organisation who are no longer prepared to support the status quo — or remain loyal, as Hirschman termed it — face a choice between 'exit' and 'voice'. That is, they must choose either to highlight their displeasure by leaving the organisation, or remain as members and encourage organisational change. As Hirschman showed, the choice between exit and voice is interrelated: the potential for meaningful exercise of voice could reduce the need to rely on exit.[2]

For a public company shareholder, the exit/voice choice is a choice between selling shares or remaining as a shareholder and encouraging the company's management to change the company's affairs. In contemporary corporate governance parlance, the voice option is often called 'engagement'.[3] Although exit via selling shares remains an option for dissatisfied shareholders,[4] capital market, regulatory and technological developments have generated greater shareholder capacity and appetite for engagement.[5]

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* We would like to thank George Dallas for helpful comments and Abi Thillainadarajah for excellent research assistance. Thanks also go to Monash University, which provided funding for this project under a Network of Excellence grant on the topic, 'Enhancing Corporate Accountability'.

[1] Albert O Hirschman, *Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations, and States* (Harvard University Press 1972).

[2] See Eleonora Broccardo, Oliver D Hart and Luigi Zingales, 'Exit Versus Voice' (2022) 130 Journal of Political Economy 3101 (for a more recent analysis of Hirschman's insight).

[3] See, eg, Matteo Tonello and Matteo Gatti, 'Board-Shareholder Engagement Practices' (Harvard Law School Forum on Corporate Governance, 30 December 2019); Jeffrey Karp, Helena Grannis and Gaia Goffe, 'Cleary Gottlieb Discusses Shareholder Engagement Trends and Considerations' (*CLS Blue Sky Blog*, 24 January 2020) <https://clsbluesky.law.columbia.edu/2020/01/24/cleary-gottlieb-discusses-shareholder-engagement-trends-and-considerations/>; Australian Securities and Investments Commission, 'Shareholder Engagement' <https://asic.gov.au/regulatory-resources/corporate-governance/shareholder-engagement/>.

[4] Some investors, for example, consider that divestment of shareholdings in fossil fuel companies is a powerful strategy for compelling such companies to adapt their business models to a low carbon future: see, eg, University of Cambridge, 'Cambridge to Divest from Fossil Fuels with "Net Zero" Plan' (Media Release, 1 October 2020) <https://www.cam.ac.uk/news/cambridge-to-divest-from-fossil-fuels-with-net-zero-plan>.

[5] See below Part II.

This chapter explores how shareholders today engage with public companies. Its starting point is the shareholder meeting which, in corporate law, is the principal formal mechanism for shareholders to engage with each other and with corporate management.[6] For some time, commentators have questioned the practical utility of the shareholder meeting, owing to concerns about managerial control of meeting procedure, rigid procedural rules which inhibit shareholder participation, and the limited incentives of dispersed shareholders to engage meaningfully in the governance of their company.[7] More recently, some commentators have also argued that the shareholder meeting is now redundant because technological developments have produced other more effective mechanisms for shareholder-company engagement.[8]

This chapter challenges such negative assessments and argues that the shareholder meeting is in fact a key engagement mechanism. The chapter highlights how different types of shareholders use the shareholder meeting in varying ways as an opportunity to highlight their concerns with corporate management.[9] However, although the shareholder meeting has practical significance, it is by no means the only, or even the main, engagement mechanism of public company shareholders today. Shareholders draw on other engagement techniques and mechanisms, including behind-the-scenes discussions and public campaigns. They also use mobile information and communications technologies, particularly where they seek prompt, iterative or direct engagement with corporate management. These other mechanisms are not, however, complete substitutes for engagement via the shareholder meeting and are often used in a complementary fashion to enhance shareholders' leverage at shareholder meetings. The chapter's analysis also highlights how much engagement, both inside and outside the shareholder meeting, is today undertaken collectively by shareholders, as another means of leveraging their corporate governance influence.

In sum, contemporary shareholder-public company engagement is a multifaceted, dynamic and multilateral exercise, both inside and outside the shareholder meeting. We argue that this insight has important implications for understanding — and regulating — the governance of public companies.

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[6] See below Part III.

[7] See below Part III(B).

[8] Ibid.

[9] See below Part III(A).

The chapter proceeds as follows. Part II discusses important changes in public equity markets, corporate governance laws and norms, and communication and information technologies which underpin modern engagement practices. In Parts III and IV, we explore those practices. In Part V, we reflect on the implications of our analysis for corporate governance and corporate accountability, and Part VI concludes.

II THE PHENOMENON OF THE ENGAGED SHAREHOLDER

Shareholder engagement has always been a central feature of closely held corporations.[10] However, in many jurisdictions, this was not historically true for larger companies, particularly public companies with a division between ownership and control. In their seminal text, *The Modern Corporation and Private Property*,[11] Berle and Means depicted public company shareholders as dispossessed owners or passive wealth-holders[12] who, as a result of dispersed shareholding and collective action problems, were powerless and in need of legal protection. This image of shareholders became hard-baked into corporate law and regulation in the United States and elsewhere. Concerns about the powerlessness of public company shareholders prompted law makers and regulators to focus on shareholder *protection*, rather than promoting shareholder *participation* in public company governance.[13] In this context, the shareholder meeting was perceived to have limited practical relevance. Berle later referred disparagingly to the shareholder meeting as 'a kind of ancient, meaningless ritual like some of the ceremonies that go with the mace in the House of Lords'.[14]

The reality in many countries no longer reflects (or, in some cases, has never reflected) these negative assessments of shareholders' corporate governance potential. In some jurisdictions, public companies have long been dominated by controlling shareholders, such as founders, government investment entities, or trading companies, which exercise close oversight of

[10] See, eg, Abram Chayes, 'Madame Wagner and the Close Corporation' (1960) 73 Harvard Law Review 1532, 1533 (noting that 'the defining characteristic of the closely held business is that it is largely owner-operated').

[11] Adolf A Berle and Gardiner M Means, *The Modern Corporation and Private Property* (Macmillan 1932).

[12] Ibid xxxiv.

[13] See, eg, S Samuel Arsht, 'A History of Delaware Corporation Law' (1976) 1 Delaware Journal of Corporation Law 1, 9 (noting the theme of shareholder protection in early US case law, where directors were often described as trustees).

[14] Adolf A Berle, *Economic Power and the Free Society* (Fund for the Republic 1957), noted in *Blasius Industries Inc v Atlas Corp* 564 A 2d 651, 659 fn 1 (quoting Franklin Balotti, Jesse A Finkelstein and Gregory P Williams, *Meetings of Shareholders* (1987) 2).

corporate managers.[15] Moreover, in many markets, large institutional investors are now substantial public company shareholders.[16] Although these investors have constrained financial and commercial incentives to expend resources on corporate governance activities,[17] it is broadly accepted, even among more critical commentators, that they are capable of playing a significant role in public company governance.[18] Indeed, their capacity for engagement has been manifested in recent years by their increasing engagement with public companies regarding environmental, social and governance ('ESG') issues, such as climate change, social inequality and workforce diversity.[19] There is also one distinctive type of institutional investor — the 'activist' hedge fund — about whose capacity for exercising 'voice' there is little doubt. These are specialised investors whose business model involves investing in a public company and agitating forcefully for changes that will drive improvement in the company's share price.[20] Their targets have included some of the largest and most well-known public companies.[21]

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[15] See generally Dan W Puchniak, 'The False Hope of Stewardship in the Context of Controlling Shareholders: Making Sense Out of the Global Transplant of a Legal Misfit' American Journal of Comparative Law (forthcoming).

[16] OECD, *OECD Corporate Governance Factbook 2021* (2021) <https://www.oecd.org/corporate/corporategovernance-factbook.htm>.

[17] See, eg, Ronald J Gilson and Jeffrey N Gordon, 'The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights' (2013) 113 Columbia Law Review 863.

[18] Ibid (arguing that, although institutional investors have limited incentives to proactively engage in corporate governance, they can be prompted by other market participants, such as hedge funds, to focus on issues of corporate performance). See also Lucian Bebchuk and Scott Hirst, 'Index Funds and the Future of Corporate Governance: Theory, Evidence and Policy' (2019) 119 Columbia Law Review 2029, 2042 ('[W]e believe that, despite the problems we identify … the concentration of shares in the hands of index funds produces substantially better oversight than would result [if shares held by index funds were] instead … owned directly by dispersed individual investors').

[19] See, eg, Jessica Strine, Marc Lindsay and Robert Main, 'The Age of ESG' (Harvard Law School Forum on Corporate Governance, 9 March 2020) <https://corpgov.law.harvard.edu/2020/03/09/the-age-of-esg/> (arguing, inter alia, that investors' engagement on ESG issues heralds a 'true paradigm shift in the relationships between public companies and their investors'). Researchers have pointed out that institutional investors in fact have material financial and commercial incentives to focus their engagement activities on such issues: see, eg, Madison Condon, 'Externalities and the Common Owner' (2020) 95 Washington Law Review 1; John C Coffee, 'The Coming Shift in Shareholder Activism: From "Firm-Specific" to "Systematic Risk" Proxy Campaigns (and How to Enable Them)' (2021) 16 Brooklyn Journal of Corporate, Financial and Commercial Law 45; Jeffrey N Gordon, 'Systematic Stewardship' (2022) 47 Journal of Corporation Law 627.

[20] See, eg, Brian R Cheffins and John Armour, 'The Past, Present, and Future of Shareholder Activism by Hedge Funds' (2011) 37 Journal of Corporation Law 51; Marcel Kahan and Edward B Rock, 'Hedge Funds in Corporate Governance and Corporate Control' (2007) 155 University of Pennsylvania Law Review 1021.

[21] For a recent review of large companies targeted by activist hedge funds, see Rich Thomas, Christopher Couvelier and Leah Friedman 'Annual Review of Shareholder Activism' (Harvard Law School Forum on Corporate Governance, 26 January 2022) <https://corpgov.law.harvard.edu/2022/01/26/annual-review-of-shareholder-activism-2/> (referring to companies such as General Motors, Allstate, Shell and Danone).

Encouragement of shareholder engagement in public company governance has also occurred via regulatory or quasi-regulatory developments in a number of jurisdictions. Examples include 'say on pay' laws,[22] the requirement in the EU Shareholder Rights Directive for institutional investors to publicly disclose their approach to engagement,[23] and institutional investor stewardship codes which exhort investors to participate proactively in corporate governance, including by voting their shares and entering into dialogue with corporate managers.[24] Stewardship codes have in fact been a remarkably popular initiative and now exist in around 20 countries and are proposed in several others.[25] Even in the United States, where shareholder participation in corporate governance has been a contentious issue, commentators have noted a perceptible shift in both practice and norms in favour of shareholder engagement.[26] Reasons for this shift include rules and guidance which have mandated or emphasised the significance of voting by pension and mutual funds,[27] 'say on pay' laws promoting corporate managers to engage with shareholders to avoid negative votes,[28] the demise of staggered boards[29] and the rise of hedge fund activism.[30]

There have also been significant technological developments since the time of Berle and Means. Developments in computing, information technology and electronic communications assist shareholders to gather and analyse information regarding the performance of a company and to communicate instantly and cheaply with potential allies and supporters among a company's shareholder base.[31]

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[22] See generally Randall S Thomas and Christoph Van Der Elst, 'Say on Pay Around the World' (2015) 92 Washington University Law Review 653.

[23] It has been said that the amended directive effectively imposes a 'duty to demonstrate engagement' on institutional investors: Iris H-Y Chiu and Dionysia Katelouzou, 'From Shareholder Stewardship to Shareholder Duties: Is the Time Ripe?' in Hanne S Birkmose (ed), *Shareholders' Duties* (Wolters Kluwer 2017) 131–52.

[24] See generally, Dionysia Katelouzou and Dan W Puchniak (eds), *Global Shareholder Stewardship* (Cambridge University Press 2022).

[25] Puchniak (n 15).

[26] See Chapter [x]. See also Matteo Tonello and Matteo Gatti, 'Board-Shareholder Engagement Practices: Findings from a Survey of SEC-Registered Companies' (The Conference Board, Director Notes, December 2019) 1–2; Lisa M Fairfax, 'From Apathy to Activism: The Emergence, Impact, and Future of Shareholder Activism as the New Corporate Governance Norm' (2019) 99 Boston University Law Review 1301.

[27] John C Coffee and Darius Palia, 'The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance' (2016) 41 Journal of Corporation Law 545, 557–58.

[28] Tonello and Gatti (n 26).

[29] Coffee and Palia (n 27) 557.

[30] Tonello and Gatti (n 26).

[31] Cheffins and Armour (n 20) Pt III(C)(2).

Significant demographic shifts in the investment market may even be transforming the small — or so-called 'retail' — investor from their historical position of corporate governance 'bystander'[32] to a proactive governance participant. Generation Z and Millennials are projected to control collectively approximately $68 trillion in assets worldwide within the decade as a result of an intergenerational wealth transfer.[33] Data indicates that these generations are keen investors in public equities.[34] Such investors are generally regarded as more socially and environmentally progressive than older cohorts of investors[35] and, as this chapter will show, are adept at using new and potentially powerful mobile trading, information and communication technologies to make and manage their investments. Their significance as investors — and their potential for activism — has been highlighted in recent years by the controversy of 'meme' stocks, including the remarkable events at GameStop.[36]

In summary, important changes in equity markets, corporate governance regulation and norms, and communication and information technologies have created increased capacity and demand for engagement by public company shareholders. The next section explores how public company shareholders seek to undertake their engagement activities.

III SHAREHOLDER-COMPANY ENGAGEMENT: THE SHAREHOLDER MEETING

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[32] See Jennifer G Hill, 'Visions and Revisions of the Shareholder' (2000) 48 American Journal of Comparative Law 39, 47–51; Richard M Buxbaum, 'The Internal Division of Powers in Corporate Governance' (1985) 73 California Law Review 1671, 1683.

[33] Coldwell Banker, *A Look at Wealth 2019: Millennial Millionaires* (Report, 2019) 6–7; Remus Valsan, 'Social Media and Shareholder Activism' (*Edinburgh Centre for Commercial Law Blog*, 8 May 2014) [2]–[3] <http://www.ecclblog.law.ed.ac.uk/2014/05/08/social-media-and-shareholder-activism/>. Cf Joseph Coughlin, 'Millennials are Banking on the Great Wealth Transfer, 4 Words Why You Shouldn't Cash That Check Yet' *Forbes* (16 November 2021) <https://www.forbes.com/sites/josephcoughlin/2021/11/16/millennials-are-banking-on-the-great-wealth-transfer-4-words-why-you-shouldnt-cash-that-check-yet/?sh=2b56443c2dde> (suggesting that the 'intergenerational wealth kinetics' are far from stable).

[34] Jack Caporal, 'Study: What are Gen Z and Millennial Investors Buying in 2021?' (*The Motley Fool*, 3 August 2021). According to one US study, 73% of Generation Z investors and 66% of millennial investors own stocks, making equity investments the most common type of investment for both age groups. Bank of America, *Gen Z to the World: Watch Out, Here We Come*, archived at <https://web.archive.org/web/20220125154245/https://www.privatebank.bankofamerica.com/articles/gen-z-defining-characteristics-understanding-impact.html>.

[35] Michal Barzuza, Quinn Curtis and David Webber, 'The Millennial Corporation: Strong Stakeholders, Weak Managers' (March 2023) European Corporate Governance Institute Law Working Paper 687/2023 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3918443>.

[36] See the discussion of the GameStop incident in Jill E Fisch, 'GameStop and the Reemergence of the Retail Investor' (2022) 102 Boston University Law Review 1799, 1806–16. For a sceptical assessment of the corporate governance significance of the meme stock phenomenon, see Dhruv Aggarwal et al, 'Meme Corporate Governance' (29 April 2023) European Corporate Governance Institute Law Working Paper 681/2023 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4347885>.

We start our discussion of contemporary shareholder engagement practices by examining the shareholder meeting. Under national corporate laws, such powers as shareholders hold must typically be exercised at a shareholder meeting by voting on resolutions.[37] The shareholder meeting also provides an opportunity for attending shareholders to interact among themselves and with corporate management. Although the shareholder meeting is by no means a perfect mechanism for shareholder-company engagement, the following discussion illustrates how the meeting nonetheless plays a key role in shareholders' engagement activities.

A *The Shareholder Meeting as a Forum for Engagement*

There are two aspects of the shareholder meeting that are important in terms of engagement. First, the shareholder meeting is the forum where shareholder voting takes place. Voting typically relates to proposals that are material to a company's management and affairs, such as the appointment of directors, resolutions relating to the remuneration of directors and/or senior executives, and the approval of significant transactions.[38] The requirement for shareholders to approve such matters provides shareholders with a degree of governance leverage.

Public company shareholders increasingly seek to exercise this leverage. Voting data highlights increased rates of voting in a number of markets, primarily driven by increased levels of voting by institutional investors.[39] This trend is underpinned by the aforementioned growth of institutional investor share ownership and regulatory developments which have prompted institutional investors to exercise the significant voting power attached to their shareholdings.[40] The emergence of proxy advisers — specialised service providers that review companies' notices of meeting and provide recommendations about how to vote — has also significantly facilitated institutional investors' share voting.[41]

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[37] Reiner Kraakman and others, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd ed, Oxford University Press 2017) 49–50.

[38] Ibid ch 3.2 (discussion of appointment and decision rights of shareholders).

[39] See, eg, Tim Bowley, *Activist Shareholders in Corporate Governance: The Australian Experience and its Comparative Implications* (Hart Publishing 2023) 73–75 (Australian data); Yaron Nili and Megan Wischmeier Shaner, 'Virtual Annual Meetings: A Path Toward Shareholder Democracy and Stakeholder Engagement' (2022) 63 Boston College Law Review 123, 145 (US data); Computershare, *2022 AGM Intelligence Report* (Report, 2022) 11 (UK data); Jun Usami and others, 'Japan 2022 Proxy Season' (*White & Case: Insight Alert*, 27 December 2022) <https://www.whitecase.com/insight-alert/japan-2022-proxy-season> (reporting emerging signs of a more activist stance to voting in Japan).

[40] See above Part II.

Public company shareholders commonly exercise their voting leverage in a reactive fashion. That is, shareholders who are dissatisfied with an aspect of their company's affairs will often choose to demonstrate their dissatisfaction by voting against or withholding votes on resolutions.[42] This practice is reflected in proxy adviser voting guidelines, which indicate, for example, that proxy advisers will recommend that their shareholder clients vote against the re-election of directors where a company has performed poorly.[43]

Activist shareholders, however, seek to harness voting power in a strategic and proactive manner. They table (or foreshadow the prospect that they will table) resolutions for consideration at a shareholder meeting as part of a broader campaign to drive change in a company's affairs. In the United States, this has been a long-standing tactic of individual activist shareholders — so-called 'gadflies'.[44] Activist hedge funds have also been adept at using the explicit or implicit threat of a proxy contest to apply pressure to corporate managers.[45] More recently, several jurisdictions have witnessed an increasing number of ESG-related shareholder proposals tabled by social activist organisations[46] such as ShareAction,[47] the Australasian Centre for Corporate Responsibility[48] and investor networks such as Climate Action 100+.[49] Evidence indicates that this form of activism operates as a

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[41] See, eg, Andrew F Tuch, 'Proxy Advisor Influence in a Comparative Light' (2019) 99 Boston University Law Review 1459; Stephen Choi, Jill Fisch and Marcel Kahan, 'The Power of Proxy Advisors: Myth or Reality?' (2010) 59 Emory Law Journal 869.

[42] See, eg, Bowley (n 39) 75–81 (noting increased voting dissent in Australia); Jun Usami and others (n 39) (noting an increase in dissent levels in Japan).

[43] See, eg, Glass Lewis, *2022 Policy Guidelines: United States* (Policy Guidelines, 2022) 18 ('We typically recommend that shareholders vote against directors … with records of poor performance').

[44] Kobi Kastiel and Yaron Nili, 'The Giant Shadow of Corporate Gadflies' (2021) 94 Southern California Law Review 569.

[45] Coffee and Palia (n 27).

[46] See, eg, Simmons & Simmons, 'More Hot News: Climate-related Shareholder Resolutions' (Publication, 22 January 2021) (discussing the situation in Europe) <https://www.simmons-simmons.com/en/publications/ckk8k0rnl1hik0918wl0w6qwr/more-hot-news-climate-related-shareholder-resolutions> ; Sullivan & Cromwell LLP, '2021 Proxy Season Review: Part 1 – Rule 14a-8 Shareholder Proposals' (*S&C Memos*, 27 July 2021) (discussing the situation in the United States); Lloyd Freeburn and Ian Ramsay, 'An Analysis of ESG Shareholder Resolutions in Australia' (2021) 44 UNSW Law Journal 1142 (discussing the situation in Australia).

[47] ShareAction, 'Shareholder Resolutions 2022' (Web Page) <www.shareaction.org/shareholder-resolutions/shareholder-resolutions-2022> (noting that '[s]hareholder resolutions are an essential tool in any investor's toolkit' and how they 'team up with institutional investors and individuals to call out some of the world's biggest companies for their role in fuelling environmental and social crises').

[48] Australasian Centre for Corporate Responsibility (ACCR), 'Shareholder Resolutions' (Web Page) <www.accr.org.au/resolution/>.

significant catalyst for engagement. Hedge funds have been described as governance 'potentiators' whose proposals for change in a company trigger a tussle between the company's managers and the protagonist fund to engage with and win the support of the company's institutional investors.[50] ESG-related proposals filed by gadflies and social activist organisations can also catalyse shareholder-company engagement. Research indicates that the filing of such proposals can prompt company managers to engage with the activists and other shareholders regarding possible changes to address activists' concerns, thereby heading off the prospect of a negative vote.[51] Moreover, those proposals that proceed to a shareholder vote are receiving significant levels of voting support from institutional investors due to the latter's increasing focus on ESG issues.[52]

Evidence from some markets indicates that the exercise (or threatened exercise) of voting power can be effective as an engagement tactic even where it will not result in a legally binding consequence. In the United States, where shareholder proposals are frequently 'precatory' (ie, non-binding) in nature,[53] research reports that such proposals can prompt corporate managers to make changes in their companies' affairs[54] even in cases where the level of voting support represents less than a majority of shares voted.[55] Research has also found that it is common for corporate managers to engage with proposal proponents ahead of the shareholder vote and that such engagement frequently leads to proponents withdrawing their proposals,[56] revealing the potential for precatory proposals to catalyse shareholder-company engagement.

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[49] Climate Action 100+, 'Proxy Season & Flagged Shareholder Votes' (Web Page) <www.climateaction100.org/approach/proxy-season/>.

[50] Gilson and Gordon (n 17) 867 ('The role for activist [hedge funds] is to potentiate institutional voice'); Jennifer G Hill, 'The Trajectory of American Corporate Governance: Shareholder Empowerment and Private Ordering Combat' [2019] University of Illinois Law Review 507, 541–42 (describing institutional investors, when so activated by hedge funds, as 'the corporate equivalent of swing voters in politics').

[51] See Chapter [x] (noting the engagement which follows the filing of such proposals and finding that this engagement commonly leads activists to withdraw their proposed resolutions). See also Freeburn and Ramsay, 'An Analysis of ESG Shareholder Resolutions in Australia' (n 46) (Australia); Jun Usami and others (n 39) (Japan); Karp, Grannis and Goffe (n 3) (United States).

[52] See, eg, the commentary in n 46.

[53] Jill E Fisch, 'Purpose Proposals' (2022) 1 University of Chicago Business Law Review 113, 122.

[54] Yonca Erimur, Frabrizio Ferri and Stephen Stubben, 'Board of Directors' Responsiveness to Shareholders: Evidence from Shareholder Proposals' (2010) 16 Journal of Corporate Finance 53; Kastiel and Nili, 'The Giant Shadow of Corporate Gadflies' (n 44) 573–575.

[55] Kastiel and Nili, 'The Giant Shadow of Corporate Gadflies' (n 44) 594.

[56] See Chapter [x]. See also Kastiel and Nili (n 44) 582.

Experience in other jurisdictions also highlights the governance potential of precatory shareholder resolutions In Australia, shareholders' annual, non-binding 'say on pay' is generally regarded as one of shareholders' most effective mechanisms for applying pressure to corporate managers.[57] Australian research also indicates that non-binding proposals addressing ESG issues can affect corporate change.[58] Internationally, activists have attempted, with some success, to push prominent public companies to provide shareholders with a periodic, non-binding vote on a company's response to the challenges of climate change — otherwise known as a 'say on climate'.[59]

The second important feature of the shareholder meeting from an engagement perspective is that it provides shareholders with the opportunity for in-person engagement activities. Some activist shareholders, for example, use the shareholder meeting to confront directors and corporate management representatives in attendance at the meeting. ShareAction reports that it uses a company's annual shareholder meeting as an 'opportunity to quiz directors, and hold the company to account on a range of issues, from climate change to gender diversity, healthy food, the living wage and more'.[60] Gadfly activists have also long used shareholder meetings in a similar way. For example, notable US gadfly, Evelyn Davis, is reported to have attended up to 50 meetings a year[61] and to have commandeered shareholder meetings and driven discussion by asking questions that were uncomfortable for management.[62]

The shareholder meeting also provides shareholders with the opportunity to interact directly with one another – or engage in what Nili and Shaner term 'horizontal democracy'.[63] Activist shareholders can highlight their concerns to fellow shareholders and seek to shift sentiment

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[57] Bowley (n 39) 76–79.

[58] Freeburn and Ramsay, 'An Analysis of ESG Shareholder Resolutions in Australia' (n 46).

[59] Discussed in Tim Bowley and Jennifer G Hill, 'The Global ESG Stewardship Ecosystem' (7 October 2022) European Corporate Governance Institute Law Working Paper 660/2022 <https://www.ecgi.global/sites/default/files/working_papers/documents/ecosystemfinal.pdf>.

[60] ShareAction, 'What is Shareholder Activism' (Web Page) <www.shareaction.org/savers-resource-hub/agm-activism>.

[61] Kastiel and Nili, 'The Giant Shadow of Corporate Gadflies' (n 44) 572.

[62] Leslie Bennetts, 'The CEO's Worst Nightmare' *Vanity Fair* (1 July 2002) <https://www.vanityfair.com/news/2002/07/shareholder-activism-200207> ; Laurence Arnold, 'Evelyn Davis, Queen of Shareholder Activism, Dies at 89' *Bloomberg* (6 November 2018) <https://www.bloomberg.com/news/articles/2018-11-05/evelyn-davis-feisty-queen-of-shareholder-activism-dies-at-89#xj4y7vzkg>. See also Sarah Haan, 'Corporate Governance and the Feminization of Capital' (2022) 74 Stanford Law Review 515, 519–20 (discussing another well-known US shareholder activist, Wilma Soss).

[63] Nili and Shaner (n 39) 192.

among attending shareholders in their favour,[64] potentially increasing the pressure brought to bear on management representatives present at the meeting and also increasing the likelihood that contentious matters will be picked up by the financial press.

The significance of the in-person, deliberative aspect of the shareholder meeting came into focus during the Covid-19 pandemic. During this period, public companies in a number of jurisdictions held 'virtual' shareholder meetings; that is, meetings conducted exclusively online.[65] This development was welcomed by some commentators, who argued that virtual meetings are more efficient than in-person meetings[66] and facilitate shareholder participation as a result of the widespread use of mobile telecommunications technology.[67] However, considerable concerns have been raised by others, including the risk of technological malfunctions preventing shareholders from accessing and participating in meetings, management use of meeting technology to control debate and questioning by shareholders, and the risk that the absence of face-to-face interaction diminishes the capacity of the meeting to act as a mechanism for holding corporate managers accountable.[68] A recent Australian study, reflecting on the experience of virtual meetings during the pandemic, concludes that virtual meetings provide shareholders with a reduced opportunity to hold corporate managers accountable compared to in-person meetings.[69] The study's findings echo the aforementioned criticisms of virtual meetings, including that virtual meetings enable corporate managers to use online meeting technology to conduct choreographed and scripted presentations and question and answer sessions. Moreover, the study highlights how the lack of in-person interactions in a virtual meeting hinders shareholders' ability to use meetings to apply pressure to corporate managers. This is because managers do not need to provide a face-to-face account to shareholders or endure potentially hostile in-person questioning. It is also more difficult for shareholders in an online meeting to interact with each other. This reduces the ability of a concerned shareholder to generate support from the floor of a meeting and

[64] Lisa Fairfax, 'Virtual Shareholder Meetings Reconsidered' (2010) 40 Seton Hall Law Review 1367, 1394.

[65] See generally, Nili and Shaner (n 39); Lloyd Freeburn and Ian Ramsay, 'Virtual Shareholder Meetings in Australia' (2021) 32 International Company and Commercial Law Review 53.

[66] Governance Institute of Australia, '"Mired in the 19th Century": Governance Institute Calls for Covid-19 Changes to Corporations Act to be Made Permanent' (Media Release, 4 June 2020) <https://www.governanceinstitute.com.au/news-media/media-releases/2020/jun/mired-in-the-19th-century-governance-institute-calls-for-covid-19-changes-to-corporations-act-to-be-made-permanent/>.

[67] Freeburn and Ramsay, 'Virtual Shareholder Meetings in Australia' (n 65) 67.

[68] Nili and Shaner (n 39) 189–92.

[69] Freeburn and Ramsay, 'Virtual Shareholder Meetings in Australia' (n 65).

collectively apply pressure to corporate managers. In light of these concerns, the study concludes that permitting companies to continue to hold virtual meetings following the pandemic may adversely affect shareholder-company engagement.[70]

B *Limitations of the Shareholder Meeting*

Nonetheless, the shareholder meeting has several limitations as an engagement mechanism. First, the meeting is typically a once-a-year event, follows a highly-structured agenda and takes place in the public glare, providing limited opportunity for shareholders to enter into fluid, interactive and candid discussions regarding a company's affairs.[71] The situation is compounded by the fact that information supplied at shareholder meetings typically repeats information already provided by companies to the market under securities law disclosure obligations,[72] and the extensive use of proxy votes means that the outcomes of items of business at the meeting are often a foregone conclusion.[73]

Second, a number of jurisdictions report low rates of attendance by shareholders.[74] In Australia, for example, the average proportion of a public company's shareholders who attended a company's annual shareholder meeting between 2012 and 2020 ranged 'from a low of 0.09 per cent in 2020 to a "high" of 0.18 per cent in 2018'.[75] These low attendance rates do not translate into low voting rates, as indicated by the voting data referred to earlier. However, low attendance rates potentially limit the impact of shareholders' attempts to use question and answer time to subject company managers to critical scrutiny.

Third, the exercise of voting power at a shareholder meeting can be an imperfect and impractical means of exerting influence over a company's affairs. Voting may send an ambiguous message to company managers as it will not necessarily be apparent from a voting

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[70] Ibid 79. Cf Nili and Shaner (n 39) 193 (who identify similar concerns with virtual meetings but conclude that the accessibility benefits of online technology 'is a benefit we cannot ignore' and that serious consideration should therefore be given to perfecting online meeting technology).

[71] In Australia, a 2012 government inquiry heard evidence that the formal and highly-structured nature of shareholder meetings limited their utility as an occasion for debate and inquiry: evidence presented to the Corporations and Markets Advisory Committee, *Inquiry into the AGM and Shareholder Engagement* (2012), cited in Bowley (n 39) 72–73, fn 10.

[72] Nili and Shaner (n 39) 153.

[73] Ibid 146.

[74] Oliver Bampfield, 'Global AGM Trends in 2018' (2018) 70 Governance Directions 379; Nili and Shaner (n 39) 145 (noting that attendance rates in the US are 'abysmal').

[75] Bowley (n 39) 72, citing Computershare, *2021 AGM Intelligence Report* (Report, 2021) 5.

tally why shareholders voted in the way they did. The act of voting only provides shareholders with an opportunity to signal approval or disapproval of the particular proposal reflected in the resolution put to the vote; it does not of itself allow for discussion or negotiation of the proposal or potential alternatives.[76] Shareholders who wish to enter into a substantive dialogue with corporate managers regarding the subject matter of a resolution will need to resort to one of the alternative engagement mechanisms described below in Part IV.

Fourth, highly diversified investors, such as many institutional investors, experience significant challenges in focusing attention on the shareholder meetings of companies in their portfolios, particularly given that most annual shareholder meetings tend to be held within a space of a few months (sometimes called the 'AGM season' or 'proxy season').[77]

Fifth, unfavourable legal rules can also frustrate shareholders' ability to use voting at shareholder meetings to exert influence. For example, in some jurisdictions, the tabling of shareholder proposals is subject to detailed and/or restrictive rules.[78]

Lastly, the shareholder meeting, as currently constructed, does not provide an ideal engagement forum for many small — or so called 'retail' shareholders. Voting turnout, as noted earlier, is driven largely by institutional investors[79] and retail shareholders tend not to attend meetings in person in material numbers.[80] This state of affairs is explained by a combination of the limited incentives of small shareholders to expend resources on corporate governance activities, collective action challenges, and the various limitations of the shareholder meeting noted above.[81] In markets where retail investors own a material

[76] Joseph A McCahery, Zacharias Sautner and Laura T Starks, 'Behind the Scenes: The Corporate Governance Preferences of Institutional Investors' (2016) 71 Journal of Finance 2905, 2913 (quoting a BlackRock executive who expresses a preference for behind-the-scenes dialogue over filing and/or voting on shareholder proposals because the former enables constructive dialogue with managers).

[77] Australian Institute of Company Directors, *Institutional Share Voting and Engagement: Exploring the Links Between Directors, Institutional Shareholders and Proxy Advisers* (Report, 2011) 3, 71.

[78] See, eg, Paul Rose, 'Shareholder Proposals in the Market for Corporate Influence' (2014) 66 Florida Law Review 2186–89; Sofie Cools, 'Shareholder Proposals Shaking Up Shareholder Say: A Critical Comparison of the United States and Europe' in Afra Afsharipour and Martin Gelter (eds), *Comparative Corporate Governance* (Edward Elgar Publishing, 2021) 302.

[79] See above Pt III(A).

[80] Nili and Shaner (n 39); Kobi Kastiel and Yaron Nili, 'In Search of the "Absent" Shareholders: A New Solution to Retail Investors' Apathy' (2016) 41 Delaware Journal of Corporate Law 55.

proportion of listed equities, their non-participation means that the views of this significant class of investor are not reflected in shareholder decision-making, which is left largely in the hands of institutional investors. Commentators argue that this is suboptimal from a governance perspective because of institutional investors' constrained incentives to participate in corporate governance and/or concerns that they engage in 'herding' behaviour, rather than adopting a suitably critical and informed perspective when engaging with companies.[82] Another concern is that retail shareholder non-participation undermines the representativeness and, therefore, the legitimacy of shareholder decision-making.[83]

In light of these limitations of the shareholder meeting, public company shareholders have developed alternative engagement mechanisms and techniques. As the next section shows, these alternatives are particularly favoured where shareholders seek prompt, direct, iterative or private interaction with corporate managers.

IV OTHER ENGAGEMENT MECHANISMS AND TECHNIQUES

A *Behind-the-Scenes Engagement*

Behind-the-scenes engagement involves private interactions between shareholder(s) and corporate managers. Such interactions may occur by way of meeting, telephone conversation or private correspondence and occur with company directors and/or senior executives.[84] Research and market data report that behind-the-scenes engagement is prevalent.[85] As corporate managers are not typically under any general legal obligation to enter into

[81] Kastiel and Nili, 'In Search of the "Absent" Shareholders: A New Solution to Retail Investors' Apathy' (n 80); Nili and Shaner (n 39).

[82] Fisch, 'Gamestop and the Reemergence of the Retail Investor' (n 36).

[83] Jill E Fisch, 'Standing Voting Instructions: Empowering the Excluded Retail Investor' (2017) 102 Minnesota Law Review 11, 14; Nili and Shaner (n 39) 187.

[84] Governance Institute of Australia and Sandy Easterbrook, *Improving Engagement between ASX-listed Entities and their Institutional Investors* (Backgound Paper, February 2014) 10; David A Bell, Ron C Llewellyn and Katherine K Duncan, 'Public Company Guide—Planning for Shareholder Engagement' (Harvard Law School Forum on Corporate Governance, 10 August 2021); PriceWaterhouseCoopers, *PwC's 2022 Annual Corporate Directors Survey: Charting the Course through a Changing Governance Landscape* (Report, 2022).

[85] See, eg, Tony Featherstone, 'Rise of the Active Investor' (2018) 34(3) Company Director 56 (discussing the prevalence of the practice in Australia); PriceWaterhouseCoopers (n 84) (US position); Jun Usami and others (n 39) (noting non-public discussions between investors and companies in Japan). See also n 86 below.

discussions with individual shareholders, behind-the-scenes engagement is generally only an option for prominent or strategically significant shareholders who have the leverage to secure private access to corporate managers. Consistently, research reports that behind-the-scenes engagement is a favoured engagement tactic of institutional investors.[86] Hedge funds also adopt this form of engagement with companies and with other major shareholders with a view to securing their desired changes without having to launch a public campaign against a company.[87] Activist organisations, like the Australasian Centre for Corporate Responsibility, also claim to undertake behind-the-scenes interactions with companies.[88] Behind-the-scenes engagement occurs throughout the year, although it will tend to intensify around key corporate events such as results announcements and the annual shareholder meeting.[89]

There are several reasons for the popularity of behind-the-scenes engagement. First, as there are typically no laws which mandate behind-the-scenes engagement, [90] investors have flexibility to determine the frequency and intensity of their engagement activities.[91] Given the constrained incentives and capacity of some investors to engage in corporate governance activities, this is a potentially important advantage of behind-the-scenes engagement. Second, the private nature of behind-the-scenes engagement may facilitate constructive interactions between shareholders and companies free from the glare of market scrutiny which might otherwise increase reputational pressures and encourage adversarial behaviour. Finally, when it takes the form of periodic interactions, behind-the-scenes engagement enables companies and their shareholders to explore and address issues iteratively.[92] These advantages of behind-

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[86] McCahery, Sautner and Starks (n 76). Various other studies have explored the behind-the-scenes engagement practices of institutional investors: see, eg, Bernard S Black and John C Coffee, 'Hail Britannia?: Institutional Investor Behaviour Under Limited Regulation' (1994) 92 Michigan Law Review 1997; Marco Becht and others, 'Returns to Shareholder Activism: Evidence from a Clinical Study of the Hermes UK Focus Fund' (2009) 22 Review of Financial Studies 3093; Elroy Dimson, Oguzhan Karakas and Xi Li, 'Active Ownership' 28 Review of Financial Studies 3225, 3227 (2015).

[87] Alon Brav and others, 'Hedge Fund Activism, Corporate Governance, and Firm Performance' (2008) 63 Journal of Finance 1729. Such interactions are not always initiated by hedge funds. It has also been reported that concerned institutional investors may sometimes approach hedge funds in private in an attempt to encourage them to launch a campaign at an under-performing company: Simi Kedia, Laura T Starks and Xianjue Wang, 'Institutional Investors and Hedge Fund Activism' (2021) 10 *Review of Corporate Finance Studies* 1, 9.

[88] Australasian Centre for Corporate Responsibility, 'First Institutional Investor Group-led Climate Shareholder Proposals Filed in Japan' (Media Release, 11 May 2022) (claiming that the shareholder proposal filed in relation to J-Power 'follow[ed] months of engagement' with J-Power) <https://www.accr.org.au/news/first-institutional-investor-group-led-climate-shareholder-proposals-filed-in-japan/>.

[89] Karp, Grannis and Goffe (n 3).

[90] Stewardship codes exhort investors to undertake discussions with companies, although they are typically 'soft law' instruments which apply on a 'comply or explain' basis: see generally Katelouzou and Puchniak (n 24).

[91] Bowley (n 39) 103.

the-scenes engagement contrast with the highly intermittent, public and formalistic nature of shareholder meetings.

Behind-the-scenes discussions are not simply a bilateral exercise between a single shareholder and their company. Institutional investors increasingly interact with their companies through representative bodies, investor networks and service providers that specialise in undertaking engagement assignments.[93] These organisations assist investors by undertaking behind-the-scenes discussions with companies on behalf of investors or by coordinating and supporting coalitions of investors to engage with companies.[94] Some of these organisations are substantial and undertake their activities on an international scale, such as Federated Hermes EOS, Climate Action 100+ (CA100) and the PRI's Collaboration Platform.[95] Proxy advisers also engage with companies, helping to channel and convey their client shareholders' concerns about companies' voting proposals.[96]

Nonetheless, the utility of this practical form of engagement can be constrained by local norms and attitudes. Communication between US companies and institutional investors has traditionally been quite limited.[97] Expressing frustration at this state of affairs, the head of corporate governance at Calpers, the largest US pension fund, stated: 'It has been like pulling teeth to get the Exxon directors to talk to investors'.[98] There is a much stronger engagement culture in other common law jurisdictions, such as the United Kingdom and Australia.[99] For

[92] Black and Coffee (n 86) 2054–55; Matthew J Mallow and Jasmin Sethi, 'Engagement: The Missing Middle Approach in the Bebchuk-Strine Debate' (2016) 12 NYU Journal of Law and Business 385, 393–94.

[93] See, eg, Luca Enriques and Alessandro Romano, 'Institutional Investor Voting Behavior: A Network Theory Perspective' (2019) University of Illinois Law Review 223; Gaia Balp and Giovanni Strampelli, 'Institutional Investor Collective Engagements: Non-Activist Cooperation vs Activist Wolf Packs' (2020) 14 Ohio State Business Law Journal 135; Marco Becht and others, 'Outsourcing Active Ownership in Japan' (June 2021) European Corporate Governance Institute Finance Working Paper No 766/2021 < http://ssrn.com/abstract_id=3864310>; Tim Bowley and Jennifer G Hill, 'Stewardship and Collective Action: The Australian Experience' in Dionysia Katelouzou and Dan W Puchniak (eds), *Global Shareholder Stewardship* (Cambridge University Press 2022) 417.

[94] Ibid.

[95] Bowley and Hill, 'The Global ESG Stewardship Ecosystem' (n 59).

[96] Bowley (n 39) 95–6.

[97] Gretchen Morgenson, 'At U.S. Companies, Time to Coax the Directors into Talking' *New York Times* (28 March 2015) <https://www.nytimes.com/2015/03/29/business/time-to-coax-the-directors-into-talking.html>.

[98] Justin Baer, Dawn Lim & Cara Lombardo, 'Investors Give Exxon Payback for Frustrations on Strategy and Climate' *Wall Street Journal* (28 May 2021) <https://www.wsj.com/articles/investors-give-exxon-payback-for-frustrations-on-strategy-and-climate-11622227480>. See also PriceWaterhouseCoopers (n 84) 23 (reporting that 42% of directors surveyed disclosed that their boards do not consider 'direct discussions between shareholders and boards are appropriate).

[99] Morgenson (n 97).

example, in evidence given to a 2021 Australian parliamentary inquiry, the peak body for investor relations professionals referred to a survey of Australian and New Zealand public companies which indicated that corporate management typically spends between 10 – 15% of their time speaking to shareholders 'in the normal course of business'.[100]

B *Public Campaigns*

Shareholders who are dissatisfied with their company's affairs will sometimes openly reveal their dissatisfaction by speaking out in public against the company. Activist hedge funds are adept at using this technique to exert pressure on target companies; for example, by publicly releasing a highly-detailed written critique of the target company[101] or even mounting a broader public relations campaign involving features such as campaign websites and billboard and media advertising.[102] Research indicates, however, that hedge funds typically first seek to engage with target companies in private and only resort to public campaigns and other hostile tactics when such engagement fails to secure a satisfactory outcome.[103]

Some institutional investor stewardship codes also contemplate public criticism being used as an escalation strategy in the face of corporate intransigence.[104] However, in practice, institutional investors tend to be reluctant to resort to public campaigns, although they may occasionally air their discontent in the financial press.[105] Commentators have previously attributed institutional investors' reluctance to undertake activism in the public domain to concerns about the reputational downside of adopting a public position or flagging their investment sentiment to their competitors who may exploit that information in their trading strategies.[106] Networks and organisations representing institutional investors are, however,

[100] Evidence to House Standing Committee on Economics, Parliament of Australia, Canberra, 22 September 2021, 47 (Ian Matheson, Australasian Investor Relations Association).

[101] Martin Lipton and Sabastian V Niles, 'Dealing with Activist Hedge Funds' (2015) <https://www.wlrk.com/docs/DealingwithActivistHedgeFunds.pdf>.

[102] Michael Jefferies, 'The Third Wave of Shareholder Influence and the Emergence of Informational Activism in Australia' (2019) 34 Australian Journal of Corporate Law 305 (describing the highly public campaign undertaken by the hedge fund, Elliott Management, against the Anglo-Australian resources company, BHP).

[103] See, eg, Alon Brav et al, 'Hedge Fund Activism, Corporate Governance, and Firm Performance' (2008) 63 The Journal of Finance 1729, 1732.

[104] See, eg, Australian Council of Superannuation Investors, *Australian Asset Owner Stewardship Code* (2018) 11; Securities and Futures Commission (Hong Kong), *Principles of Responsible Ownership* (2016) 4, 5.

[105] McCahery, Sautner and Starks (n 76) 2913; Bowley and Hill, 'Stewardship and Collective Action: The Australian Experience' (n 93) 429.

[106] See, eg, Black and Coffee (n 86).

more visible. For example, the Climate Action 100+ network of investors highlights the companies it is targeting on its website and in press releases.[107] This may reflect the fact that institutional investors are more comfortable with their intermediaries engaging in public activism on their behalf.[108]

Although public campaigns have the potential to apply considerable pressure to corporate managers, they can also be significant and costly undertakings and require investors to have the skill and resources to use the financial press and other public relations resources effectively. As the preceding examples demonstrate, public campaigns are generally, therefore, undertaken by well-resourced investors.

C *Tech-enabled Engagement*

Our discussion of the preceding engagement alternatives has highlighted how significant shareholders, such as institutional investors, hedge funds and larger social activist organisations, predominantly utilise those alternatives. Reflecting on institutional investors' ability to secure more substantial engagement opportunities with companies, the well-known gadfly, Evelyn Davis, claimed: 'Institutional investors get treated like royalty, individual investors like peasants!'[109] Although this may have been true at the time that Davis made the complaint, in recent years significant technological developments have started to transform how investors, particularly retail investors, engage with public companies.

Mobile trading, information, and communication technologies are establishing an online ecosystem which is drawing smaller investors into the equities market and providing them with low-cost mechanisms to engage in corporate governance.[110] These technologies include chat forums and message boards, messaging applications, social media, and online trading platforms. They are particularly favoured by younger investors — especially Millennial and Generation Z investors — who tend to be more comfortable than older investors using technology, including for investment activities.[111] Younger investors entered the stock market

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[107] Climate Action 100+, 'Companies' (Web Page) <https://www.climateaction100.org/whos-involved/companies/>; Climate Action 100+, 'News' (Web Page) <https://www.climateaction100.org/news/page/2/>.

[108] Bowley (n 39) 118 (noting how the interposition of an intermediary may lessen investors' concerns about competitive and reputational downside risk).

[109] Leslie Bennetts, 'The C.E.O's Worst Nightmare' *Vanity Fair* (1 July 2002) <https://www.vanityfair.com/news/2002/07/shareholder-activism-200207>.

[110] See generally, Steve Kourabas, 'Shareholder (Dis)empowerment through Crowd-Sourced Equity Funding' (2023) 46 UNSW Law Journal (forthcoming).

in large numbers during the Covid-19 pandemic[112] and they are forecast to continue growing as a major investor class as a result of intergenerational wealth transfer.[113] This demographic shift may see the use of mobile technologies become an embedded feature of public company corporate governance.

This online ecosystem has several components. First, low-cost and easy-to-use investment and trading apps make it easier (and, according to some commentators, more entertaining)[114] for small investors to participate in the public equities market.[115] Having acquired shares, investors then use social media platforms to access information relevant to their investments. For instance, investors aged between 25 and 45 who use the online trading platform 'Superhero' identified 'online news' and 'podcasts' as their most common sources for financial information.[116] Younger investors also appear to rely increasingly on posts made on platforms such as Twitter, including posts made by celebrity figures such as Elon Musk, or on popular subreddits such as r/WallStreetBets.[117] In one survey, 34% of retail investor respondents said that they had made at least one change to their investments as a result of announcements seen on social media, including Twitter, LinkedIn, Reddit and Instagram.[118] Tech-savvy investors also use communication and trading apps to facilitate their engagement with investee companies. Prominent activists, for example, have been quick to recognise the potential of social media as an engagement mechanism. In 2013–15, Carl Icahn used his extensive Twitter network to influence the value of Apple shares and the decision-making of

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111 As the Australian Securities Exchange (ASX) notes, next generation investors are more likely than older cohorts of investors to seek information through sources such as YouTube, podcasts, social messaging, and social media platforms: ASX, *ASX Australian Investor Study 2020* (Report, 2020) 25–26, 40 <https://www2.asx.com.au/blog/australian-investor-study>. See also, Sergio Alberto Gramitto Ricci and Christina M Sautter, 'Corporate Governance Gaming: The Collective Power of Retail Investors' 22 Nevada Law Journal 51 68-70.

112 Fisch, 'Gamestop and the Reemergence of the Retail Investor' (n 36) 1817.

113 See above n 33.

114 Fisch, 'Gamestop and the Reemergence of the Retail Investor' (n 36) 1819 (discussing concerns that trading apps have 'gamified' investing).

115 Ricci and Sautter (n 111).

116 Natalie Ann Hendry, Benjamin Hanckel and Angel Zhong, 'Navigating Uncertainty: Australian Young Adult Investors and Digital Finance Cultures' (August 2021) RMIT University and Western Sydney University Research Paper, 8 <https://apo.org.au/node/313385>. Further, young investors have also reported reading online news shared in finance related Facebook groups as a source of information for investments.

117 Ibid.

118 Elana Dure, 'Social Media's Influence on the Investing Community', *JP Morgan* (13 September 2021) <https://www.chase.com/personal/investments/learning-and-insights/article/social-medias-influence-on-the-investing-community>. Many Gen Z investors report using TikTok and Instagram for financial information, while millennials turned to Facebook as a key source of advice.

Apple CEO, Tim Cook. A study conducted by Dinh, Kopf and Seitz found that Icahn's Twitter postings generated abnormal returns on Apple shares.[119] Icahn also claimed to have achieved his goal of convincing Cook to substantially increase Apple's share repurchases, after posting tweets urging Cook to take this course of action.[120]

Prominent actors like Icahn are not the only investors utilising technology in their engagement efforts. The role played by stock message boards highlights this point. These are internet forums providing discussion threads about particular shares or trading topics. Forums such as Stockaholics, Stockopedia and Trade Brains allow users to post information and ask questions at little cost in threads that are created on a particular topic.[121] They provide a means for individuals to aggregate and disseminate their knowledge, thereby potentially reducing the informational disadvantage they face relative to institutional investors.[122] These message boards also help investors to interact with and exert influence over companies. A study by Ang and others explored the effect of stock message board postings on decisions by managers of Chinese companies regarding mergers and acquisitions.[123] Examining 303 firms facing potentially value-destroying acquisitions and 13,496 acquisition-related comments from a single stock message board, the authors found a correlation between a company's decision to withdraw from an acquisition and the extent of investor opposition to the acquisition on the message board forum in the 10 days following the acquisition's announcement.[124] The study also found that there was a link between the criticisms cited by users on the message board and subsequent managerial explanations for withdrawal decisions.[125] Interestingly, the authors found that information posted on the stock message board before any significant media coverage of the acquisition contributed significantly to managerial withdrawal decisions. This raises the possibility that the message board facilitated new and substantive analysis of the

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[119] Tami Dinh, Karla Kopf and Barbara Seitz, 'The Power of Social Media – Shareholder Activism via Twitter and a Firm's Market Value' (2017) 71 Swiss Journal of Business Research and Practice 50.

[120] Ibid 69.

[121] James Ang and others, 'Could Social Media Give Small Investors Greater Say in Corporate Governance?' (*CLS Blue Sky Blog*, 5 August 2020) <https://clsbluesky.law.columbia.edu/2020/08/05/could-social-media-give-small-investors-greater-say-in-corporate-governance/>.

[122] James S Ang and others, 'The Role of Social Media in Corporate Governance' (2021) 96(2) Accounting Review 1, 2.

[123] Ibid.

[124] Ibid 24.

[125] Ibid 4. In some cases, posts may be considered mere 'noise' with little impact on a firm's reputation or share price. In other cases, stock message board posts are seriously considered by investors and firms and consequently do have significant effects on financial markets: Hendry, Hanckel and Zhong (n 116).

acquisition proposals, rather than just reflecting analysis or opinions generated and communicated elsewhere. However, even if the latter were true, the message board would still have served the function of disseminating information to investors and helping to coalesce investors' opinions regarding the acquisition proposals.

These technologies are enabling retail investors to engage in influential activism, including in relation to ESG issues. For example, Tulipshare, a start-up launched in 2021, identifies a company for intervention and encourages individuals to invest in that company. It then leverages those investments in support of an ESG-related campaign against the company — generally by filing a shareholder proposal.[126] At the time of writing, Tulipshare is seeking to compel Coca Cola to produce plastic bottles made from 100% recycled material, Amazon to provide fair and safe working conditions for warehouse workers, and JPMorgan Chase to stop investing in fossil fuel projects.[127] The platform claims to have had a number of successes. In 2021, Tulipshare filed a shareholder resolution with Johnson & Johnson calling for the company to halt global sales of talc-based baby powder. Tulipshare claims that its activism prompted the company, less than one year later, to stop its sales of this product. Celebrating the outcome, Tulipshare founder and CEO, Antoine Argouges, pointed to Tulipshare's potential to invigorate the corporate governance influence of the individual:

> Today is a triumph in corporate governance and for the investors, consumers, and campaigners who all united under the umbrella of shareholder activism to make this happen. When individuals unite, their collective action really can overcome the power of companies. It is also a day of justice for over 38,000 victims who submitted claims to J&J after they developed cancer in the US and thousands more across the globe who have suffered unnecessarily.[128]

Tulipshare's activism is not limited to the shareholder meeting. After claiming that Tesla's management was 'sneaky' in quietly moving the date of its AGM so that shareholders could not file ESG-related resolutions, Tulipshare publicly stated that it would continue to seek meetings with Tesla management outside of the shareholder meeting to express its

[126] Tulipshare, 'How Does Tulipshare Work?' (Web Page) <https://tulipshare.com/how-it-works>.

[127] Tulipshare, 'Our Campaigns' (Web Page) <https://tulipshare.com/campaigns>.

[128] Cited in Tulipshare, 'Johnson & Johnson are Stopping the Sale of their Talc-Based Baby Powder around the World' (*Tulipshare Blog*, 12 August 2022) <https://tulipshare.com/blog/JNJ-stop-sale-of-talc-based-baby-powder-after-calls-from-investors>.

concerns.[129] The public posting of these claims on Tulipshare's website is itself a form of engagement that corporate management cannot easily control or restrict.

These technologies are marketed on the basis that they enable smaller investors to sidestep the hierarchically structured and intermediated process of investing in and engaging with companies through conventional investment and engagement channels. For example, the Robinhood trading app was established with the explicit aim of 'democratizing' finance through the removal of barriers to investment such as minimum balance requirements and complicated financial jargon.[130] In June 2022, Tulipshare added a further element to its activist shareholder approach when it began a partnership with As You Sow, a not-for-profit activist organisation that seeks to promote corporate responsibility through shareholder advocacy and legal strategy.[131] Tulipshare's press release heralded the partnership as a step-change in corporate governance because '[u]ntil now, investing for shareholder advocacy has largely been in the domain of large institutions'.

D New Technologies and the Disintermediation of Share Voting

In spite of these developments, many investors are likely to continue to invest in listed equities through highly diversified intermediaries such as mutual and pension funds. This strategy can help investors achieve significant efficiencies, improve risk-adjusted returns and (in the case of retirement savings) may be required under retirement savings regimes.[132] In this situation, an intermediary will hold title to the shares and decide how governance rights attached to those shares are exercised, precluding underlying investors from exercising voice in the companies in which their savings are invested. Some commentators regard this as an unsatisfactory state of affairs, owing to institutional investors' constrained capacity and incentives to engage in the governance of their investee companies,[133] and have called for

[129] Tulipshare, 'Tesla's Sneaky AGM Move and What It Means for Our Campaign' (*Tulipshare Blog*, 2 February 2023) <https://tulipshare.com/blog/tesla-changes-AGM-date>.

[130] United States Securities and Exchange Commission (SEC), 'Form S-1 Registration Statement: Robinhood Markets, Inc' (Registration Statement, 1 July 2021) <https://www.sec.gov/Archives/edgar/data/1783879/000162828021013318/robinhoods-1.htm#ib5a32e8afc3b422193a2f2891a49e0c9_806>.

[131] As You Sow, 'As You Sow and Tulipshare Announce Strategic Partnership to Empower Global Retail Investors to Engage in Shareholder Advocacy' (Media Release, 22 June 2022) <https://www.asyousow.org/press-releases/2022/6/22/as-you-sow-tulipshare-empower-retail-investors-engage-shareholder-advocacy>.

[132] Gilson and Gordon (n 17) pt II (describing how these factors have underpinned the growth of intermediaries — or what the authors term 'agency capitalism').

limits to be placed on intermediaries' ability to vote shares in investee companies. More recently, in light of institutional investors' increasing focus on ESG issues such as climate change, commentators have questioned the legitimacy of these large financial institutions engaging on such socially and politically salient issues without reference to the preferences of their underlying investors.[134]

Emerging technologies have the potential, however, to enable underlying investors in this situation to exert influence over how intermediaries engage with investee companies. For example, Tumelo, a fintech startup, has developed pass-through voting and expression-of-wish products to enable underlying investors to provide input into how intermediaries' approach their engagement activities. Tumelo's 'pass-through' product enables underlying investors to submit their vote instructions to an intermediary, which then aggregates and submits those instructions to the proxy agent for voting at a shareholder meeting.[135] The 'expression of wish' product leaves official voting power with the intermediary but allows it to engage with the underlying investors to capture their voting preferences in advance of a shareholder meeting.[136]

Prominent fund managers also have begun to embrace disintermediation in their share voting activities.[137] BlackRock, for example, announced its Voting Choice Initiative in 2021 which its CEO describes as 'a capability that leverages technology and innovation to give our clients … the option to engage much more directly in proxy voting'.[138] It has been suggested that, by transferring governance decisions to underlying investors, such technology will also allow large institutional investors to sidestep criticism of their role and influence in corporate

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[133] See, eg, Dorothy Lund, 'The Case Against Passive Shareholder Voting' (2018) 43 Journal of Corporation Law 493.

[134] See, eg, Jill Fisch and Jeff Schwartz, 'Corporate Democracy and the Intermediary Voting Dilemma' (February 2023) European Corporate Governance Institute Law Working Paper 685/2023 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4360428>.

[135] Tumelo, 'Powerful Voting Technology That Wins You Clients' (Web Page) <https://www.tumelo.com/fund-managers>.

[136] Ibid.

[137] Brooke Masters, 'BlackRock Opens Door for Retail Investors to Vote in Proxy Battles' *Financial Times* (3 November 2022) <https://www.ft.com/content/6446b81f-a1b4-492f-b335-62f0efe11e7c> (referring to initiatives by BlackRock, Charles Schwab and Vanguard).

[138] Larry Fink, 'The Transformative Power of Choice in Proxy Voting' (Web Page) <https://www.blackrock.com/corporate/about-us/investment-stewardship/blackrock-voting-choice/proxy-voting-power-of-choice>.

governance, such as that which emerged in the common ownership debate[139] or more recent criticism questioning the legitimacy their ESG activism. [140]

The impact of these developments on share voting practices remains to be seen. Proponents argue that they will catalyse 'shareholder democracy'[141] and there is some early evidence of this technology improving voting rates by small investors.[142] However, these developments also have the potential to fragment the considerable voting power currently exercised by institutional investors which, as discussed in Part III above, is used to exert material influence in public company governance. Many underlying investors are small retail investors who have entrusted their retirement or other savings to intermediaries for investment and may not have the capacity or incentives to turn their mind to how intermediaries ought to vote shares in the numerous companies held in their portfolios.[143] This creates the risk that pass-through arrangements will simply result in large numbers of shares going unvoted or being voted on an uninformed basis.[144]

Moreover, these developments have the potential to complicate further engagement practices from the perspective of corporate managers. As the CEO of BlackRock has noted:

> Those of us who lead public companies will have a broader set of shareholders with whom to engage. Companies may need to develop new models of engaging with asset owners on their most important voting matters. This may take time to evolve.[145]

V SHAREHOLDER-COMPANY ENGAGEMENT: A MULTI-DIMENSIONAL, NETWORKED AND EVOLVING PHENOMENON

A *Engagement as a Multi-dimensional Phenomenon*

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[139] See generally, Jennifer G Hill, 'The Conundrum of Common Ownership' (2020) 53 Vanderbilt Journal of Transnational Law 881.

[140] Masters (n 137); Andrey Malenko and Nadya Malenko, 'Voting Choice' (April 2023) European Corporate Governance Institute Finance Working Paper 910/2023 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4390367> 26.

[141] Tumelo, 'Get to Know Tumelo' (Web Page) <https://www.tumelo.com/about-us>.

[142] Rafe Uddin, 'Shareholder Participation on the Rise in the UK' *Financial Times* (11 January 2023) <https://www.ft.com/content/8d5bacbd-2f70-4a13-bce7-971fa7c82e34?shareType=nongift>.

[143] Gilson and Gordon (n 17); Fisch and Schwartz (n 134).

[144] Fisch and Schwartz (n 134).

[145] Larry Fink (n 138).

Contemporary shareholder-company engagement is complex and evolving. Most strikingly, it is a multi-dimensional phenomenon. In addition to the shareholder meeting, shareholders also utilise, to varying degrees, behind-the-scenes engagement, public campaigns and a growing ecosystem of online trading, information and communication technologies. Whereas the shareholder meeting is typically a choreographed, once-a-year event whose agenda is largely determined by corporate management, these other techniques provide shareholders with greater scope to shape the timing, frequency, intensity and subject matter of their engagement activities.

Shareholders mix and match these various engagement techniques in a synergistic manner to leverage their influence. For example, online platforms like Tulipshare coordinate small investor activism in relation to shareholder voting proposals. Institutional investors use voting dissent at a shareholder meeting as a signalling device to indicate to a company that it has not addressed concerns previously raised by shareholders in private discussions, and they rely on behind-the-scenes interactions to resolve investor concerns revealed through voting dissent.[146]

B *Engagement as a Networked Exercise*

Another notable feature of contemporary shareholder-company engagement is the fact that it is not merely a bilateral interaction between an individual shareholder and a company. This chapter has highlighted how it is in fact a highly networked exercise, which involves shareholders employing engagement techniques in ways that mitigate collective action challenges traditionally faced by public company shareholders. The chapter has noted, for example, the synergistic interactions between institutional investors and activist shareholders such as hedge funds, gadflies and activist organisations and how these interactions enable institutional investors' substantial voting power to be employed as an offensive tactic at shareholder meetings. This chapter has also highlighted the important role played by investor organisations, investor networks and service providers such as proxy advisers and engagement firms. These organisations not only assist institutional investors with the substantial workload of engaging with the many companies in their diversified portfolios. By acting and advocating for multiple investors, these organisations also collectivise the influence of those investors. The technological innovations described in the previous section perform an analogous function. Commentators have pointed out that the current

[146] Bowley (n 39) 87.

developments in online communication technology have facilitated a 'network of networks that connects all types of communication from one-to-one to many-to-many into a wider "space" of communication'.[147] At the most basic level, the communications revolution facilitates low-cost information sharing and the expansion of two-way, virtually instantaneous, and ongoing interaction in a way that was not previously possible.[148]

This networking does not simply increase the intensity of shareholder-company engagement. It also affects the content of corporate governance discourse. Networked engagement, for example, is shaping the content of much contemporary ESG engagement. The interaction of gadflies, social activist organisations, ESG-conscious institutional investors, investor networks and international institutions such as the United Nations and its agencies is shaping and transmitting norms of ESG stewardship and coordinating ESG stewardship 'on the ground' in markets across the globe.[149] These engagement developments are, in turn, prompting companies to address environmental and social issues that were once considered the domain of lawmakers and governments.[150] For smaller investors, especially Millennial and Generation Z investors, social networking technology has created 'networked publics' that coalesce around issues not easily categorised as 'economic', 'social', or 'political' or defined by geographic reference. Rather, networked publics focus on social media-friendly issues that can be easily personalised and which bring attention to political identities and values.[151] Tulipshare's coordinated shareholder activism against prominent public companies in relation to producing bottles from recycled material, providing fair and safe working conditions for warehouse workers, and halting the production of talc-based baby powder highlights this development.

C *Implications for the Shareholder Meeting*

The shareholder meeting has long been criticised as an engagement technique. Some of this criticism disputes the practical utility of the meeting, owing to rigid meeting formalities that

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[147] Nick Couldry, *Media, Society, World: Social Theory and Digital Media Practice* (Polity Press 2012) 2.

[148] See Pearlie Koh, 'Shareholder Empowerment in the Digital Age' in Andrew Godwin, Pey Woan Lee and Rosemary Teele Langford (eds) *Technology and Corporate Law: How Innovation Shapes Corporate Activity* (Edward Elgar Publishing 2021) 172–73.

[149] Bowley and Hill, 'The Global ESG Stewardship Ecosystem' (n 59).

[150] Condon (n 19) (raising a concern as to whether it is legitimate for investors to be driving significant change on issues that were typically the domain of elected law makers).

[151] See generally Eirik Vatnøy, 'The Rhetoric of Networked Publics: Studying Social Network Sites as Rhetorical Arenas for Political Talk' (DPhil thesis, University of Bergen 2017).

limit the opportunity for shareholder engagement and low attendance rates.[152] A second, more recent, related criticism is that new forms of engagement, including online technology, have radically altered the relationship and engagement dynamics between shareholders and corporate management.[153] According to scholars such as Oranburg, engagement tools like Twitter are more effective at overcoming collective action problems that have long plagued shareholder engagement through the shareholder meeting.[154] It is not a large leap to move from such critiques to a view that the shareholder meeting should be dispensed with in favour of alternative engagement mechanisms.

Although the shareholder meeting undoubtedly has its limitations as an engagement mechanism, it would be precipitous to dismiss it as redundant. The formal, in-person and public nature of the shareholder meeting sets it apart from the other engagement mechanisms described in this chapter and gives it unique potential as a forum for scrutiny and accountability. For corporate managers, providing a public and in-person account of a company's performance at a shareholder meeting can be an unsettling experience that 'focuses the mind' and imposes a level of discipline on how they account for that performance.[155] Shareholders are able to observe how corporate managers behave when subjected to the pressure of public scrutiny.[156] Activist shareholders can 'read the room', seek to build consensus and leverage the pressure brought to bear on managers from the floor of the meeting.[157] Low attendance rates, noted earlier, indicate that shareholders do not routinely avail themselves of these opportunities. However, these features of the shareholder meeting may prove significant when a company experiences material management problems and shareholders wish to exert concerted pressure on corporate managers. In this sense, the shareholder meeting is perhaps best conceived of as an engagement mechanism with

[152] See, eg, Berle and Means (n 11) and Berle (n 14).

[153] Seth C Oranburg, 'A Little Birdie Said: How Twitter is Disrupting Shareholder Activism' (2015) Fordham Journal of Corporate & Financial Law 695.

[154] Ibid 696, 711.

[155] A point made in submissions made to a 2012 Australian government inquiry into the utility of the annual shareholder meeting. See, eg, Ashurst, *Submission on Future of the AGM and Shareholder Engagement* (20 December 2012) 2 (reporting results of a roundtable discussion involving representatives of 25 Australian public companies which noted that '[b]oards … are conscious of the "discipline" which the AGM brings to the annual presentation of the company's activities, financial position and prospects') 2; Australian Institute of Company Directors, *Submission on Future of the AGM and Shareholder Engagement* (21 December 2012) 3; Business Council of Australia, *Submission on Future of the AGM and Shareholder Engagement* (February 2013) 4.

[156] Telstra Corporation Ltd, *Submission on Future of the AGM and Shareholder Engagement* (21 December 2012) 3.

[157] Freeburn and Ramsay, 'Virtual Shareholder Meetings in Australia' (n 65) 71–73; Nili and Schaner (n 39) 186.

'contingent significance'. As the Delaware court has noted, 'a keen realization of the reality of the degree of deliberation that is possible [at a shareholder meeting], should make the preservation of residual mechanisms of corporate democracy more, not less, important'.[158] It is also conceivable that shareholders who do not fully avail themselves of the governance potential of the shareholder meeting nonetheless value the opportunity which physical attendance at a meeting affords more activist shareholders to exert pressure on corporate management.[159]

This interactive public reckoning in a formal meeting setting cannot be fully replicated by alternative engagement mechanisms such as private shareholder-company meetings, public relations campaigns or online fora. The limitations of the latter, in particular, became apparent in light of the extensive use of virtual meetings in lieu of in-person meetings during the Covid-19 pandemic.[160]

One area where technological developments described earlier could potentially displace the shareholder meeting is in relation to share voting. Online technologies already facilitate share voting[161] and much voting today occurs in advance of meetings by proxy.[162] In these circumstances, it would not seem a major change, in practice, to undertake voting through a stand-alone plebiscite process, leaving the shareholder meeting as a forum purely for reporting, discussion and debate. In the authors' view, any such proposal should be approached with caution. An Australian government inquiry in 2012 raised the possibility of conducting voting pursuant to a plebiscite occurring following the close of a shareholder meeting.[163] Respondents to the inquiry pointed out that having share voting finalised at the shareholder meeting contributes to the meeting's capacity to act as a pressure point on corporate managers, especially where voting outcomes reveal material shareholder disquiet.[164]

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158 *Hoschett v TSI International Software* 683 A 2d 43, 46.

159 See, eg, Bruce Goldfarb, 'Are Virtual Annual Meetings Good for Shareholder Democracy?' *Forbes* (5 May 2020) <https://www.forbes.com/sites/brucegoldfarb/2020/05/05/are-virtual-annual-meetings-good-for-shareholder-democracy/?sh=3bda08fb27f3> (referring to the benefits for shareholders of observing the 'give and take' between dissidents and corporate managers at contested shareholder meetings).

160 See notes 65–70 and accompanying discussion.

161 Uddin (n 142); see also, Sharesies, 'Have Your Say with Shareholder Voting' (Webpage) <https://www.sharesies.nz/blog/have-your-say-with-shareholder-voting > (describing a facility for investors who acquire shares via Sharesies' online trading app to vote those shares using an interface in the app).

162 See, eg, Bowley (n 39) 72; Nili and Shaner (n 39) 146.

163 Corporations and Markets Advisory Committee, *The AGM and Shareholder Engagement* (Discussion Paper, 2012) 123–25.

This is not to say that the shareholder meeting cannot be improved as an engagement mechanism. Possibilities such as hybrid meetings, improving the functionality of online meeting technologies, and streamlining the voting process for shareholders are all worthy of careful consideration.[165] However, reform initiatives need to recognise the fact that the shareholder meeting today forms part of a broader array of engagement techniques and mechanisms which shareholders use in a synergistic fashion. Whether changes to the format and structure of shareholder meetings are necessary or desirable, and their likely impact on the quantity and nature of shareholder-company engagement, will need to be assessed in light of the alternative mechanisms utilised by shareholders.

D *Implications for Governance Accountability*

The engagement developments discussed in this chapter provide not only opportunities but also challenges. One important consequence of the varied engagement practices described in this chapter is that the process of corporate decision-making is now more diffuse and less transparent.[166] In these circumstances, we may need to consider what it means to move beyond reliance on strict hierarchies based on clear divisions of authority and responsibility towards greater acceptance of disaggregated, fragmented, and networked models of influence-wielding and decision-making in corporate governance. In particular, accountability becomes a more complex issue in these circumstances. We must ask who is seeking to influence corporate policy and operations, what are their motivations, whether such influence is transparent, and whether there is an appropriate accountability mechanism to address such influence-wielding. This is particularly important when we consider that some aspects of contemporary shareholder engagement rest on the actions of a handful of key participants. In the United States, for example, a few individual gadflies are responsible for a disproportionate number of shareholder advisory proposals.[167] In some jurisdictions, a small number of proxy advisory firms play a vital role in supporting the voting activities of

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[164] See, eg, Hermes Equity Ownership Services, *Submission on Future of the AGM and Shareholder Engagement* (December 2012) 12 ('[W]e believe that [accountability] can only be delivered by a meeting which combines the full range of reporting, questioning, deliberation and decision-making').

[165] For a discussion of reform possibilities, see Nili and Shaner (n 39) Pt III.

[166] Mark Fenwick and Erik PM Vermeulen, 'Technology and Corporate Governance: Blockchain, Crypto, and Artificial Intelligence' (November 2018) European Corporate Governance Institute Law Working Paper 424/2018, 5.

[167] Kastiel and Nili, 'The Giant Shadow of Corporate Gadflies' (n 44). See also, John Coates, *The Problem of 12: When a Few Financial Institutions Control Everything* (Columbia Global Reports 2023).

institutional investors at shareholder meetings.[168] Recent regulatory initiatives in relation to the regulation of proxy advisers in Australia[169] and the tightening of requirements for filing advisory proposals in the United States in 2020[170] can be seen as attempts to address such issues in light of the prominent roles played by proxy advisers and shareholder proposals in contemporary corporate governance.

VI CONCLUSION

Modern public company shareholder engagement is proactive, strategic, networked and collectivised. The shareholder meeting has not become redundant, as some critics would suggest. Nonetheless, it is by no means the only or even primary engagement mechanism and instead forms part of a broader constellation of engagement techniques. These developments entail both opportunity and risk from a corporate governance perspective. They hold the promise of establishing a more dynamic and responsive system of corporate accountability by providing multiple channels for shareholder influence-wielding. Yet, the disaggregated, informal and sometimes private nature of much contemporary engagement raises concerns about transparency and accountability of the various actors involved in this engagement ecosystem.

[168] Bowley (n 39) 203–4 (noting this situation in the Australian context).

[169] Josh Frydenberg and Jane Hume, 'Reforms to Bring Greater Transparency and Accountability to Proxy Advice' (Media Release, 17 December 2021) < https://ministers.treasury.gov.au/ministers/jane-hume-2020/media-releases/reforms-bring-greater-transparency-and-accountability-proxy>.

[170] Discussed in Kastiel and Nili, 'The Giant Shadow of Corporate Gadflies' (n 44) 619–21.

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