

SUPERANNUATION FUNDS AND AUSTRALIAN CORPORATE GOVERNANCE

TIM BOWLEY*

Superannuation funds' significance was highlighted in 2023 when Australia's largest fund derailed a high-profile takeover transaction. Commentators expressed reservations about funds' increasing power over Australian Securities Exchange-listed entities. This article explores the rise of superannuation funds and their corporate governance significance.

Data indicates that superannuation funds do not own enough shares to control listed entities. Instead, share ownership is concentrating in the hands of groups of superannuation funds and other institutional investors. In this setting, governance outcomes are determined not by a controlling shareholder but through the interplay between compact groups of investors and corporate management.

This phenomenon has not been explored in detail in Australia. This article contributes a conceptual framework for analysing the phenomenon: the 'market for corporate influence'. This article argues that superannuation funds have attributes that make them adept wielders of influence in the market for corporate influence, and highlights implications for Australian corporate governance regulation.

I INTRODUCTION

The ownership of entities listed on the Australian Securities Exchange ('ASX') is increasingly concentrating in the hands of institutional investors, such as superannuation funds and index funds. Market commentators, scholars, and law makers have been aware of this trend for some time¹ and have generally regarded it as a positive development for Australian corporate governance.² This reflects a

* Adjunct Associate Professor and Member, Centre for Commercial Law and Regulatory Studies, Faculty of Law, Monash University; Visiting Researcher, Ross Parsons Centre of Commercial, Corporate and Taxation Law, Sydney Law School, University of Sydney.

1 For early analysis of this development, see Ian M Ramsay and Mark Blair, 'Ownership Concentration, Institutional Investment and Corporate Governance: An Empirical Investigation of 100 Australian Companies' (1993) 19(1) *Melbourne University Law Review* 153.

2 See, eg, GP Stapledon, 'Disincentives to Activism by Institutional Investors in Listed Australian Companies' (1996) 18(2) *Sydney Law Review* 152, 154 ('Disincentives to Activism'); Parliamentary Joint

view that large, sophisticated, institutional investors are likely to be better placed than smaller shareholders to exercise meaningful oversight over the management of listed entities.³

In late 2023, however, a high-profile incident prompted a discernible shift in sentiment. The incident involved a takeover made by a consortium of overseas investors for Origin Energy Ltd ('Origin'), an ASX-listed energy company. The takeover was supported by Origin's board of directors and an independent financial expert appointed by Origin,⁴ and was cleared by the competition regulator on public interest grounds.⁵ In order to proceed, the takeover also required approval by a special majority of Origin shareholders.⁶ One of Origin's major shareholders was Australia's largest superannuation fund, AustralianSuper ('AusSuper').⁷ AusSuper did not support the takeover because it believed the takeover price undervalued the strategic role Origin will play in Australia's transition to renewable energy.⁸ Before the takeover was put to a vote of Origin's shareholders, AusSuper acquired additional Origin shares to increase its shareholding in Origin from 12.7% to approximately 17%.⁹ This multi-billion-dollar investment¹⁰ made AusSuper the largest shareholder in Origin¹¹ and highlighted its determination to block shareholder approval of the takeover. AusSuper also engaged in a high-profile

Committee on Corporations and Financial Services, Parliament of Australia, *Better Shareholders – Better Company: Shareholder Engagement and Participation in Australia* (Report, June 2008) 13 [3.12], 57 [4.64] ('*Better Shareholders*').

3 Stapledon, 'Disincentives to Activism' (n 2) 154; *Better Shareholders* (n 2) 13 [3.12], 57 [4.64].

4 Origin Energy, 'Court Approves Distribution of Scheme Booklet and Convening of Scheme Meeting' (Media Release, 19 October 2023) <<https://www.originenergy.com.au/about/investors-media/court-approves-distribution-of-scheme-booklet-and-convening-of-scheme-meeting/>>.

5 The acquiring consortium included an investor which specialised in renewable energy investments. The regulator concluded that the investor's involvement would benefit Australia's renewable energy transition and outweigh the anti-competitive effects of the acquisition: Australian Competition and Consumer Commission, 'ACCC Authorises Brookfield and MidOcean's Acquisition of Origin' (Media Release, 10 October 2023) <<https://www.accc.gov.au/media-release/accc-authorises-brookfield-and-midoccean%E2%80%99s-acquisition-of-origin>>.

6 The takeover was structured as a scheme of arrangement and required approval at a shareholder meeting by a majority in number of the shareholders voting at the meeting which collectively held at least 75% of all shares voted at the meeting: *Corporations Act 2001* (Cth) s 411(4) ('*Corporations Act*').

7 Fund size taken from Australian Prudential Regulation Authority, 'Annual Fund-Level Superannuation Statistics: June 2024' (Statistics, 30 January 2025) <<https://www.apra.gov.au/annual-fund-level-superannuation-statistics>>.

8 AustralianSuper, 'AustralianSuper Rejects Brookfield and EIG Bid for Origin Energy' (Media Release, 31 October 2023) <<https://www.austriansuper.com/about-us/newsroom/?c=Media%20release&t=&s=&n=2>>.

9 Form 604: Notice of Change of Interests of Substantial Holder from AustralianSuper Pty Ltd to Origin Energy Limited, 1 July 2022, 1 (showing the fund's shareholding prior to the takeover as 12.66%); AustralianSuper, 'AustralianSuper Welcomes the Vote on Origin Energy' (Media Release, 4 December 2023) <<https://www.austriansuper.com/about-us/newsroom/?c=Media%20release&t=&s=&n=2>> (showing that the fund had increased its shareholding to 'a stake of over 17%' by the time of the shareholder vote).

10 At the proposed takeover price of \$9.53 per Origin share, AusSuper's 17% shareholding was valued at more than \$2.5 billion.

11 Simon Johanson and Colin Kruger, 'Takeover: Origin Suitor Steps up Campaign Fight to Persuade Shareholders', *The Sydney Morning Herald* (Sydney, 7 November 2023) 22.

public relations campaign against the takeover, at one point even enlisting former Australian Prime Minister Paul Keating to support its stance.¹² AusSuper's actions ultimately catalysed sufficient dissent amongst Origin's other shareholders, and the takeover was defeated when it was put to a vote of Origin shareholders in December 2023.¹³

AusSuper's high-profile, combative, and costly intervention highlighted the increasing significance of superannuation funds. These are institutions which invest and manage the savings of workers under Australia's compulsory occupational retirement savings system. Since the superannuation system commenced in the 1990s, superannuation funds have grown considerably, and now manage nearly \$4 trillion in capital and invest a significant proportion of this capital in the shares of ASX-listed entities.¹⁴

As funds have grown, there has been recurring and often acrimonious debate about the governance, investment performance, and political allegiances of these major financial institutions.¹⁵ However, the AusSuper–Origin incident prompted a new controversy: whether the growth of the superannuation system is a desirable development for the governance of ASX-listed entities. Two related concerns were raised. First, commentators claimed that the AusSuper–Origin incident heralded the 'rise of big super'¹⁶ and demonstrated how these substantial financial institutions are now in a position to exert control over the governance of ASX-listed entities. The second (and related) concern was that this concentration of governance power may be suboptimal for the effectiveness and legitimacy of ASX-listed entity corporate governance.¹⁷

These are potentially significant issues. ASX-listed entities manage economically and societally important businesses, including the nation's major banks, insurers, supermarket chains, toll roads, and energy production. Their governance and control are therefore matters of economic and broader social importance.¹⁸ Yet, aspects of the debate surrounding the AusSuper–Origin incident seemed contentious or underexplored. In particular, it was unclear to what extent

12 Paul Keating, 'Brookfield Taking Suckers for a Ride', *The Australian Financial Review* (Melbourne, 30 November 2023) 38 (describing the consortium attempting to acquire Origin as 'just another opportunist private equity fund trying to take suckers for a ride').

13 'AustralianSuper Welcomes the Vote on Origin Energy' (n 9).

14 See below Part II.

15 See below Part II.

16 See, eg, Elizabeth Knight, 'Comment: Big Super Wants Changes Company Boards Won't Like', *The Sydney Morning Herald* (Sydney, 15 December 2023) 29; 'The Lexcorps of the Next Decade Will Be the Big Super Funds', *Senator Andrew Bragg* (Opinion Piece, 9 January 2024) <<http://www.andrewbragg.com/post/the-lexcorps-of-the-next-decade-will-be-the-big-super-funds>> ('The Lexcorps'); Hannah Wootton, 'Super Pool to Soar but with Fewer Funds', *The Australian Financial Review* (Sydney, 13 March 2024) 11.

17 As to the details of these concerns, see below Part II.

18 The economic and social salience of large corporations has been highlighted in recent years by the level of political attention focused on their performance and conduct: see, eg, Ayesha de Kretser, 'Joyce Forced to Front Senate Costs Inquiry', *The Australian Financial Review* (Melbourne, 24 August 2023) 3; Jonathan Barrett, 'Coles and Woolworths to Face Senate Scrutiny amid Claims of Profiteering', *The Guardian* (online, 3 December 2023) <<https://www.theguardian.com/australia-news/2023/dec/03/coles-and-woolworths-to-face-senate-scrutiny-amid-claims-of-profiteering>>; House of Representatives

AusSuper's intervention at Origin was truly representative of the influence now wielded by superannuation funds over ASX-listed entities. Moreover, it was unclear why increasing superannuation fund influence over ASX-listed entities, were it to be the case, would necessarily be problematic. Superannuation funds are charged with the societally important task of investing the retirement savings of workers, and are closely regulated by the Australian prudential and corporate regulators.¹⁹ Why, therefore, would the ascendancy of superannuation funds necessarily be a retrograde step for the governance of ASX-listed entities?

This article engages with these important issues.²⁰ Its central claim is that the implications of superannuation funds' remarkable growth for Australian corporate governance are significant, albeit more nuanced and complex than conveyed in the recent debate. This article presents empirical evidence which reveals that it is unlikely that superannuation funds commonly exercise (or will come to exercise) any measure of control over ASX-listed entities. This evidence reveals, however, that the ownership of shares in ASX-listed entities is nonetheless significantly concentrating in the hands of a relatively small number of superannuation funds *and* other institutional investors. The so-called 'rise of big super' is therefore not a story about the rise of superannuation funds as controlling shareholders, but a story about overall share ownership concentration in the Australian market.

Should this development be a concern from a corporate governance perspective? The issue posed by this question implicates an important, broader academic inquiry regarding the increasing assertiveness of non-controlling shareholders in listed entity corporate governance. This inquiry has been spurred by the rise of shareholder activism and stewardship. Reflecting on this phenomenon, John Farrar, a senior Australasian scholar, has suggested that it might 'require some doctrinal shift in our concepts of the company, control and fiduciary duty'.²¹ Scholars in the United States ('US') and the United Kingdom ('UK') have in fact developed a conceptual framework for analysing the phenomenon – the so-called 'market for corporate influence'.²² This concept takes as its starting point the increasing levels of share ownership concentration in the hands of institutional investors, and demonstrates how these investors have become a strategic 'swing constituency' in listed-entity corporate governance. It highlights how it is entirely possible in this setting for a non-controlling shareholder to solicit and leverage the support of this constituency, and thereby secure substantial influence over a company's

Standing Committee on Economics, Parliament of Australia, *Flood Failure to Future Fairness: Inquiry into Insurers' Responses to 2022 Major Floods Claims* (Report, October 2024).

19 See below Part II.

20 The AusSuper–Origin incident potentially also raises issues relevant to takeover regulation. For example, will funds routinely have the ability to block takeovers, and will this impact the efficiency of the Australian market for corporate control and the interests of other investors in ASX-listed entities?: see, eg, 'The Lexcorps' (n 16). Consideration of these issues falls outside the scope of this article.

21 John H Farrar, 'The Move from Private Enforcement to Public Enforcement and Now the Move to Litigation Funding of Shareholder Activism: Are We Entering a New Era of Access to Justice in Corporate Law?' (2015) 26(1) *European Business Law Review* 75, 93 <<https://doi.org/10.54648/eulr2015005>>.

22 Discussed below in Part IV(A).

governance. The concept of the market for corporate influence illuminates the characteristics of successful influence-wielding shareholders and the mechanisms they use to wield influence. It provides an important framework for exploring the potential of superannuation funds in Australian corporate governance.

This article argues that superannuation funds have attributes that are likely to make them adept wielders of influence in the Australian market for corporate influence. Although this development is not inherently problematic, it has the capacity to give rise to risks and issues that may impact the efficacy of listed entity governance. Such risks and issues, which have been explored overseas, have received limited attention in Australia to date. This article argues that Australian corporate governance discourse and regulation needs to shift toward a more inquiring examination of the implications of share ownership concentration, and the corresponding rise of influential, non-controlling shareholders such as superannuation funds. It concludes by highlighting areas of corporate governance regulation and practice whose analysis would benefit from a greater appreciation of this issue.

II SUPERANNUATION FUNDS' SIGNIFICANCE

Before turning to examine the implications of the 'rise of big super' for the governance of ASX-listed entities, it is first necessary to provide some important context regarding superannuation funds and their economic significance.

A Nature, Origins, and Growth of Superannuation Funds

A superannuation fund operates a retirement savings scheme for workers and is typically structured as a trust. An employer pays a worker's superannuation entitlements, as prescribed by Commonwealth law, into a fund selected by the worker or employer, or in some cases, as prescribed under an applicable industrial instrument. These entitlements are invested by the fund on behalf of the worker with a view to generating sufficient capital to support the worker in their retirement.²³

Superannuation funds are subject to a detailed regulatory regime which supplements the general law rules applicable to trusts and trustees.²⁴ Funds are also subject to supervision by both the prudential regulator – the Australian Prudential Regulation Authority ('APRA'), and the corporate and financial services regulator – the Australian Securities & Investments Commission ('ASIC').²⁵

23 As to the matters in this paragraph, see generally 'How Super Works: Look after Your Super Now, so It Looks after You', *Moneysmart.gov.au* (Web Page) <<http://moneysmart.gov.au/how-super-works>>.

24 See generally Maged Girgis, 'Superannuation Governance: Strength in Structural Diversity' in Tony Damian and Amelia Morgan (eds), *Bootmakers, Boards and Rogues: Issues in Australian Corporate and Securities Law* (Herbert Smith Freehills, 2023) 701.

25 'APRA and ASIC: A New Era in Cooperation', *Australian Prudential Regulation Authority* (Insight, 28 February 2020) <<http://www.apra.gov.au/apra-and-asic-a-new-era-cooperation>>.

Since its inception in the 1990s,²⁶ the superannuation system has grown dramatically,²⁷ and is now both economically and societally significant. As at 30 June 2024, the total amount of assets held by superannuation funds stood at \$3.9 trillion, equivalent to 145% of Australia's annual gross domestic product.²⁸ This makes the Australian system the seventh largest in the world as a share of gross domestic product.²⁹ Approximately 17 million Australians participate in the system and superannuation will become the primary source of retirement income for most retirees by the mid-2040s.³⁰ Superannuation has significantly increased the nation's national savings and acted as an important source of liquidity for the Australian capital market. Superannuation funds played a key role, for example, in advancing new capital to Australian businesses during the economic turmoil of the Global Financial Crisis, and in the initial stages of the COVID-19 pandemic.³¹

The superannuation system will continue to experience significant growth. Total superannuation assets are projected to increase to \$10 trillion by the early 2040s (equivalent to 170% of national gross domestic product).³² Growth is only expected to slow by the middle of the century when members who have been in the system for their entire working lives retire and begin drawing down their significant accumulated balances.³³ By that point, superannuation assets are forecast to exceed \$14 trillion and represent around 169% of gross domestic product.³⁴

B Structure of the Superannuation Sector

Superannuation funds can be divided into two broad categories: private funds established and personally managed by individual workers, known as self-managed superannuation funds or 'SMSFs', and professionally managed 'institutional' funds which cater for large numbers of employees.³⁵ Institutional funds are the largest component of the superannuation system, accounting for nearly 75% of total

26 For historical accounts, see Christine St Anne, *A Super History: How Australia's \$1 Trillion+ Superannuation Industry Was Made* (Major Street Publishing, 2012); Bernard Mees and Cathy Brigiden, *Workers' Capital: Industry Funds and the Fight for Universal Superannuation in Australia* (Allen & Unwin, 2017).

27 This growth is generated by a steadily rising compulsory contribution rate and strong investment performance: Mercer, *Shaping Super 2025: Analysis of Superannuation Maturity in a Time of Consolidation and Change* (Report, March 2025) 2 ('*Shaping Super*').

28 *Shaping Super* (n 27) 3.

29 Ibid.

30 Commonwealth of Australia, *Intergenerational Report 2023: Australia's Future to 2063* (Report, 24 August 2023) 165–6; *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254, 271 [33] (French CJ, Gummow, Heydon, Crennan and Bell JJ) (the High Court acknowledging that '[f]or some people, superannuation is their greatest asset apart from their houses; for others it is even more valuable').

31 Industry Super Australia, *Millions of Australians Own Big Super: How Industry Super Investments Support the Australian Economy* (Report No 2, 22 August 2022) 23–5 <<https://apo.org.au/node/319115>>.

32 *Shaping Super* (n 27) 1; Deloitte, *Dynamics of the Australian Superannuation System: The Next 20 Years to 2043* (Report, March 2024) 6–7 <<https://www.deloitte.com/au/en/Industries/financial-services/perspectives/dynamics-australian-superannuation-system.html>> ('*The Next 20 Years*').

33 *Shaping Super* (n 27) 3.

34 Ibid.

35 For an overview, see Girgis (n 24) 713–16.

superannuation assets under management ('AUM').³⁶ This market share is forecast to increase further in coming years.³⁷ Owing to their significance, institutional funds have been the focus of the recent debate about the 'rise of big super'.

Institutional funds take one of four main forms: government-established funds that cater for public sector workers ('public sector funds'), funds established by corporate employers to cater for their employees ('corporate funds'), publicly-offered funds established by commercial financial services organisations (commonly referred to as 'retail funds') and so-called 'industry funds'.³⁸ The latter are funds that were originally established by unions and/or employer groups to manage the superannuation of workers in particular industries or sectors of the economy³⁹ – hence the 'industry' moniker. However, they are now open to the general public.⁴⁰

Industry funds are the dominant component of the institutional fund sector, accounting for 60% of total AUM held by institutional funds (and approximately 44% of total superannuation AUM).⁴¹ They are followed by retail funds which account for 30% of AUM held by institutional funds (and 23% of total superannuation AUM).⁴² As a result of various commercial and regulatory factors,⁴³ industry funds are forecast to experience materially higher growth in AUM than other segments of the superannuation market in coming years.⁴⁴

An important point to appreciate is that inter-fund mergers are significantly reducing the total number of institutional funds and concentrating superannuation assets in the hands of fewer (and larger) institutional funds.⁴⁵ In 2022, just 12 funds accounted for approximately 60% of total superannuation AUM held by institutional funds.⁴⁶ Of these 12 funds, seven were industry funds, four were retail funds and one was a public sector fund.⁴⁷ Merger activity is expected to continue

36 *The Next 20 Years* (n 32) 13.

37 *Ibid* 13–14.

38 'Types of Super Funds', *Moneysmart.gov.au* (Web Page) <<https://moneysmart.gov.au/how-super-works/types-of-super-funds>>; Girgis (n 24) 713–16.

39 St Anne (n 26); Bernard Mees and Aron Paul, 'Industry Superannuation Funds: A New Kind of Mutual' (2017) 112 (May) *Labour History* 25 <<https://doi.org/10.5263/labourhistory.112.0025>>.

40 'Types of Super Funds' (n 38).

41 *The Next 20 Years* (n 32) 14.

42 *Ibid*.

43 This includes (i) industry funds' strong record of investment performance, low costs, and distinctive marketing, which have enabled funds to grow their AUM substantially; (ii) some industry funds enjoy a ready source of new capital as a result of being default funds under industrial awards; and (iii) recently enacted 'stapling' laws that tie a worker to the fund they joined when they first entered the superannuation system, which can benefit industry funds which have strong connections to sectors that are entry points into the workforce for first-time workers: see generally, *The Next 20 Years* (n 32) 12–14.

44 *Ibid* 13.

45 See, eg, Scott Lawrence and Geoff Warren, *Do Superannuation Fund Members Benefit from Large Fund Size?* (Report, 24 March 2023) 4 <<https://theconexusinstitute.org.au/wp-content/uploads/2023/03/Does-Size-Benefit-Super-Fund-Members-24-March-2023.pdf>> (reporting a decline in APRA regulated funds from 150 in 2018 to 97 in 2022); *Shaping Super* (n 27) 6 (reporting a decline in APRA regulated funds from 107 to 89 in the 2023–24 financial year).

46 KPMG, *Super Insights 2023: New Competitive Battlegrounds* (Report, May 2023) 8 <<https://assets.kpmg.com/content/dam/kpmg/au/pdf/2023/super-insights-2023-report.pdf>> ('*Super Insights 2023*').

47 *Ibid*.

for the foreseeable future.⁴⁸ Industry funds and, to a lesser extent, retail funds will be the principal beneficiaries of this merger activity.⁴⁹

The preceding overview highlights three key points that are relevant for this article's analysis. First, the economic significance of the superannuation sector cannot be understated. Its total AUM already exceeds the total market capitalisation of the ASX⁵⁰ and the sector is forecast to nearly double in size by the next decade.⁵¹ Second, superannuation assets are concentrating in the hands of fewer (and larger) institutional funds. Third, industry funds have become a substantial component of the superannuation system and are likely to continue their ascendancy, owing to a combination of commercial, regulatory, and merger-related factors.

C Debate about the Role of Superannuation Funds in the Governance of ASX-Listed Entities

Superannuation funds employ a diversified investment strategy; that is, they invest workers' superannuation contributions across different asset classes in order to manage investment risk.⁵² One such asset class is shares in ASX-listed entities. According to data compiled by APRA, institutional funds held \$611 billion, or approximately 25% of all AUM held by institutional funds, in ASX-listed equities at the end of 2023.⁵³ This represented nearly one quarter of the total market capitalisation of the ASX at that date.⁵⁴ Industry funds accounted for almost a majority of this investment (48%), followed by retail funds (35%), public sector funds (15%), and corporate funds (1.5%).⁵⁵ Superannuation funds are therefore highly significant investors in the ASX.

Prior to the AusSuper–Origin incident, however, there had been only sporadic and limited consideration of the implications of funds' significant share ownership for the governance of ASX-listed entities. Conservative commentators and politicians, for example, have periodically raised concerns that industry superannuation funds, owing to their trade union connections, might exploit their economic power to pressure ASX-listed entities to support progressive political objectives.⁵⁶ A federal parliamentary inquiry in 2021 ('2021 Common Ownership

48 *Shaping Super* (n 27) 6. Mergers have been prompted by funds' desire to achieve economies of scale as well as government policy: see Lawrence and Warren (n 45); *Shaping Super* (n 27) 5–6.

49 *Super Insights 2023* (n 46) 8.

50 Hannah Wootton and Alex Gluyas, 'Super Funds Looking Elsewhere as They Outgrow Shrinking ASX', *The Australian Financial Review* (Melbourne, 8 June 2023) 20.

51 *Shaping Super* (n 27) 1, 3.

52 'Super Investment Options', *Moneysmart.gov.au* (Web Page) <<https://moneysmart.gov.au/grow-your-super/super-investment-options>>.

53 Australian Prudential Regulation Authority, 'Quarterly Superannuation Industry Publication: December 2023' (Statistics, 12 April 2024) Table 9 ('APRA December 2023 Statistics'). This includes figures for Australian listed equities, listed property, and listed infrastructure.

54 Calculated using December 2023 market capitalisation data at 'Historical Market Statistics', *Australian Securities Exchange* (Web Page) <<https://www.asx.com.au/about/market-statistics/historical-market-statistics>>.

55 Calculated by reference to 'APRA December 2023 Statistics' (n 53).

56 See, eg, Janet Albrechtsen, 'Trump's War on DEI Puts the Wind up Our Diversity Divas', *The Australian* (Canberra, 29 January 2025) 11; 'The Lexcorps' (n 16).

Inquiry')⁵⁷ investigated the possibility that large institutional investors which hold shares in companies competing in the same sector may cause those companies to behave as anti-competitive oligopolies.⁵⁸ The inquiry did not reach any definitive findings and recommended that '[t]he phenomena should be carefully scrutinised over the coming years'.⁵⁹ It has since been criticised as a misguided initiative.⁶⁰

Apart from these examples, mainstream Australian corporate governance discourse has generally tended to regard institutional investor share ownership as desirable, owing to the potential for such investors to act as diligent monitors of listed entities and thereby potentially improve corporate performance.⁶¹ This reflects a broader theoretical and policy acceptance in Australia of the importance of shareholders playing a central role in corporate governance and having strong legal rights.⁶²

The AusSuper–Origin incident, however, unleashed a remarkable stream of negative or ambivalent commentary about the potentially negative implications of superannuation funds' increasing economic significance for the governance of ASX-listed entities. Commentators asserted (or presumed) that funds are now in a position to exercise a distinct measure of control over listed entities. According to one newspaper columnist, 'it is not exactly open warfare, but the country's biggest industry super funds are flexing the muscles that are constantly pumped up by growth in funds under management'.⁶³ The press described industry superannuation funds as 'increasingly vocal investors [which] ... hold sway over boards',⁶⁴ 'curb unruly boards',⁶⁵ and 'influence [entities'] policies on emission targets, executive pay, gender diversity and other key issues'.⁶⁶

57 House of Representatives Standing Committee on Economics, Parliament of Australia, *Report on the Implications of Common Ownership and Capital Concentration in Australia* (Report, March 2022) ('2021 Common Ownership Inquiry Report').

58 This concern originates in US scholarship examining the implications of the significant concentration of US share ownership in the major index funds. It has been subjected to significant criticism on both theoretical and empirical grounds, and is regarded as highly contentious: see Jennifer G Hill, 'The Conundrum of Common Ownership' (2020) 53(3) *Vanderbilt Journal of Transnational Law* 881.

59 2021 Common Ownership Inquiry Report (n 57) iv–v.

60 Russell Baker, 'Super Fund Ownership of ASX Is No Gothic Horror Story', *Investment Magazine* (online, 19 January 2024) <<https://www.investmentmagazine.com.au/2024/01/super-fund-ownership-of-asx-is-no-gothic-horror-story/>>.

61 See above n 2.

62 Vivien Chen, Ian Ramsay and Michelle Welsh, 'Corporate Law Reform in Australia: An Analysis of the Influence of Ownership Structures and Corporate Failure' (2016) 44(1) *Australian Business Law Review* 18 (noting how Australian corporate law reform has displayed a preference for shareholder empowerment); Richard Mitchell et al, 'Shareholder Protection in Australia: Institutional Configurations and Regulatory Evolution' (2014) 38(1) *Melbourne University Law Review* 68, 69 (noting that Australia 'has a decidedly shareholder-centric model of corporate law when measured against the systems of some other similar economies').

63 Knight (n 16).

64 Hannah Wootton, 'Super Fund CEOs Put ASX on Notice over Workplace Conditions', *The Australian Financial Review* (online, 23 October 2023) <<https://www.afr.com/policy/tax-and-super/super-fund-ceos-put-asx-on-notice-over-workplace-conditions-20231019-p5edlm>> ('ASX on Notice').

65 Matt Bell, 'Super Giants Flex Muscles in AGM Votes', *The Australian* (Canberra, 25 September 2023) 15.

66 Ibid.

Commentators argued that superannuation funds may exercise their governance power to the detriment of ASX-listed entities and their smaller shareholders. Reflecting on AusSuper's potential governance power, a prominent opinion column asked rhetorically: 'Who says the way AustralianSuper ... sees the world is right?'.⁶⁷ Senior corporate leaders expressed reservations about funds leveraging their increasing power to play a determinative role in the appointment of directors to the boards of ASX-listed entities, claiming that such a practice may undermine board independence by leading to the appointment of directors who owe fealty to their superannuation fund sponsors.⁶⁸ A Liberal politician called for law reform to impose caps on funds' shareholdings in listed entities and to expand the remit of the Australian Takeovers Panel to enable it to more closely scrutinise fund behaviour in change of control transactions.⁶⁹

III ASSESSING CLAIMS ABOUT SUPERANNUATION FUND CONTROL IN AUSTRALIAN CORPORATE GOVERNANCE

The concerns raised in connection with the AusSuper–Origin incident suggested or presupposed that superannuation funds have acquired a measure of control over the governance of ASX-listed entities. We now turn to investigate this claim.

A How Shareholders Exert Control in Corporate Governance

To provide a reference point for this discussion, we first need to establish what shareholder control looks like in a listed entity.⁷⁰ An important point to emphasise at the outset is that listed entity shareholders do not have a direct role in the management of a company. In the typical public company, management power is allocated to the board of directors.⁷¹ This leaves shareholders with a more limited allocation of power, primarily consisting of rights to vote on certain significant issues and transactions, such as the removal of directors,⁷² changes to a company's constitution,⁷³ and capital distributions.⁷⁴ These formal rights can, however, give shareholders significant practical leverage. A company's directors, for example, may be highly attentive to the preferences of shareholders who have sufficient voting

67 James Thomson, 'Every Second, \$634 Flows to AusSuper: No Wonder Origin Deal Looks Dead', *The Australian Financial Review* (online, 22 November 2023) <<https://www.afr.com/chanticleer/every-second-634-flows-to-aussuper-no-wonder-origin-deal-looks-dead-20231122-p5em3t>> ('Every Second').

68 See, eg, Wootton and Gluyas (n 50); Knight (n 16).

69 'The Lexcorps' (n 16).

70 On the concept of shareholder control, see generally Farrar (n 21); Peter Edmundson, 'Indirect Self-Acquisition: The Search for Appropriate Concepts of Control' (1997) 15(5) *Company and Securities Law Journal* 264.

71 This is the default position under *Corporations Act* (n 6) s 198A. The board will generally delegate a substantial amount of this power to the company's senior management team.

72 Ibid s 203D.

73 Ibid s 136(2).

74 Ibid ch 2J.

shares to vote the directors out of office.⁷⁵ For this reason, Australian corporate law primarily conceives of shareholder control as entailing the holding of an interest in voting shares that is sufficient to determine the outcome of shareholder voting. This conception, for example, underpins the regulation of corporate control transactions under the *Corporations Act 2001* (Cth) (*'Corporations Act'*).⁷⁶

The point at which a shareholder acquires such control tends to be significantly less than a majority shareholding. This is because shareholder voting approval thresholds are calculated by reference to either an ordinary or special majority of shares *voted* rather than of shares *on issue*.⁷⁷ As the proportion of shares voted at a shareholder meeting in practice tends to be significantly less than 100%, a shareholding of considerably less than 50% can enable a shareholder to control the outcome of shareholder voting.⁷⁸ Australian takeover law therefore strictly regulates acquisitions of shares that increase a person's total interest in shares above 20%.⁷⁹

A shareholding which is not large enough to determine the outcome of shareholder voting may still be sufficient to give its holder what is known as 'negative control'. This refers to the situation where a shareholder holds sufficient shares to *block* the passage of a shareholder resolution requiring a special majority.⁸⁰ As matters requiring a special majority can be highly significant in nature,⁸¹ a shareholder with the capacity to block such an approval can acquire significant practical leverage over a company's governance. Moreover, because the threshold for a special majority is high (typically, 75% or more of shares *voted*),⁸² a shareholding that is significantly smaller than 50% can deliver a shareholder

75 Lucian A Bebchuk and Scott Hirst, 'Private Ordering and the Proxy Access Debate' (2010) 65(2) *Business Lawyer* 329, 336 (arguing that a benefit of laws that facilitate shareholder voting in director elections 'would result not so much from its use, but from its availability and its general effect on directors' incentives and behavior').

76 *Re GoldLink Growthplus Ltd* [2007] ATP 23 [16]–[19] (emphasising that *Corporations Act* (n 6) ch 6 proceeds on the basis that control over a company is obtained by acquiring interests in the company's voting shares). A focus on shares held also underpins the concept of parent company–subsidiary company under *Corporations Act* (n 6) s 46. The *Corporations Act* (n 6) recognises that there may also be instances where practical control over a company arises because of relationships or dealings unrelated to any shareholding (eg, as a result of being a lender): at s 50AA. However, this concept of control is unlikely to be relevant for the purpose of this discussion as it is unlikely that an arms-length, diversified equities investor such as a superannuation fund would have some other relationship or dealing with a listed entity, such as a trading relationship or a lender relationship, that would give them the requisite 'capacity to determine the outcome of decisions about the ... entity's financial and operating policies' for the purpose of section 50AA.

77 See, eg, *Corporations Act* (n 6) s 250MA.

78 Voting data indicates that, on average, about 42% of a listed entity's shares are voted at a shareholder meeting; the percentage increases to around 64% for the 300 largest listed entities: Computershare and Georgeson, *2021 AGM Intelligence Report* (Report, 2021) 8 <<https://landing.computershare.com/2021-AGM-Intelligence-Report>>. Accordingly, a shareholding of between 20–30% may be sufficient to control the outcome of shareholder voting.

79 *Corporations Act* (n 6) s 606.

80 Farrar (n 21) 78.

81 For example, the approval of a constitutional amendment or a merger transaction by scheme of arrangement: *Corporations Act* (n 6) ss 136(2), 411(4).

82 See, eg, *ibid* ss 250MA, 411(4).

negative control. This was illustrated in the AusSuper–Origin incident where the market assumed that AusSuper’s shareholding, which ranged from 12–17% during the course of the transaction, would enable AusSuper to block shareholder approval of the Origin takeover.⁸³

In summary, the preceding analysis indicates that a shareholder may have some measure of control over a company with a shareholding of more than 10%. However, an important final observation is that the precise point at which such a measure of control is obtained is heavily dependent on the distribution of a company’s other shares.⁸⁴ For example, a shareholding of 11% might provide a measure of control if it is the largest shareholding and the company’s other shares are widely dispersed amongst numerous small shareholders with limited incentives to participate in corporate governance.⁸⁵ However, a shareholding of 11% may not provide any measure of control if there are other shareholders with shareholdings of a comparable size who can counteract the voting power of the first shareholder. This underscores how it is important to consider the size of a shareholder’s shareholding in both absolute and relative terms when thinking about shareholder control.

B Superannuation Fund Investment in ASX-Listed Entities

We now turn to consider whether the size of superannuation funds’ shareholdings in ASX-listed entities is typically large enough to give funds any of the preceding forms of control over ASX-listed entities.

Locating evidence of superannuation funds’ shareholdings is not a straightforward task because disclosure obligations under Australian law do not provide a complete picture of the ownership of company shares.⁸⁶ Although a company must maintain a publicly accessible register of shareholders, which discloses the identity of registered shareholders and their shareholdings,⁸⁷ this information does not reflect the commercial reality of listed entity share ownership. This is because many investors, for reasons related to legal compliance or administrative convenience, do not hold shares as the registered holder, and instead have them registered in the name of a service provider (called a ‘nominee holder’), which holds shares for them under a bare trust.⁸⁸ A company’s share register, therefore, will disclose the shareholdings of such nominees, but will provide no indication of the identity and underlying interest of the investors who stand behind the nominees. In order to understand the underlying ownership of listed entities, a researcher must instead look to other sources of information. The next three sections undertake this exercise.

83 See, eg, Thomson, ‘Every Second’ (n 67).

84 Maurice Zeitlin, ‘Corporate Ownership and Control: The Large Corporation and the Capitalist Class’ (1974) 79(5) *American Journal of Sociology* 1073, 1090 <<https://doi.org/10.1086/225672>>.

85 Edmundson (n 70) 271.

86 On this point, see also Jenifer Varzaly, ‘Shareholder Concentration and Control in Australia’ (2023) 23(1) *Journal of Corporate Law Studies* 105 <<https://doi.org/10.1080/14735970.2023.2227369>>.

87 *Corporations Act* (n 6) ss 168–9.

88 Varzaly (n 86); Deloitte Access Economics, *Competition in Funds Management* (Report, 24 September 2021) 116, 126 <<https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-702-competition-in-funds-management/>>.

1 The Position Revealed by Substantial Holder Notices

One window into the underlying ownership of listed entity shares is provided by the substantial holder notice regime in the *Corporations Act*. This regime imposes an obligation on a person to publicly file a ‘substantial holder’ notice if they hold a ‘relevant interest’ in 5% or more of a listed entity’s voting shares.⁸⁹ A ‘relevant interest’ is a sui generis concept that is broader than the concept of legal ownership, and includes the situation where a person has an enforceable or unenforceable power or control over votes attached to shares, or over the disposal of shares.⁹⁰ It is therefore capable of capturing institutional investors whose investments are held by nominees, because the terms of a nominee arrangement typically give the institutional investor control over the voting and disposal of shares held by the nominee.⁹¹

Analysing different samples of ASX-listed entities between 2016–19, separate studies by Jennifer Varzaly, and by Andrew Leigh and Adam Triggs, found that many of these entities had ‘substantial holders’.⁹² The most common substantial holders were the major international index funds, BlackRock, State Street, and Vanguard. Superannuation funds were only occasional substantial holders.⁹³

In a submission to the 2021 Common Ownership Inquiry, Principles for Responsible Investment (‘PRI’) assembled a more comprehensive and up-to-date data set which identified substantial holders in the largest 100 ASX-listed entities in 2020.⁹⁴ There were a total of 330 substantial holders across 91 of these entities. Again, BlackRock, State Street, and Vanguard were the most prevalent substantial holders, with 119 substantial holdings (36% of all identified substantial holdings). Superannuation funds held just 21 substantial holdings (6%). A diverse group of asset managers and other institutional investors accounted for 87 substantial holdings (26%) and large, non-diversified shareholders (commonly referred to as ‘blockholders’), private investment vehicles, and miscellaneous entities accounted

⁸⁹ *Corporations Act* (n 6) s 671B.

⁹⁰ *Ibid* s 608.

⁹¹ GP Stapledon, ‘The Duties of Australian Institutional Investors in Relation to Corporate Governance’ (1998) 26(5) *Australian Business Law Review* 331, 339–40.

⁹² Andrew Leigh and Adam Triggs, ‘Common Ownership of Competing Firms: Evidence from Australia’ (2021) 97(318) *Economic Record* 333 <<https://doi.org/10.1111/1475-4932.12610>> (analysing substantial holders as at December 2019 of the four major firms in each of the commercial banking, explosives manufacturing, fuel retailing, general insurance, and iron ore mining sectors. Of the 20 firms, 16 were ASX-listed; all 16 ASX-listed firms in their sample had at least two substantial holders); Varzaly (n 86) (analysing the substantial holders as at 2016 in the 50 largest listed entities, and finding that there were 93 substantial holders across 38 of those entities).

⁹³ Leigh and Triggs (n 92) 337 (reporting that BlackRock and Vanguard were each a substantial holder in 15 of the 16 entities, and that the next most common substantial holder was AustralianSuper, which was a substantial holder in three entities); Varzaly (n 86) 129–30 (reporting that BlackRock, State Street, and Vanguard accounted for one third of the 93 substantial holdings in the sample, and that UniSuper accounted for five of the substantial holdings).

⁹⁴ Principles for Responsible Investment, Submission No 9 to House of Representatives Standing Committee on Economics, Parliament of Australia, *Inquiry into the Implications of Common Ownership and Capital Concentration in Australia* (2021). PRI is a network of institutional investors and allied organisations with a focus on promoting responsible investment practices, and is supported by the United Nations Environmental Program Finance Initiative and the United Nations Global Compact: ‘About the PRI’, *Principles for Responsible Investment* (Web Page) <<https://www.unpri.org/about-us/about-the-pri>>.

for the balance (31%). The superannuation fund substantial holdings were held by just three funds, each of which was an industry fund.⁹⁵

This research indicates that it is not common for superannuation funds to have a relevant interest in 5% or more of a listed entity's shares. Moreover, even in those cases where funds had substantial holdings, those holdings were not large enough to assure funds any realistic measure of control. In the PRI sample, for example, the average substantial holding of superannuation funds was 9.5%. The other key insight from this research is the significance of BlackRock, State Street, and Vanguard. *Two or more* of these three funds were substantial holders in 44 of the 100 largest listed entities covered by PRI's research. According to this research, index funds are far more likely to be substantial shareholders than superannuation funds.

2 Tracing Notice Research

A limitation of research based on substantial holdings data is that it only reveals ownership at or above the 5% substantial holding disclosure threshold. Listed entities, however, can investigate ownership below this threshold by using the 'tracing notice' regime in the *Corporations Act*.⁹⁶ Under sections 672A and 672B, an entity can serve a notice on any registered holder of securities requiring them to disclose details of any 'relevant interest' held by another person in those securities. No percentage threshold applies under the tracing notice regime.⁹⁷ The regime therefore enables an entity to ascertain the investors who hold shares pursuant to nominee arrangements (or, indeed, any other structured arrangements), irrespective of the size of those investments.

In practice, the information disclosed in response to a tracing notice can be notoriously difficult to decipher owing to the complexities of the 'relevant interest' concept and the intricate arrangements used by investors to hold their investments.⁹⁸ Listed entities, however, will commission specialist service providers to undertake the technical and time-consuming task of analysing information contained in responses to tracing notices.⁹⁹ While this analysis is generally not publicly disclosed, a comprehensive example analysing the ownership of the 300 largest entities on the ASX between 2019–21 was made available during the 2021 Common Ownership Inquiry.¹⁰⁰

This analysis, undertaken by Orient Capital, reports that on average Australian superannuation funds *collectively* held 13.1% of the issued shares of the 300

95 AusSuper, UniSuper, and Aware Super.

96 *Corporations Act* (n 6) pt 6C.2.

97 *Ibid* s 672A.

98 *2021 Common Ownership Inquiry Report* (n 57) 14–15 [2.15]–[2.19] (noting the view of one experienced industry participant that information in the register is 'almost unusable to the general public').

99 *Ibid*.

100 The analysis was commissioned by the Australasian Investor Relations Association and undertaken by Orient Capital: see Australasian Investor Relations Association, Submission No 10.1 to House of Representatives Standing Committee on Economics, Parliament of Australia, *Inquiry into the Implications of Common Ownership and Capital Concentration in Australia* (13 September 2021) ('AIRA Submission').

largest listed entities during this period.¹⁰¹ The analysis does not, however, indicate the degree of dispersion of superannuation fund ownership, so it is not possible to determine whether the average collective holding of 13.1% is likely to be dispersed among a large number of funds holding a fraction of a percentage point each, or concentrated mainly in the hands of a few large funds.

Notably, the Orient Capital analysis also reports that index funds collectively owned, on average, a similar proportion of the issued shares of the largest 300 entities.¹⁰² Orient Capital found that these holdings were ‘dominated’ by BlackRock, State Street, and Vanguard.¹⁰³

3 Research Based on Portfolio Holdings Disclosure

A further method for ascertaining the extent of superannuation funds’ investments in listed equities is to examine their ‘portfolio holdings disclosures’ (‘PHDs’). These public disclosures are required by the *Corporations Act*,¹⁰⁴ and are intended to provide fund members and the broader public with a twice-yearly insight into the how funds invest members’ superannuation contributions.¹⁰⁵ Under the law, funds must disclose the investments held in relation to each investment option they offer members,¹⁰⁶ including details of investments in listed equities.¹⁰⁷

It is not practical to review the PHDs of the numerous institutional funds operating in Australia. However, given that a very substantial proportion of superannuation assets are now held by a small number of very large funds,¹⁰⁸ it is possible to obtain an insight into the likely extent of superannuation funds’ aggregate equities investments by examining the PHDs of the largest funds. This author therefore reviewed the PHDs of the eight largest industry funds as at 31 December 2023.¹⁰⁹ At that date, these funds were eight of the 12 largest funds in Australia and accounted for more than half of all AUM held by institutional funds.¹¹⁰

The author reviewed the PHDs of each of these funds and determined their aggregate holdings in the Australian-incorporated entities included in the ‘Top 50

101 Ibid 5.

102 Ibid 4 (reporting 13.2%).

103 Ibid.

104 *Corporations Act* (n 6) s 1017BB, as supplemented by *Corporations Regulations 2001* (Cth) regs 7.9.07Z–7.9.07ZA, sch 8D (‘*Corporations Regulations*’).

105 Explanatory Memorandum, Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Bill 2012 (Cth) 31, 45.

106 *Corporations Act* (n 6) s 1017BB(1). Funds are not required to make disclosure in respect of certain excluded investment options, including investment options that have been closed to new members for at least five years and defined benefit investment options.

107 *Corporations Act* (n 6) s 1017BB(6) (definition of ‘investment item’). In relation to listed equities, funds must identify the issuer of the equities and the number, value, and portfolio weighting of the equities: *Corporations Regulations* (n 104) sch 8D.

108 See above n 45 and accompanying text.

109 The eight funds were AusSuper, Australian Retirement Fund, Aware Super, UniSuper, Hostplus, REST Super, Cbus, and HESTA.

110 KPMG, *Super Insights 2024: Is Super Really Super?* (Report, May 2024) 20 <<https://assets.kpmg.com/content/dam/kpmgsites/au/pdf/2024/super-insights-2024-report.pdf>>.

by Market Cap' list disclosed by the ASX.¹¹¹ This list discloses the 50 largest listed entities by market capitalisation and includes 38 Australian-incorporated entities. Reflecting how broadly superannuation funds invest across the market, each of the eight funds disclosed holdings in all but one of the 38 entities.

The average size of the eight funds' individual holdings in the sample entities was 1.23%. Consistent with the findings of the substantial shareholding research discussed earlier, there were very few holdings in excess of the 5% threshold.¹¹² The eight funds' average *collective* holding in the sample entities was 9.71%.¹¹³ It is instructive to contrast the *eight funds'* average collective holding of 9.71% with Orient Capital's finding that the average collective holding of *all* superannuation funds in larger ASX-listed entities is 13.1%. Taken together, these two findings would appear to suggest that superannuation fund ownership of ASX-listed entities is likely to be concentrated in a relatively small number of large funds.¹¹⁴

4 The Impact of the Superannuation Sector's Continuing Growth

It is also necessary to take into account the significant projected increase in superannuation assets discussed in Part II. As noted in Part II, this increase is likely to see total superannuation AUM almost double by the next decade, from \$3.5 trillion to \$6 trillion.¹¹⁵ This growth will provide funds with substantial additional capital to invest.

Several considerations suggest, however, that funds are unlikely to materially increase their exposure to ASX-listed equities. First, diversified investors such as superannuation funds face significant practical challenges when attempting to invest substantial amounts of additional capital into a smaller market like the ASX.¹¹⁶ In short, a fund would find that, over time, the steady inflow of contributions from its members would force it to take increasingly larger positions in the relatively small pool of major ASX-listed entities, resulting in the fund having to forgo the benefits of diversification and grapple with the significant practical challenges associated with trading and managing very large positions in listed equities.¹¹⁷ Another reason why it is unlikely that superannuation funds will materially

111 'Top 50 by Market Cap', *Australian Securities Exchange* (Web Page) <<https://www.asx.com.au/markets/trade-our-cash-market/equity-market-prices/top-50-market-cap>>. Thirty-eight Australian-incorporated entities are included in this top 50 list.

112 Only 10 (3%) of all holdings of the eight funds were 5% or greater.

113 An industry submission to the 2021 Common Ownership Inquiry provided a theoretical construction of the holdings of the largest superannuation funds, having regard to commonly accepted portfolio construction parameters. Relevantly, it reported a collective holding for the eight largest funds of approximately 8.7%, consistent with the empirical finding reported here: see Association of Superannuation Funds of Australia, Submission No 16 to House of Representatives Standing Committee on Economics, Parliament of Australia, *Inquiry into the Implications of Common Ownership and Capital Concentration in Australia* (13 September 2021) 7 ('ASFA Submission').

114 This inference is also consistent with the research that finds that superannuation assets are increasingly concentrating in the hands of a few very large funds: see above n 45 and accompanying text.

115 See above n 32 and accompanying text.

116 In relation to this issue, see Lawrence and Warren (n 45) 11–14.

117 Large trades in listed securities can materially impact the supply/demand for those securities, which will in turn materially impact the price paid/received for those securities. See generally *ibid*.

increase their exposure to Australian listed equities is the fact that funds already display a notable ‘home bias’, with approximately 25% of their existing assets allocated to Australian listed equities.¹¹⁸ This exposure to Australian listed equities is disproportionate to Australia’s share of the global economy and is therefore not ideal from a diversification perspective.¹¹⁹ Australian funds’ current allocation to listed equities is already significantly greater than allocations by equivalent funds in other major pension markets, suggesting that there is potential for Australian funds to reduce exposure in line with international practice.¹²⁰ Industry commentary predicts, therefore, that funds will reduce their exposure to Australian assets in coming years.¹²¹

5 Summary

The evidence outlined above reveals a more complex picture of superannuation fund share ownership than the one emerging from recent ‘rise of big super’ commentary. Although superannuation funds are significant investors in the ASX, the data presented above indicates that their individual holdings are typically less than 5%.¹²² Although funds will grow substantially in coming years, funds’ need to maintain appropriate levels of diversification and avoid the challenges associated with making very large investments in listed entities may constrain further increases in funds’ exposure to ASX-listed equities. It therefore seems unlikely that individual funds routinely have (or will in time have) shareholdings of sufficient size to give them a measure of control over ASX-listed entities.

In collective terms, funds’ ownership of ASX-listed entities is somewhat more material. The research outlined above indicates that funds’ average collective shareholdings in the largest 300 listed entities between 2019–21 was 13.1%, and suggests that this is likely to be concentrated in a relatively small number of very large funds. It is possible that ongoing merger activity in the superannuation sector will further concentrate superannuation fund share ownership in the hands of a few very large funds.¹²³

118 See above n 53 and accompanying text.

119 A point conceded, in fact, by the superannuation sector: Wootton and Gluyas (n 50), quoting the Chief Investment Officer of AMP to this effect.

120 Thinking Ahead Institute, *Global Pension Assets Study* (Report, 2024) 18 <<https://www.thinkingaheadinstitute.org/research-papers/global-pension-assets-study-2024/>> (reporting that Australian funds allocate 51% to equities compared to the US (46%), Canada (31%), Netherlands (27%), and the UK (26%)).

121 JP Morgan, *The Future of Superannuation: Optimising Outcomes through Global Investment and Unlisted Assets* (Report, 2023) 7 <<https://www.jpmorgan.com/content/dam/jpm/cib/complex/content/markets/futue-of-superannuation/Optimising-outcomes-through-global-investment-and-unlisted-assets.pdf>> (‘*The Future of Superannuation*’); Lawrence and Warren (n 45) 22.

122 Funds’ approaches to managing their listed equity investments vary, with some outsourcing management to third party asset managers and others using in-house management teams: *The Future of Superannuation* (n 121) 12–13. Although this might seem to introduce a degree of uncertainty over the extent of some funds’ practical control of their holdings, many funds nonetheless publicly proclaim their preparedness to act as diligent stewards of their investments: see below nn 194–8 and accompanying text. This would suggest that funds are prepared to supervene in decisions regarding their holdings where necessary.

123 On this point, see also Lawrence and Warren (n 45) 24.

Several factors make it unlikely, however, that funds would routinely seek to leverage their material collective ownership position to *exercise collective control* over ASX-listed entities. First, scholars have found that institutional investors have potentially significant commercial incentives to eschew intensive forms of collective action.¹²⁴ Second, funds are independently governed and employ varying strategies for managing their equity investments. Some funds outsource management of their listed equities investments to external fund managers, while others have established substantial in-house portfolio management functions.¹²⁵ As a result of these independent and varying management structures, there is no certainty that funds would agree on how any measure of control attaching to their collective holdings should be exercised. Third, Australian law significantly constrains control-seeking collective action by shareholders through the imposition of detailed public disclosure obligations, and by subjecting collective action to prescriptive takeover rules in the *Corporations Act*.¹²⁶ Australian investors have consistently maintained that these laws significantly inhibit collective shareholder action.¹²⁷

An important final factor that makes it unlikely that funds would routinely leverage their collective shareholdings to exert a measure of control over a listed entity relates to the point made earlier about the importance of considering both the absolute and *relative* size of a shareholding when assessing its control implications. In this regard, it is important to note that the research outlined above reveals that funds are not the only significant investors in ASX-listed entities. In addition to superannuation funds' average collective holding of approximately 13%, the Orient Capital analysis also reveals the significance of index funds (average collective holdings of 13.2%), and international and domestic asset managers and investment firms (average collective holdings of approximately 30%).¹²⁸ This suggests that, on average, total institutional investor ownership of large listed entities is nearly 60%, with superannuation funds accounting for almost a quarter of that amount.¹²⁹ The balance of listed entities' shares tend to be held by a diverse group of retail investors and non-institutional blockholders, such as private investment vehicles,

124 For example, an investor may worry that their participation in a coalition of investors targeting a company might give the other investors an insight into their share trading intentions, which the other investors might exploit to their commercial advantage: Bernard S Black and John C Coffee Jr, 'Hail Britannia: Institutional Investor Behavior under Limited Regulation' (1994) 92(7) *Michigan Law Review* 1997, 2061–2 <<https://doi.org/10.2307/1289659>>; Paul Davies, 'Shareholders in the United Kingdom' in Jennifer G Hill and Randall S Thomas (eds), *Research Handbook on Shareholder Power* (Edward Elgar Publishing, 2015) 355, 370–1 <<https://doi.org/10.4337/9781782546856.00033>>.

125 *The Future of Superannuation* (n 121) 12–13.

126 Tim Bowley, *Activist Shareholders in Corporate Governance: The Australian Experience and Its Comparative Implications* (Hart Publishing, 2023); 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 ('Stewardship and Collective Action') <<https://doi.org/10.1017/9781108914819>>.

127 Bowley (n 126) 175–6.

128 AIRA Submission (n 100).

129 This is consistent with other research which shows that, on average, aggregate ownership of large ASX-listed entities by all institutional investor types is likely to represent a substantial majority of an entity's issued shares: for a detailed review, see Bowley (n 126) 32–5 [3.3.2].

founders, or wealthy individuals, albeit blockholders tend to be more prevalent in smaller listed entities.¹³⁰

In summary, although superannuation funds are significant investors in the ASX, they are not on average the numerically dominant class of investor, and instead form one of a handful of material investor constituencies. In this context, it is difficult to see how either their individual shareholdings or their collective shareholdings will necessarily provide them with a measure of control over listed entities' governance.

IV THE MARKET FOR CORPORATE INFLUENCE AND INFLUENTIAL NON-CONTROLLING SHAREHOLDERS

This is not, however, the end of the analysis. This is because conventional concepts of shareholder control explored above fail to capture another significant dynamic in contemporary corporate governance: the wielding of substantial governance influence by non-controlling shareholders. This phenomenon is reflected in the remarkable rise of public company shareholder activism over the last 15 years.¹³¹ An activist shareholder is a non-controlling shareholder which proactively strives to convince a company to make some change in its affairs; such conduct may involve the exercise by the activist of formal governance rights (eg, requisitioning a shareholder meeting) or the use of extra-legal tactics (eg, public relations or social media campaigns).¹³² The activist shareholder engages in activism because, unlike a controlling shareholder, it cannot achieve its aims simply by leveraging a controlling shareholding. The activist will succeed only if it can convince a company's directors and management (or, if the relevant decision lies in the hands of shareholders, the company's other shareholders) to make the relevant change. Multilateral engagement between the activist and others involved in a company's governance therefore lies at the heart of shareholder activism.

Shareholder activism has become increasingly common in Australia and overseas markets and is engaged in by various shareholder types, including hedge funds, non-governmental organisations, institutional investors, and individuals.¹³³ Activists have achieved some notable successes in relation to some of the largest public companies.¹³⁴ Writing in 2015, Farrar observed that shareholder activism reveals the potential for non-controlling shareholders to obtain a significant

130 Ibid.

131 See generally Wolf-Georg Ringe, 'Shareholder Activism: A Renaissance' in Jeffrey N Gordon and Wolf-Georg Ringe (eds), *The Oxford Handbook of Corporate Law and Governance* (Oxford University Press, 2015) 387 <<https://doi.org/10.1093/oxfordhb/9780198743682.001.0001>> ('Shareholder Activism').

132 Bowley (n 126) 1–4.

133 Ringe, 'Shareholder Activism' (n 131).

134 Barclays Capital Inc, *2024 Review of Shareholder Activism* (Report, January 2025) 6 <https://corpgov.law.harvard.edu/wp-content/uploads/2025/01/Barclays-2024-Review-of-Shareholder-Activism_vF.pdf> (noting activist campaigns targeting Disney, BP, Starbucks, and Rio Tinto, among others).

measure of influence over companies – or what he called ‘minority control’.¹³⁵ Farrar suggested that this trend might ‘require some doctrinal shift in our concepts of the company, control and fiduciary duty’.¹³⁶

A Introducing the Market for Corporate Influence

Overseas scholars have since used the concept of the ‘market for corporate influence’ to explain the rise of shareholder activism and its corporate governance dynamics.¹³⁷ This concept recognises an important change in corporate governance that has resulted from the remarkable growth of institutional investor share ownership. Prior to the rise to prominence of such investors, public company share ownership in markets such as the US, the UK, and Australia was dispersed, to a significant extent, among large numbers of small shareholders with limited incentives to participate in a company’s governance.¹³⁸ Australian listed entities also had notable levels of blockholders such as founders, entrepreneurs, and trading companies.¹³⁹ The practical effect of these shareholding structures was either that shareholder participation in corporate governance was muted (in the case of companies with dispersed small shareholders),¹⁴⁰ or governance outcomes were shaped by blockholders (in the case of companies with significant blockholders).¹⁴¹

Today, however, relatively compact groups of institutional investors will typically hold a substantial proportion of a listed entity’s shares, as highlighted above in Part III. These investors have three important attributes from a corporate governance perspective. First, they are financially sophisticated, have meaningful incentives to engage in corporate governance, and are supported in their governance activities by an ecosystem of advisers and service providers.¹⁴² This tends to make

135 Farrar (n 21) 78. US scholars had noted this trend a few years earlier: see, eg, William W Bratton and Michael L Wachter, ‘The Case against Shareholder Empowerment’ (2010) 158(3) *University of Pennsylvania Law Review* 653 <<https://doi.org/10.2139/ssrn.1480290>>; Iman Anabtawi and Lynn Stout, ‘Fiduciary Duties for Activist Shareholders’ (2008) 60(5) *Stanford Law Review* 1255, 1295 <<https://doi.org/10.2139/ssrn.1089606>> (referring to the ‘reality that modern shareholders can influence corporate policy through a variety of strategies that do not require them to control a numerical majority of the firm’s voting shares’).

136 Farrar (n 21) 93.

137 See, eg, Brian R Cheffins and John Armour, ‘The Past, Present, and Future of Shareholder Activism by Hedge Funds’ (2011) 37(1) *Journal of Corporation Law* 51; Paul Rose, ‘Shareholder Proposals in the Market for Corporate Influence’ (2014) 66(6) *Florida Law Review* 2179 <<https://doi.org/10.2139/ssrn.2324150>> (‘Shareholder Proposals’); Paul Rose and Bernard S Scharfman, ‘Shareholder Activism as a Corrective Mechanism in Corporate Governance’ [2014] (5) *Brigham Young University Law Review* 1015; Anna L Christie and JS Liptrap, ‘Goldilocks (Control) and the Three Bears: *Panel on Takeovers and Mergers v King*’ (2020) 21(3) *European Business Organization Law Review* 591 <<https://doi.org/10.1007/s40804-019-00173-9>>.

138 As famously highlighted by Adolf A Berle Jr and Gardiner C Means, *The Modern Corporation and Private Property* (MacMillan, 1932).

139 Chen, Ramsay and Welsh (n 62).

140 Berle Jr and Means (n 138).

141 Alan Dignam and Michael Galanis, ‘Australia Inside-Out: The Corporate Governance System of the Australian Listed Market’ (2004) 28(3) *Melbourne University Law Review* 623.

142 Owing to their business models and the competitive nature of the funds management industry, their incentives to expend time and resources on governance activities are not perfect; nonetheless, those incentives still tend to be greater than those of small, retail shareholders: see Ronald J Gilson and Jeffrey N

them relatively attentive participants in a company's governance.¹⁴³ Second, they are focused on managing investment risks and returns, and will generally exercise their governance rights by reference to financial and investment considerations.¹⁴⁴ Third, the collective extent of their shareholdings means that, in aggregate, these investors can wield significant voting power at a shareholding meeting. Taken together, these attributes make institutional investors an attentive, financially rational, and strategic constituency in listed entity corporate governance.

The so-called 'market for corporate influence' refers to the fact that, in this setting, a non-controlling shareholder can compete for substantial influence over a company's governance. In the words of two senior US scholars, a company's institutional investor shareholders are a potentially decisive 'swing constituency'.¹⁴⁵ If an activist, non-controlling shareholder can obtain their support, it may be able to bring considerable pressure to bear on a company's board and senior management. In this context, 'support' does not typically mean proactive joint action with the activist (such as forming a coalition). Support is more often reactive, uncoordinated, or tacit in nature (eg, where an investor unilaterally determines to support the published objectives of the activist and communicates this to management of the target company).¹⁴⁶

The term 'market for corporate influence' echoes Henry Manne's concept of the 'market for corporate control' which explained takeovers as a market mechanism for ensuring that control of public companies moves to persons who will maximise the value of that control.¹⁴⁷ However, in the market for corporate influence, a critical point of difference is that the successful activist acquires momentary substantial influence rather than enduring control. That is, the activist's leverage relates to the particular issue it is seeking to address, and is contingent on the momentary support of the 'swing constituency' of institutional investors. Once the issue is addressed, institutional investor support for the activist will dissipate as the swing constituency returns to a 'neutral' position and awaits any further governance contestation.¹⁴⁸

Gordon, 'The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights' (2013) 113(4) *Columbia Law Review* 863.

143 A phenomenon that has resulted in their participation in corporate governance being given the distinct moniker 'stewardship': see generally, Dionysia Katelouzou and Dan W Puchniak (eds), *Global Shareholder Stewardship* (Cambridge University Press, 2022) <<https://doi.org/10.1017/9781108914819>>.

144 Gilson and Gordon (n 142). In recent years, investors have heavily emphasised environmental, social, and governance ('ESG') issues. However, most institutional investors perceive such issues through an investment performance lens, not a social, environmental, or political lens: Tim Bowley and Jennifer G Hill, 'Stewardship Codes, ESG Activism and Transnational Ordering' in Thilo Kuntz (ed), *Research Handbook on Environmental, Social and Corporate Governance* (Edward Elgar Publishing, 2024) 117 <<https://doi.org/10.4337/9781802202533>>.

145 Gilson and Gordon (n 142). See also Christie and Liptrap (n 137) 604.

146 See, eg, Gilson and Gordon (n 142) 896–7 (noting how an activist presents a proposal to 'sophisticated but not proactive' institutional investors who then decide whether to support that proposal and intimate their stance to corporate management).

147 Henry G Manne, 'Mergers and the Market for Corporate Control' (1965) 73(2) *Journal of Political Economy* 110 <<https://doi.org/10.1086/259000>>.

148 Rose, 'Shareholder Proposals' (n 137) 2200 (noting the presence of a 'large central group of voters [that] is not irrevocably and ideologically committed to one side or the other. They will cast their votes

The market for corporate influence is sustained by a mix of legal, technological, and normative factors and developments.¹⁴⁹ This includes technological developments that have made it easier for shareholders to inform themselves and communicate with each other;¹⁵⁰ a normative emphasis in corporate governance law and policy on the desirability of shareholder participation in corporate governance and the primacy of shareholder interests in corporate governance;¹⁵¹ and law reform expanding governance rights available to shareholders or removing regulatory barriers to shareholder participation in corporate governance.¹⁵²

There are various examples in Australia and overseas of the market for corporate influence at work. In the US, hedge fund activists, which typically do not hold more than 10% of a company's shares,¹⁵³ have successfully brought about change at some of the largest US listed entities.¹⁵⁴ US researchers have also noted how a handful of so-called 'gadfly' activists – natural persons with very small shareholdings – have been remarkably successful at pressuring large public entities to address various environmental, social, and governance ('ESG') issues by tabling shareholder proposals at annual shareholder meetings which receive significant voting support from institutional investors.¹⁵⁵ In Australia, Lloyd Freeburn and Ian Ramsay have described how a handful of non-governmental organisations with very small shareholdings have been responsible for a considerable amount of ESG-related activism in Australia, and have attracted sufficient investor support to encourage changes in corporate behaviour.¹⁵⁶

B Factors that Make a Shareholder an Adept Wielder of Influence in the Market for Corporate Influence

Research has highlighted several factors that assist activist non-controlling shareholders to succeed in the market for corporate influence. The first is credibility. Activist hedge funds seek to establish their credibility by investing substantial capital to acquire a material 'toehold' shareholding in a target company, developing and promoting a detailed proposal for change, and prosecuting their campaign in a forceful manner which leaves little doubt as to their willingness to escalate their

opportunistically for whichever side presents the most compelling arguments or simply offers a change from past policies').

149 See generally, Tim Bowley, Jennifer G Hill and Steve Kourabas, 'Shareholder Engagement Inside and Outside the Shareholder Meeting' in Luca Enriques and Giovanni Strampelli (eds), *Board Shareholder Dialogue: Policy Debate, Legal Constraints and Best Practices* (Cambridge University Press, 2024) 368, 370–4 <<https://doi.org/10.1017/9781009360746>>.

150 Cheffins and Armour (n 137).

151 See, eg, Lisa M Fairfax, 'From Apathy to Activism: The Emergence, Impact, and Future of Shareholder Activism as the New Corporate Governance Norm' (2019) 99(3) *Boston University Law Review* 1301.

152 Bowley, Hill and Kourabas (n 149).

153 Cheffins and Armour (n 137).

154 See above n 134 and accompanying text.

155 Kobi Kastiel and Yaron Nili, 'The Giant Shadow of Corporate Gadflies' (2021) 94(3) *Southern California Law Review* 569.

156 Lloyd Freeburn and Ian Ramsay, 'An Analysis of ESG Shareholder Resolutions in Australia' (2021) 44(3) *University of New South Wales Law Journal* 1142 <<https://doi.org/10.53637/AZNF5816>>.

aggression should they be rebuffed by a target company.¹⁵⁷ Success also appears to breed success: research has found that activist hedge funds with a successful track record tend to be more successful in interventions than hedge funds without a track record.¹⁵⁸ However, a reputation for high profile and aggressive activism is not the only way an activist shareholder can establish credibility and influence. European and Japanese research has highlighted how successful activist investors in those markets frequently undertake their interventions through behind-the-scenes interactions. Such activists establish their credibility and influence through iterative, considered, and constructive private interactions with the boards and senior management of target companies.¹⁵⁹

Second, market familiarity is important. The importance of local knowledge is recognised by the Climate Action 100+ association, an international network of institutional investors which seeks to compel large listed entities to address climate change and energy transition risks.¹⁶⁰ The network assists its member institutions to form coalitions with like-minded investors to engage with target companies in markets across the globe.¹⁶¹ These coalitions frequently include both local investors and foreign institutional investors. According to Climate Action 100+, the involvement of local investors ensures that the network's campaigns have the benefit of local market knowledge and an understanding of local cultural norms.¹⁶²

Third, successful activists will commonly leverage their influence by acting collectively with like-minded shareholders.¹⁶³ Collective action enables non-controlling shareholders to pool resources and know-how, share the costs of their activism, and enhance their leverage when engaging with listed entities.¹⁶⁴ Researchers in the US have described how hedge funds will sometimes simultaneously target

157 Gilson and Gordon (n 142) 900–1; John C Coffee Jr and Darius Palia, 'The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance' (2016) 41(3) *Journal of Corporation Law* 545 <<https://doi.org/10.2139/ssrn.2656325>>.

158 CNV Krishnan, Frank Partnoy and Randall S Thomas, 'The Second Wave of Hedge Fund Activism: The Importance of Reputation, Clout and Expertise' (2016) 40 *Journal of Corporate Finance* 296 <<https://doi.org/10.1016/j.jcorpfin.2016.08.009>>.

159 Marco Becht et al, 'Outsourcing Active Ownership in Japan' (Working Paper No 766/2021, European Corporate Governance Institute, June 2021) <<https://doi.org/10.2139/ssrn.3864310>>; Marco Becht, Julian Franks and Jeremy Grant, 'Hedge Fund Activism in Europe: Does Privacy Matter?' in Jennifer G Hill and Randall S Thomas (eds), *Research Handbook on Shareholder Power* (Edward Elgar Publishing, 2015) 116.

160 'About Climate Action 100+', *Climate Action 100+* (Web Page) <<https://www.climateaction100.org/about/>>.

161 Ibid.

162 Climate Action 100+, *2020 Progress Report* (Report, December 2020) 66 <<https://www.climateaction100.org/wp-content/uploads/2020/12/CA100-Progress-Report.pdf>>. For other examples, see Bowley and Hill, 'Stewardship and Collective Action' (n 126) 427–8. Conversely, a lack of local familiarity has been cited as one reason why US hedge fund activists have struggled to establish themselves in Australia: Bowley (n 126) 108–9.

163 See generally, Peter O Mülbert and Alexander Sajnovits, 'Emerging ESG-Driven Models of Shareholder Collaborative Engagement' in Luca Enriques and Giovanni Strampelli (eds), *Board-Shareholder Dialogue: Policy Debate, Legal Constraints and Best Practices* (Cambridge University Press, 2024) 270 <<https://doi.org/10.1017/9781009360746>>; Wolf-Georg Ringe, 'Investor-Led Sustainability in Corporate Governance' (LawFin Working Paper No 36, Center for Advanced Studies on the Foundations of Law and Finance, Goethe University, 2022) ('Investor-Led Sustainability').

164 Bowley and Hill, 'Stewardship and Collective Action' (n 126).

a company in what is known as a ‘wolf pack’ campaign.¹⁶⁵ Institutional investors will occasionally form ad hoc coalitions with like-minded investors to pressure a company to address a concern.¹⁶⁶ Institutional investors also establish formal networks and associations in order to systematically and strategically engage listed entities in relation to issues that have broad salience for the investor community, such as in relation to climate change and energy transition risks.¹⁶⁷

Finally, there is some evidence that the structure and composition of corporate boards is a potentially significant factor. In markets like the UK, the US, and Australia, listed entity boards are dominated by professional non-executive directors; that is, individuals who specialise in serving as directors of listed entities and who typically hold multiple directorships.¹⁶⁸ As these individuals seek to make a career out of serving as directors, they have material incentives to protect their professional reputation as a director.¹⁶⁹ Commentators have pointed out that boards comprised of such directors can be particularly responsive to influence-wielding activists, reflecting a desire to minimise the risk of a reputation-damaging public confrontation with a high-profile investor.¹⁷⁰

C The ASX as a Market for Corporate Influence

The ASX displays key attributes of a market for corporate influence. It has high levels of institutional investor share ownership;¹⁷¹ these institutions are generally regarded as bringing an attentive and critical perspective to matters of corporate governance, as reflected by steadily increasing levels of share voting and increasing levels of dissenting votes on shareholder resolutions.¹⁷² Australia also has shareholder-friendly regulatory settings,¹⁷³ and corporate governance norms and practices that emphasise the desirability of shareholder participation in corporate governance, and the importance of respecting the preferences of shareholders.¹⁷⁴

ASX-listed entities also have boards which are dominated by professional non-executives drawn from a relatively exclusive cadre of professional company directors

165 Coffee Jr and Palia (n 157).

166 Bowley and Hill, ‘Stewardship and Collective Action’ (n 126). The 2020 intervention by a coalition of institutional investors against Rio Tinto, discussed below in Part V(B), is one of the highest profile interventions in Australia in recent times.

167 Mülbert and Sajnovits (n 163); Ringe, ‘Investor-Led Sustainability’ (n 163).

168 Stephen M Bainbridge, ‘The Board of Directors’ in Jeffrey N Gordon and Wolf-Georg Ringe (eds), *The Oxford Handbook of Corporate Law and Governance* (Oxford University Press, 2018) 275, 309–15.

169 Jeffrey N Gordon, ‘The Rise of Independent Directors in the United States, 1950–2005: Of Shareholder Value and Stock Market Prices’ (2007) 59(6) *Stanford Law Review* 1465, 1488 <<https://doi.org/10.2139/ssrn.928100>>.

170 Theodore N Mirvis and William Savitt, ‘The Dangers of Independent Directors’ (2016) 40(2) *Delaware Journal of Corporate Law* 481, 486; Diane Del Guercio, Laura Seery and Tracie Woidtke, ‘Do Boards Pay Attention When Institutional Investor Activists “Just Vote No”?’ (2008) 90(1) *Journal of Financial Economics* 84, 102 <<https://doi.org/10.1016/j.jfineco.2008.01.002>> (finding that campaigns by investors involving voting against directors are effective because directors fear damage to their reputations as members of ‘prestigious and well-compensated board rooms of the very largest public firms’).

171 See above Part III.

172 The relevant voting data is discussed in Bowley (n 126).

173 Mitchell et al (n 62).

174 See above n 2.

who tend to hold multiple listed entity directorships.¹⁷⁵ Commentators suggest that such directors are sensitive to their reputations and will seek to minimise confrontation with shareholders.¹⁷⁶ Australia's experience with 'say on pay' voting would appear to lend support to such claims. Under section 250R of the *Corporations Act*, a listed entity must propose a resolution at each annual general meeting ('AGM') seeking approval of shareholders for the company's remuneration report. The resolution is advisory only and does not bind the entity or its directors.¹⁷⁷ If an entity receives a 'no' vote on the resolution of at least 25% at two consecutive AGMs (commonly called a 'strike'), then the entity must, at the second AGM, put a further resolution to a vote of shareholders, which asks whether the entity should convene a further shareholder meeting at which all of the directors will stand for re-election (commonly called a 'board spill').¹⁷⁸ Although it is common for shareholders to deliver 'strikes' on remuneration report resolutions,¹⁷⁹ sometimes even to signal protest at issues unrelated to executive remuneration,¹⁸⁰ they rarely vote in favour of a board spill.¹⁸¹ Yet, despite the fact that the remuneration vote is non-binding and is rarely used to trigger a board spill, both the corporate and investment sectors acknowledge that the vote has made Australian boards significantly more responsive to shareholder concerns.¹⁸² This is generally attributed to the fact that corporate directors regard an adverse shareholder vote on the non-binding remuneration report resolution as a

175 Ownership Matters, *Many Are Called, Few Are Chosen: An Analysis of the Composition of ASX 300 Boards from 2005–2020* (Report, 25 October 2020) <<https://ownershipmatters.com.au/many-are-called-few-are-chosen/>>; Luke Nottage and Fady Aoun, 'The Rise of Independent Directors in Australia: Adoption, Reform and Uncertainty' (2016) 23(2) *University of Miami International and Comparative Law Review* 571 <<https://doi.org/10.2139/ssrn.2567504>>.

176 Michael Roddan, 'Funds Lash Directors, Auditors', *The Australian* (Canberra, 20 March 2018) 20.

177 *Corporations Act* (n 6) s 250R(3).

178 *Ibid* s 250U.

179 For example, ASIC has reported that the remuneration vote received the highest average 'no' vote of all resolution types voted on at annual shareholder meetings of listed entities in 2016–18: Australian Securities & Investments Commission, *Annual General Meeting Season 2018* (Report No 609, January 2019) <<https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-609-annual-general-meeting-season-2018/>>. See also *2021 AGM Intelligence Report* (n 78) 20 ('[shareholders have] shown few reservations in voting against the remuneration report when it is appropriate to do so').

180 Michael Chandler, '2019 Australian Annual General Meeting Season Review' (2020) 72(1) *Governance Directions* 9.

181 Martin Bugeja et al, 'Lower Defeat Thresholds for Minority Shareholders and Corporate Governance: Evidence from the Australian "Two Strikes" Rule' (Research Paper, November 2022) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2876925>. This research reports that in 2011–14, 60 listed entities received two strikes and were required to ask shareholders to vote on whether to hold a spill meeting: at 15. The latter resolution passed in only 12 cases: at 32. The board spill meeting was held in nine of those cases; only three companies changed their boards significantly. See also *2021 AGM Intelligence Report* (n 78) 20 (reporting on a company where shareholders in 2020 voted to hold a spill meeting, and noting that this was the first time this had occurred since 2014).

182 See, eg, Productivity Commission, *Executive Remuneration in Australia* (Report No 49, December 2009) 281–2; Kym Sheehan, 'Shareholder Resolutions in Australia: Is There a Better Way?' (Research Paper, Australian Council of Superannuation Investors, October 2017) 9 <<https://acsi.org.au/wp-content/uploads/2020/02/Shareholder-resolutions-in-Australia.Oct17.pdf>>; Chandler (n 180).

reputation-damaging criticism of their capacity to appropriately manage their entity's remuneration arrangements.¹⁸³

The Australian market for corporate influence differs, however, in one important respect from its international equivalents. US and UK scholars perceive the market for corporate influence as primarily involving activist hedge funds as the principal type of influence-wielder.¹⁸⁴ Outcomes in those markets therefore depend on how company boards and institutional investors react to hedge fund influence-wielding. Australia, however, has low levels of hedge fund activism.¹⁸⁵ Instead, as the next section shows, superannuation funds appear to be some of the most impactful influence-wielders in the Australian market.

V SUPERANNUATION FUNDS' POTENTIAL AS INFLUENCE-WIELDERS

Testimony by representatives of the corporate sector to the 2021 Common Ownership Inquiry highlighted how superannuation funds are some of the most proactive shareholders in the Australian market and, in particular, engage more intensively than the major index funds.¹⁸⁶ As noted earlier in this article, market and media commentary at the time of the AusSuper–Origin incident similarly noted the significant role played by superannuation funds in listed entity governance.

The evidence and analysis presented earlier in this article indicates that such testimony and commentary is unlikely to be describing controlling behaviour by superannuation funds. However, it is conceivable that this commentary is instead describing what amounts to effective influence-wielding behaviour. Certainly, superannuation funds display many of the characteristics which Part IV identified as being exhibited by successful influence-wielding shareholders, as detailed below.

A Highly Credible Market Actors

First, superannuation funds are highly credible and significant participants in the Australian listed equities market. They are societally and economically significant institutions that are some of the largest providers of capital to the Australian economy.¹⁸⁷ High-profile events such as the AusSuper–Origin incident

183 Activist Insight and Arnold Bloch Leibler, *Shareholder Activism in Australia: A Review of Trends in Activist Investing* (Report, 2016) 11 <<https://www.abl.com.au/expertise/shareholder-activism/shareholder-activism-in-australia-a-review-of-trends-in-activist-investing/>> ('There's an aversion to reputational damage. Directors really want to avoid a strike, even if their position is safe').

184 See, eg, Cheffins and Armour (n 137); Gilson and Gordon (n 142).

185 Bowley (n 126) ch 6.

186 Evidence to House Standing Committee on Economics, Parliament of Australia, Canberra, 23 September 2021, 32 (Shayne Elliott, Chief Executive Officer of ANZ) ('Evidence of Shayne Elliott'); Evidence to House Standing Committee on Economics, Parliament of Australia, Canberra, 23 September 2021, 3 (Matt Comyn, Chief Executive Officer of Commonwealth Bank) ('Evidence of Matt Comyn').

187 See above Part II.

underscore their significance to other market participants.¹⁸⁸ In the words of the chief executive of Australia's second largest superannuation fund:

[Superannuation] funds will have a bigger role in the Australian capital market than they did 10 years ago, just by virtue of a combination of the size of these funds and the size of the Australian capital market ... It's not that big, so the role we play in this market will be outsized relative to our size.¹⁸⁹

Superannuation funds' credibility is also underpinned by their strong track record as corporate governance activists. Industry funds have run multi-year campaigns that have played a determinative role in prompting ASX-listed entities to adopt a more rigorous approach to setting executive remuneration and increasing gender diversity on corporate boards.¹⁹⁰ Notable interventions in 2023–24 revealed that certain funds are also considering a more interventionist approach to the appointment of directors at ASX-listed entities. In the aftermath of the AusSuper–Origin incident, for example, AusSuper publicly announced that it reserved the right to request the appointment of a person nominated by it to the board of Origin.¹⁹¹ In late 2023, Aware Super disclosed that it had assembled a cohort of suitable individuals for appointment to the boards of its unlisted investments, and observed that it would be open to adopting a similar approach towards the listed entities in which it holds shares.¹⁹² Prior to the 2024 AGM at Woodside Energy, HESTA disclosed publicly that it had written to Woodside informing the company of individuals it wished to be considered for appointment to Woodside's board.¹⁹³

Industry superannuation funds have also prominently embraced ESG issues, responsible investment, and stewardship. AusSuper, UniSuper, Aware Super, HESTA, and a number of other funds are members of the United Nations-supported PRI,¹⁹⁴ which describes itself as 'the world's leading proponent of responsible investment'.¹⁹⁵ The Australian Council of Superannuation Investors ('ACSI'), a representative body that advocates for industry funds' interests in matters of listed entity corporate governance, states that it 'exists to provide a strong voice on

188 See, eg, 'Takeovers and Schemes Review 2023: An Analysis of Australian Public Mergers and Acquisitions in 2022', *Gilbert + Tobin* (Insight, 22 March 2023) <<https://www.gtlaw.com.au/insights/takeovers-and-schemes-review-2023-an-analysis-of-australian-public-mergers-and-acquisitions-in-2022>> (pointing out to its clients the involvement of funds in major capital market transactions and commenting that '[t]he involvement and influence of superannuation funds is clearly growing').

189 Wootton, 'ASX on Notice' (n 64), quoting the Chief Executive of Australian Retirement Trust.

190 Bernard Mees and Sherene A Smith, 'Corporate Governance Reform in Australia: A New Institutional Approach' (2019) 30(1) *British Journal of Management* 75 <<https://doi.org/10.1111/1467-8551.12298>>.

191 Angela MacDonald-Smith, 'AusSuper Offers Origin Capital after \$20b Takeover Fails', *The Australian Financial Review* (online, 4 December 2023) <<https://www.afr.com/companies/energy/origin-investors-block-20b-takeover-deal-20231204-p5eos2>>. Industry commentators have expressed the view that it is inevitable that superannuation funds will come to play a more hands-on role in the selection of director candidates: Hannah Wootton, 'Keating "Right" about Super-Linked Directors', *The Australian Financial Review* (Melbourne, 23 February 2024) 7.

192 Hannah Wootton and Gus McCubbing, 'Aware Not Pushing for Seats on Boards – Yet', *Australian Financial Review* (Melbourne, 13 March 2024) 5.

193 Hannah Wootton, 'Warning on Super Director Picks', *The Australian Financial Review* (Melbourne, 15 March 2024) 1, 7.

194 'Signatory Directory', *Principles for Responsible Investment* (Web Page) <<https://www.unpri.org/signatories/signatory-resources/signatory-directory>>.

195 'About the PRI' (n 94).

financially material environmental, social and governance (ESG) issues'.¹⁹⁶ ACSI's investor stewardship code, which has been adopted by 12 industry funds,¹⁹⁷ states that '[a]sset owners should engage with companies' including by 'encourag[ing] improved practices and transparency on a variety of issues including those that relate to ESG considerations'.¹⁹⁸ Such positioning implies that funds will adopt an active ownership stance in their engagement with listed entities (and arguably also necessitates that funds' actively demonstrate such behaviour).

Funds have also demonstrated a clear willingness to escalate their engagement with companies when they perceive that an entity has failed to address a governance failing. This was dramatically highlighted by two incidents in 2020. In the first incident, industry superannuation funds, led by ACSI, called for boardroom change at the financial services company AMP, in response to AMP's promotion of a senior executive who had been subject to disciplinary action two years earlier in respect of a sexual harassment complaint.¹⁹⁹ The intervention led to the resignation of AMP's chair and another director, and the demotion of the executive. ACSI's chief executive stated publicly that '[i]nvestors will be continuing to engage with AMP to understand how these decisions were made and how the company intends to strengthen company culture'.²⁰⁰ Also in 2020, a group of industry superannuation funds led a high-profile, cross-border shareholder revolt at Rio Tinto when management failings became apparent in the aftermath of the company's destruction of ancient rock art in the Juukan Gorge. The industry funds were credited with catalysing the ire of major European and North American investors who were initially supportive of Rio Tinto's management.²⁰¹

B Deep Market Familiarity

The superannuation sector is a key economic and social institution in Australia. It is now more than 30 years old, invests nearly a quarter of AUM in Australian listed equities, and holds private investments in other significant Australian asset classes, such as major infrastructure assets.²⁰² In the area of corporate governance,

196 'About Us', *Australian Council of Superannuation Investors* (Web Page) <<https://www.acsi.org.au/about/what-we-do/>> ('ACSI About Us').

197 'Australian Asset Owner Stewardship Code', *Australian Council of Superannuation Investors* (Web Page) <<https://www.acsi.org.au/members/australian-asset-owner-stewardship-code/>>.

198 Australian Council of Superannuation Investors, 'Australian Asset Owner Stewardship Code' (Code, 22 March 2024) 12 <<https://acsi.org.au/wp-content/uploads/2024/08/Australian-Asset-Owners-Stewardship-Code-2024-final.pdf>>.

199 Aleks Vickovich and James Frost, "'Too Late': AMP Shareholders Not Satisfied with Scalps", *The Australian Financial Review* (online, 24 August 2020) <<https://www.afr.com/companies/financial-services/too-late-amp-shareholders-not-satisfied-with-scalps-20200824-p55oq7>>; Charlotte Grieve and Sarah Danckert, "'Some Comfort' as AMP Chair Quits", *The Age* (Melbourne, 25 August 2020) 10.

200 Vickovich and Frost (n 199).

201 The incident and the role of superannuation funds is described in Tim Bowley and Jennifer G Hill, 'The Global ESG Stewardship Ecosystem' (2024) 25(2) *European Business Organization Law Review* 229, 243–6 <<https://doi.org/10.1007/s40804-024-00316-7>>.

202 As to the details in this paragraph, see above Part II; Association of Superannuation Funds of Australia, 'A Decade of Super-Charged Investment in Infrastructure and Green Energy Assets' (Media Release, 22 February 2023) <<https://www.superannuation.asn.au/media-release/media-release-22-february-2023/>>.

representative bodies of the superannuation sector are members of the ASX Corporate Governance Council, the body responsible for drafting Australia's corporate governance code, and are active in debates about corporate governance policy and practice.²⁰³

C Use of Collective Action

Superannuation funds are also adept at leveraging their influence through collective action. On occasions, this is achieved through the formation of ad hoc coalitions as in the Rio Tinto incident. Industry funds also use their representative body, ACSI, to advocate for their collective interests in matters of listed entity corporate governance. According to its website, ACSI 'supports members in exercising active ownership' through 'research, engagement, advocacy and voting recommendations'.²⁰⁴ ACSI reports that in the 2022/23 financial year, it held 306 meetings with 194 ASX-listed entities in relation to various ESG-related issues.²⁰⁵ The financial press has described ACSI as 'an activist superannuation outfit with more muscle than ever before'.²⁰⁶ Reflecting its significance, ACSI was targeted in 2021 by attempted law reform by the then Coalition government, which sought to constrain industry fund shareholder activism by proposing restrictive regulation that would have curtailed ACSI's operations.²⁰⁷

D Summary: Superannuation Funds as a Key Constituency in Australian Corporate Governance

As a result of these attributes and behaviours, superannuation funds are likely to be perceived as a highly significant constituency from the perspective of directors of ASX-listed entities. Funds are substantial domestic institutions that adopt an activist stance in relation to matters of corporate governance and have made it clear that they are prepared to escalate their concerns where necessary. Moreover, as superannuation funds are broadly invested across the ASX,²⁰⁸ company directors are likely to have repeat interactions with funds in the course of their career as directors. In particular, a director who attracts the displeasure of superannuation fund shareholders at one company may face (or, at least, may perceive that they will face) superannuation

203 ASX Corporate Governance Council, 'Corporate Governance Principles and Recommendations' (Guideline No 4, 27 February 2019) 1 <<https://www.asx.com.au/content/dam/asx/about/corporate-governance-council/cgc-principles-and-recommendations-fourth-edn.pdf>> ('Governance Principles and Recommendations').

204 'ACSI About Us' (n 196).

205 Australian Council of Superannuation Investors, *Engagement Report: 2022–2023 Public Summary* (Report, 2023) 2 <<https://acsi.org.au/wp-content/uploads/2024/05/ACSI-Public-Engagement-Report-FY-22-23-Final.pdf>>.

206 Patrick Durkin, 'Quiet Achievers Who Felled a Bank Boss', *The Australian Financial Review* (Melbourne, 28 November 2019) 36. Bernard Mees and Sherene A Smith argue that ACSI's effectiveness is a result of its activist mindset, the backing of funds with significant shareholdings, and a willingness to undertake sustained campaigns against listed entities: Mees and Smith (n 190) 82–6.

207 Nassim Khadem, 'Proxy Advice Law Which Sparked Fears It Would Reduce Investor Activism Defeated in the Senate', *ABC News* (online, 10 February 2022) <<https://www.abc.net.au/news/2022-02-10/proxy-advice-regulation-by-josh-frydenberg-defeated-in-senate/100819906>>.

208 See above Part II.

fund opposition to their directorships in other entities. The perceived significance of funds to a director's professional career is likely to have been reinforced by certain funds' public statements, noted earlier, indicating an intention to play a more interventionist role in the selection of candidates for appointments to the boards of ASX-listed entities. Highlighting this perceived significance of superannuation funds, the chief executive of AusSuper noted in testimony to the 2021 Common Ownership Inquiry that '[i]nterestingly, the overwhelming majority of interactions we have with companies are sought by companies'.²⁰⁹

Superannuation funds' reputation and track record in relation to matters of listed entity corporate governance suggest that funds have also been effective at securing support from, or at least not triggering resistance from, the 'swing constituency' of other institutional investors in the Australian market. This was highlighted in the Rio Tinto incident, discussed earlier, where industry superannuation funds were reported to have catalysed a groundswell of support from other institutional investors in Rio Tinto who were initially ambivalent about taking action.²¹⁰ Certainly, from the perspective of other investors, superannuation funds' track-record in governance activism makes them a credible and informed perspective in Australian corporate governance. As the Rio Tinto incident highlighted, it is possible that international investors may find superannuation funds particularly influential in relation to corporate governance issues in the Australian market. In the case of the large index funds, this dynamic may also be underpinned by the fact that such funds have constrained incentives to devote their own resources to company-specific corporate governance, owing to their index-tracking investment model, highly diversified portfolios, and low-fee products.²¹¹

Several other factors may further contribute to other institutional investors' attentiveness to superannuation fund influence-wielding. This includes the fact that many other institutional investors are asset managers which manage investments on behalf of superannuation funds (which are likely to be significant clients as a result of their substantial AUM).²¹² Moreover, it has been reported that Australian asset managers are struggling to maintain the viability of their business models in the face of increasing competition from low-cost index funds and a trend of superannuation funds in-sourcing their equities management functions.²¹³ For such investors, acquiescing in, supporting, or free-riding on the governance efforts of superannuation funds may therefore prove to be a reasonable course of action.

209 Evidence to House Standing Committee on Economics, Parliament of Australia, Canberra, 20 September 2021, 16 (Ian Silk).

210 Discussed in Nick Toscano and Elizabeth Knight, 'How Aussie Rabble Rousers Ended Rio Boss', *The Sydney Morning Herald* (Sydney, 19 September 2020) 4.

211 Lucian Bebchuk and Scott Hirst, 'Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy' (2019) 119(8) *Columbia Law Review* 2029, 2095–7 <<https://doi.org/10.3386/w26543>> ('Index Funds and the Future of Corporate Governance'); Lucian Bebchuk and Scott Hirst, 'Big Three Power, and Why It Matters' (2022) 102(5) *Boston University Law Review* 1547, 1596–7.

212 ASFA Submission (n 113) 8.

213 Cliona O'Dowd, 'Active Managers Battle Squeeze as Funds Flow Out', *The Australian* (online, 2 May 2024) <<https://www.theaustralian.com.au/business/wealth/active-managers-battle-squeeze-as-funds-flow-out/news-story/3a587769a04d2d94bc0ff081b83bee91>>.

One important qualification needs to be raised in relation to the preceding discussion. Namely, it will be noted that the examples of funds' activism almost exclusively involve industry superannuation funds or their representative body, ACSI. Commentators, scholars and industry participants have noted that industry funds on average tend to be the most activist of Australia's institutional superannuation funds.²¹⁴ The industry funds have various attributes that may explain this pattern. Commentators claim, for example, that the funds' distinctive origins in 1980s and 1990s trade union campaigns and the political scrutiny they have experienced from conservative politicians have given industry funds a unique institutional culture and mindset.²¹⁵ Industry funds have operating models which tend to centralise their asset management functions and decision-making in contrast, for example, to the significant outsourcing of asset management utilised by large retail superannuation funds.²¹⁶ Moreover, as noted earlier in this article, industry funds appear on average to be increasing in size faster than other types of fund.²¹⁷ This insight suggests that, when thinking about superannuation fund significance in Australian corporate governance, we need to be alert to the possibility that different types of funds may display varying levels of influence-wielding intensity. Our understanding of superannuation funds' role in the market for corporate influence would benefit from further empirical research into the relative significance of different types of superannuation funds as influence-wielders.

VI IMPLICATIONS FOR AUSTRALIAN CORPORATE GOVERNANCE SCHOLARSHIP, REGULATION, AND PRACTICE

The preceding analysis recasts the recent narrative about the role of superannuation funds in ASX-listed entity governance as an issue of influence and not corporate control. It shows that superannuation funds are just one participant, albeit a potentially significant one, in a market for corporate influence. Seen in this light, the issue of superannuation fund share ownership forms part of a larger and more complex governance phenomenon. This has several important implications for corporate governance scholarship, regulation and practice.

A Ownership Concentration and the Market for Corporate Influence

In the market for corporate influence, governance outcomes occur through the interaction of influence-wielding shareholders, boards of directors, and other major

214 Mees and Smith (n 190); Evidence of Shayne Elliott (n 186); Evidence of Matt Comyn (n 186); Bell (n 65).

215 See, eg, Girgis (n 24) 707 (noting that industry funds' origins tell 'a compelling story ... that continues to influence their attitudes and behaviour (their "culture") on an ongoing basis').

216 *The Future of Superannuation* (n 121); David Bell and Geoff Warren, *State of Super 2024: Industry Insights Based on APRA's Annual Fund-Level Data Release for FY 2023* (Report, January 2024) 28–9 <<https://theconexusinstitute.org.au/wp-content/uploads/2024/02/State-of-Super-Booklet-FY2024-Final-20240122.pdf>>.

217 See above Part II(B).

shareholders who comprise the so-called ‘swing constituency’.²¹⁸ This market does not, however, realise the aspirations of some scholars for corporate governance to resemble the democratic political process,²¹⁹ or to allow for ‘ground up’ decision-making reflecting diverse shareholder viewpoints.²²⁰ The share ownership data and governance dynamics described in this article instead involve a considerable concentration of governance power in the hands of a small number of large investors and listed entity boards of directors.

US scholars have been aware for longer of this phenomenon in their own market and have highlighted various concerns. Some have argued that it may significantly reduce competition in the market because major investors which own significant shareholdings in competing companies (eg, in each of the major US airlines) are likely to prefer those companies to behave as an oligopoly and not engage in potentially costly competition among themselves.²²¹ These concerns have been heavily criticised on the grounds that (i) it is unclear why financially motivated investors would want the market to become less competitive and productive; and (ii) there is no clear evidence of investors using their governance power to prompt companies to behave anti-competitively.²²² The 2021 Common Ownership Inquiry considered similar concerns in the Australian context and found that there was no basis to conclude that such anti-competitive conduct was occurring in Australia.²²³ Harvard academic, John Coates, has raised a different concern. Coates argues that the significant concentration of governance power over major US public corporations in the hands of the three major index funds calls into question the legitimacy of the US corporate sector, and poses a threat to ‘the foundations of a democratic republic built on Montesquieu’s separation of powers as well as federalism’.²²⁴ This would seem to be less of a concern in the Australian context given superannuation funds’ central role in investing the retirement savings of working Australians and their close regulation under Australian law. In these circumstances, it is not apparent how funds’ significant ownership of ASX-listed entities would give rise to such fundamental issues of legitimacy.

US scholars have raised a further concern which would appear to be more salient in the Australian context. They point out that the concentration of governance power at the shareholder level creates a risk of shareholder ‘groupthink’ in relation to matters of corporate governance. It is claimed that ‘groupthink’ may result in listed entities being governed in a ‘one size fits all’ manner that prevents them from developing tailored governance structures, processes, and outcomes that might

218 See above n 145 and accompanying text.

219 See, eg, John Pound, ‘The Rise of the Political Model of Corporate Governance and Corporate Control’ (1993) 68(5) *New York University Law Review* 1003.

220 See, eg, Michael Rawling, ‘Australian Trade Unions as Shareholder Activists: The Rocky Path towards Corporate Democracy’ (2006) 28(2) *Sydney Law Review* 227.

221 Discussed in Hill (n 58).

222 Ibid.

223 2021 *Common Ownership Inquiry Report* (n 57).

224 John Coates, *The Problem of Twelve: When a Few Financial Institutions Control Everything* (Columbia Global Report, 2023) 13 <<https://doi.org/10.2307/jj.15552482>>.

be more efficient for the particular circumstances of individual companies.²²⁵ For example, they may adopt uniform approaches to how they remunerate, incentivise, and impose performance accountability on their senior executives. This is an issue that has also been noted by the OECD, which has observed how a material level of consensus can emerge among institutional investors in relation to issues of corporate governance, especially where those investors take advice from common corporate governance advisers.²²⁶

In this context, there is also a related risk that a market's corporate governance practices and outcomes will become highly sensitive to shifts in the attitudes and sentiments of just a handful of major institutional investors. Recent events in the US highlight this point. Conservative US law makers, government officials, and commentators have subjected the three major index funds to considerable political and regulatory pressure, which has resulted in those funds reducing their ESG activism.²²⁷ As those funds are major investors in US public corporations, their retreat from ESG activism is contributing to a material reduction in the intensity of investor focus on environmental and social issues in US corporate governance.²²⁸ In other words, a paradigm shift is potentially underway in US corporate governance in large part because of an externally triggered shift in attitude involving just three major investors. It is not inconceivable that superannuation funds may similarly find themselves exposed to similar political and interest group pressure that has knock-on effects for Australian corporate governance. Funds have already been targeted by concerted campaigns from conservative lawmakers and commentators.²²⁹ Activist non-governmental organisations have also focused their attention on superannuation funds' approach to climate change and the energy transition as part of their broader objective of changing the energy mix in the Australian economy.²³⁰

225 See, eg, Jill Fisch and Jeff Schwartz, 'Corporate Democracy and the Intermediary Voting Dilemma' (2023) 102(1) *Texas Law Review* 1, 41; Paul Rose, 'Common Agency and the Public Corporation' (2010) 63(5) *Vanderbilt Law Review* 1353 <<https://doi.org/10.2139/ssrn.1470086>>.

226 Organisation for Economic Co-operation and Development, 'Common Ownership by Institutional Investors and its Impact on Competition' (Secretariat Background Note, 29 November 2017) 22 <https://www.oecd.org/content/dam/oecd/en/publications/reports/2017/10/common-ownership-by-institutional-investors-and-its-impact-on-competition_549c7097/40c7872a-en.pdf>.

227 See, eg, Jack Pitcher, 'BlackRock Withdraws from Climate Coalition, Backpedaling Again on ESG', *The Wall Street Journal* (online, 9 January 2025) <<https://www.wsj.com/business/blackrock-withdraws-from-climate-coalition-backpedaling-again-on-esg-0e9ad0f8>>; Freshfields, *Trends and Updates from the 2024 Proxy Season* (Report, 27 June 2024) <<https://www.freshfields.com/49ee6e/globalassets/noindex/documents/trends-and-updates-from-the-2024-proxy-season.pdf>> ('Trends and Updates 2024').

228 *Trends and Updates 2024* (n 227).

229 See above Part II(C). Conversely, Labor politicians have revealed an awareness of the potential for the superannuation sector to serve political interests through comments about superannuation being 'honey' and the nation's 'secret weapon': James Thomson, 'Why Wayne Swan Says Super Is Our "Economic Secret Weapon"', *The Australian Financial Review* (online, 31 October 2023) <<https://www.afr.com/chanticleer/why-wayne-swan-says-super-is-our-economic-secret-weapon-20231030-p5eg64>>.

230 'Campaigns: Super', *Market Forces* (Web Page) <<https://www.marketforces.org.au/campaigns/super/>>; Australasian Centre for Corporate Responsibility, *Super Votes: How Australia's Largest Superannuation Funds Voted on ESG Resolutions in 2021* (Report, December 2022) <<https://www.accr.org.au/research/super-votes-how-australias-largest-superannuation-funds-voted-on-esg-resolutions-in-2021-full/>>.

B Risks to the Effectiveness of Board Decision-Making

The concentration of power at the shareholder level also poses risks for the effectiveness of listed entity boards. This article has highlighted how, as a result of their structure and composition, listed entity boards may be particularly sensitive to major shareholder influence-wielding.²³¹ Recent moves by certain large superannuation funds to play a more hands-on role in director appointments may further heighten director sensitivity to superannuation funds' influence-wielding.

Some commentators have argued that a more interventionist role by superannuation funds in the appointment of directors may create conflicts of interest for directors who are supported by or otherwise aligned with superannuation funds.²³² Given practices observed to date, this seems unlikely. Funds' initiatives appear to be motivated by a concern to secure the appointment of capable, arms' length candidates, rather than a desire to insert partisan insiders onto the boards of listed entities.²³³ Even if there were a material risk of legally conflicted directors being appointed, Australian corporate law already contains detailed rules addressing conflicts of interest and related party transactions.²³⁴

The issue in this context would instead appear to be what Pamela Hanrahan and Tim Bednall have characterised as a 'balance of power' issue.²³⁵ This term refers to the desirability of the board of directors having sufficient independence from the other loci of internal corporate power (ie, a company's senior executives and the company's shareholders).²³⁶ The term envisages a federated governance structure that provides scope for the respective sources of corporate power in a company to develop and bring to bear independent perspectives on their decision-making, thereby contributing to a more robust system of internal governance. Hanrahan and Bednall consider that such a system would only be compromised when a shareholder acquires a controlling shareholding and can dictate governance outcomes at the board and senior executive levels. However, their analysis does not take into account the significant concentration of share ownership in the hands of compact groups of influential institutional investors revealed by this article. This development also has the potential to create a concentration of power at the shareholder level that might threaten the independence of perspective that Hanrahan and Bednall argue should exist at the board and senior executive levels.

C Responses to These Issues

In view of the multilateral nature of interactions within the market for corporate influence, we must avoid a singular focus on superannuation funds. Lawmakers,

231 See above Part IV(C).

232 Wootton, 'Warning on Super Director Picks' (n 193).

233 See the discussion in the sources cited at nn 191–3 (including Wootton and McCubbing (n 192), quoting a fund representative who argues that their desire to play a more hands-on role is intended to ensure that listed entities have expertise on the board to guide their energy transition strategy: at 5).

234 Pamela Hanrahan and Tim Bednall, 'Independence of Directors Affiliated with Substantial Shareholders: Issues of Law and Corporate Governance' (2015) 33(4) *Company and Securities Law Journal* 239.

235 Ibid.

236 Ibid 255.

regulators, and researchers should instead consider all key participants in the market, and how they undertake, experience, and respond to influence-wielding. In these circumstances, the type of interventionist law reform targeting superannuation funds that was proposed during the recent ‘rise of big super’ debate²³⁷ would be premature and very possibly counter-productive. In the dynamic environment of the market for corporate influence, curbing funds’ role may well generate undesirable spillover effects vis-à-vis other participants in the market. Boards of directors, for example, may find themselves subject to less shareholder scrutiny and monitoring, with potentially adverse consequences for shareholder-manager agency costs,²³⁸ or other types of investors may find they have greater scope to exert their influence over the governance of listed entities. Such alternative scenarios may be no better, and may even be worse, than the current state of affairs.²³⁹ The share ownership data presented in this article suggests, for example, that the next most significant class of investor in the ASX after superannuation funds are the large index funds. There is detailed research that highlights the highly constrained incentives of these investors to engage meaningfully in the numerous companies in which they hold shares.²⁴⁰ There is an open question as to what role they would play in the market for corporate influence should the governance power of superannuation funds be constrained through law reform. Interventionist law reform should therefore only be considered once the dynamics of the market are better understood.

A less precipitous response would instead appear to be in order for now. That is, there will need to be a shift in the current orientation of Australian corporate governance discourse in order to engage with the potential issues outlined above. The development of Australian corporate law and corporate governance norms since the 1980s has reflected a normative acceptance of the desirability of shareholder influence in corporate governance. The focus of law reform and regulation has been on augmenting shareholders’ governance rights and facilitating their participation in corporate governance,²⁴¹ rather than imposing obligations or

237 Such reforms included the imposition of caps on shareholdings of superannuation funds: see above n 69 and accompanying text.

238 The UK may provide an instructive example of the potentially adverse governance effects that occur when significant domestic institutional investors cease to play a substantial role in corporate governance. One commentator has claimed that the significant reduction in ownership of UK-listed equities by UK domestic institutions has produced a reduction in management accountability. It is said that this results from the fact that there is no longer a significant presence of local investors with deep market familiarity and strong local relationships that provide them with governance credibility and leverage: see Guy R Jubb, ‘From Principles to Prosperity: The Time Has Come to “Apply and Explain”’, *Institute of Directors* (Blog Post, 13 May 2024) <<https://www.iod.com/resources/governance/from-principles-to-prosperity-the-time-has-come-to-apply-and-explain/>>.

239 Indeed, in this regard, it should be borne in mind that superannuation funds may have attributes that make their influence-wielding desirable, relative to other participants in the market for corporate influence. As Parts II and III demonstrated, they have a significant exposure to (and, therefore, a significant interest in) the performance of the Australian economy; they are subject to detailed regulation under Australian law; they are embedded in Australian society as a result of their critical role in the superannuation system; and, as investors of workers’ retirement savings, they must manage their investments with a long-term outlook.

240 See, eg, Bebchuk and Hirst, ‘Index Funds and the Future of Corporate Governance’ (n 211).

241 Chen, Ramsay and Welsh (n 62); Mitchell et al (n 62).

limitations on shareholders with respect to their role in corporate governance.²⁴² This has prompted Stephen Bottomley to ask recently: ‘How is it that, for the most part, shareholders have escaped the broad critical public examination that other corporate players have received?’²⁴³ In this context, the rise of institutional investor share ownership has been broadly welcomed. Institutional investors have been perceived as a desirable variety of shareholder with the capacity to promote sound corporate governance and mitigate management agency costs.²⁴⁴

This article’s analysis suggests that a more critical and reflective focus on share ownership concentration and its implications is necessary. To echo Farrar’s observation, this perspective will need to move beyond traditional concepts of ‘corporate control’.²⁴⁵ In particular, it must recognise that the governance of ASX-listed entities plays out today in a complex, dynamic, and multidimensional setting – or what this article has described as the market for corporate influence. In this setting, influence-wielding shareholders operate both within and without the formal mechanisms of corporate governance, and seek to leverage their impact through multilateral engagement. We must be alert to the key participants in this market for corporate influence and the nature and likely consequences of their interactions with one another.

The following example illustrates the potential significance of adopting this perspective when thinking about corporate governance regulation and best practice. The example relates to the guidance in the ASX Corporate Governance Council’s Corporate Governance Principles and Recommendations (‘Governance Principles and Recommendations’) in relation to the appointment of listed entity directors.²⁴⁶ The Governance Principles and Recommendations emphasise three key objectives in relation to board appointments. The first is to ensure that directors bring a critical and independent perspective to their decision making, in the sense that they will make decisions that ‘reflect the best interests of the entity as a whole and [which are] not biased towards the interests of management or any other person or group with whom a ... director may be associated’.²⁴⁷ The second is an objective of promoting ‘effective functioning of the board and ... investor confidence’ by ensuring that entities have a ‘formal, rigorous and transparent process for the appointment and reappointment of directors to the board’.²⁴⁸ To this end, the Governance Principles and Recommendations exhort listed entities to provide their shareholders with material information regarding candidates standing

242 There have been some developments at the margins in the form of the creation of stewardship codes – non-binding, industry-formulated codes of conduct which exhort institutional investors to adopt a diligent and informed approach to their corporate governance activities: see Bowley and Hill, ‘Stewardship and Collective Action’ (n 126).

243 Stephen Bottomley, *The Responsible Shareholder* (Edward Elgar Publishing, 2021) 4 <<https://doi.org/10.4337/9781800373402>>.

244 See above n 2 and accompanying text.

245 Farrar (n 21) 77, 93.

246 ‘Governance Principles and Recommendations’ (n 203).

247 Ibid 15.

248 Ibid 12.

for (re-)election to the board of directors.²⁴⁹ Finally, the Governance Principles and Recommendations seek to ensure that boards are composed of directors from diverse backgrounds because '[d]iversity is increasingly seen as an asset to listed entities and a contributor to better overall performance'.²⁵⁰ The ASX Corporate Governance Council has separately noted that diversity can 'avoid "groupthink" or other cognitive biases'.²⁵¹

The Governance Principles and Recommendations seek to promote these objectives through a series of recommendations, and related commentary in relation to the structure and composition of a listed entity's board of directors. However, these recommendations and commentary do not directly engage with the potential governance implications of the share ownership concentration and influence-wielding dynamics described in this article. This raises a question as to whether the Governance Principles and Recommendations are capable of achieving their underlying objectives. This point can be illustrated with the following hypothetical scenario drawn from this article's analysis.

Director Candidate A is standing for election to the board of Company X. Candidate A is recommended and strongly supported by an institutional investor holding 4.8% of Company X's shares; the investor does this in the course of private communications with Company X's chairperson and the head of its nomination committee. The chairperson and Nomination Committee head have had significant previous interactions with the investor at the various companies in which they are directors.

Candidate A is pursuing a career as a professional director and is a director of another substantial ASX-listed entity in which the investor holds a 4% shareholding. The investor has an established reputation for advocating (both alone and together with like-minded major investors) for listed entities to adopt particular approaches to corporate reporting, executive remuneration and other topical corporate governance issues.

Is there not a possibility that in these circumstances, Candidate A might be highly attuned to the governance preferences of the investor in relation to such issues? What is the likelihood of Candidate A bringing a different perspective to their decision-making on such issues? To what extent can it reasonably be expected that Company X's chairperson and Nomination Committee will resist the lobbying of the investor in relation to the nomination of Candidate A? Should these discussions be treated as a private matter between Company X and the investor? These are all potentially significant issues from the perspective of the ASX Governance Council's objectives of transparency, director independence, and board diversity.

Yet, the current recommendations in the Governance Principles and Recommendations do not directly engage with this scenario. Candidate A would not be caught by the guidance which states a director may not be independent if they are a representative, employee, or officer of or professional adviser to a

249 Ibid 7.

250 Ibid 9.

251 ASX Corporate Governance Council, 'Corporate Governance Principles and Recommendations: 5th Edition' (Consultation Draft, 27 February 2024) 20 <<https://www.asx.com.au/content/dam/asx/about/corporate-governance-council/corporate-governance-principles-and-recommendations-consultation-draft.pdf>>.

‘substantial holder’.²⁵² This is because (i) Candidate A is not a representative person of the investor or an employee, officer, or professional adviser of the investor; and (ii) the investor’s shareholding in Company X is below the 5% threshold in the Governance Principles and Recommendations’ definition of ‘substantial holder’.²⁵³ In addition, Candidate A’s appointment does not directly implicate the guidance regarding diversity, which instead focuses on how gender, age, race, and personal background diversity can avoid groupthink and cognitive biases in corporate governance.²⁵⁴ Admittedly, the Governance Principles and Recommendations include some ‘catch-all’ commentary that states that the guidance regarding director independence is not exhaustive of the situations that might undermine a director’s independence, and which exhorts listed entities to disclose all material information regarding board candidates.²⁵⁵ It is unclear, however, to what extent such generic commentary would prompt listed entities to consider and disclose the more nuanced governance implications posed by our example.

Of course, appointments of the kind described in the example may not be problematic if director candidates proposed by large investors are prepared to act independently, or if there are sufficient other directors on a company’s board to ensure that board decision-making is informed by independent and diverse perspectives. However, a core tenet of the Governance Principles and Recommendations is that

the market receives an appropriate level of information about the entity’s governance arrangements so that investors and other stakeholders can have a meaningful dialogue with the board and management on governance matters and can factor the information [into voting decisions].²⁵⁶

The approach adopted in the Governance Principles and Recommendations is arguably insufficient to ensure that such a dialogue could occur.

The recent failure of the attempted updating of the Governance Principles and Recommendations means that their guidance is unlikely to be changed in the foreseeable future.²⁵⁷ In these circumstances, policy makers, regulators, market actors, and scholars will need to take up the task of considering the developments and issues raised in this article. In a market characterised by concentrated share ownership and influential shareholders, it is important to ensure that governance structures, practices, and norms provide appropriate scope for critical and diverse perspectives.

252 ‘Governance Principles and Recommendations’ (n 203) 14.

253 Ibid 36.

254 Ibid 9–10.

255 See, eg, *ibid* 7–8, 13–14.

256 Ibid 2.

257 ASX Corporate Governance Council, ‘ASX Corporate Governance Council Closes Consultation on Draft Fifth Edition Corporate Governance Principles and Recommendations’ (Communique, 20 February 2025) <<https://www.asx.com.au/content/dam/asx/about/corporate-governance-council/20-feb-asx-corporate-governance-council-closes-consultation.pdf>>.

VII AN ASIDE

This article has focused on the implications of increasing superannuation fund share ownership for the governance of ASX-listed entities. It should be noted that this article's analysis also has implications for the separate debate about the governance of superannuation entities themselves. This debate has focused on what governance structures and processes should be adopted by funds to ensure that fund governance promotes optimal member outcomes²⁵⁸ and minimises prudential risk.²⁵⁹ This article's analysis highlights another important reason for maintaining an ongoing focus on superannuation fund governance: namely, robust fund governance is also important in view of funds' significant role in the governance of ASX-listed entities, and in establishing and enforcing norms and practices of corporate governance in the Australian market.

VIII CONCLUSION

The 2023 Origin takeover highlighted a significant trend in the ownership and governance of ASX-listed entities. Although the time has not come for prescriptive regulatory change to address this development, it is important for Australian lawmakers, regulators, and researchers to recognise the significance of increasing share ownership concentration in Australia, and reflect more deeply on the implications of shareholder power for Australian corporate governance.

258 See, eg, Girgis (n 24); M Scott Donald and Suzanne Le Mire, 'Independence in Practice: Superannuation Fund Governance through the Eyes of Fund Directors' (2019) 42(1) *University of New South Wales Law Journal* 300 <<https://doi.org/10.53637/GWML7532>>.

259 Relevantly, the Reserve Bank of Australia and the International Monetary Fund have recently raised concerns about increasing systemic risk associated with the significant concentration of superannuation assets in a handful of very large funds: David Taylor, 'Donald Trump and the One Big Threat to Australia's Almost \$4 Trillion Superannuation System', *ABC News* (online, 12 November 2024) <https://www.abc.net.au/news/2024-11-12/risk-to-australia-s-superannuation-system/104589106?utm_source=abc_news_web&utm_medium=content_shared&utm_campaign=abc_news_web>.