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# Shareholder concentration and control in Australia

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## ABSTRACT

There is ongoing interest in understanding share ownership and control dynamics in publicly listed companies, given the governance and regulatory implications arising therefrom. This article presents a new empirical analysis of shareholder data, focusing on the largest 50 publicly listed companies in Australia, filling a striking gap in the existing literature. Specifically, the following issues are investigated within each company: 1. The level of institutional ownership within the largest 20 registered shareholders; 2. The percentage of issued capital owned by the largest three registered shareholders; 3. The control of that ownership, to determine the extent to which ownership and control diverge; and 4. Substantial shareholding information is collected and analysed, in order to reduce the information gap which exists between ownership and control, and to provide a more complete picture of shareholding patterns. Several explanatory factors behind the identified landscape and the implications arising from the findings are then discussed.

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**KEYWORDS** Corporate law; share ownership and control; institutional investors; corporate governance

## 1. Introduction

Prevailing patterns of corporate share ownership have been described as the ‘most conspicuous’ of the numerous factors that help to shape the development of corporate law around the world.<sup>1</sup> Indeed, shareholding patterns are thought to impact numerous fundamental features of corporate law, independent of the jurisdiction studied, thus making it important to understand both ownership and control in practice.<sup>2</sup> From a functional perspective, share ownership patterns may affect the legal and regulatory strategies which are deployed in a given jurisdiction, and may complement

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<sup>1</sup>Reinier Kraakman and others, *The Anatomy of Corporate Law* (3rd edn, Oxford University Press 2017), 25.

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

the methods of enforcement of those laws, as well as the institutions which support such enforcement.<sup>3</sup> Moreover, share ownership patterns provide the framework for understanding the core interest groups which are likely to influence corporate governance practices and reform efforts.<sup>4</sup> Additionally, this information allows for an analysis of the likely sets of agency costs which arise from, for example, an identified separation between ownership and control to be highlighted in any ensuing policy and regulatory discussions.<sup>5</sup>

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

Further to this, institutions with large holdings can theoretically overcome collective action problems and reduce the coordination costs associated with monitoring, stewardship and enforcement activities. Certainly, where institutional investors are dominant, they have the ability to impact markets, improve the oversight of managers, as well as overall corporate

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<sup>3</sup>Reinier Kraakman and others, *The Anatomy of Corporate Law* (3rd edn, Oxford University Press 2017), 25, 46; Jenifer Varzaly, 'The Enforcement of Directors' Duties in Australia: An Empirical Analysis' (2015) 16 *European Business Organization Law Review* 281.

<sup>4</sup>Reinier Kraakman and others, *The Anatomy of Corporate Law* (3rd edn, Oxford University Press 2017), 24–25.

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

<sup>6</sup>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 *Australian Business Law Review* 18, 18–20, 23–32.

<sup>7</sup>*ibid.*, 18–20. That is, corporate law may respond to the structure of share ownership in order to enhance overall welfare- termed an 'efficiency effect': Reinier Kraakman and others, *The Anatomy of Corporate Law* (3rd edn, Oxford University Press 2017), 24, 25.

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

<sup>9</sup>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 *Australian Business Law Review* 18, 31, 33–34.

<sup>10</sup>*ibid.*; Reinier Kraakman and others, *The Anatomy of Corporate Law* (3rd edn, Oxford University Press 2017), 27.

performance.<sup>11</sup> This is because, at least notionally, institutional investors are able to take a more active approach than dispersed individual investors, and can thereby influence corporate governance practices.<sup>12</sup> This is bolstered by their ability to, in principle, coordinate their activities, reduce collective action problems, access relevant company information, and exercise their voting power.<sup>13</sup> Given that they typically own large blocks of shares, and are incentivised to expertly monitor investments, they are theoretically better able to bring management to account for actions which are contrary to overall shareholder welfare, thus reducing agency costs.<sup>14</sup>

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

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

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

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

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

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

<sup>16</sup>*ibid.*, 19, 20–21; Olivia Dixon and Jennifer Hill, 'The Protection of Investors and the Compensation for their Losses: Australia' (2018) European Corporate Governance Institute (ECGI) - Law Working Paper No. 421/2018, 6–7; Richard Mitchell and others, 'Shareholder Protection in Australia: Institutional Configurations and Regulatory Evolution' (2014) 38(1) *Melbourne University Law Review* 68; Vivien Chen, lan

evidence on Australian share ownership patterns, given the clear gaps present in outmoded research, and the difficulty expressed in drawing strong conclusions therefrom.<sup>17</sup>

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

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Ramsay and Michelle Welsh, 'Corporate Law Reform in Australia: An Analysis of the Influence of Ownership Structures and Corporate Failure' (2016) 44 *Australian Business Law Review* 18, 22–23.

<sup>17</sup>*ibid.* The House of Representatives Standing Committee on Economics inquiry into the implications of common ownership and capital concentration in Australia was commenced on Thursday, 29 July 2021, with the final Report tabled in March 2022. The report called attention to the information asymmetries associated with the paucity of detailed, publicly available share ownership information in Australia, making such research all the more timely. Further, see Carole Comerton-Forde, 'An Analysis of S&P/ASX 300 and NZX 50 Share Ownership' (February 2021) Australasian Investor Relations Association, noting the poor level of share ownership disclosure required in Australia, with Morningstar rating Australia below average on fund disclosures, 5.

<sup>18</sup>Ian Ramsay and Mark Blair, 'Ownership Concentration, Institutional Investment and Corporate Governance: An Empirical Investigation of 100 Australian Companies' (1993) 19 *Melbourne University Law Review* 153, 189; Jenifer Varzaly, 'The Effectiveness of Disclosure Law Enforcement in Australia' (2021) 21 *Journal of Corporate Law Studies* 135; Reinier Kraakman and others, *The Anatomy of Corporate Law* (3rd edn, Oxford University Press 2017), 25; Ronald J Gilson and Jeffrey N Gordon, 'The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights' (2013) 113 *Columbia Law Review* 863, 868.

<sup>19</sup>Tim Bowley, *Activist Shareholders in Corporate Governance: The Australian Experience* (Hart 2023); Tim Bowley and Jennifer Hill, 'Shareholder Inspection Rights: Lessons from Australia' (2022) 22 *Journal of Corporate Law Studies* 335; Jennifer Hill, 'Good Activist/Bad Activist: The Rise of International Stewardship Codes' (2018) 41 *Seattle University Law Review* 497; Ian Ramsay and Mark Blair, 'Ownership Concentration, Institutional Investment and Corporate Governance: An Empirical Investigation of 100 Australian Companies' (1993) 19 *Melbourne University Law Review* 153, 189; Ronald J Gilson and Jeffrey N Gordon, 'The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights' (2013) 113 *Columbia Law Review* 863, 868; Lucian A Bechuk and Scott Hirst, 'Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy' (2019) 119 *Columbia Law Review* 2029, 2043.

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

<sup>21</sup>See e.g., Michael Jefferies, 'The Third Wave of Shareholder Influence and the Emergence of Informational Activism in Australia' (2019) 34 *Australian Journal of Corporate Law* 305; Tim Bowley and Jennifer Hill, 'Stewardship and Collective Action: The Australian Experience' (2020) *European Corporate Governance Institute - Law Working Paper No. 491/2020*, 4; Olivia Dixon and Jennifer Hill, 'The Protection of Investors and the Compensation for their Losses: Australia' (2018) *European Corporate Governance*

From a research design perspective, share ownership and control can be investigated within individual companies, as well as within share indices as a whole. Both levels of analysis are important, given the distinctive, inter-related implications which arise from the findings. At the company level, it is firstly important to understand the degree of concentration of share ownership. This necessitates the collection of both registered and substantial shareholder data, in order to distinguish nominee and controlling shareholders, given that both types of shareholders may hold concentrated parcels of shares. The higher the level of concentration found, the greater the degree of control that shareholders within the company will be able to exercise, *ceteris paribus*. Equally, understanding whether share ownership is concentrated within a single dominant blockholder, a coalition of large shareholders, or some other identifiable pattern, will likewise be instructive from an agency cost perspective. For example, significant implications arise from whether there is a substantial nominee holding or a large blockholding held by a single beneficial owner.<sup>22</sup> Moreover, it is important to examine whether the largest shareholders are institutions as opposed to individuals. If institutions are prevalent, identifying the type of institution is relevant to understanding whether control rights are likely to be present, the possible degree of institutional involvement in governance, whether there is a long or short term investment horizon, and the type of beneficial owners involved.

At the share index level, analysing the degree of ownership concentration is important from the perspective of determining whether the same large shareholders have substantial holdings across companies within the index, as this may impact their incentives to engage in stewardship.<sup>23</sup> Additionally, the presence of recurring substantial shareholders across share indices may influence the focus of corporate law and governance reform,<sup>24</sup> and is likewise relevant to discussions around potential anticompetitive effects arising from

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Institute (ECGI) - Law Working Paper No. 421/2018, 6; Richard Mitchell and others, 'Shareholder Protection in Australia: Institutional Configurations and Regulatory Evolution' (2014) 38(1) Melbourne University Law Review 68; 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 Australian Business Law Review 18, 22–23; Alan Dignam, (2008) 'The Globalisation of General Principle 7: Transforming the Market for Corporate Control in Australia and Europe?' (2008) 28 Legal Studies 96, 106.

<sup>22</sup>Where say 15% of the shares are held by a single nominee, on behalf of several thousand beneficial owners, this has substantial implications compared to where those several thousand beneficial owners own their shares directly (and not through a nominee). Nominee information is additionally important to understand and analyse, given that it reveals a significant information gap between registered ownership and control, and serves as an indirect indicator of the degree of institutional share ownership which exists. This has a direct bearing on disclosure law policy and reform in the Australian context, given the comparatively low level of ownership disclosure required: Carole Comerton-Forde, 'An Analysis of S&P/ASX 300 and NZX 50 Share Ownership' (February 2021) Australasian Investor Relations Association, with Morningstar Rating Australia Below Average on Fund Disclosures When Compared with Other Jurisdictions, 5.

<sup>23</sup>Lucian A Bebchuk and Scott Hirst, 'Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy' (2019) 119 Columbia Law Review 2029.

<sup>24</sup>Reinier Kraakman and others, *The Anatomy of Corporate Law* (3rd edn, Oxford University Press 2017), 25.

horizontal shareholdings in competing companies within concentrated industries.<sup>25</sup> Thus, understanding these core issues within companies and across indices has significant implications from a corporate governance and an agency costs perspective, and is consequential for both policy and regulatory design.

In like manner, the choice of company coverage also requires justification.<sup>26</sup> From a research design perspective, there are sound and distinctive reasons to examine large publicly listed companies. First, from a disclosure perspective, the regulatory framework analysed only applies to the publicly listed subset of companies. Second, despite the difficulties in sourcing publicly available information regarding share ownership, this is possible in the publicly listed company context, but not in the private company context. Third, the stark gaps in the existing body of literature which this article seeks to cover, exclusively examine publicly listed companies. Fourth, the largest publicly listed companies are the most economically significant, with the ASX 50 comprising 64.53% of the total equities market.<sup>27</sup> Fifth, the key implications relating to any assessment of share ownership, such as stewardship, relevant agency costs, the separation of registered and beneficial share ownership, common ownership, the role of institutional investors, collective action problems, and coordination costs associated with monitoring and enforcement (among other things), are at their highest in the large publicly listed company context. Sixth, any empirical analysis must be circumscribed to provide sufficient depth. One of the major aims of this article is to provide a more detailed and granular analysis than previous literature, which is not possible with a broader sample of companies. The decision was therefore made to prioritise depth of analysis versus (necessarily more superficial) breadth of coverage.

In light of the foregoing, this research seeks to take an important step forward by providing much needed data to the existing body of knowledge, through an empirical analysis of shareholder ownership and control within the largest Australian publicly listed companies. To date, there are no studies which have undertaken an in-depth analysis of ownership identity, concentration and control within the 50 largest companies by market capitalisation in Australia utilising post 1999 data, despite the existence of dynamic

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<sup>25</sup>Einer R Elhauge, 'How Horizontal Shareholding Harms Our Economy - And Why Antitrust Law Can Fix It' (2020) 10 *Harvard Business Law Review* 207.

<sup>26</sup>In the UK context see: Jonathan Hardman and Guillem Ramírez Santos, 'Empirical Evidence for the Continuing Need to 'Think Small First' in UK Company Law' (2023) 24 *European Business Organization Law Review* 117.

<sup>27</sup>This figure was calculated as at September 2020 using ASX historical market statistics regarding total Australian equity by market capitalisation: <https://www2.asx.com.au/about/market-statistics/historical-market-statistics#end> and ASX 50 market capitalisation data accessed from S&P Global: <https://www.spglobal.com/spdji/en/indices/equity/sp-asx-50/#data>.

changes to shareholder structures over this time.<sup>28</sup> As such, in order to address the clear gap within the current body of knowledge, a dataset of the largest 50 publicly listed companies within the Standard and Poor's (S&P)/Australian Securities Exchange (ASX) 20 index (ASX 20) and the S&P/ASX 50 index (ASX 50) has been constructed for the 2016 financial year period.<sup>29</sup> Drawing upon the dataset, this research explores the following issues within each company: 1. The level of institutional ownership within the largest 20 registered shareholders; 2. The percentage of issued capital owned by the largest three registered shareholders; 3. The control of that ownership, to determine the extent to which ownership and control diverge; and 4. Substantial shareholding information is collected and analysed, in order to reduce the information gap which exists between ownership and control, and to provide a more complete picture of share ownership patterns.

The three key overarching contributions to knowledge which emerge from the research are: 1. A more comprehensive description of the ownership landscape, showing the significance of institutional shareholders at the index level and at the company level. Thus, the first major contribution of this research is to accurately map the shareholder landscape across these two areas at a granular level, as it is thus far unknown. 2. A better explanation for the contours of this landscape. That is, the data allows for an empirical exploration of a number of the potential reasons (explanatory factors) that the observed shareholder patterns may exist in the Australian context. Understanding the empirical fit of these explanatory factors adds significantly to the current body of knowledge. This is particularly the case in Australia, where significant gaps exist in the literature. 3. An improved understanding of the implications arising from the prevalence of institutional shareholders as registered owners, as distinct from holding control rights. The data allows for this finding to be disaggregated from the control results, based on substantial shareholding information. This facilitates the identification of stark information gaps which exist between ownership and control, and the associated chains of agency costs. This allows for an evaluation of the policy implications and reform options arising therefrom, which are assessed in the final two sections of the article.

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<sup>28</sup>This has not been done since the seminal La Porta et al 1999 study: Rafael La Porta and others, 'Corporate Ownership Around the World' (1999) 54 *Journal of Finance* 471; although, Lamba and Stapledon examine non-institutional blockholders and control, using data up to and including 2004 in their 2014 article: Asjeet S Lamba and Geof Stapledon, 'What Motivates Block Share Ownership?' (2014) 11 *Corporate Ownership & Control* 349.

<sup>29</sup>This timeframe captures dynamic changes to shareholding structures post 2004 (the time of the last major empirical study of ownership and control in Australia), and post the sizable growth of the Australian pension market, the significant increase in managed funds, and the expanding influence of index funds both within Australia and globally. Future work plans to track the evolution of ownership data over time, which will include effects post 2016 as relevant data becomes available.



## 2. The relevant literature

The seminal work of Adolf Berle and Gardiner Means in 1932, highlighted the predominance of widely held companies in the US context, where share ownership is dispersed among many shareholders, and managers ultimately control the company.<sup>30</sup> Their assertion that ownership was separate from control in the largest American corporations has had an ‘enduring legacy’,<sup>31</sup> both within and beyond the US. Similarly, a key implication arising from this claim, that the interests of managers diverge from those of shareholders, has informed an understanding of the structure of corporate law and regulation for the decades which have followed.<sup>32</sup> Indeed, without using the term ‘agency’ theory, Berle and Means indicate a clear awareness of the possible divergence of interests between directors and managers, on one hand, and the ultimate owners of the company, on the other.<sup>33</sup>

Yet, there is little systematic evidence regarding such ownership patterns in practice, particularly from an international perspective.<sup>34</sup> With the aim of filling this gap, two of the most significant studies in this area were those conducted by La Porta, Lopez-de-Silanes, Shleifer, and Vishny (La Porta et al) in 1998 and 1999, respectively, which collect and analyse data on shareholding dispersion. The first of these studies, ‘Law and Finance’, examines first level ownership within the ten largest publicly traded firms across 49 countries, but does not look beyond this to find the ultimate owners from a control perspective.<sup>35</sup> For each country, the authors calculated the average and the median ownership stake of the three largest shareholders in the ten largest publicly listed companies.<sup>36</sup> The lowest mean and median degrees of ownership concentration, when grouped on a legal origin basis (English origin),<sup>37</sup>

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<sup>30</sup>Adolf A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property* (Macmillan 1933) (1932).

<sup>31</sup>Brian Cheffins, ‘The Rise and Fall (?) of the Berle–Means Corporation’ (2019) 42 *Seattle University Law Review* 445.

<sup>32</sup>Adolf A Berle and Gardiner C Means, *The Modern Corporation and Private Property* (Macmillan 1933) (1932); George J Stigler and Claire Friedland, ‘The Literature of Economics: The Case of Berle and Means’ (1983) 26 *The Journal of Law and Economics* 237; Olivier Weinstein, ‘Firm, Property and Governance: From Berle and Means to the Agency Theory, and Beyond’ (2012) 2 *Accounting, Economics, and Law* 1; Michael Jensen and William Meckling, 1976, ‘Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure’ (1976) 3 *Journal of Financial Economics* 305.

<sup>33</sup>Murray Weidenbaum and Mark Jensen, Introduction to *The Modern Corporation and Private Property* (2nd edn, Transaction Publishers 1991), ix.

<sup>34</sup>Rafael La Porta and others, ‘Corporate Ownership around the World’ (1999) 54 *Journal of Finance* 471, 472.

<sup>35</sup>Rafael La Porta and others, ‘Law and Finance’ (1998) 106 *Journal of Political Economy* 1113.

<sup>36</sup>*ibid.*, 1146.

<sup>37</sup>La Porta et al classified countries based on the legal origin of their commercial laws, due to the fact that they considered legal origin to be correlated with the level of shareholder protection found. Common law origin was defined as originating from the English common law: Rafael La Porta and others, ‘Corporate Ownership around the World’ (1999) 54 *Journal of Finance* 471, 479.

were found to exist in the UK (0.19 mean), US (0.20 mean), followed by Australia (0.28 mean).<sup>38</sup>

Following this, in their 1999 study, 'Corporate Ownership Around the World', La Porta et al collect and analyse data within the largest 20 companies by market capitalisation across 27 countries with developed economies.<sup>39</sup> This research analyses share ownership patterns with the goal of identifying the controlling shareholders within each of the companies studied, in order to provide a comparative perspective on the relevance of the Berle and Means description of corporations.<sup>40</sup> The authors use both a 20% and 10% metric of control to determine the existence of substantial shareholders, with the 20% metric indicating the degree of voting power needed to effectively control the company.<sup>41</sup> Where significant owners are found within companies, the authors seek to find out who they are. Their main contribution is thus to find the identities of the ultimate owners of capital and voting rights, where this is possible.<sup>42</sup>

The findings of this study show that the UK, Japan, the US, Australia, and Ireland, form the group of countries with the highest proportion of publicly listed companies without a 20% controlling shareholder in the study.<sup>43</sup> At the more restrictive 10% level of control, the UK, US, and Australia have the three highest rates of shareholder dispersion, although the UK and US figures are outliers in this regard.<sup>44</sup> More specifically, 13 of the 20 largest publicly listed companies in Australia did not have a 20% (or greater) controlling shareholder, and 11 of the 20 largest publicly listed companies in Australia did not have a 10% (or greater) shareholder, accordingly being classified as widely held at both levels of control.<sup>45</sup> The UK figures at the 20% and 10% levels of control were, respectively, 20 out of 20 and 18 out of 20, and the US figures were 16 out of 20 at both levels of control.<sup>46</sup>

Consistent with these findings, more recent research conducted by the Organisation for Economic Co-operation and Development (OECD) classified Australia as one of four countries with substantially dispersed ownership.<sup>47</sup> Further, the OECD indicated that the majority of shares in the largest 200

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<sup>38</sup>Rafael La Porta and others, 'Law and Finance' (1998) 106 *Journal of Political Economy* 1113, 1147.

<sup>39</sup>Rafael La Porta and others, 'Corporate Ownership around the World' (1999) 54 *Journal of Finance* 471.

<sup>40</sup>*ibid.*, 472.

<sup>41</sup>*ibid.*, 477.

<sup>42</sup>*ibid.*, 472.

<sup>43</sup>*ibid.*, 492; John Armour and Jeffrey N Gordon, *The Berle-Means Corporation in the 21st Century*, Working Paper (2008), 8 <<http://www.law.upenn.edu>>accessed.

<sup>44</sup>Rafael La Porta and others, 'Corporate Ownership around the World' (1999) 54 *Journal of Finance* 471, 493; John Armour and Jeffrey N Gordon, *The Berle-Means Corporation in the 21st Century*, Working Paper (2008), at <http://www.law.upenn.edu>, 8. Australia was closely followed by Switzerland, Canada and Japan, with each of these countries having 10 out of the 20 largest publicly listed companies without a 10% (or greater) shareholder.

<sup>45</sup>*ibid.*, 492–93.

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

<sup>47</sup>OECD, *Corporate Governance Factbook* (2017), 11; OECD, *Corporate Governance Factbook* (2019), 17.

publicly listed companies in Australia were held by institutions operating in the finance industry, and that these holdings seldom surpassed 10%.<sup>48</sup> However, no company level data or additional detail is provided on either point, necessitating further information and analysis.

Turning to the Australian literature, there is only one previous study which comprehensively examines shareholder ownership *and* control in Australian companies.<sup>49</sup> This study, undertaken by Stapledon, collects ownership control data at the firm level, seeking to determine the degree of substantial shareholders present in the All Ordinaries Index companies as at 31 August 1996.<sup>50</sup> Stapledon finds that 97% of the companies studied had at least one substantial shareholder, and regarding institutional ownership, institutions were the largest or only substantial shareholders in 34% of the companies studied.<sup>51</sup> Additionally, 45% of the companies had a non-institutional shareholder which controlled 20% or more of the ownership within the dataset.<sup>52</sup>

While there is one additional study which evaluates control, this examines *non-institutional* blockholders in primarily assessing the relationship between ownership structure and private benefits of control. Specifically, shareholdings within the largest 200 publicly listed companies in Australia were analysed over the 2000–2004 period, with the research finding that blockholders are prevalent in the firms studied.<sup>53</sup> While the authors focus on non-institutional investors and exclude foreign companies, their analysis indicates that 39–45% of the sample firms had a 10% or greater shareholder, and 22–30% had a 20% or larger shareholder over the study period.<sup>54</sup>

In respect of the more limited inquiry into the *concentration* of ownership (as distinct from control) in the hands of registered shareholders, the following studies are of relevance. First, Ramsay and Blair assessed ownership concentration within a sample of 100 companies in the All Ordinaries Index in Australia in the early 1990s.<sup>55</sup> Their results indicated the growth of

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<sup>48</sup>OECD, Corporate Governance Factbook (2017), 12. That is, the holdings are typically dispersed.

<sup>49</sup>G P Stapledon, 'Share Ownership and Control in Listed Australian Companies' (1999) 2 Corporate Governance International 17. Based on publicly available data.

<sup>50</sup>*ibid.*

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

<sup>52</sup>*ibid.* The identity of the non-institutional shareholders were predominantly families, entrepreneurs, overseas companies, and other Australian listed companies.

<sup>53</sup>Asjeet S Lamba and Geof Stapledon, 'What Motivates Block Share Ownership?' (2014) 11 Corporate Ownership & Control 349.

<sup>54</sup>*ibid.* Moreover, 8–9% of the sample firms had a 50% or greater shareholder. Further, while the authors collect data on 5% or larger blockholdings, they use a dummy variable in the analysis as opposed to measuring the precise shareholding of the largest shareholders in each of the companies studied. This is a deliberate choice by the authors because of the theory they test, namely, that a company is more likely to have a controlling blockholder when private benefits of control are large, as opposed to looking into the precise shareholding stake actually held (at 353).

<sup>55</sup>Ian Ramsay and Mark Blair, 'Ownership Concentration, Institutional Investment and Corporate Governance: An Empirical Investigation of 100 Australian Companies' (1993) 19 Melbourne University Law Review 153. The company data included was reported between June 1990 and November 1991, with the authors analysing the percentage of ordinary shares held by the largest five, ten, and twenty shareholders within each of the sample companies.

institutional investment, the increasing prominence of bank nominee companies, and an average holding size (top five shareholders) of 41.17% within the largest companies in their sample.<sup>56</sup> Second, Marshall, Anderson, and Ramsay analysed existing empirical evidence regarding the sustained growth of managed funds in Australia (up to and including 2006 data), confirming that the amount of equity under management through institutional investors had increased over time.<sup>57</sup> Third, Comerton-Forde and Matheson examined ownership patterns from 2002–2011, with the results showing additional growth in institutional investor holdings.<sup>58</sup> Specifically, institutional ownership increased from 84.9% to 90.1% over the study period.<sup>59</sup> Moreover, as company size by market capitalisation decreased, institutional investor holdings increased.<sup>60</sup> However, the authors use a holding size proxy to determine whether a shareholder is classified as an institution, meaning that large individual shareholders will equally be (erroneously) captured by the analysis.<sup>61</sup> Fourth, Comerton-Forde assessed the S&P/ASX 300 index from 2017–2020. Again, using proxies for institutional and retail ownership, the results indicated that institutional investors held a larger percentage of issued capital over the study period, across all indices. Further, the findings showed a

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<sup>56</sup>ibid.

<sup>57</sup>Shelley Marshall, Kirsten Anderson and Ian Ramsay, 'Are Superannuation Funds and Other Institutional Investors in Australia Acting Like 'Universal Investors?'' (2009) University of Melbourne Legal Studies Research Paper 463, 5 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1570879](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1570879)> accessed 3 December 2019. Australian fund managers were found to be responsible for a sizable volume of the overall amount of money being managed in the market for equities. Such fund managers were overseeing around \$343 billion as of 2006, equating to 27.9% of the total assets being managed in the equities market. In relation to the proportion of the equity of publicly listed companies which is held by institutional investors, the relevant evidence indicates that the average shareholdings of institutional investors remained relatively constant over the 1990s, standing at around 37% (ibid, 6). Although, this is not as significant as, e.g. the UK equivalent holdings, which were measured at over 60% of the equities market in 1991: G Stapledon, *Institutional Shareholders and Corporate Governance* (Clarendon Press, Oxford 1996), 25.

<sup>58</sup>Carole Comerton-Forde and Ian Matheson, 'Analysis of Share Ownership in Australia from 2001–2011' (February 2013) Australasian Investor Relations Association. The research utilised annual report data sourced from Morningstar regarding shareholders, to document the composition of share ownership in Australia during the period 2001–2011. The sample included companies in the S&P/ASX 300 Index during the period which reported details of their shareholders (around 60% of these companies). Individual holdings of more than 10,000 shares were categorised as institutional shareholders.

<sup>59</sup>ibid. Over this period, small shareholders reduced their direct ownership of shares from 15.1% to 9.9%. Additionally, institutional investors increased their shareholdings across the ASX 300. For example, within the 20 largest companies by market capitalisation in Australia, institutional shareholders owned 74.8% of the issued capital, although they only comprised 2.9% of the number of company shareholders. Correspondingly, retail investors owned 25.2% of issued capital and represented 97.1% of company shareholders.

<sup>60</sup>ibid. That is, in the ASX 51–100 companies studied, institutional investors owned 87.9% of issued shares and comprised 17.4% of shareholders. Similarly, in the average ASX 201–300 company index, institutional ownership was reported at 92.2% of share capital and these institutions represented 29.7% of shareholders.

<sup>61</sup>ibid, 3. The authors state, 'For the purposes of this analysis, individual parcels of 10,000 or fewer shares were categorised as being small shareholders and more than 10,000 were categorised as being institutional shareholders'.

decline in the number of retail shareholder holdings between 2017 and 2019.<sup>62</sup>

Consequently, it can be observed from the results of numerous studies that Australia holds a notable international place from a shareholder dispersion perspective, which is worthy of further investigation.<sup>63</sup> Augmenting the previous analyses with more recent and detailed shareholder data is of particular relevance given that ownership structures are not static; by contrast, they are likely to change over time due to various political, legal and regulatory forces.<sup>64</sup> For example, the widely observed growth in institutional investor holdings is integral to any present-day discussion of shareholding patterns, and is likely to influence our understanding of the impact of such patterns.<sup>65</sup> Without a doubt, institutional investors are now prominent players in financial markets across countries and are crucial to the economic interests of corporate participants.<sup>66</sup> As a result, the extent to which shareholder dispersion is applicable in Australian companies has been deliberated upon in light of this change.<sup>67</sup> For example, if institutional shareholders are more prominent within publicly listed companies, at least theoretically, they may coordinate and collaborate in order to actively engage in corporate governance and bring executives to account.<sup>68</sup> Conversely, they might act as

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<sup>62</sup>Carole Comerton-Forde, 'An Analysis of S&P/ASX 300 and NZX 50 Share Ownership' (February 2021) Australasian Investor Relations Association. This was observed across all indices. The largest 20 registered shareholders were used as a proxy for institutional investor holdings (irrespective of actual identity), and shareholders holding less than 1000 shares in any given company were used as a proxy for retail investors.

<sup>63</sup>Brian R Cheffins, 'Corporate Governance Convergence: Lessons from Australia' (2002–2003) 16 *Transnational Law* 13, 19, 22.

<sup>64</sup>Stuart L Gillan and Laura T Starks, 'Corporate Governance, Corporate Ownership, and the Role of Institutional Investors: A Global Perspective' (2003) 13 *Journal of Applied Finance* 4.

<sup>65</sup>OECD, *Corporate Governance Factbook* (2019), 17, 72, indicating that institutional investors are now the largest category of shareholders in publicly listed companies, holding 41% of global market capitalisation as at the end of 2017. These were found to primarily be profit-maximising intermediaries who invest on behalf of their ultimate beneficiaries, with the most important institutions being mutual funds, pension funds, and insurance companies. See also Shelley Marshall, Kristen Anderson and Ian Ramsay, 'Are Superannuation Funds and Other Institutional Investors in Australia Acting Like 'Universal Investors'?' (2009) 51 *Journal of Industrial Relations* 439; Richard Mitchell and others, 'Shareholder Protection in Australia: Institutional Configurations and Regulatory Evolution' (2014) 38 *Melbourne University Law Review* 68; 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 *Australian Business Law Review* 18 in the Australian context.

<sup>66</sup>Stuart L Gillan and Laura T Starks, 'Corporate Governance, Corporate Ownership, and the Role of Institutional Investors: A Global Perspective' (2003) 13 *Journal of Applied Finance* 4; OECD, *Corporate Governance Factbook* (2019), 17. As Cheffins pertinently discusses, the original Berle-Means analysis of public companies should take into account the increasing prominence of institutional investors in order to maintain a contemporary relevance: Brian Cheffins, 'The Rise and Fall (?) of the Berle-Means Corporation' (2019) 42 *Seattle University Law Review* 445, 447.

<sup>67</sup>Richard Mitchell and others, 'Shareholder Protection in Australia: Institutional Configurations and Regulatory Evolution' (2014) 38(1) *Melbourne University Law Review* 68; 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 *Australian Business Law Review* 18, 22–23.

<sup>68</sup>Brian Cheffins, 'The Rise and Fall (?) of the Berle-Means Corporation' (2019) 42 *Seattle University Law Review* 445, 447.

passive investors from a governance perspective, and may therefore have little impact on the performance and autonomy of management.<sup>69</sup> As such, quantifying the degree of institutional ownership and control is critical to understanding share ownership patterns in practice. Indeed, the paucity of research in this area is no doubt one of the key motivating factors for the parliamentary inquiry into shareholder concentration and common ownership in Australia.<sup>70</sup>

### 3. The new data: share ownership patterns

#### 3.1. Methodology

Data was collected in relation to the 50 largest publicly listed companies in Australia, which comprise the ASX 20 and the ASX 50.<sup>71</sup> These two indices are composed and ranked by reference to float-adjusted market capitalisation, and include the most prominent and liquid stocks in Australia.<sup>72</sup> Within each of the 50 companies, shareholding information was analysed in relation to the 20 largest shareholders. Beyond this, information was sought regarding the existence, identity, and ownership levels of any substantial shareholders (possessing 5% or greater voting power) within each of the companies. This information was obtained from each of the ASX 50 individual company annual reports for the 2016 financial year period.<sup>73</sup>

While all of the ASX 20 companies also feature in the ASX 50, distinct observations are made regarding each index in the discussion which follows, particularly where the analysis results in interesting and

<sup>69</sup>*ibid*; Richard Mitchell and others, 'Shareholder Protection in Australia: Institutional Configurations and Regulatory Evolution' (2014) 38 *Melbourne University Law Review* 68; 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 *Australian Business Law Review* 18.

<sup>70</sup>The House of Representatives Standing Committee on Economics inquiry into the implications of common ownership and capital concentration in Australia was commenced on Thursday, 29 July 2021, with the final Report tabled in March 2022. See also the Australian Federal Government Consultation Paper, 'Increasing Transparency of the Beneficial Ownership of Companies' (2017), raising questions around the adequacy of the substantial holding provisions and the tracing notice obligations, at 19.

<sup>71</sup>Data was taken from the ASX website in relation to the ASX 20 and ASX 50 indices: <http://www.asx.com.au/products/capitalisation-indices.htm>, and the ASX 20 and ASX 50 individual company annual reports for the 2016 financial year were accessed in order to obtain specific data regarding the largest shareholders from each company. Historical data was accessed through: <https://www.asx20list.com/> and <https://www.asx50list.com/>. Comparing the data on the largest companies (ranked by market capitalisation) on the ASX website (not indexed) with the S&P ASX 50 indexed data shows that the ASX 50 index captured Australia's largest companies by market capitalisation: <https://www2.asx.com.au/> and <https://www.spglobal.com/spdji/en/indices/equity/sp-asx-50/#overview>. Over the study period, News Corporation and Meridian Energy were the only two companies with different index and ASX market capitalisation rankings, due to the foreign-domiciled index rules and the calculation of secondary listing market capitalisation.

<sup>72</sup>Float adjusting an index means that market capitalisation is calculated by multiplying the share price by the number of shares readily available to the public.

<sup>73</sup>From 1 July 2015 to 30 June 2016.

differentiated results across the indices. Maintaining this distinction is additionally thought to be important given that the ASX 20 alone comprises 49.14% of the total Australian equities market, thus warranting a detailed analysis.<sup>74</sup> Looking beyond the ASX 20 to the ASX 50, the 50 largest companies comprise 64.53% of the total equities market, hence the overarching analysis covers a significant proportion of Australian share ownership patterns and their associated control.<sup>75</sup>

### 3.2. Shareholder identity

The dataset of shareholding information indicates that 17 of the ASX 20 companies have only institutional and corporate shareholders within their group of 20 largest registered shareholders. That is, in these 17 companies, the 20 largest registered shareholders do not include individual investors. Within the remaining three ASX 20 companies, each of these companies has one individual shareholder and 19 institutional and corporate shareholders, which comprise their group of 20 largest shareholders. That is to say, within the entire ASX 20, when examining the groups of 20 largest shareholders, individual registered ownership is (in totality) 0.75%. Examining the ASX 50 as a whole, individual registered ownership is (in totality) 2.2% across the ASX 50 groups of 20 largest shareholders. That is, 97.8% of the ASX 50 groups of 20 largest registered shareholders are institutions or companies.<sup>76</sup> Substantially all of these registered shareholders are institutional nominee companies, institutional custodian companies, and public

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<sup>74</sup>This figure was calculated as at September 2020 using ASX historical market statistics regarding total Australian equity by market capitalisation: <https://www2.asx.com.au/about/market-statistics/historical-market-statistics#end> and ASX 20 market capitalisation data accessed from S&P Global: <https://www.spglobal.com/spdji/en/indices/equity/sp-asx-20/#data>.

<sup>75</sup>Over the 2016 financial year, the total number of ASX listed companies ranged between 2203 and 2238; and the domestic equity market capitalisation at the end of the 2016 financial year was \$1.62 trillion: ASX historical market statistics. As a ratio to GDP, stock market capitalisation was around 135% for the 2016 financial year, of which the ASX 50 significantly contributed 64.53%. The stock market capitalisation (as a ratio to GDP) is comparable to both the UK and Japan: Reserve Bank of Australia, 'Background on the Australian Listed Equity Market', Submission to the House of Representatives Standing Committee on Economics Inquiry into Common Ownership and Capital Concentration in Australia (September 2021). Regarding the total number of companies registered in Australia, there were 2,372,444 at the end of the 2016 financial year: ASIC historical market statistics. While publicly listed companies account for less than 1% of the total number of registered companies, they are the most economically significant companies. By comparison, the largest 500 private companies contributed 5.6% (or \$264 billion) of the \$4.7 trillion revenue in Australia over the study period, with publicly listed companies providing the largest share of overall revenue: IBISWorld (September 2016) Special Report: The Top 500 Private Companies in Perspective, 5; The Australian Financial Review (August 2016) 'Top 500 Private Companies 2016'. The current research project does not comment on companies beyond the ASX 50. The extent to which the findings of the current research may apply to the shareholder composition and control of the smaller listed companies is uncertain, being outside of the scope of this study.

<sup>76</sup>In some instances, it was possible to look beyond corporate holdings, e.g. where a corporation was set-up to act as a trustee company for a discretionary trust, which was created on behalf of a family or prominent individual investor. If the investigation uncovered a family or individual standing behind the corporate investment vehicle, the shareholder was categorised as an individual investor.

investment companies. This dominance across both indices is consistent with OECD findings which indicate that institutional investors are now the largest category of shareholders in publicly listed companies globally.<sup>77</sup> As a second step in the analysis, it is useful to look beyond the prevalence of institutional and corporate registered ownership in order to determine the degree of ownership which is held by the largest shareholders as a percentage of issued capital. That is, to determine the extent to which ownership is concentrated within the ASX 20 and ASX 50.

### 3.3. Ownership concentration

In order to evaluate the concentration of publicly disclosed shareholdings, the ownership percentages of the three largest registered shareholders within each company were identified, as a proportion of overall issued capital. The concentration ratio was calculated for each of the ASX 50 companies (based on the three largest shareholders) in order to determine the degree of concentration of these registered holdings.<sup>78</sup> The results indicate that the mean level of concentration across the ASX 20 is 47.53%, and that the mean level of concentration across the ASX 50 is 53.87%. The degree of concentration of the three largest registered shareholders is presented in [Table 1](#), with their identities displayed in [Table 2](#) below.

In examining the information presented in [Table 2](#), the following points are evident: they are all institutions and, with the exception of five companies, they are all nominee/custodian shareholders. That is, 97% of the three largest shareholders within the 50 most significant companies in Australia are nominee/custodian shareholders.<sup>79</sup> Moreover, the prevalence of the same institutions across the ASX 20 and ASX 50 is striking: HSBC Custody Nominees (Australia) Ltd (HSBC Nominees) is one of the three largest shareholders in all but one company within the ASX 50 (98% of companies).

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<sup>77</sup>Corporate Governance Factbook (2019), 17, 72, holding 41% of global market capitalisation as at the end of 2017.

<sup>78</sup>The concentration ratio (N-firm or N-shareholder) measures the degree of concentration within a market (or a company), and shows the extent to which there is dominance or control by a limited number of firms. The two most common ways of measuring concentration are the N-firm concentration ratio and the Herfindahl index (HI): See e.g., John Black, Nigar Hashimzade and Gareth Myles, *A Dictionary of Economics* (5th edn, Oxford University Press 2017); Harold Demsetz and Belen Villalonga, 'Ownership Structure and Corporate Performance' (2001) 7 *Journal of Corporate Finance* 209; Boya Wang, 'Ownership, Institutions, and Firm Value: Cross-Provincial Evidence from China' (2016) Centre for Business Research, University of Cambridge, Working Paper No. 484 (on the HI). The Herfindahl index was also calculated to cross-check the findings regarding concentration. The major difference between the HI and the concentration ratio is that the HI assigns more weight to very large shareholdings, because the shareholdings are squared prior to being summed (it is thus sensitive to the distribution of market share between firms). This method is best applied where the entire population of shareholders and associated holdings is known. Here, the results are correlated with each other across both methods.

<sup>79</sup>This increase can be compared with Ramsay and Blair's previous findings: Ian Ramsay and Mark Blair, 'Ownership Concentration, Institutional Investment and Corporate Governance: An Empirical Investigation of 100 Australian Companies' (1993) 19 *Melbourne University Law Review* 153.



**Table 1.** Shareholder concentration.

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

Similarly, JP Morgan Nominees Australia Ltd (JP Morgan Nominees) is one of the largest three shareholders in all (100%) of the companies. In the same manner, National Nominees Ltd is one of the three largest shareholders in

**Table 2.** Largest shareholders.

Company	Largest Three Shareholders		
<b>ASX 20</b>			
AMP Limited	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	Citicorp Nominees Pty Ltd
ANZ Banking Group Limited	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
BHP Billiton Limited	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
Brambles Limited	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
Commonwealth Bank of Australia	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
CSL Limited	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
Insurance Australia Group Ltd	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
Macquarie Group Limited	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
National Australia Bank Limited	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	Citicorp Nominees Pty Ltd
QBE Insurance Group Limited	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	Citicorp Nominees Pty Ltd
RIO Tinto Limited	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	Citicorp Nominees Pty Ltd
Scentre Group Stapled	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	BNP Paribas Nominees Pty Ltd
Suncorp Group Limited	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
Telstra Corporation Limited	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
Transurban Group Stapled	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	BNP Paribas Nominees Pty Ltd
Wesfarmers Limited	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
Westfield Corporation Stapled	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	Citicorp Nominees Pty Ltd
Westpac Banking Corporation	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
Woodside Petroleum Limited	HSBC Custody Nominees Ltd	Shell Energy Holdings Aus Ltd	JP Morgan Nominees Ltd
Woolworths Limited	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
<b>Remainder of ASX 50</b>			
AGL	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
Amcor	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
APA Group Stapled	HSBC Custody Nominees Ltd	BNP Paribas Nominees Pty Ltd	JP Morgan Nominees Ltd
ASX Ltd	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	BNP Paribas Nominees Pty Ltd
Aurizon Holdings Ltd	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	Citicorp Nominees Pty Ltd
Coca-cola Amatil Limited	Coca-Cola Holdings Ltd	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd
Computershare Limited	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd

*(Continued)*

**Table 2.** Continued.

Company	Largest Three Shareholders		
Caltex Australia Limited	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	Citicorp Nominees Pty Ltd
Dexus Property Group Stapled	HSBC Custody Nominees Ltd	National Nominees Ltd	JP Morgan Nominees Ltd
Goodman Group Stapled	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
GPT Group Stapled	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	BNP Paribas Nominees Pty Ltd
Incitec Pivot Limited	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
James Hardie Industries PLC	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
Lendlease Group Stapled	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
Mirvac Group Stapled	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
Medibank Private Limited	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
Newcrest Mining Limited	HSBC Custody Nominees Ltd	National Nominees Ltd	JP Morgan Nominees Ltd
Origin Energy Limited	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
Orica Limited	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
Oil Search Limited 10T	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	AET Ltd
Qantas Airways Limited	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
Ramsay Health Care Limited	JP Morgan Nominees Ltd	AFIC Ltd	Sandhurst Trustees Ltd
SOUTH32 Limited	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
Seek Limited	JP Morgan Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
Stockland Stapled	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
Sonic Healthcare Limited	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd
Santos Limited	HSBC Custody Nominees Ltd	Citicorp Nominees Pty Ltd	JP Morgan Nominees Ltd
Sydney Airport Forus	HSBC Custody Nominees Ltd	BNP Paribas Nominees Pty Ltd	JP Morgan Nominees Ltd
Treasury Wine Estates Limited	JP Morgan Nominees Ltd	HSBC Custody Nominees Ltd	National Nominees Ltd
Vicinity Centres Stapled	HSBC Custody Nominees Ltd	JP Morgan Nominees Ltd	National Nominees Ltd

32 companies within the ASX 50 (64%), Citicorp Nominees Pty Ltd is one of the three largest shareholders in 8 companies (16%), and BNP Paribas Nominees Pty Ltd is one of the three largest shareholders in 6 of the ASX 50 companies (12%). Indeed, when the above custodian and nominee institutions are taken out of the three largest shareholder analysis, Shell Energy Holdings Australia Ltd (Shell Energy), Coca-Cola Holdings (Overseas) Limited (Coca-Cola Holdings) (in its capacity as a holding company in relation to the

Australian subsidiary), Australian Foundation Investment Company Ltd (AFIC), Australian Executor Trustees Limited (AET), and Sandhurst Trustees Limited (Sandhurst), are the only other companies which feature in the entire 50 company dataset. Certainly, what is striking is the prevalence of a small number of companies in this analysis, thus indicating a state of homogeneity regarding large shareholder identity across Australia's most significant companies (and industries) by market capitalisation.

Additionally, the finding regarding the dominance of nominee/custodian shareholders is deserving of further discussion and analysis. A nominee shareholder is an entity or individual contracted to hold shares in its own name (as the registered share owner) on behalf of another person (the beneficiary).<sup>80</sup> The nominee is therefore the legal owner and a member of the company in which the shares are held, with the shares being held on trust for the beneficiary.<sup>81</sup> While the nominee is entitled to vote as a registered member of the company, whether there is a general power to vote is subject to the terms of the appointment agreement.<sup>82</sup> That is, the nominee has the power to vote only as expressly directed by the beneficiary, as will be detailed within the contract of appointment, if this right exists at all.<sup>83</sup> Similarly, custodians are contracted to hold the shares of their clients, and to administer share accounts, collect dividends and interest payments, among other things. They are likewise not actively involved in company decision making. Custodians only process the proxy votes of the shares they hold on behalf of their clients. That is, they are instructed how to vote, if at all, depending on the interests of their clients. For example, in the case of financial intermediaries, broker firms commonly adopt the practice of creating a company to act as a nominee or custodian shareholder, in order to simplify the administrative requirements of buying and selling shareholdings on behalf of their clients.<sup>84</sup>

As such, it is difficult to engage in further analysis without understanding the underlying beneficial ownership of the shares. For example, it is incorrect

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<sup>80</sup>Geof P Stapledon, 'Institutional Investors: What are Their Responsibilities as Shareholders?' in J Parkinson, A Gamble and G Kelly (eds), *The Political Economy of the Company*, (Hart Publishing 2000); M F Blue, 'Nominee Shareholding in Australia' (1975) 5 *Adelaide Law Review* 188, 188–189; Thomson Reuters Practical Law: (glossary): A beneficial owner of shares may decide to appoint a nominee because it does not want to have the shares registered in its own name, or it may be required to appoint a nominee under some circumstances. Nominee shareholders can be either individuals or corporations.

<sup>81</sup>*ibid.* Thus, the use of nominee/custodian shareholders signifies a structure under which shares are held on a bare trust for the client beneficial owners. Under a typical bare trust arrangement, the trustee (custodian/nominee) holds shares on behalf of the beneficial owner, without discretion over the property and with no active duties other than to transfer the property to the beneficiary as and when required.

<sup>82</sup>In the absence of an express term dealing with voting: 'It is doubtful whether, in general, the contract would be interpreted as authorizing or permitting such a power. This is supported by the fact that, in distinction to other trust relationships, it is the beneficiary who exercises the control over shares held by his nominee.' M F Blue, 'Nominee Shareholding in Australia' (1975) 5 *Adelaide Law Review* 188, 189.

<sup>83</sup>*ibid.*

<sup>84</sup>Thomson Reuters Practical Law: (glossary).

to imply that because HSBC Nominees holds a 28.72% ownership stake in AMP Limited (AMP), it also has 28.72% of the votes. As stated above, as a custodian/nominee, HSBC Nominees only possess the proxy votes of their clients and is instructed how to vote. The real question relates to the composition/shareholdings of their clients, for example, these could be institutional investors, board members of AMP, or a small private company. Likewise, this shareholding could represent a large number of shareholders or a very small number of individuals. While there is a scarcity of relevant research in the Australian context, previous studies indicate that the clients of financial nominee companies in particular include superannuation funds, international institutional investors, and individual investors.<sup>85</sup> Reasons advanced for the increase in their prevalence and level of holdings include the significant growth of Australian superannuation funds and the greater level of international institutional investment which has occurred.<sup>86</sup> Numerous superannuation funds reportedly utilise nominee company services, and international institutional investors frequently use resident nominee/custodian companies to hold their shares and collect dividends/interest payments.<sup>87</sup>

While companies do not make publicly available the identities of the beneficial owners of their shares (where this is known), it is possible to obtain information regarding substantial shareholdings. Where substantial shareholdings exist, these trigger disclosure requirements and must additionally be released to the public within the annual report of a publicly listed company in Australia.<sup>88</sup> Section 9 of the Corporations Act 2001 defines a 'substantial holding' within a body corporate to be 5% or more of the total number of votes attached to voting shares in the corporation. The aim of the provisions which deal with voting rights is to mandate the disclosure of significant shareholdings which may impact the corporation's affairs and strategic direction.<sup>89</sup> The relevant law and empirical findings are discussed below, given their direct bearing on control.

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<sup>85</sup>Ian Ramsay and Mark Blair, 'Ownership Concentration, Institutional Investment and Corporate Governance: An Empirical Investigation of 100 Australian Companies' (1993) 19 *Melbourne University Law Review* 153, 169.

<sup>86</sup>*ibid.*

<sup>87</sup>*ibid.*, 169, 185. One previous study which sought to identify the beneficial owners of financial nominee company holdings within the BHP Group Ltd found that superannuation funds were the major beneficial holders: P H Davies, 'Equity Finance and the Ownership of Shares' (1982) Australian Financial System Inquiry, Commissioned Studies and Selected Papers, Part 3. While superannuation funds were registered as the holders of 3.7% of BHP shares, their beneficial ownership was actually 12.9%. This is not publicly available information, Davies was able to ascertain this by contacting bank nominee companies and requesting further written information as part of the inquiry.

<sup>88</sup>See s671B of the Corporations Act 2001 and ASX Listing Rule 4.10.4.

<sup>89</sup>ASIC Regulatory Guide 5, Relevant interests and substantial holding notices (August 2020), RG 5.11. Persons who, together with their associates, have relevant interests in voting shares representing 5% or more of the votes in a listed company, body or listed registered managed investment scheme, must disclose details of their relevant interest: Part 6C.1 Corporations Act 2001.

#### 4. Substantial shareholdings: relevant law and theory

In order to determine the degree of control exercised by the largest ASX 50 shareholders, the extent to which these shareholders possess voting power must be determined. The requirement in Australia for publicly listed companies to disclose details of any substantial shareholdings is intended to ensure that investors are accurately informed about the identity, relevant ownership interests, and dealings of shareholders who may have the ability to influence or control the future direction of the company.<sup>90</sup> The relevant provision is set out in s671B of the Corporations Act 2001, which provides that a person must provide a substantial holding notice if, in relation to an entity that is a listed company or listed registered managed investment scheme, the person:

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

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

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

<sup>90</sup>*ibid.*, 65.

<sup>91</sup>s671B(1), Corporations Act 2001; ASIC Regulatory Guide 5, Relevant interests and substantial holding notices (August 2020), 29.

<sup>92</sup>Board of Trade (UK), Report of the Committee on Company Law Amendment (Cohen Committee), Cmd 6659 (1945), par 77–82; ASIC Regulatory Guide 5, Relevant interests and substantial holding notices (August 2020), RG 5.288; Second interim report of the Company Law Advisory Committee to the Standing Committee of Attorneys-General (Eggleston Committee Report), Parliamentary Paper No. 43 (1969), par 3–4.

<sup>93</sup>Board of Trade (UK), Report of the Committee on Company Law Amendment (Cohen Committee), Cmd 6659 (1945), par 77.

<sup>94</sup>Second interim report of the Company Law Advisory Committee to the Standing Committee of Attorneys-General (Eggleston Committee Report), Parliamentary Paper No. 43 (1969), par 3–4, referring to overseas legislation (US and UK requirements at that time), stating that 'provision should be made

More broadly, the objective of this disclosure requirement is one of financial market integrity, through facilitating investor access to information regarding the existence of shareholders who may substantially influence companies and transactions in which they are investing.<sup>95</sup> Specifically, the substantial holding provisions aim to ensure that shareholders, directors, and the market have timely access to appropriate information about the identities of controllers of substantial percentages of voting shares; and information regarding any agreements, conditions or restrictions that may affect the way in which shares are voted or sold, among other things.<sup>96</sup> The concept of a 'substantial holding' is pertinently defined in s9 of the Corporations Act 2001, as a relevant interest in voting shares or interests carrying 5% or more of the total votes attached to all voting shares or interests. This is to be interpreted in conjunction with s608(1) of the Corporations Act 2001, which sets out the basic relevant interest rule, stating that a person has a relevant interest in securities if they:

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

Given the key nature of this obligation, a person who completes a substantial holding notice is required to provide full, as opposed to minimal or technical, disclosure to the relevant listed company and to the ASX.<sup>98</sup> Relevantly, this should comprise details of ownership movements (of 1% or greater), as

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substantially along the lines of the United Kingdom legislation'; ASIC Regulatory Guide 5, Relevant interests and substantial holding notices (August 2020), RG 5.291, 5.289: '[S]hareholders are entitled to know whether there are in existence, substantial holdings of shares which might enable a single individual or corporation, or a small group, to control the destinies of the company, and if such a situation does exist, to know who are the persons on whose exercise of voting power the future of the company may depend'.

<sup>95</sup> ASIC Regulatory Guide 5, Relevant interests and substantial holding notices (August 2020), 70. Including, for example, substantial holdings acquired through securities lending or prime brokerage agreements.

<sup>96</sup> *ibid.*, 69–70.

<sup>97</sup> An expanded notion of power or control is set out in s608(2) of the Corporations Act 2001. Here, it is still necessary to analyse whether any power exists 'to exercise some true or actual measure of control' over voting or disposal: *Re Kornblums Furnishings Ltd* (1981) 6 ACLR 25 at 36; *Edensor Nominees Pty Ltd v ASIC* (2002) 41 ACSR 325 at [33]; ASIC Regulatory Guide 5, Relevant interests and substantial holding notices (August 2020), RG 5.29.

<sup>98</sup> ASIC Regulatory Guide 5, Relevant interests and substantial holding notices (August 2020), 74–75, 80. Notice must be given to a listed company, or the responsible entity for a listed managed investment scheme, and a copy provided to the securities exchange. The prescribed documents for substantial holding notices are Form 603, 604, and 605. Relevantly, under s671C(1) of the Corporations Act 2001, civil liability may ensue where s671B is contravened: A person who contravenes section 671B is liable to compensate a person for any loss or damage the person suffers because of the contravention.

well as detailed information regarding the source and nature of any relevant interest or association relating to the shareholder's disclosed degree of voting power.<sup>99</sup>

#### **4.1. Empirical findings**

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

As can be seen from the table, there are a total of 18 substantial shareholders across the ten ASX 20 companies which reported substantial shareholders. Fifteen of these shareholders had a relevant interest of between 5% and 10% of the voting rights conferred by ordinary shares within the company, three of these shareholders had holdings at the 10–15% level, and none had shareholdings with total votes of over 15%. From a shareholder identity perspective, 17 of the 18 parties are institutional shareholders, with only one non-institutional holder: a family holding of the shares/voting rights (9.5% of Westfield Corporation).<sup>100</sup>

In terms of the identities/types of the 17 institutions which are substantial shareholders, these have been disaggregated as follows: First, the largest retail bank in Australia, the Commonwealth Bank of Australia, is a substantial shareholder in three of these companies (Brambles Ltd, CSL Ltd, and Transurban Group Stapled). Second, financial services institutions, MFS Investment Management on behalf of Sun Life Financial Inc. and Perpetual Limited are each substantial shareholders in one company (Brambles Ltd and Woolworths Ltd, respectively). Third, investment management/advisory institutions are substantial shareholders as follows: the BlackRock Group (in three companies: Scentre Group Stapled, Suncorp Group Ltd, and Westfield Corporation Stapled), the Vanguard Group (in two companies: Scentre Group Stapled and Westfield Corporation Stapled), State Street Corporation in one company (Westfield Corporation Stapled), and FIL Limited in one company (Suncorp Group Ltd). Fourth, the Australian pension/superannuation fund, UniSuper, is a

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<sup>99</sup>ibid.

<sup>100</sup>This is denoted as institutional (I) and non-institutional (N-I) in table 3 above.



**Table 3.** Substantial shareholders: voting rights.

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

substantial shareholder in two companies (Scentre Group Stapled and Transurban Group Stapled). Fifth, oil and gas company, Shell Energy Holdings Australia Limited, is a substantial shareholder in one company (Woodside Petroleum Ltd). Sixth, the Macquarie Group Limited is a substantial shareholder of its own shares. Lastly, Shining Prospect Pte Ltd, a Singapore-based entity owned by Chinalco, the state-backed Aluminium Corporation of China Limited, is a substantial shareholder in one company (Rio Tinto Ltd).

Within the ASX 50, in totality, there were 93 substantial shareholders across 38 of the 50 companies, with 78 (83.9%) having holdings of between 5% and 10% of the voting rights conferred by ordinary shares. At the 10–15% level of control, 11 substantial shareholders (11.8%) had holdings within these parameters, and only four (4.3%) had shareholdings with total votes of over 15%. Notably, in relation to the final category of substantial shareholders (>15%), one of these four companies was Coca-Cola Holdings (holding 29.21%), in its capacity as a holding company in relation to the Australian subsidiary. The second was the Paul Ramsay Foundation<sup>101</sup> (32.16%) in relation to Ramsay Health Care Limited. The third was the Gandel Group Pty Ltd<sup>102</sup> (an investment firm associated with the Gandel family as a shareholder of Vicinity Centres) with 17.25%. Taking these three shareholders out of the analysis, the only non-related institutional holding possessing more than 15% control/voting rights across the entire ASX 50 is UniSuper (a pension fund as a shareholder of Sydney Airport) with a 16.36% holding. In relation to shareholder identity, across the entire ASX 50, only two of the 93 identified substantial shareholders (2.2%) are non-institutional.

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

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

Taking this analysis a step further, in respect of the ‘Big Three’ index funds, BlackRock, Vanguard, and State Street, the results indicate that they collectively hold 31 (one third) of the 93 substantial shareholding positions across the ASX 50. Utilising the ASX sector classifications, it is apparent that of BlackRock’s 17 substantial shareholder positions, 14 of these companies are in the financial sector, four are in materials, one is in energy, one is in

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<sup>101</sup>Disclosed in full as the Paul Ramsay Foundation Pty Limited as trustee for the Paul Ramsay Foundation. Paul Ramsay was the Chairman and founder of Ramsay Health Care. The Paul Ramsay Foundation is the largest charity in Australia by assets. Its grants are funded from the dividends of its Ramsay Health Care shareholding.

<sup>102</sup>John Gandel and the Gandel family reportedly own 50% of Vicinity Centres’ largest asset (Chadstone shopping mall), with Vicinity Centres holding the remaining 50% (of which the Gandel Group Pty Ltd owns 17.25%). Over the study period, there are additionally two non-independent directors on the board of directors of Vicinity Centres, who are closely associated with the Gandel Group (David Thurin and Peter Kahan).

**Table 4.** Recurring substantial shareholders.

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

health care, and one is in consumer staples.<sup>103</sup> Vanguard has its substantial holdings in eight companies in the financial sector, and one company in industrials. In respect of State Street, all five of its substantial holdings are within companies in the financial sector. Therefore, within the ASX 50, the holdings of the 'Big Three' are predominantly in the financial sector, with 27 of the 31 identified substantial holdings (87.1%) held in financial companies. This analysis thus provides a preliminary empirical foray into the relevance of the common ownership discussion in Australia.

#### 4.2. Revising the La Porta et al analysis

Importantly, the foregoing substantial shareholder analysis (as distinct from registered shareholder holdings) also allows for a revision of the pivotal La Porta et al 1999 study, utilising updated data for the 20 largest Australian companies.<sup>104</sup> That is, as in the La Porta et al study, a significant contribution of this research is to determine the identities of the ultimate owners of share capital and voting rights, insofar as this is possible.<sup>105</sup> Strikingly, now all of the 20 largest publicly listed companies in Australia can be classified as widely held (versus 13 in the 1999 study of La Porta et al), which is defined as not having a shareholder with 20% or more of shares in the company. At the 10% threshold of control, 17 out of the 20 largest publicly listed companies can be classified as widely held (versus 11 in the La Porta et al study).

Indeed, even if the La Porta et al analysis is replicated across the entire ASX 50, and related institutions/holding companies are not reclassified or removed from the analysis,<sup>106</sup> then strikingly, 48 of the 50 largest publicly listed companies in Australian can be classified as widely held at the 20%

<sup>103</sup>The ASX utilises the Global Industry Classification Standard (GICS), as developed by S&P Dow Jones Indices and MSCI, in order to categorise companies into sectors and industries.

<sup>104</sup>See Rafael La Porta and others, 'Corporate Ownership Around the World' (1999) 54 *Journal of Finance* 471.

<sup>105</sup>*ibid.*, 472.

<sup>106</sup>That is, in the case of Coca-Cola Holdings (Overseas) Limited (holding 29.21%), in its capacity as a holding company in relation to the Australian subsidiary, and the Paul Ramsay Foundation (holding 32.16%) in relation to Ramsay Health Care Limited. If these related holdings are reclassified, then the figures regarding the number of widely held publicly listed companies are 50 out of 50 at the 20% level of control, and 37 out of 50 at the 10% threshold of control.

threshold of control. At the 10% level of control, 35 of the 50 companies can be classified as widely held, indicating a high degree of shareholder dispersion across the entire ASX 50 at both levels of control.<sup>107</sup>

### 4.3. Tracing notices

Beyond substantial shareholding disclosures, one further method of attempting to uncover undisclosed beneficial share ownership is worthy of mention: the tracing provisions found in Part 6C.2 of the Corporations Act 2001. Specifically, ss672A and 672B provide a beneficial ownership tracing mechanism regarding the 'relevant interests' in public listed company shares, which may be exercised by the company itself or ASIC.<sup>108</sup> Under s672B(1A), information about shareholder 'relevant interests' need only be disclosed 'to the extent to which it is known to the person required to make the disclosure'. Where tracing occurs, the company must keep this information in a register (s672DA). Notably, the stated purpose of the tracing provisions 'is to promote a fully informed market and to provide a swift response to inquiries concerning the ultimate ownership of securities. The identity of the beneficial owners may give insights about the future of the entity or impact on its management. It also informs the market about whether the securities were acquired legally'.<sup>109</sup> Yet, in practice, the utility of these provisions, from an investing public perspective, has been constrained in a number of ways. In many instances, due to privacy concerns, tax avoidance, or other illicit purposes (such as money laundering), beneficial shareholders are unlikely to report their interest (or changes to it). Further, numerous tracing notices will require deployment, given the chains of beneficiaries which exist. Additionally, where there are chains of beneficial interests, not every link in the chain may possess the relevant information, even if called upon to disclose this. That is to say, their value is determined by the responses provided which are directly 'known' to the recipient.<sup>110</sup> Moreover, a physical onsite inspection of the register, or a copy of the register may be requested, both requiring the payment of a fee.<sup>111</sup> In the case of the latter, the company has up until the end of 21 days after the day on which the request is made (and the payment of the fee is received), to comply with the request, which is unlikely to be considered a 'swift' response.<sup>112</sup> Furthermore, ASX

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<sup>107</sup>That is, a high level of shareholder dispersion exists across the largest 50 companies which comprise 64.53% of the total Australian equities market.

<sup>108</sup>Or the responsible entity for a listed registered scheme, or the operator of a listed notified foreign passport fund, or a shareholder of the company may also request that ASIC exercise its tracing powers (s672A, Corporations Act 2001).

<sup>109</sup>See *Brunswick NL v Blossomtree Pty Ltd* (1992) 10 ACLC 658, 667; ASIC Regulatory Guide 86, Tracing beneficial ownership (RG 86) (June 2007), 5.

<sup>110</sup>s672B(1A), Corporations Act 2001.

<sup>111</sup>s672DA(7) and s672DA(8), Corporations Act 2001.

<sup>112</sup>s672DA(8), Corporations Act 2001.

50 companies have large registers with underlying esoteric data. This raw data is complexly structured and heavily utilises acronyms, which typically must be analysed and explained by share register analytics providers, in order to be understood.<sup>113</sup> The result of the above is that the tracing provisions do not promote a fully informed market from an investing public perspective. Indeed, these information asymmetry issues, and the lack of public disclosure, are echoed in the recent parliamentary inquiry.<sup>114</sup> In order for the stated purpose of these provisions to be fulfilled, such information should be made available to all investors, in order to reduce information asymmetries, bolster investor confidence, and increase transparency.

## 5. Discussion

The first notable point which arises from the results of this study, is that equity ownership within the largest publicly listed Australian companies differs from the patterns of dispersed, *individual* share ownership which were originally observed by Berle and Means in the early 1930s.<sup>115</sup> At the time of writing, Berle and Means referred to the dispersed and predominantly non-institutional shareholder composition of publicly listed companies, with largely individual owners unable to effectively monitor management or overcome coordination costs.<sup>116</sup> The empirical results of this study clearly establish that the principal identity of the largest registered shareholders across the ASX 50 is institutional, although ownership remains divorced from control (at least in relation to the largest 20 shareholders across the ASX 50 companies). While the largest registered institutions hold concentrated parcels of shares, given that the three firm concentration ratio has a mean level of 53.87% across the ASX 50,<sup>117</sup> these are *not* the shareholders with control rights identified by the substantial shareholding disclosures. This

<sup>113</sup>In Australia, these services are provided by Nasdaq Corporate Solutions (Australia) & Orient Capital Pty Ltd. Typically, listed companies utilise these professional services firms to analyse their own registers in order to uncover and understand beneficial ownership information. These reports are not made public, only the bare register. See also, ASIC Regulatory Guide 86, Tracing beneficial ownership (June 2007), RG 86.41: 'A company or responsible entity is not required to include any analysis of information provided to it under Pt 6C.2 in the register. Nor is the company or responsible entity required to reformat the information within a register entry ...'

<sup>114</sup>Parliament of the Commonwealth of Australia, 'Report on the implications of common ownership and capital concentration in Australia', House of Representatives Standing Committee on Economics (March 2022) p41, par 1.12: 'The committee was provided evidence that large Australian listed entities regularly pay financial investigators to identify their biggest beneficial owners. This can involve making multiple inquiries through nominee and holding companies – sometimes held offshore – in order to identify the true shareholders. (Although these investigatory exercises are paid for by shareholders, their results are rarely disclosed.)'

<sup>115</sup>Adolf A Berle and Gardiner C Means, *The Modern Corporation and Private Property* (Macmillan 1933) (1932).

<sup>116</sup>Adolf A Berle and Gardiner C Means, *The Modern Corporation and Private Property* (Macmillan 1933) (1932); Brian Cheffins, 'The Rise and Fall (?) of the Berle–Means Corporation' (2019) 42 *Seattle University Law Review* 445, 447.

<sup>117</sup>Comprising the largest three shareholders in each company within the dataset.

represents an agency capitalism ownership model, in which beneficial owners typically hold their ownership interests through a chain of intermediary institutions, such as banks, superannuation funds and managed funds, who are the actual registered owners (record holders) of the shares.<sup>118</sup> This study thus adds to the existing body of literature which questions the extent to which the Berle and Means ownership patterns are of continuing contemporary relevance, whether within the US itself or beyond.<sup>119</sup>

Turning next to registered ownership identity, the research results confirm the increasing importance of nominee and custodian institutions, both from a frequency and a shareholding concentration perspective, which were previously analysed in Ramsay and Blair's 1993 article.<sup>120</sup> In that study, the two most prominent nominee companies (National Nominees and ANZ Nominees) were one of the five largest shareholders in 53 and 46 companies, respectively, within the 100 company sample, predominantly holding between 5% and 10% of shares within each company.<sup>121</sup> Here, the two most prominent nominee companies (HSBC Nominees and JP Morgan Nominees) were one of the three largest shareholders in 49 and 50 companies, respectively, within the ASX 50 (98% and 100% of companies), showing a significant increase. Additionally, the concentration of their holdings is markedly higher than previously reported findings regarding the most prominent nominee companies in Australia.<sup>122</sup>

As noted above, these institutions are the registered shareholders (record holders), as distinct from the beneficial shareholders which stand behind the identified institutions. As such, these concentrated institutional holdings are *not* equated with control, unless the exercise of voting rights is expressly included in the nominee appointment agreement, which does not typically occur.<sup>123</sup> Therefore, this information, on its own, does not allow for a clear

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<sup>118</sup>See table 2, above. For example, HSBC Custody Nominees Australia Ltd (the second most prominent ASX 50 registered shareholder in the present study) operates in financial services, engaging in commercial, private, and retail banking, and wealth management, investment, and advisory services: Bloomberg company profiles. In the US context, see Ronald J Gilson and Jeffrey N Gordon, 'The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights' (2013) 113 *Columbia Law Review* 863, 865.

<sup>119</sup>See e.g. Ronald J Gilson and Jeffrey N Gordon, 'The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights' (2013) 113 *Columbia Law Review* 863; Brian Cheffins, 'The Rise and Fall (?) of the Berle–Means Corporation' (2019) 42 *Seattle University Law Review* 445; A De La Cruz, A Medina and Y Tang 'Owners of the World's Listed Companies' (2019) OECD Capital Market Series, Paris, 18.

<sup>120</sup>Ian Ramsay and Mark Blair, 'Ownership Concentration, Institutional Investment and Corporate Governance: An Empirical Investigation of 100 Australian Companies' (1993) 19 *Melbourne University Law Review* 153.

<sup>121</sup>*ibid*, 184–85, 193.

<sup>122</sup>*ibid*.

<sup>123</sup>Geoff P Stapledon, 'Institutional Investors: What are Their Responsibilities as Shareholders?' in J Parkinson, A Gamble and G Kelly (eds), *The Political Economy of the Company*, (Hart Publishing 2000). The securities are held on trust by the nominee shareholder for the beneficial owner's benefit, and the existence of control must be conferred (if at all) by contract. The usual structure involves the use of a bare trust, under which the custodian/nominee holds shares on behalf of the beneficial

picture of beneficial ownership to be determined. Nonetheless, nominee shareholding information is important to understand, for two reasons in particular in the Australian context. First, as an indirect measure of the overall level of institutional share ownership. Second, as an indicator of the degree of beneficial share ownership information which is not readily accessible from a public perspective.

In respect of the first reason, given that there is no specific disclosure law requirement, annual survey, or register of beneficial shareholders in Australia, there is no *direct* evidence of the overall level of institutional share ownership present in the market. However, the substantial growth in nominee company holdings evident from the study results is a particularly important *indirect* measure of institutional share ownership. This is because nominee companies are used 'extensively' to register the shareholdings of superannuation funds, unit trusts, and foreign institutional investors in Australia.<sup>124</sup>

Consequently, the substantial shareholding requirements enshrined in s671B of the Corporations Act 2001 and ASX Listing Rule 4.10.4 are of central relevance in moving the analysis forward, while equally indicating the level of ownership cloaking possible under current disclosure rules. Given that 'substantial holding' denotes a relevant interest in voting shares of 5% or more of the total votes attached to all share capital,<sup>125</sup> examining this data allows for an understanding the incidence, identity, and concentration level of substantial holdings across both indices. This information, in turn, allows for an analysis of the extent to which the above institutional pattern of concentrated holdings is truly reflective of control (as distinct from registered ownership).

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

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owner, without discretion over the shares and without active duties, except to transfer the shares to the beneficiary when requested.

<sup>124</sup>GP Stapledon, 'The Structure of Share Ownership and Control: The Potential for Institutional Investor Activism' (1995) 18 UNSW Law Journal 250, 253. Combined with a decrease in the percentage of shares held by individuals.

<sup>125</sup>The full definition of a 'substantial holding' is found in s9 of the Corporations Act 2001, as a relevant interest in voting shares or interests carrying 5% or more of the total votes attached to all voting shares or interests. This is to be read in conjunction with s608(1) of the Corporations Act 2001, which sets out the basic definition of a relevant interest in securities.

this finding confirms that insufficient control rights (if indeed any) have been conferred upon nominee institutions to trigger the 5% substantial shareholder disclosure requirements. Notably, *none* of the identified substantial shareholders are nominee or custodian institutions. So while institutions are key, overall there is a clear separation between ownership and control.<sup>126</sup>

Thus, in relation to the second reason why nominee shareholder information is important, the fact that the identified nominee shareholders are not captured by the substantial shareholder disclosure requirements, gives us a sense of the magnitude of beneficial share ownership information which is entirely *unknown* to members of the investing public.<sup>127</sup> Indeed, previous research indicates that the use of nominee institutions thus underreports the true level of beneficial interest associated with institutional shareholders such as superannuation funds in Australian capital markets, and the current results show that this gap has further increased.<sup>128</sup> Accordingly, this shareholding dynamic is important for policy makers and regulators to understand, particularly in light of common ownership discussions and the recent parliamentary inquiry into the implications of common ownership and capital concentration in Australia.<sup>129</sup> Additionally, the results provide an indication of the informational gap present in the market— that is, they inform our understanding of the degree of control information which the substantial shareholding disclosure requirements are *unable* to capture. Specifically, where institutions or individuals with control rights hover just below the 5% disclosure radar, this effectively creates an investor cloaking mechanism.<sup>130</sup>

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<sup>126</sup>Institutions comprise 97.8% of the identified substantial shareholders across the ASX 50, and 97.8% of the largest 20 groups of shareholders across the ASX 50.

<sup>127</sup>As acknowledged in The House of Representatives Standing Committee on Economics Inquiry and Report on the implications of common ownership and capital concentration in Australia (March 2022); subject to a successful tracing notice (section 4.3 above).

<sup>128</sup>PH Davies, 'Equity Finance and the Ownership of Shares' (1982) Australian Financial System Inquiry, Commissioned Studies and Selected Papers, Part 3, 343; Ian Ramsay and Mark Blair, 'Ownership Concentration, Institutional Investment and Corporate Governance: An Empirical Investigation of 100 Australian Companies' (1993) 19 Melbourne University Law Review 153, 169, 185. Davies sought to identify the beneficial owners of financial nominee company holdings within the BHP Group Ltd and found that superannuation funds were the major beneficial holders. While superannuation funds were registered shareholders of 3.7% of BHP shares, their beneficial ownership amounted to 12.9%.

<sup>129</sup>The House of Representatives Standing Committee on Economics Inquiry and Report on the implications of common ownership and capital concentration in Australia (March 2022). See also, the Australian Federal Government Consultation Paper, 'Increasing transparency of the beneficial ownership of companies' (2017), and Andrew Leigh and Adam Triggs, 'Common Ownership of Competing Firms: Evidence from Australia' (2021) 97 Economic Record 333.

<sup>130</sup>In the absence of a successful tracing notice. This can be contrasted with the UK situation, in which survey information can aid our understanding of beneficial share ownership, combined with a lower disclosure threshold which is able to shed light on interests as low as 3%. For example, in the UK context, the Office for National Statistics releases a biennial statistical ownership bulletin detailing the value of ordinary shares held in UK publicly listed companies by sector of beneficial ownership, with a geographical breakdown of shares owned outside the UK. The report methodology involves measuring beneficial share ownership using data from Euroclear (CREST), the electronic settlement system for equity share trading, and additional analysis of share registers.



Moreover, the prevalence of investment management institutions and the recurring presence of the 'Big Three' index funds as substantial shareholders (holding one third of the substantial shareholding positions across the ASX 50) is worthy of further discussion. This finding is likely due to a combination of factors: First, the concept of a 'substantial holding' found in s671B of the Corporations Act 2001,<sup>131</sup> is defined in s9 as a 5% or greater relevant interest in shares, with 'relevant interest' defined in s608(1) as including the power to vote or the power to dispose of the shares.<sup>132</sup> Given that investment management agreements generally grant the investment manager both of these powers, the interest in the shares will therefore fall within the s608 definition.<sup>133</sup> Second, investment managers will often hold shares in a given company (Company X) on behalf of numerous clients. In the case of an investment manager such as BlackRock or Vanguard, their holding in Company X will typically be on behalf of hundreds of different clients. As a result, the average investment management institution is far more likely than the average client (beneficial owner) to have a 5% or greater relevant interest in the shares of a publicly listed company.

With regard to shareholding concentration, the share ownership within the dataset is widely dispersed, given that 100% of the ASX 20 companies can be classified as widely held at the 20% level of control. Similarly, 17 of the ASX 20 companies can be classified as widely held at the 10% threshold of control. This can be compared with the seminal La Porta et al 1999 study figures, which are 13 out of 20 and 11 out of 20, respectively, across both levels of control. Therefore, the current analysis clearly indicates that the degree of shareholder dispersion has increased over time, taking into account the identities of the ultimate owners of share capital and voting rights (as distinct from registered share ownership), wherever this is possible.<sup>134</sup> This significantly calls into focus the appropriate place of Australian share ownership from a comparative corporate governance perspective, given that these shareholder dispersion figures are much more similar to those previously reported in the UK and the US.<sup>135</sup> Indeed, this seems an appropriate avenue for future comparative corporate governance research.

In light of the empirical findings, the following section of the article will begin by exploring a number of explanatory factors behind the increased

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<sup>131</sup>s671B of the Corporations Act 2001 sets out the applicable disclosure obligations in relation to substantial holdings.

<sup>132</sup>s608(1)(b) and (c), Corporations Act 2001.

<sup>133</sup>Although, over the past few years, the largest superannuation funds have been retaining their voting power, as opposed to delegating it to the investment fund manager. Nonetheless, the investment manager will still have a relevant interest in the shares through having the power to dispose of the shares: s608(1)(c) Corporations Act 2001.

<sup>134</sup>Rafael La Porta and others, 'Corporate Ownership around the World' (1999) 54 *Journal of Finance* 471, 472.

<sup>135</sup>Rafael La Porta and others, 'Corporate Ownership around the World' (1999) 54 *Journal of Finance* 471, 492–3.

level of dispersion in the largest Australian publicly listed companies. Then, the significance of the identified institutional separation between ownership and control will be discussed, followed by the implications arising from the results.

### **5.1. Explanatory factors behind the identified landscape**

This section of the article focuses on two major driving forces behind the observed shareholding landscape in the context of Australia's largest publicly listed companies: first, those factors which may have led to major shareholders selling their shares or allowing for a dilution of their ownership (the 'sell side'); second, those factors which may have led to an increased demand to purchase shares (the 'buy side').<sup>136</sup> The sell side factors which are discussed are the increase in government privatisations, the parallel increase in company demutualisations, and the concurrent decrease in non-institutional shareholdings which occurred over the same period. The buy side factors which are canvassed include the significant increase in institutional and corporate investor holdings, the implementation of a mandatory superannuation system, and the increase in foreign investment into the Australian equity market over the applicable time period. Specifically, these explanatory factors are capable of addressing the increase in shareholder dispersion, when compared with the previous La Porta et al results.

The primary purpose of this section is to test the empirical plausibility of the identified explanatory factors. That is, the aim is to identify the extent to which each factor is consistent with, and thus supported or undermined by, the results. This advances our understanding of why the landscape is as it is, and it can also help us to see that landscape more sharply too; thus, reducing and rendering more comprehensible some of the complexities in the data. Understanding the 'empirical fit' of these putative explanatory factors adds significantly to the existing body of literature. This is particularly the case in the Australian context, where striking gaps exist in the literature post 1999. Consequently, academic theorists have (inevitably) not sought to explain the present shareholding landscape results, nor have other writers tested any factors empirically, against this data, either.

It is important to stress that the explanatory factors are complementary, rather than competing. They complement each other in at least two senses. First, to some extent each factor focuses on a different aspect of the shareholding landscape, so that together they purport to explain more than any one factor alone could do. Second, even where the factors overlap (where, say, two of the factors both speak to the same feature of

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<sup>136</sup>Cf. Brian Cheffins, *Corporate Ownership and Control: British Business Transformed* (2008) Oxford University Press, for a detailed exploration of the 'sell side' and 'buy side' drivers in the UK context.

the landscape), their explanations are typically consistent with, rather than undermining, each other. More specifically, focusing on the ‘buy’ and ‘sell’ sides are ‘complementary’ in the sense that they are the two sides of the same coin.

All that said, these explanatory factors, even taken together, are still limited in scope. For example, just because each shines a light on only some areas of the landscape, some areas likely remain unilluminated by any of these factors. Further, even for the areas which the factors do help to illuminate, it is unlikely that any factor captures all those elements which are helping to shape even that, limited, part of the landscape. Thus, additional factors that might also be helping to shape that area (but which the current study will not investigate) include the following: regarding the sell side, the discussion does not cover commercial and strategic decisions made by corporations or institutions to unwind holdings, or those subject to a takeover, the investment decisions of individual blockholders to sell their shares, rights issues, or decisions which may have been influenced by changes in the laws which decreased the ability of shareholders to exercise private benefits of control. In relation to the buy side, the factors do not address the reasons for the increased level of foreign investment in Australian equity markets, commercial and strategic decisions made by institutions to increase holdings or to initiate a takeover, or purchase decisions which may have been influenced by changes in the laws (and notably, enforcement) which increased the level of investor protection in Australia over the same period.

### 5.1.1. *The sell side*

In the Australian context, it is theorised that there are (at least) three important explanatory factors which increased the sale of shares and, hence, the market supply. Namely, the decrease in non-institutional, small shareholders,<sup>137</sup> the significant number of Australian government privatisations,<sup>138</sup> and the financial sector demutualisations which occurred over the course of the 1990s and 2000s.<sup>139</sup>

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<sup>137</sup>Carole Comerton-Forde and Ian Matheson, ‘Analysis of Share Ownership in Australia from 2001–2011’ (February 2013) Australasian Investor Relations Association; Carole Comerton-Forde, ‘An Analysis of S&P/ASX 300 and NZX 50 Share Ownership’ (February 2021) Australasian Investor Relations Association.

<sup>138</sup>Reserve Bank of Australia, ‘Background on the Australian Listed Equity Market’, Submission to the House of Representatives Standing Committee on Economics Inquiry into Common Ownership and Capital Concentration in Australia (September 2021); Reserve Bank of Australia, ‘Privatisation in Australia’ (1997) December *Bulletin*. Proceeds from privatisations were approximately \$61 billion across the 1990s, occurring in three main sectors in Australia: financial services, electricity and gas, and transport and communication. State and Commonwealth Governments sold assets by offering equity to the public, and concluding trade sales.

<sup>139</sup>Reserve Bank of Australia, ‘Background on the Australian Listed Equity Market’, Submission to the House of Representatives Standing Committee on Economics Inquiry into Common Ownership and Capital Concentration in Australia (September 2021); Reserve Bank of Australia, ‘Demutualisation in Australia’ (1999) January *Bulletin*.

The first notable point is that non-institutional, small shareholders have continued to decrease their direct ownership of Australian listed company shares, across all index groupings over the study period.<sup>140</sup> Indeed, it has been reported for many years across capitalist economies that the proportion of individual shareholders has notably declined, in parallel to an increase in the percentage of shares held by financial intermediaries.<sup>141</sup> The reasons behind this trend stem from the obvious efficiency benefits of intermediary role specialisation, and the general increase in wealth which has increased capital market participation.<sup>142</sup> Certainly, a key efficiency gain arising from financial intermediation is that individual investors do not need to know about portfolio management or make specific share purchase decisions; their principal investment choice is simply whether to provide funds to a selected intermediary, such as a mutual fund or index fund.<sup>143</sup>

Regarding the government privatisations, they notably included the (now ASX 20 listed companies) Telstra Corporation Limited (Telstra) and the Commonwealth Bank of Australia. As evident from the dataset, both Telstra and the Commonwealth Bank of Australia are two of the most widely held companies within the ASX 20. Moreover, the empirical results indicate that neither of these companies has any substantial shareholders, evincing the move towards greater dispersion over the study period. In totality, the proceeds from the privatisations which occurred in the 1990s alone were estimated to be approximately \$61 billion,<sup>144</sup> with the significant resultant public equity offerings contributing to spreading share ownership more widely in Australia.<sup>145</sup>

Similarly, in respect of the demutualisations which occurred, the financial system effects included a substantial increase the number of shareholders as well as increasing the Australian share market capitalisation over the past

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<sup>140</sup>See e.g., the Australian Share Ownership Study/Australian Investor Study published annually by the ASX, which indicates an ongoing trend in the reduction of direct retail share ownership and participation in the share market, with each year reporting a decrease in directly held retail share ownership; Carole Comerton-Forde and Ian Matheson, 'Analysis of Share Ownership in Australia from 2001–2011' (February 2013) Australasian Investor Relations Association, reporting that small shareholder ownership declined from 15.1% in 2002 to 9.9% in 2011.

<sup>141</sup>Robert Clark, 'The Four Stages of Capitalism: Reflections on Investment Management Treatises' (1981) 94 *Harvard Law Review* 561, 565.

<sup>142</sup>*ibid.*, 568; GP Stapledon, 'Share Ownership and Control in Listed Australian Companies' (1999) 2 *Corporate Governance International* 17.

<sup>143</sup>Robert Clark, 'The Four Stages of Capitalism: Reflections on Investment Management Treatises' (1981) 94 *Harvard Law Review* 561, 571.

<sup>144</sup>As at December 1997. This does not capture all significant privatisation proceeds, for example, the Telstra privatisation process *began* in 1997 and was not finalised until 2011. Further, in 1997 it was noted that government privatisations over the period 1997–2000 would be worth US\$150 billion, with telecommunications privatisations alone likely to be worth US\$38.9 billion in 1997: Parliament of Australia, 'Telstra: Privatisation Issues' (1996–97) 8 *Current Issues Brief*.

<sup>145</sup>Reserve Bank of Australia, 'Privatisation in Australia' (1997) December *Bulletin*. Trade sales were also used in addition equity offerings. Overall, the RBA reported that Australia had one of the largest privatisation programs among OECD nations, with the value of privatisations in Australia during the 1990s ranking second after the UK.

twenty years.<sup>146</sup> This was particularly the case regarding former life insurance mutual companies, prominent examples of which include (the now ASX 20 listed company) AMP Ltd and (the now ASX 50 listed company) Medibank Private Ltd.<sup>147</sup> AMP Ltd, by way of example, was formed as the Australian Mutual Provident Society in 1849 as a non-profit life insurance company and mutual society, prior to demutualising in 1998, resulting in policyholders receiving shares in the new company. The empirical results indicate that AMP Ltd is now a widely held ASX 20 company, with no substantial shareholders, and with 2,957,737,964 shares held among 788,692 shareholders over the present study period. In sum, the Reserve Bank of Australia calculated the total equity value of demutualised companies at approximately \$21 billion, in turn controlling assets of around \$180 billion.<sup>148</sup> As such, the supply within Australia's publicly listed share market increased 'sharply' over the course of the 1990s and early 2000s, as a consequence of large demutualisations and privatisations by means of public equity floats,<sup>149</sup> combined with small shareholders reducing their holdings.<sup>150</sup> Thus, each of these factors appear to be consistent with the results, principally in relation to the increased level of shareholder dispersion found.

### 5.1.2. *The buy side*

The first explanatory factor worthy of mention, is that the marked increase in (registered) institutional ownership in Australia, evident from the results, is consistent with the widespread investment strategy shift away from fixed-interest securities (such as bonds) towards shares, as similarly occurred in the UK.<sup>151</sup> This asset-allocation shift thus provides context for the investment

<sup>146</sup>Reserve Bank of Australia, 'Background on the Australian Listed Equities Market' (2021) Submission to the House of Representatives Standing Committee on Economics Inquiry into Capital Concentration and Common Ownership in Australia, 1; P Lowe and M Gizycki, 'The Australian Financial System in the 1990s' (2000), in S Shrestha and D Gruen (eds), *The Australian Economy in the 1990s*, Proceedings of a Conference, Reserve Bank of Australia, Sydney, pp 180–215; Reserve Bank of Australia, 'Demutualisation in Australia' (1999) January *Bulletin*.

<sup>147</sup>Reserve Bank of Australia, 'Demutualisation in Australia' (1999) January *Bulletin*. For example, AMP Ltd was formed as the Australian Mutual Provident Society in 1849 as a non-profit life insurance company and mutual society, prior to demutualising in 1998, resulting in policyholders receiving shares in the new company. AMP Ltd is now a widely held ASX 20 company, with no substantial shareholders, and with 2,957,737,964 shares held among 788,692 shareholders over the present study period. Similarly, Medibank had only one substantial shareholder (Blackrock Inc. (5.01%)).

<sup>148</sup>As at January 1999: Reserve Bank of Australia, 'Demutualisation in Australia' (1999) January *Bulletin*.

<sup>149</sup>Reserve Bank of Australia, 'Demutualisation in Australia' (1999) January *Bulletin*. At the time of publication the RBA had recorded 1,948 public floats.

<sup>150</sup>Carole Comerton-Forde and Ian Matheson, 'Analysis of Share Ownership in Australia from 2001–2011' (February 2013) Australasian Investor Relations Association.

<sup>151</sup>Reserve Bank of Australia, 'Background on the Australian Listed Equity Market', Submission to the House of Representatives Standing Committee on Economics Inquiry into Common Ownership and Capital Concentration in Australia (September 2021): Further, considering stock market capitalisation as a ratio to GDP, Australia has a similar level (140%) to the UK and Japan; GP Stapledon, 'The Structure of Share Ownership and Control: The Potential for Institutional Investor Activism' (1995) 18 UNSW Law Journal 250, 254. It should, however, be noted that the near total dominance of institutional and

changes which occurred over the same period, impacting the degree of institutional ownership observed. This was, secondly, accompanied by an increased level of long-term saving over the period, and parallel growth in the number and availability of institutional investment funds in Australia.<sup>152</sup>

A third explanatory factor which assists our understanding of the results, is the fact that Australia has the fastest growing pension (superannuation) market in the world and allocates the greatest proportion of assets to equity,<sup>153</sup> hence contributing to the increase in registered institutional shareholders in the dataset.<sup>154</sup> Relevantly, a key aspect of the Australian pension system is the mandatory nature of employer contributions, known as the Superannuation Guarantee (SG). The SG was introduced in 1992 (initially requiring a 3% contribution), and currently requires a compulsory 9.5% contribution to be made by employers.<sup>155</sup> Since this time, Australia has grown to become the 4th largest pension market in the world,<sup>156</sup> thus facilitating high levels of capital market investment through pension funds,<sup>157</sup> and increasing institutional holdings as well as potential influence within investee companies.<sup>158</sup>

The fourth relevant explanatory factor is the parallel increase in foreign investment into Australian financial markets and, more specifically, the increase in overseas institutional and pension investment into Australian

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corporate shareholders in 'the largest 20 owners' category, does not prove that total institutional ownership in each company, or in the ASX indices as a whole, is greater than individual ownership.

<sup>152</sup>*ibid*, 254.

<sup>153</sup>Willis Towers Watson, *Global Pension Assets Study* (2019), 8, 11, 14 (reporting that 47% of assets are allocated to equity).

<sup>154</sup>Michael Jefferies, 'The Third Wave of Shareholder Influence and the Emergence of Informational Activism in Australia' (2019) 34 *Australian Journal of Corporate Law* 305; Jennifer Hill, 'Good Activist/Bad Activist: The Rise of International Stewardship Codes' (2018) 41 *Seattle University Law Review* 497, 499.

<sup>155</sup>Additionally, the Australian system allows flexibility in choice, with individuals able to choose between various investment options with different risk profiles and investment strategies employed.

<sup>156</sup>Willis Towers Watson, *Global Pension Assets Study* (2019), 18. Over the last thirty years, the total value of assets managed by Australian pension funds has grown from \$73 billion in 1989 to \$2.89 trillion, as reported by the Australian Bureau of Statistics in June 2019, achieving a compound annual growth rate of 13%.

<sup>157</sup>Reserve Bank of Australia, 'Background on the Australian Listed Equity Market', Submission to the House of Representatives Standing Committee on Economics Inquiry into Common Ownership and Capital Concentration in Australia (September 2021); Deloitte Analysis Report, 'Dynamics of the Australian Superannuation System' (2019). The investment of current superannuation funds in Australian shares comprises approximately 35% of the ASX total market capitalisation. If funds continue to hold the same proportions through asset allocations to equity, this is expected to increase to over 60% by 2038 and therefore dominate ASX holdings.

<sup>158</sup>Michael Legg, 'Shareholder Class Actions in Australia – the Perfect Storm?' (2008) 31 *UNSW Law Journal* 669, 674. Additionally, nominee companies are widely utilised by domestic superannuation funds and unit trusts, which is consistent with the dataset findings regarding the dominance of institutions and the prevalence of nominees within corporate share registers: GP Stapledon, 'The Structure of Share Ownership and Control: The Potential for Institutional Investor Activism' (1995) 18 *UNSW Law Journal* 250, 253–54; Ian Ramsay and Mark Blair, 'Ownership Concentration, Institutional Investment and Corporate Governance: An Empirical Investigation of 100 Australian Companies' (1993) 19 *Melbourne University Law Review* 153, 169, 185.

shares.<sup>159</sup> This is consistent with the overall increase in institutional investment as well as the high level of nominee company holdings in the empirical findings, given that overseas institutional investment is regularly facilitated by Australian resident bank nominee and custodian companies (as registered owners).<sup>160</sup>

## ***5.2. The importance of shareholder protection within an agency capitalism structure***

This section of the article analyses whether the existing regulatory framework is consistent with the identified shareholding landscape within the ASX 50. That is, whether current regulation complements and incentivises governance actors and mitigates the identified agency costs. This is an important issue to consider, given that the empirical analysis comprises 64.53% of the total equities market, thus covering a significant proportion of Australian share ownership and control patterns.<sup>161</sup>

In Australia, the existing regulatory framework facilitates shareholder protection and engagement. It is thus well suited to the identified shareholding landscape, particularly given that the empirical findings indicate that a clear separation between ownership and control exists within the largest Australian publicly listed companies, albeit as between institutional shareholders and managers.<sup>162</sup> Further, this must be coupled with the separation which exists between institutional investors as registered shareholders, and the ultimate beneficial owners of the shares.<sup>163</sup> In this respect, there is an added layer (or chain) of separation between (beneficial) shareholders and

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<sup>159</sup>For example, foreign investors reportedly account for approximately one third of the holdings of Australian publicly listed shares, from a share value perspective: Reserve Bank of Australia, 'Background on the Australian Listed Equities Market' (2021) Submission to the House of Representatives Standing Committee on Economics Inquiry into Capital Concentration and Common Ownership in Australia, 4; Ian Ramsay and Mark Blair, 'Ownership Concentration, Institutional Investment and Corporate Governance: An Empirical Investigation of 100 Australian Companies' (1993) 19 Melbourne University Law Review 153, 170. See also, GP Stapledon, 'The Structure of Share Ownership and Control: The Potential for Institutional Investor Activism' (1995) 18 UNSW Law Journal 250, 254.

<sup>160</sup>Ian Ramsay and Mark Blair, 'Ownership Concentration, Institutional Investment and Corporate Governance: An Empirical Investigation of 100 Australian Companies' (1993) 19 Melbourne University Law Review 153, 170.

<sup>161</sup>A detailed examination of the data beyond the ASX 50 is a point for a future inquiry. Looking to the ASX 300, recent research indicates similar patterns, such as a downward trend in the number of retail shareholders across all indices; the top 20 registered shareholders holding a larger proportion of issued capital across all indices; and the largest institutional investors increasing their share ownership across all indices and sectors: Carole Comerton-Forde, 'An Analysis of S&P/ASX 300 and NZX 50 Share Ownership' (February 2021) Australasian Investor Relations Association.

<sup>162</sup>Whereas the Berle and Means analysis identified the separation between diversified shareholders and managers: Adolf A Berle and Gardiner C Means, *The Modern Corporation and Private Property* (Macmillan 1933) (1932).

<sup>163</sup>Ronald J Gilson and Jeffrey N Gordon, 'The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights' (2013) 113 Columbia Law Review 863.

managers, conceptually comprising an additional set (or sets) of agency costs.<sup>164</sup>

Consequently, the existence of strong shareholder protection and informational rights, as measures to reduce conflicts of interest and information asymmetries, are particularly important in light of the identified shareholder patterns.<sup>165</sup> Certainly, the strategies of substantial shareholders will be related to the shareholder rights granted under legislation, insofar as they may either facilitate or constrain any planned engagement. In Australia, the existing regulatory framework is viewed as enabling shareholder protection and engagement.<sup>166</sup> For example, shareholders with 5% or more of a company's shares (with voting rights) can requisition a general meeting, and directors must call the meeting within 21 days of receiving a valid request.<sup>167</sup> Additionally, shareholders with 5% or more of the votes may move a resolution at a general meeting,<sup>168</sup> supported by the power to request that a statement be provided to all company members regarding the proposed resolution.<sup>169</sup> Importantly, this includes a resolution to appoint or remove director(s), despite anything in the company's constitution or any contrary agreement between the company and the director.<sup>170</sup> These are thus key legal strategies for both protecting and facilitating shareholder involvement with corporate governance, and reducing agency costs.<sup>171</sup>

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<sup>164</sup>ibid, 876–78. As such, agency relationships exist along two margins: between the registered owner and the beneficial owner; and between the registered owner and the managers of the investee company. These agency relationships are present whether there is a chain of institutions between beneficial and registered ownership, or just one institution which is interposed between the beneficial owners and managers. These are known as the agency problems of institutional investors, termed 'the agency costs of agency capitalism' by Gilson and Gordon.

<sup>165</sup>Other examples include directors' duties and shareholder litigation. Regarding the existence and enforcement of these rights in the Australian context see e.g., Jenifer Varzaly, 'The Effectiveness of Disclosure Law Enforcement in Australia' (2021) 21 *Journal of Corporate Law Studies* 135; Jenifer Varzaly, 'The Enforcement of Directors' Duties in Australia: An Empirical Analysis' (2015) 16 *European Business Organization Law Review* 281.

<sup>166</sup>Richard Mitchell and others, 'Shareholder Protection in Australia: Institutional Configurations and Regulatory Evolution' (2014) 38(1) *Melbourne University Law Review* 68; Gilbert and Tobin *Shareholder Activism Report* (2018), 4.

<sup>167</sup>s249D, *Corporations Act 2001*. Alternatively, shareholders with at least 5% of the votes may convene one themselves: s249F.

<sup>168</sup>s249N, *Corporations Act 2001*.

<sup>169</sup>s249P, *Corporations Act 2001*, or in respect of any other matter which may be properly considered at the general meeting.

<sup>170</sup>s203D, *Corporations Act 2001*, in relation to public companies. Regarding the appointment of directors, see s201G and s201E, *Corporations Act 2001*. These sections require ordinary resolutions which need only a simple majority (more than 50% of votes cast in favour of the resolution) to pass.

<sup>171</sup>Reinier Kraakman and others, *The Anatomy of Corporate Law* (3rd edn, Oxford University Press 2017), 32, 37. From a practical perspective, there were a total of 44 activist board seats gained in Australia in 2018, with 22 of these seats won through voting, and the remaining 22 won by settlement: Activist Insight and Schulte Roth & Zabel, 'The Activist Investing Annual Review 2019', 35. Additional examples of shareholder activism utilising appointment and removal rights include the appointment of directors in order to implement a share buy-back (the targeting of Intrepid Mines by Quantum Pacific Capital), and an (unsuccessful) attempt to remove and replace an entire board (Lone Star Value Investors unsuccessfully attempting to replace the board of Antares Energy with a proxy and media campaign), both occurred in 2014: See e.g., Michael Jefferies, 'The Third Wave of Shareholder Influence



Relevantly, the minimum required thresholds for triggering these powers are equivalent to the minimum required voting power to satisfy the substantial shareholder provisions (5% or more). Thus, in the 38 ASX 50 companies in which there is at least one substantial shareholder, such decisions to intervene may notionally be impacted by these facilitative powers.

Further, Division 9 of the Corporations Act 2001 provides for what is known as the two strikes rule, which provides the lowest international threshold for shareholders to spill the board (requiring directors to stand for re-election).<sup>172</sup> This is viewed as a globally distinctive regime, providing opportunities for activist shareholders to pressure the board and effectively force a response to shareholder concerns which go beyond the scope of the spill resolution.<sup>173</sup> It applies where at least 25% of shareholders vote against the company's remuneration report for two consecutive years at the AGM.<sup>174</sup> Following this, shareholders can put forward a spill resolution which must pass by majority vote at the latter of the two AGMs.<sup>175</sup> Subsequent to this, all company directors will cease to hold office and fresh elections will occur at a special meeting of members (the spill meeting), to be held within 90 days.<sup>176</sup> While few board spills have occurred in practice, these provisions have been found to result in reduced CEO pay and turnover, with likely reputational sanctions following therefrom.<sup>177</sup>

Regarding the agency costs of institutional investors, these arise because of the divergence of interests between investment fund managers and beneficial owners.<sup>178</sup> This is because registered institutional shareholders (such as superannuation funds and managed funds) invest the money of their

and the Emergence of Informational Activism in Australia' (2019) 34 Australian Journal of Corporate Law 305.

<sup>172</sup>Michael Jefferies, 'The Third Wave of Shareholder Influence and the Emergence of Informational Activism in Australia' (2019) 34 Australian Journal of Corporate Law 305. See s250V Corporations Act 2001.

<sup>173</sup>Gilbert and Tobin Shareholder Activism Report (2018), 10; Michael Jefferies, 'The Third Wave of Shareholder Influence and the Emergence of Informational Activism in Australia' (2019) 34 Australian Journal of Corporate Law 305; Martin Bugeja and others, 'Life after a Shareholder Pay 'Strike': Consequences for ASX-Listed Firms' (2016) CIFR Paper No. 130/2016: <<https://ssrn.com/abstract=2876925>>.

<sup>174</sup>See, Division 9, s250U Corporations Act 2001.

<sup>175</sup>s250V Corporations Act 2001.

<sup>176</sup>s250V, s250W Corporations Act 2001.

<sup>177</sup>Martin Bugeja and others, 'Life after a Shareholder Pay 'Strike': Consequences for ASX-Listed Firms' (2016) CIFR Paper No. 130/2016 <<https://ssrn.com/abstract=2876925>> accessed August 2016, the research findings included 306 first strikes, 51 s strikes, and 12 board spills, resulting in 8 director dismissals or resignations thereafter. Moreover, a recent example of an attempt to utilise the board spill provisions was in relation to Harvey Norman Holdings Ltd in November, 2019. The company received two consecutive strikes against its remuneration report, but avoided a board spill after institutional shareholders declined to support the spill resolution. See e.g. <https://www.afr.com/companies/retail/harvey-norman-s-australian-sales-return-to-growth-20191126-p53ed8>. While 50.6% and 47.5% of shareholders voted against the remuneration report, in two consecutive AGMs, only 11.1% of shareholders supported the spill resolution. Institutional shareholders reportedly followed the advice of proxy advisers Ownership Matters and CGI Glass Lewis in voting against the remuneration report, however, they did not support spilling the entire Harvey Norman board.

<sup>178</sup>Lucian A Bebchuk, Alma Cohen and Scott Hirst, 'The Agency Problems of Institutional Investors' (2017) 31 Journal of Economic Perspectives 89, 90.

beneficial shareholders, and not their own.<sup>179</sup> This raises questions relating to stewardship decisions, such as whether these investors are likely to make the same decisions as they would make if they were investing their own capital, or whether they are incentivised to take a divergent, suboptimal approach.<sup>180</sup> In the Australian context, there are two key industry body stewardship codes:<sup>181</sup> the Australian Council of Superannuation Investors (ACSI) published the Australian Asset Owner Stewardship Code in May 2018 (the ACSI code);<sup>182</sup> and the Financial Services Council (FSC) published FSC Standard No 23: Principles of Internal Governance and Asset Stewardship in July 2017 (the FSC code).<sup>183</sup> Perhaps surprisingly, given the prevalence of institutional investors, these codes were only introduced relatively recently in comparison to other advanced economies.<sup>184</sup> In terms of application, the ACSI code is voluntary, with signatories required to periodically disclose their compliance with the code, or indicate why there has been a departure from one or more of the principles.<sup>185</sup> While the FSC code is mandatory for FSC Members who are asset managers,<sup>186</sup> this simply requires non-prescriptive disclosure, which likewise utilises a ‘comply or explain’ approach.<sup>187</sup> Consequently, while the principles across

<sup>179</sup>Geoff P Stapledon, ‘Institutional Investors: What are Their Responsibilities as Shareholders?’ in J Parkinson, A Gamble and G Kelly (eds), *The Political Economy of the Company*, (Hart Publishing 2000). In Australia, there may be a number of institutions interposed between the beneficial owners and registered shareholder, depending on the institution type. For example, in the case of AustralianSuper (the largest Australian superannuation and pension fund), in-house fund managers are used to manage equity investments in a variety of companies, which are registered in the name of their custodian, JP Morgan Nominees Australia Ltd (the registered shareholder). However, in the case of smaller superannuation funds, external fund managers are generally used to manage their equity investments, resulting in a chain of intermediary institutions. In this instance, the fund managers play a key role where the fund management agreement provides them with the power to exercise the voting rights attached to the shares (as is commonly the case).

<sup>180</sup>Lucian A Bebchuk, Alma Cohen and Scott Hirst, ‘The Agency Problems of Institutional Investors’ (2017) 31 *Journal of Economic Perspectives* 89, 93, 107; Lucian A Bebchuk and Scott Hirst, ‘Big Three Power, and Why it Matters’ (2022) 102 *Boston University Law Review* 1547.

<sup>181</sup>The ACSI and the FSC are the two leading industry bodies in relation to asset owners and asset managers.

<sup>182</sup>With reporting requirements beginning 1 July 2018.

<sup>183</sup>Effective 1 January 2018.

<sup>184</sup>For example, in the UK the Financial Reporting Council (FRC) published the first version of the UK Stewardship Code in July 2010. It has been suggested that this may in part be due to the fact that Australia did not experience significant adverse results post the global financial crisis, which precipitated heightened investor scrutiny in other jurisdictions: Tim Bowley and Jennifer Hill, ‘Stewardship and Collective Action: The Australian Experience’ (2020) *European Corporate Governance Institute - Law Working Paper No. 491/2020*, 5. On the prevalence of international stewardship codes see e.g., Lucian A Bebchuk and Scott Hirst, ‘Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy’ (2019) 119 *Columbia Law Review* 2029, 2045; Dionysia Katelouzou and Mathias Siems, ‘The Global Diffusion of Stewardship Codes’ (2020) *European Corporate Governance Institute - Law Working Paper No. 526/2020* <<https://ssrn.com/abstract=3616798>> accessed.

<sup>185</sup>The Australian Council of Superannuation Investors (ACSI) *Australian Asset Owner Stewardship Code* (May 2018), 5, 6.

<sup>186</sup>Or undertakes asset management activities.

<sup>187</sup>That is, asset managers are required to either describe the policy underlying their practices or explain why they are not relevant to them. The comply or explain approach has been criticised on the basis that it generally results in a failure to take compliance seriously, and in the event of non-compliance a

both industry codes usefully highlight important stewardship practices and focus on their disclosure; the non-binding nature of both codes weakens their effect in practice.<sup>188</sup>

This has more recently been raised by the ACSI itself, in a 2019 policy paper entitled 'Towards Stronger Investment Stewardship'.<sup>189</sup> Within this publication, the ACSI proposes a review of the approach to stewardship in Australia, arguing for the implementation of a regulatory framework, comprising minimum stewardship standards and reporting requirements, applicable to all institutional investors.<sup>190</sup> Indeed, in light of the results of this study confirming the significance of institutional investors, it seems sensible for uniform stewardship regulation to be developed in consultation with key industry bodies. Such an approach seems particularly appropriate as a means to avoid the narrow application of non-binding, fragmented principles inherent in the current codes.<sup>191</sup>

### 5.3. Implications

Given that Australian legislation enables shareholder protection and engagement, in line with the findings regarding the separation between institutional shareholders and managers and registered and beneficial shareholders, the next logical step is for a uniform stewardship code to be developed in Australia, as a matter of best practice.

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superficial justification is typically provided: Brian Cheffins, 'The Stewardship Code's Achilles' Heel' (2010) 73 *Modern Law Review* 985, 1013.

<sup>188</sup>This may be compared with recommendation 42 of the Independent Review of the Financial Reporting Council (FRC) in the UK, led by Sir John Kingman (the Kingman Review), the report of which was published in December 2018. The findings relevantly include that the UK Stewardship Code, 'whilst a major and well-intentioned intervention, is not effective in practice' and that a 'fundamental shift in approach' is required to ensure that the revised Code more clearly focuses on 'outcomes and effectiveness, not on policy statements', concluding that 'If the Code remains simply a driver of boilerplate reporting, serious consideration should be given to its abolition', 46.

<sup>189</sup>ACSI policy, *Towards Stronger Investment Stewardship* (May 2019), <<https://acsi.org.au/policies/towards-stronger-investment-stewardship/>> accessed 15 November 2020. The policy proposals form part of ACSI's broader response to the 2019 report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry in Australia.

<sup>190</sup>The ACSI submitted that the 'benefits of a stewardship code that applies to a more comprehensive array of stakeholders are tangible'. In their view, a stewardship code within an appropriate regulatory framework, applicable to all institutional investors should be introduced. The ACSI suggests that this could be undertaken in consultation with key stakeholders such as, for example, the Australian Prudential Regulation Authority (APRA), an independent statutory authority that supervises banking, insurance and superannuation institutions, and promotes financial system stability in Australia; and the Financial Services Council (FSC), a leading industry body which sets standards and develops policy in Australia's financial services sector, in relation to the regulatory aspects of stewardship.

<sup>191</sup>While the existence of regulatory or code-based measures may be expected to improve aspects of this governance relationship, it is unlikely that they alone can modify institutional reticence, to the extent that this is problematic. See e.g., Lucian A Bebchuk, Alma Cohen and Scott Hirst, 'The Agency Problems of Institutional Investors' (2017) 31 *Journal of Economic Perspectives* 89, 108: To the extent that there is a problem with the incentives of institutional investors to spend on stewardship, a change in investment manager incentives will likely be more successful than aspirational principles or well-intentioned guidelines.

Regarding the parameters of the shareholding and control landscape, it is clear that there is an informational gap when it comes to beneficial share ownership. The current substantial shareholding provisions require disclosure to be made where shareholdings reach 5% (or above).<sup>192</sup> This disclosure still effectively hides many of the ultimate beneficiaries of the shares, where those beneficiaries possess voting rights which equate to less than 5%. That is, shareholders wishing to avoid disclosure requirements simply hover slightly below the relevant threshold. This results in an informational gap whereby the ultimate share ownership within the ASX 50 remains opaque to the investing public,<sup>193</sup> and there are certainly good reasons for investors to know who company shareholders are.

As noted earlier, the Cohen Committee Report (UK) and the Eggleston Committee Report (Australia), confirmed that substantial holding disclosure requirements aim to reduce information asymmetries and increase the information available about shareholders, for the purpose of increasing investor knowledge and confidence, in a timely manner.<sup>194</sup> Yet, we see that the substantial shareholder disclosure requirements do not uncover the beneficial shares held by the identified nominees. Indeed, any beneficial owners sitting below the 5% disclosure threshold are entirely unknown to their co-adventurers, in the absence of a successful tracing notice (the difficulties regarding which are discussed in section 4.3).<sup>195</sup>

In order to address the informational gap issue, an initial step that regulators may consider taking is to lower the relevant disclosure threshold. Drawing upon the UK regime as a comparison point, 3% would be in line with the equivalent UK disclosure rules.<sup>196</sup> This would reduce information asymmetries, by allowing for a greater degree of transparency at a lower threshold of ownership.

While a beneficial share ownership register has alternatively been proposed as a regulatory solution,<sup>197</sup> which would typically involve disclosures above 20%, this is not capable of addressing *this* informational problem. The informational gaps identified by this research indicate the need to

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<sup>192</sup>Where they meet the relevant interest definition in s608(1) of the Corporations Act 2001.

<sup>193</sup>See further, Parliament of the Commonwealth of Australia, 'Report on the implications of common ownership and capital concentration in Australia', House of Representatives Standing Committee on Economics (March 2022) p41, par 1.11.

<sup>194</sup>Board of Trade (UK), Report of the Committee on Company Law Amendment (Cohen Committee), Cmd 6659 (1945), par 77–82; ASIC Regulatory Guide 5, Relevant interests and substantial holding notices (August 2020), RG 5.287, p69.

<sup>195</sup>See further, Parliament of the Commonwealth of Australia, 'Report on the implications of common ownership and capital concentration in Australia', House of Representatives Standing Committee on Economics (March 2022) p41, par 1.12.

<sup>196</sup>FCA Disclosure and Transparency Rules, DTR 5.1.2R, DTR 5.3.1R(1), Disclosure Guidance and Transparency Rules sourcebook August 2022 (in relation to UK incorporated issuers).

<sup>197</sup>Parliament of the Commonwealth of Australia, 'Report on the implications of common ownership and capital concentration in Australia', House of Representatives Standing Committee on Economics (March 2022) p42, par 1.13–1.15.

understand beneficial share ownership falling *under* 5% in Australian publicly listed companies, as a way to reduce ownership 'cloaking' and informational asymmetries, while increasing the degree of investor transparency which exists.

The substantial shareholding provisions leave a significant gap in the information which is readily available to shareholders and prospective investors. Moreover, the tracing notice provisions do little to remedy this informational void. While the recent parliamentary inquiry highlighted numerous information asymmetries associated with the paucity of detailed, publicly available share ownership information in Australia, the report proposals do not address the issues uncovered by this study.<sup>198</sup> In light of this research, a more data-driven, nuanced approach is required by policy makers and regulators. Certainly, further debate is required in order to strike a balance between numerous competing interests. On one hand, further regulation will increase the informational burden and costs faced by listed companies and regulators, while leading to a reduction in beneficial shareholder privacy. On the other hand, this must be balanced with the desirability of producing more transparent, publicly available, ownership information, in order to bolster financial market integrity. It is thus hoped that the results of this study will serve as a useful foundation for further research and discussion in this important area.

From an international perspective, the implications are clear, more work needs to be done regarding the incentivisation of institutional shareholders to follow minimum stewardship standards. While, for example, the UK has a Stewardship Code, this soft-law effort does not go far enough towards creating institutional investor, issuer-specific engagement,<sup>199</sup> and while the US and UK both have robust shareholder powers in place, these are unable to offset passivity. Scholars have recognised that institutional investor business models need to change for meaningful engagement to be incentivised, as actions are more likely to correlate with commercial interests and incentives, even where the existing regulatory framework is strong.<sup>200</sup> In relation to those markets which are moving towards an agency capitalism

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<sup>198</sup>The House of Representatives Standing Committee on Economics Inquiry and Report on the implications of common ownership and capital concentration in Australia (March 2022). While the Australian Federal Government Consultation Paper, 'Increasing transparency of the beneficial ownership of companies' (2017) raised questions about the adequacy of the substantial holding disclosure provisions as well as the tracing notice obligations, at 19, no reform followed the consultation.

<sup>199</sup>Bobby Reddy, 'The Emperor's New Code? Time to Re-Evaluate the Nature of Stewardship Engagement under the UK's Stewardship Code' (2021) 84 *Modern Law Review* 842.

<sup>200</sup>See e.g. Lucian A Bebchuk and Scott Hirst, 'Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy' (2019) 119 *Columbia Law Review* 2029; Lucian A Bebchuk, Alma Cohen and Scott Hirst, 'The Agency Problems of Institutional Investors' (2017) 31 *Journal of Economic Perspectives* 89; Lucian A Bebchuk and Scott Hirst, 'Big Three Power, and Why it Matters' (2022) 102 *Boston University Law Review* 1547; Bobby Reddy, 'The Emperor's New Code? Time to Re-Evaluate the Nature of Stewardship Engagement under the UK's Stewardship Code' (2021) 84 *Modern Law Review* 842.

shareholder model, the present research would indicate that there should be an initial focus on bolstering shareholder rights and protections, as well as the mitigation of agency costs along the margins identified.

From a research agenda perspective, further work across jurisdictions is needed. If, as this article has demonstrated, our prior understanding of the shareholder landscape in Australia is incomplete and outdated, then it is possible that this is also true in other countries. Thus, the first research implication is that other countries may want to revisit the empirics of shareholder ownership, focusing on the issues raised in this article (such as the information gap between register and beneficial ownership, the identity of substantial shareholders, and ownership dispersion) to develop a more comprehensive understanding of the existing shareholder landscape. Second, whether further studies reveal that other countries have similar, or in fact very different, landscapes to Australia, explanations will be required for those similarities or differences. For example, if the same patterns are replicated in other countries, is this for the same reasons, or are different factors at play? If differences are emerging, how can those differences be explained? This will require the development of explanatory factors across jurisdictions to support the initial empirical analysis. Third, unique policy and reform implications will then need to be formulated, in order to push our understanding further across borders.

## 6. Conclusion

This article has provided much needed data to the existing body of knowledge regarding share ownership and control within Australia. It is the first in-depth analysis of both ownership and control which has been undertaken utilising post 2004 data, collecting and evaluating information from the largest registered shareholders as well as substantial shareholders within the ASX 50 (comprising 64.53% of the total equities market). The foregoing analysis clearly shows the divide between openly accessible registered shareholder information, and the beneficial shareholder information which is unknown to the investing public. The discussion highlights the ways in which current disclosure regulation fails to adequately bridge this information deficit, and the policy implications arising therefrom. In taking a first step towards filling the existing gaps in this area, the main empirical findings of this article are summarised below.

First, the study findings provide insight into registered shareholder identity, where institutional and corporate shareholders dominate the groups of 20 largest shareholders within the ASX 50 in Australia. Across the ASX 20, individual registered ownership is 0.75% within the groups of 20 largest shareholders. Within the ASX 50, individual registered ownership is 2.2% across all 50 groups of 20 largest shareholders. That is, 97.8% of the ASX 50

groups of 20 largest shareholders are institutions or companies, indicating an increase in their register dominance as compared with previous research.

Second, the three-firm concentration ratio was calculated for each of the ASX 50 companies in order to determine the degree of concentration of these registered holdings.<sup>201</sup> Within the ASX 20, the mean level of concentration is 47.53%. Looking to the ASX 50 as a whole, the mean level of concentration is 53.87%.<sup>202</sup> This may be compared with the increasing levels of institutional shareholder concentration and register dominance which have occurred within both the UK and the US.<sup>203</sup> This is consistent with the reconcentration of registered ownership which has been observed in both the US and the UK.<sup>204</sup>

Third, 97% of the three largest shareholders in each of the ASX 50 companies are nominee and/or custodian institutions. This thus revises our understanding of the both the prevalence and degree of holdings of nominee/custodian institutions in Australia, when contrasted with the lower levels reported by prior studies. This finding is consistent with the agency capitalism shareholder model which exists in both the US and the UK.<sup>205</sup> Moreover, the prevalence of the same institutions across the ASX 20 and ASX 50 is striking. While beneficial share ownership information is not publicly available, substantial shareholding (5% of more voting power) data was obtained, given that this triggers disclosure requirements under the Corporations Act 2001 and denotes control.

Fourth, in order to reduce the information gap between register and control rights, substantial shareholding notices were investigated. This data indicated that ten of the ASX 20 companies (50%) had at least one substantial shareholder, and there were 18 substantial shareholders across these ten companies. Within the ASX 50, 38 out of the 50 companies (76%) had at least one substantial shareholder. In totality, there were 93 substantial shareholders across the 50 companies, with 83.9% holding between 5% and 10% of the voting rights conferred by ordinary shares.<sup>206</sup> At the 10–15% level of control, there were 11 substantial shareholders (11.8%), and only four

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<sup>201</sup>Based on the three largest shareholders within each company.

<sup>202</sup>It has similarly been observed that ownership concentration has been increasing in both the US and UK contexts due to institutional holdings: OECD, *Corporate Governance Factbook* (2019), 17; Brian Cheffins, 'Corporate Governance and Countervailing Power' (2019) 74 *The Business Lawyer* 1.

<sup>203</sup>See e.g. OECD, *Corporate Governance Factbook* (2019), 17; A De La Cruz, A Medina and Y Tang 'Owners of the World's Listed Companies' (2019) OECD Capital Market Series, Paris.

<sup>204</sup>Ronald J Gilson and Jeffrey N Gordon, 'The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights' (2013) 113 *Columbia Law Review* 863; Adrienne Buller and Benjamin Braun, 'Under New Management: Share Ownership and the Growth of UK Asset Manager Capitalism' (2021) *Common Wealth Report*.

<sup>205</sup>*ibid.*

<sup>206</sup>Overall, comparing the two indices examined, it is evident that within the ASX 20 there is a greater preponderance of institutional investors, an overall greater degree of shareholder dispersion at both levels of control, there are fewer substantial shareholders, and the ownership of these substantial shareholders is less concentrated, when compared with the ASX 50.

shareholders (4.3%) fell within the greater than 15% category of voting rights/control.<sup>207</sup> Additionally, the results of this study have a preliminary bearing on the relevance of common ownership theory within Australia. In relation to the 'Big Three' index funds, these institutions comprise 33.33% of the substantial shareholding positions across the ASX 50. Notably, 87.1% of these substantial holdings are in companies within the financial sector.

Fifth, the substantial shareholding results indicate that dispersion has increased, as measured by control rights (relevant interests).<sup>208</sup> While registered ownership is concentrated, there is a very low degree of concentration (high degree of dispersion) when control is examined. Despite the identified information asymmetries in publicly available data, this finding is not constrained by current disclosure regulation. Substantial shareholding notices allow for the identification of control rights above the 5% threshold, allowing for a replication of the influential La Porta et al study (1999).<sup>209</sup> Based on this information, now all of the 20 largest publicly listed companies in Australia can be classified as widely held (versus 13 in the La Porta et al study) at the 20% level of control. At the 10% threshold of control, 17 out of the 20 largest publicly listed companies can be classified as widely held (versus 11 in the La Porta et al study). The study results thus indicate an increase in shareholder dispersion over time.

The clear separation between ownership and control highlights the divergent incentives of registered and beneficial share owners, as well as potential impediments to optimal levels of stewardship. Based on this understanding, there are (at least) four central messages for regulators and policy makers. First, corporate governance regulation must evolve in parallel to a more precise understanding of share ownership and distribution.<sup>210</sup> Second, there is a need for complementarity between shareholder patterns and regulation which incentivises potential governance actors and mitigates identified agency costs.<sup>211</sup> Third, the information asymmetries present in the share registers studied may be partially overcome by lowering the relevant disclosure threshold. Fourth, the technical manner and complexity with which the tracing notice regime currently operates should be reviewed. That is, based

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<sup>207</sup>While the research results show that investment management institutions such as BlackRock, Vanguard and State Street are substantial shareholders in numerous ASX 50 companies, their ownership does not yet match the pervasiveness which has been observed in the US context: See e.g., Lucian A Bebchuk and Scott Hirst, 'The Specter of the Giant Three' (2019) 99 Boston University Law Review 721, 735.

<sup>208</sup>As discussed in section 4 of the article, s9 of the Corporations Act 2001 defines a substantial holding as a relevant interest carrying 5% or more of the total votes attached to all voting shares or interests. This is to be read in accordance with s608(1) of the Corporations Act 2001, which defines a relevant interest by reference to control rights (voting, disposition).

<sup>209</sup>Rafael La Porta and others, 'Corporate Ownership around the World' (1999) 54 Journal of Finance 471.

<sup>210</sup>Ronald J Gilson and Jeffrey N Gordon, 'The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights' (2013) 113 Columbia Law Review 863, 868.

<sup>211</sup>*ibid*; Lucian A Bebchuk and Scott Hirst, 'Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy' (2019) 119 Columbia Law Review 2029, 2043.



on the data, reform focusing on beneficial shareholder disclosure and interest tracing will likely have a greater impact than policy proposals to create a beneficial share registry, given the informational gaps identified.

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## Disclosure statement

No potential conflict of interest was reported by the author(s).

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