



# Non-Voting Ordinary Shares

ASX Public Consultation

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## What this paper is about

This public consultation paper invites feedback on a proposal for ASX to amend its listing rules to allow quotation of non-voting ordinary shares, subject to certain safeguards.

ASX is conducting this consultation in response to stakeholder requests. ASX has not yet formed a view with respect to this proposal, but feels that the time is right for a review of this issue and has therefore decided to release this consultation paper.

If ASX decides to proceed with this proposal, the market will be informed accordingly, and ASX will commence the normal rule amendment approval processes with ASIC.

Because ASX has not yet decided whether to proceed with the proposal outlined in this paper, entities currently listed on ASX should continue to operate on the assumption that the current listing rules will be retained, until advised otherwise by ASX.

ASX confirms that any departures from the one share: one vote principle would be implemented by way of rule amendment, not waiver. If ASX were to proceed with listing rule changes, it is envisaged that they would not come into operation before the second half of 2008.

## Invitation to comment

ASX invites comment on the proposal put forward in this paper by **Friday 7 March 2008**.

Comments can be sent to:

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# Contents

What this paper is about .....	2
Invitation to comment.....	2
1. Overview.....	4
2. Non-Voting Shares – An Introduction .....	6
3. Benefits Of Non-Voting Shares.....	7
4. Non-Voting Shares – Common Concerns Explored .....	8
5. Possible Safeguards For Non-Voting Shares .....	9
6. International Experience.....	11
7. Straw Man Proposal For Consultation .....	13

# 1. Overview

- 1.1 ASX listing rule 6.9 currently states that on a resolution to be decided on a poll, ordinary security holders must be entitled to one vote for each fully paid security.
- 1.2 This paper outlines a proposal to amend the rule to allow companies to issue non-voting ordinary shares. On a poll, holders of non-voting ordinary shares would not be entitled to one vote for each fully paid security. ASX is conducting this consultation in response to stakeholder requests. ASX has not yet formed a view with respect to this proposal.
- 1.3 Companies seeking admission to the official list would need to clearly disclose in their Prospectus whether the company's constitution allows it to issue non-voting shares. If the company proposed to issue non-voting shares as part of the IPO process, the shares would need to be clearly identified as such. Consistent with this approach, existing listed entities would be required to seek shareholder approval for the issue of non-voting shares prior to any such issue occurring, such approval to expire after 12 months. Subsequent issues of non-voting shares would require shareholder approval only if they triggered the threshold applicable to all issues of equity securities in listing rule 7.1.<sup>1</sup>
- 1.4 In addition to these requirements, ASX could amend the listing rule to allow non-voting securities subject only to certain safeguards. For example, the listing rules could allow non-voting shareholders to exercise one vote for each fully paid security where there is a major corporate action such as a proposal to wind up the company, however it is not envisaged that holders of non-voting shares would have any rights to vote in relation to a change of control. Section 5 sets out details of possible safeguards for comment.
- 1.5 ASX has been asked to consider these amendments to its listing rules in order to:
  - Enhance capital raising flexibility
  - Reduce reliance on debt capital
  - Provide greater investment opportunities for equity investors in the Australian market
  - Generate positive credit ratings implications
  - Enhance international competitiveness of ASX listed companies
  - Support controlling or founding family shareholders and give them access to the Australian equity market without relinquishing control
  - Enhance the efficiency of the Australian capital market
  - Enable the separate trading of economic and voting rights which has benefits for both companies and investors
  - Preserve investor freedom of choice
- 1.6 Although ASX has not yet decided whether to proceed with the proposal set out in this paper, ASX does believe the time is right for a review of this issue.
  - Listing rule 6.9 has not been reviewed for ten years. In that time new retail products which provide exposure to a company's economic performance but which do not provide voting rights have been developed and accepted by the market. Examples of such products are warrants and contracts for difference (CFDs).
  - Investors and companies listed on comparable overseas exchanges have access to non-voting ordinary shares. Australian investors and companies may be at a relative disadvantage due to ASX's current listing rules. Section 6 contains an overview of comparable international requirements.
- 1.7 ASX has developed and put forward for comment a "straw man" proposal in order that this public consultation can be meaningful. This will assist ASX more than a general debate around the pros and cons of non-voting shares. Specifically, this proposal is:

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<sup>1</sup> Essentially the current threshold is issuance of greater than 15% of the company's issued share capital. ASX is currently consulting on a separate proposal to increase this limit to 25%, in certain circumstances, for small-medium sized entities.

1.8 ASX listing rule 6.9 be amended to allow listed entities to issue non-voting ordinary securities subject to the following conditions:

- a. the company's constitution does not preclude the issue of non-voting ordinary securities; and
- b. the company has clearly set out in its IPO documentation the terms and conditions attaching to non-voting shares OR for existing listed entities has obtained shareholder approval by ordinary resolution to issue non-voting shares no more than 12 months before the first issue of non-voting shares; and
- c. the rights of the holders of non-voting ordinary securities are substantially the same as the rights of holders of voting securities, except for the voting power per security; and
- d. non-voting ordinary shares receive a dividend equal to or greater than ordinary voting shareholders; and
- e. non-voting shareholders receive equal voting rights in the following circumstances:
  - (i) Proposal to wind-up the company
  - (ii) Proposal to buy-back or reduce voting ordinary capital

1.9 ASX invites:

- a. Feedback on the perceived benefits of non-voting ordinary securities;
- b. Views on the specific concerns raised in relation to non-voting securities and how these might be overcome;
- c. Views on the specific conditions proposed to be attached to the issue and listing of non-voting securities, and
- d. Feedback on any other issues which may be relevant to ASX's consideration of non-voting securities.

## 2. Non-Voting Shares – An Introduction

- 2.1 This proposal is to allow listed entities to issue non-voting ordinary shares. The non-voting shares would rank equally with other ordinary shares in a winding up, and would be entitled to the same or higher dividend as other ordinary shares.
- 2.2 ASX listing rule 6.9 currently states that on a resolution to be decided on a poll, ordinary security holders must be entitled to one vote for each fully paid security. The principle that has historically underpinned listing rule 6.9 is described in a recent report to the European Union (EU) as the “proportionality principle”<sup>2</sup>, i.e. voting power is proportionate to economic interest.
- 2.3 It is debatable whether the proportionality principle has retained currency as capital markets have grown and matured. The relevant ASX listing rule has not been reviewed for ten years. In that time new retail products which provide exposure to a company’s economic performance but which do not provide voting rights have been developed and accepted by the market. Examples of such products are warrants and contracts for difference (CFDs). The use of equity put and call options, and of short selling have also gained mainstream acceptance. These activities also undermine the proportionality principle.
- 2.4 The alternative and arguably more attractive principle for a mature market is described in the EU-commissioned report as “freedom of contract principle”. Essentially this principle recognises an entity’s inherent right to self-organisation.
- 2.5 Since 1994 ASX has allowed one listed entity, News Corporation, to quote non-voting shares. ASX has quoted shares with differential voting rights for former-cooperatives, but generally on the basis that the company normalise its voting structure within a period of 3 years (see Guidance Note 3 *Cooperatives and Mutual Business Entities*). ASX has granted waivers from compliance with the one share: one vote principle to enable external managers of listed infrastructure funds to hold special voting shares which enable the managers to elect a majority of directors to their particular infrastructure fund’s board, in limited situations where there is a stapled entity structure.
- 2.6 The types of entities potentially attracted to non-voting shares are:
- Overseas listed companies with a dual share structure
  - Unlisted Australian family-owned companies
  - Unlisted Australian professional services partnerships
  - Listed Australian companies seeking flexible capital raising arrangements
  - Government assets being corporatised and listed
- 2.7 Section 250E of the Corporations Act does not limit entities to one share: one vote. Companies therefore have the flexibility to adopt different voting structures in their constitution. However, section 253C of the Corporations Act restricts members of a managed investment scheme to 1 vote for each dollar of the value of the total interests they have in the scheme. This proposal is limited to listed companies only. ASX invites feedback on the question of whether listed managed investment schemes should be able to issue non-voting units. ASX may pursue this issue as a second area of reform pending feedback received and discussions with ASIC and Treasury, on possible legislative reform.

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<sup>2</sup> Institutional Shareholder Services, Shearman & Sterling, European Corporate Governance Institute, Report on the Proportionality Principle in the European Union, 18 May 2007.

## 3. Benefits Of Non-Voting Shares

3.1 Key benefits of non-voting share structures, as put to ASX, are outlined below. ASX invites feedback in relation to other perceived benefits of non-voting shares. ASX also welcomes comments or counter-propositions in relation to the following points. Non-voting share structures may:

- Provide companies with greater capital raising flexibility and choice, providing listed entities with additional fund raising options that do not involve diluting the voting rights of existing shareholders by allowing the issue of non-voting securities.
- Enhance the competitiveness of ASX listed companies, eliminating any disincentive to shift a company's listing to a foreign jurisdiction which allows the issue of non-voting ordinary shares.
- Facilitate dual listing of company securities where the company's primary overseas exchange permits non-voting shares, thereby enhancing the attractiveness of the Australian market to these overseas entities.
- Facilitate listing of Australian family-owned entities currently accessing capital from sources such as private equity, thereby providing retail investors with access to these companies. The ability to issue non-voting ordinary shares achieves the majority shareholder objective of accessing new equity capital and maintaining control, while enabling outside investors to share in ownership risks and rewards.
- Reduce the reliance on debt and retain listings which may otherwise seek private equity funding. Where a listed company is subject to a private equity buyout, there is effectively a replacement of publicly listed equity capital with untradeable or illiquid debt or hybrid securities. This may be a concern to the broader investment community as it decreases the range of listed equity investment opportunities.
- Enhance capital market efficiency. Companies should be free to adopt the structure and financing mechanisms to suit their needs. Investors will not invest in any product which they do not find attractive and therefore suboptimal and inefficient mechanisms will not survive.
- Enhance economic efficiency. Separation of trading of economic and voting rights is a desirable mechanism to facilitate the transfer of goods to those who most value them in an economically efficient manner.

## 4. Non-Voting Shares – Common Concerns Explored

4.1 The paragraphs below discuss concerns commonly raised in relation to non-voting shares, and responses to those concerns. ASX invites comments on these and any other issues related to non-voting ordinary securities, including possible ways to address the concern.

4.2 *Alignment of Shareholder and Company Interests:* The commonly accepted rationale for voting rights attaching to securities is that investors' long term interests are most closely aligned with those of the company, and hence investors have the best incentives to control the entity. The investor's voting power has therefore been proportionately linked to their economic exposure to the entity on the basis of one share: one vote.

It has been suggested to ASX that there are a range of reasons why, in today's markets, investors' interests are not necessarily aligned with those of the entity. The use of put and call options and short sales of securities are common and can alter the investors' economic alignment with that of the company and other investors. Therefore, it is arguable that the introduction of sophisticated products has already undermined this assumption. Further, it is suggested that by separating the economic and voting interest, market efficiency is enhanced, because investors who value the voting interest will pay a premium for this, to the benefit of investors who do not value the voting interest.

4.3 *Management Accountability.* It is suggested that the concept of non-voting shares is inconsistent with management accountability because not all shareholders are able to vote to remove underperforming directors.

Under the proposal shareholders remain free to sell their shares if they are unhappy with management performance. Where this occurs, market forces generally result in a higher cost of capital for underperforming companies, due to their lower relative share price (affecting equity raisings) and potentially weaker credit ratings (affecting debt raisings).

4.4 *Market Efficiency.* A third common assumption about non-voting shares is that their use may result in greater management entrenchment leading to a loss of market for corporate control, possibly impacting on liquidity and market efficiency.

In response to this concern, it has been suggested to ASX that the anticipated take-up of non-voting share structures would be limited, thus reducing the likelihood of widespread impact on market efficiency. Where an entity is already listed, shareholder approval would be required before the company could issue non-voting securities. Finally, in a climate of private equity activity, non-voting share structures may be a mechanism to retain listings that would otherwise revert to private ownership and to attract new listings which would otherwise continue to raise capital through private equity structures. The benefits of these retained and new listings would add to the depth and liquidity of the market.

4.5 *Potential Market Confusion.* A final potential concern relates to investors' ability to understand the terms attaching to the securities they purchase, specifically whether or not they will be entitled to a vote.

This is an issue which could arguably be addressed by disclosure rules and clear prospectus and ongoing disclosures. Retail investors currently trade products which are arguably more complex than non-voting ordinary securities, namely preference shares, warrants, convertible debt and hybrid securities. Each of these products provides the investor with economic exposure to an underlying security but does not provide voting entitlements or provides very limited voting entitlements.

4.6 Comment is sought on each of the issues canvassed above. Feedback is also requested on the threshold issue of whether Australia's market is sufficiently sophisticated that entities and investors should be given the flexibility to adopt share structures that best suit the entity, provided there is adequate disclosure of whether voting rights attach to securities.

## 5. Possible Safeguards For Non-Voting Shares

- 5.1 If ASX decides to amend its listing rules to allow companies to issue non-voting securities, it could do so subject to a range of potential safeguards.
- 5.2 Companies seeking admission to the official list would need to clearly disclose in their Prospectus whether the company's constitution allows it to issue non-voting shares. If the company proposed to issue non-voting shares as part of the IPO process, the shares would need to be clearly identified as such.
- 5.3 Companies which are already listed on ASX would be required to seek a one-off shareholder approval by ordinary resolution for the issue of non-voting shares, such approval to expire after 12 months, if no issue of non-voting shares is made.
- 5.4 ASX listing rule 7.1 currently requires shareholder approval for issues of ordinary securities above a certain threshold. ASX envisages that this rule and all other listing rules in relation to the issue of securities (such as the related party transaction rules) would apply to ordinary non-voting securities in the same way they apply to other ordinary securities.
- 5.5 Feedback is requested on the measures outlined above, the additional possible safeguards set out below, and on any other safeguards ASX should consider.
- 5.6 The safeguards listed below are derived from overseas exchanges and the terms of non-voting shares previously listed on ASX. Readers should not assume that, if it proceeds with the proposal, ASX will adopt any or all of the safeguards listed below.
- The rights of voting and non-voting shareholders be substantially the same except for voting power per share;
  - Non-voting shareholders receive equal voting rights in the following circumstances:
    - (i) Proposal to wind-up the company
    - (ii) Proposal to buy-back or reduce voting ordinary capital
  - Non-voting ordinary shares receive a dividend equal to or greater than ordinary voting shareholders.
- 5.7 ASX has considered, and is inclined to reject as inappropriate, several other possible safeguards. The safeguard and ASX's reasons for considering it inappropriate are set out below.
- At least two-thirds of voting shareholders entitled to vote approve the issue and terms of the non-voting ordinary shares and / or a majority of independent directors approve the issue and terms of the non-voting ordinary shares.

In our view, if a company's prospective shareholders in an IPO context have decided to take up shares, having had full disclosure in the prospectus, and existing shareholders have voted by majority to approve issuance of non-voting shares within the next 12 months, then ongoing shareholder vote should only be required for large, dilutionary share issues, as already required in the listing rules. This additional requirement for a two-thirds vote would add unnecessarily to the company's cost of capital raising for no clear additional regulatory benefit.

- Non-voting shares revert to voting shares if the company does not pay any dividends on non-voting shares for 24 months.

This safeguard has the potential to increase uncertainty and to create confusion in relation to the status of non-voting shares. It may unfairly and unnecessarily disadvantage those companies which do not pay a dividend.

- 5.8 ASX has considered, and is inclined to reject several other possible safeguards, on the basis that the Corporations Act currently deals with the matter satisfactorily.

- Holders of non-voting shares quoted on ASX receive all shareholder communications including proxy material sent to the holders of voting securities of the entity;
- Non-voting shareholders be entitled to attend and speak at all meetings at which voting shareholders are entitled to attend and speak;
- Non-voting ordinary shareholders receive the same per share consideration applicable to ordinary shares in a takeover situation.

5.9 When considering what safeguards should be imposed, ASX will take into account the interests of current and prospective shareholders, across all share classes. ASX will also take into account the Issuers' cost of complying with any requirements.

5.10 ASX requests feedback on what safeguards it should, or should not, consider imposing through the listing rules, if it proceeds with this proposal.

## 6. International Experience

6.1 Overseas markets typically have fewer restrictions on voting structures than in Australia. The table below sets out the availability of non-voting shares and multi-voting shares in leading countries covered by the Morgan Stanley Capital Index (MSCI).

Rank	Country	Non-Voting Ordinary Shares	Multi Voting Shares
1	USA	✓	✓
2	UNITED KINGDOM	✓	✓
3	JAPAN *	✗	✗
4	FRANCE	✓	✓
5	CANADA	✓	✓
6	GERMANY	✗	✗
7	AUSTRALIA	✗	✗
8	SWITZERLAND	✓	✓
9	SPAIN	✗	✗
10	ITALY	✓	✓

MSCI Top 10 Countries by Closing Market Cap 19 October 2007.

\* Tokyo Stock Exchange is currently considering a proposal to allow non-voting shares. The initiative was announced in April 2007.

6.2 The current ASX proposal relates only to non-voting shares. Multi-voting (or “super-voting”) shares are securities which allow the holder to exercise more than one vote. ASX’s previous review of listing rule 6.9 was undertaken in 1993 following a request from News Corporation Ltd to issue super voting shares. The request was ultimately withdrawn, following a public consultation on the issue. ASX is not aware of any current demand for multi-voting shares. Further, ASX considers that multi-voting shares constitute a more significant departure from the one share: one vote proportionality principle and ASX is not aware of market demand for this initiative.

6.3 The European Union has recently completed a review of voting rights.<sup>3</sup> The review was prompted by a push from the EU Commissioner of Markets to introduce a one share, one vote framework across the EU. The Commissioner has since backed away from his position, following strong resistance from member countries and companies across Europe. The review process included a comprehensive study of EU countries, companies, and existing academic literature studying the effects of different control structures, undertaken by a consortium headed by proxy advisory group Institutional Shareholder Services.

6.4 Some key findings contained in the EU-commissioned report are:

- The claim that one share, one vote is the uniquely optimal structure for dispersedly held firms is not justified.
- Empirical economic literature does not yet tell if disproportionate ownership destroys firm value
- It may be more important to ensure transparency of disproportionate ownership structures than to mandate one share, one vote.

6.5 Comparable overseas securities exchanges which allow companies to issue non-voting ordinary shares include London Stock Exchange, New York Stock Exchange, Nasdaq, and Toronto Stock Exchange. Below is an overview of the regulatory requirements in each of these jurisdictions.

6.6 *London Stock Exchange*: The Financial Services Authority’s UK Listing Authority (UKLA) adopts a flexible approach to the listing of non-voting securities. While there is no specific prohibition to the listing of non-voting shares, in

<sup>3</sup> Proportionality between ownership and control in EU Listed companies: External study commissioned by the European Commission, “Report on the Proportionality principle in the European Union”, 18 May 2007

practical terms, the UKLA would pre-approve any proposal by an issuer to list non-voting shares. Safeguards could be determined on a case by case basis.

6.7 *New York Stock Exchange (NYSE)*: NYSE permits the issue of non-voting shares if the following safeguards are met:

- The non-voting shares must meet all original listing standards applicable to ordinary shares;
- The rights of the holders of the non-voting shares must, except for voting rights, be substantially the same as those of the ordinary shareholders. This does not prevent a company from issuing preference shares with no voting rights as preference shares are not subject to this particular safeguard; and
- The holders of non-voting securities must receive all communications, including proxy voting material, sent generally to the ordinary shareholders.

A company cannot convert listed voting shares into non-voting shares.

NYSE will accept any action relating to the voting rights structure of a non-US issuer, even if it does not comply with NYSE's requirements for domestic companies, providing the action is not prohibited by the company's home country law.

6.8 *Nasdaq*: Nasdaq has a similar policy to NYSE. Non-voting shares may be listed if the following safeguards are met:

- The non-voting shares must meet all original listing standards applicable to ordinary shares;
- The issuer of the shares must hold an annual general meeting of all shareholders, which must include the holders of non-voting shares (but which may exclude holders of non-voting preferred shares).

A company cannot convert listed voting shares into non-voting shares.

Nasdaq will accept any action relating to the voting rights structure of a non-US issuer, even if it does not comply with Nasdaq's requirements for domestic companies, providing the action is not prohibited by the company's home country law.

6.9 *Toronto Stock Exchange (TSX)*: TSX allow the listing of non-voting shares subject to the following safeguards:

- If a share certificate is issued for non-voting shares, it must be specifically designated as "non-voting"
- Holders of non-voting shares must be given notice of security holders' meetings and must be allowed to attend and to speak at all such meetings to the extent that an ordinary shareholder would be entitled to attend and to speak. These rights must be included in the company's charter documents
- A company which has issued non-voting shares must describe the lack of voting rights attaching to those shares in all documents, other than financial statements, sent to security holders and files with TSX (including information circulars, proxy statements and directors' circulars);
- Holders of non-voting shares must be sent concurrently all documents which are sent to ordinary shareholders in connection with a meeting of security holders, including information circulars, notices of meeting, annual reports and financial statements; and
- Non-voting shares must be subject to acceptable "coat-tail" provision which give holders of non-voting shares voting rights if a takeover proposal for the company treats voting and non-voting shares differently. The wording of these provisions must be pre-approved by the TSX.

## 7. Straw Man Proposal For Consultation

7.1 ASX has developed and put forward for comment a “straw man” proposal in order that this public consultation can be meaningful. This will assist ASX more than a general debate around the pros and cons of non-voting shares.

7.2 ASX requests feedback on the following proposed rule amendment and accompanying safeguards:

7.3 ASX listing rule 6.9 be amended to allow listed entities to issue non-voting ordinary securities subject to the following conditions:

- a. the company’s constitution does not preclude the issue of non-voting ordinary securities; and
- b. the company is seeking admission to the official list and has clearly set out in its IPO documentation the terms and conditions attaching to non-voting shares  
*OR*  
the company is currently listed on ASX and has obtained shareholder approval by ordinary resolution to issue non-voting shares, such approval to expire after 12 months if non-voting securities are not issued by the company; and
- c. the rights of the holders of non-voting ordinary securities are substantially the same as the rights of holders of voting securities, except for the voting power per security; and
- d. non-voting ordinary shares receive a dividend equal to or greater than ordinary voting shareholders; and
- e. non-voting shareholders receive equal voting rights in the following circumstances:
  - (i) Proposal to wind-up the company
  - (ii) Proposal to buy-back or reduce voting ordinary capital

7.4 ASX invites comment by **Friday 7 March 2008**.

Comments can be sent to:

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