Australasian Investor Relations Association

ABN:66095554153
GPO Box 1365
Sydney NSW 2001 Australia
Telephone +612 9872 9100
+612 9872 9200
administration@aira.org.au

18 December 2012

Sent by email: camac@camac.gov.au

Corporations and Markets Authority Committee

GPO Box 3967

Sydney NSW 2001

Dear Sirs,

Submission on the future of the AGM and shareholder engagement

The Australasian Investor Relations Association would like to thank the CAMAC for the opportunity to comment on its Discussion Paper. We have focussed our comments on corporate engagement with investors and not the AGM per se.

The Australasian Investor Relations Association (AIRA) was formed with the object of advancing the awareness of and best practice in investor relations in Australasia and thereby improving the relationship between listed entities and the investment community. Among other aims, it seeks to act as a united voice for the investor relations community, in areas advancing professional standards, including in best practice disclosure. AIRA's 150 corporate members represent approximately two-thirds of the market capitalization listed on ASX.

We welcome CAMAC's initiative in launching this debate. As you will appreciate, engagement with equity – and debt – holders lies at the heart of the Investor Relations task, and AIRA members provide a vital channel of communication, linking boards of listed companies with investors. This channel is of course highly regulated, and a large element of an IRO skill set is in ensuring compliance, while building constructive long term relationships with sources of capital.

In doing so, IRO's take account of the uniqueness of their company; no single approach works for all companies. Consequently, AIRA believes that guidance as opposed to fixed regulation is preferred.

Shareholder engagement

A key purpose of investor relations in listed companies is to help investors and potential investors create a fair valuation of the company, through enhancing their understanding of the context in which the company is operating. To do this, IR teams support the board of the company in developing beneficial relationships. AIRA and its equivalent organisations around the world have over many years developed best practice guides into how to achieve this.

In our experience, creating formal, mandatory processes for all companies to follow is unhelpful, as each investor situation is different.

- should there be more formalised guidance on how the members of a company's board engage with shareholders?
    - Clearly every company is different in the make-up of its shareholders. Some are fortunate enough to have long term, supportive investors who understand the long term equity story. At the other end of the spectrum, short term speculators in practice rarely 'engage' in the long term. The skills of the Investor Relations team lie in being able to create beneficial relationships in both situations. Creating 'formalised' guidance – which would become the default minimum standard, would risk losing this skilled, as needed, intervention.
- should the equivalent of the UK Stewardship Code be introduced into Australia? This Code sets out principles and guidance on how various institutional shareholders should discharge their position as significant equity owners?
    - The Stewardship Code in the UK has proven to be a good start. Indeed, the European Commission is examining whether potential EU-wide adoption could be of benefit. However, the Code is far from the finished article. Indeed the FRC is in the middle of changes to improve it. These include encouraging more regular updates to investor disclosures, disclosure of the use they make of proxy voting, disclosure of stock lending policies, and provisions around becoming insiders. These are helpful additions, in improving the practicalities of relationships between companies and their investors.
      We also note that the uptake by investors is very limited, and compliance more limited still.
      Consequently, we consider that introduction of a "Stewardship Code" would be helpful, but it should be based on a 'comply or explain' model, and be subject to continuous review.

- does the manner in which institutional shareholders utilise the services of proxy advisers require enhanced guidance or regulation ?
    - We agree with your analysis of the scale and scope of this issue. Many public companies in Australia have had mixed experiences with proxy advisers. On the one hand the advisers play a useful role in adding to the participation of investors in voting.
      However, many companies have found that the advisers can be in practice frustrating to deal with. The quality of discussion with their representatives can leave a lot to be desired. Even with errors of understanding in the facts surrounding a vote, a recommendation can be difficult to change. Many are tied to their hard-coded policies.
      Engaging directly with the fund manager on governance issues following a proxy adviser's recommendation is also patchy; in our members' experience, long investors with well established compliance functions are more reluctant to change a view formed by the proxy adviser, than their boutique investor peers, where the fund manager – familiar with the company and its investor proposition – can vote with a deeper understanding.
      So in our view, there is a role for regulators in Australia in ensuring that proxy advisers engage deeply in their understanding of the company, and avoid a tick the box, yes/no approach.

Annual reports

As with so much that touches on investor relations, the role of the annual report varies company to company. To a few, it is a burdensome, compliance focussed chore. To others, it is an important communications opportunity. The latter speak of its use as a "corporate brochure", especially where the customers are C-suite (eg outsourcing), and as a useful tool in tendering for contracts. Others in luxury goods speak of 'thump factor' – using the report to illustrate their approach to quality. Others consider it a key in the retail investor communications suite.

There is also a general support for the idea that there is a need for a report which captures the company's financial and strategic state, duly audited, at a point in time.

However, among all companies there is a concern that the report has also become a "repository" for technical disclosure. We note in the UK for example a range of new disclosures around audit, on greenhouse gas emissions, on board diversity, and many others which will continue to grow the size of the annual report. Doubtless of value to some but by no means all.

We tend to agree with the comment in your paper regarding the where the annual reports fits in the reporting calendar.

In our view, it is not possible to construct a single printed document which meets the highly specialised needs of the huge range of individual audiences, while retaining flow and readability. Consequently, constructing guidance which seeks to create a standard for reporting is also not possible.

In our view, regulations should permit and encourage issuers to tell a connected equity story in a document that would be available on request in printed form, while allowing companies to make technical disclosures in a separate report, which can appear online only.

- do annual reports contain unnecessary 'clutter'?
    - We think that there is a purpose behind all disclosures in the report, at least to some market participants. However to oblige *all* readers to wade through these disclosures is unhelpful.
- should annual reports more clearly distinguish between a high level strategic report (which identifies the strategy and future direction of the company as well as the challenges facing it) and other supporting information?
    - Yes. We think the approach proposed in the UK more accurately reflects best practice investor relations, in creating distinct communications for distinct audiences.
- what technological developments might be employed to assist shareholders to glean useful information from the annual report?
    - We are supportive of greater use of the company's website as a key distribution point for company related information. The technologies that allow each user (investor, analyst, activist, employee, customer...) to create their own reporting suite, is very helpful. We note the rising number of accesses to company IR websites through devices other than computers. Ipads, mobile phones etc now represent more than one fifth of all accesses.
    - We also note the slow but steady evolution of "social media" in investor communications. Research done by Leipzig University highlights the breadth of opportunities available to companies and their audiences to develop closer engagement. The 'push' element of this communication is already well advanced, with the vast majority of issuers taking advantage; however there is a long way to go before social media helps fully in engagement. For that reason we do NOT suggest that the social media on their own should comprise sufficient distribution for regulatory purposes.
    - On XBRL, we are in broad terms supportive of its wider use. However we continue to have several concerns, including its lack of adoption by users including analysts (both sell and buy side), and its focus on annually updated numerical data. When taxonomies are developed that allow description of non financial assets, strategies, business models etc, this will change.

Future of the AGM

Most IR teams at public companies do not regard the AGM as a significant opportunity to engage with shareholders. It is a process that is expensive, and has little to do with communication of the longer term value story. Consequently, our members support greater use of technology to enable the ever widening stakeholder group to raise issues they find important.

Thank you again for the opportunity to contribute to this important debate. Naturally, we remain available for any clarifications needed.

Yours sincerely

Ian Matheson
Chief Executive officer of
Australasian Investor Relations Association

18 December 2012

Ms Joanne Rees
Convenor
CAMAC
GPO Box 3967
SYDNEY NSW 2001 camac@camac.gov.au

Dear Ms Rees

The AGM and shareholder engagement

The Group of 100 (G100) is an organization of chief financial officers from Australia's largest business enterprises with the purpose of advancing Australia's financial competitiveness. We are pleased to provide comment on the following questions raised in the CAMAC discussion paper.

Shareholder engagement

Should legislative or other initiatives (for instance, additional ASX Corporate Governance Council, or other, guidance) be adopted, and if so for what reasons, concerning:

- *the role of the board collectively as it relates to engagement with institutional/retail shareholders throughout the year, including leading up to the AGM*
- *the role of particular board members, such as the board chair or the chairs of board committees, in relation to engagement with institutional/retail shareholders*
- *the role of institutional shareholders throughout the year, including leading up to the AGM. In this context:*
  - *is there a problem with having a peak AGM season and, if so, how might this matter be resolved*
  - *should at least some institutional shareholders be required or encouraged to report on the nature and level of their engagement with the companies in which they invest, in the manner provided for in the UK Stewardship Code or otherwise*
- *corporate briefings*

  The G100 considers that it is good practice for the transcript of corporate briefings to be placed on the company's website.

- *the role of proxy advisers, including:*
  - *standards for investors using proxy advisers, including the extent to which these investors should be entitled to rely on the advice of proxy advisers in making voting decisions, or, alternatively, whether those investors should have some obligation to bring an independent mind to bear on these matters.*
  - *Standards for proxy advisers*

  Proxy advisors play an important role in the process of engagement between the company and some classes of shareholders. As such, it is important that there is transparency about their activities, the resources and skills at their disposal, the ways in which they approach their tasks and how they are remunerated.

Accordingly, the G100 considers that proxy advisors, and the institutions that engage their services, should be subject to codes of behaviour for their respective operations along the lines of the Stewardship Code in the United Kingdom. Such Codes should be prepared in association with industry/professional bodies which would apply to organisations on an 'if not, why not' basis.

The G100 believes that in view of their activities and their growing significance in investment markets it is desirable that there be disciplines regarding institutional investors and their use of proxy advisors.

It is important that the primary relationship between shareholders and the company be maintained. To this end it is recommended that guidelines be drawn up, which recommend that shareholders advise the company should they intend to follow a proxy advisor's recommendation to vote against a motion.

Could greater use be made of technology to promote shareholder engagement outside the AGM and, if so, how?
The G100 believes that developments in technology and the social media provide opportunities for more timely and cost effective communication with shareholders.

For example, a range of company information can be published on the website as and when events occur rather than forming part of the annual report. Transcripts etc of analyst briefings and other information could be included on the website and, subject to amendments to the Corporations Law, included by reference in the directors' report. Such an approach would provide more timely communication with shareholders and contribute to a reduction in the volume of the annual report.

The annual report
Should legislative or other changes be adopted, and if so for what reasons, concerning any aspect of the annual report requirements?

In this context:
- *do the current reporting requirements produce any unnecessary information ('clutter') in annual reports and, if so, how might this be reduced?*
  The G100 strongly believes that compliance with current requirements creates unnecessary clutter in annual reports. A major contributor to such clutter arises from the approach to compliance with accounting standards by companies, auditors and regulators. For example, standard-setters tend to set disclosures on a standard by standard basis and adopt an approach that more disclosure is better without considering the overall disclosure load. Even though materiality applies to compliance with the disclosure requirements auditors and regulators expect blanket compliance with the result that companies tend to comply rather than spend time and cost justifying why a particular disclosure is not made.

This is an outcome of the lack of a principles based framework for developing disclosure requirements on the part of the standard-setter.

The G100's concerns about this aspect of clutter and ways in which it can be addressed are explained in the G100/PricewaterhouseCoopers publication *"Less is More"* which is attached to this submission. {Copies are also available at www.group100.com.au).

However, we do not believe that this is an issue which CAMAC can resolve. As part of its conceptual framework project the IASB will consider the development of a principles-based disclosure framework and the outcome of related work by other bodies such as the Managing Complexity Task Force of the Financial Reporting Council, the Financial Accounting Standards Board and the European Financial Reporting Advisory Group.

- *should the reporting requirements be redesigned in any respect, including along any of the lines adopted, or under consideration, in overseas jurisdictions, such as having a strategic report and an annual directors' statement?*
  The G100 considers that the reporting system could be redesigned so that companies lodge detailed information with the regulator and provide a shorter shareholder friendly report to shareholders with the lodged documents available on the website for those shareholders and other users seeking more detailed information. We consider that the shareholder friendly document should comprise the financial statements, an operating and financial review and an abridged audit report and incorporate, by reference, other documents such as the remuneration and corporate governance statement.

  This is based on the view that the annual report is essentially a document of record and a legal compliance exercise, the key aspects of which can be communicated to the general body of shareholders more effectively and efficiently by other means. For example, some companies already provide separate simpler reports to shareholders, often described as annual reviews, to better communicate with shareholders and address the volume and complexity of the annual report.

- *what, if any, issues of liability might arise in the event of changes to the reporting requirements, particularly in relation to forward-looking statements, and how might this matter be dealt with;*
- *what, if any, initiatives might be introduced to cater for future innovations in reporting (for instance, would it be beneficial to establish the equivalent of a Financial Reporting Laboratory)?*
  The G100 has noted the formation and activities of the Financial Reporting laboratory in the United Kingdom and at this stage does not believe that there is a case for replicating this body in Australia. Although interesting in concept, there is a lack of evidence whether it can achieve its objectives.

Recent experience with the formation and subsequent removal of the Financial Reporting Panel in Australia reflects the difficulties of imitating developments elsewhere.

Yours sincerely
Group of 100 Inc

Terry Bowen
President

IAG
Insurance Australia Group

SUBMISSION TO CORPORATIONS AND MARKET ADVISORY COMMITTEE – THE AGM AND SHAREHOLDER ENGAGEMENT

December 2012

SUMMARY

- IAG has more than 808,000 shareholders (as at August 2012). IAG's register is the third largest in Australia.
- IAG believes annual general meetings (AGMs) provide a forum for shareholder participation in the process of director accountability and engagement by shareholders towards scrutiny of company management.
- IAG considers the AGM provides a valuable forum to facilitate effective corporate governance. IAG believes shareholders understanding and exercising their rights compliments the legal obligation on directors and management to promote and encourage accountability and company performance.
- IAG's corporate governance framework is designed to facilitate and protect the exercise of shareholders' rights. It is based on the premise that shareholders have the right to contribute to, and to be sufficiently informed on, decisions impacting significantly on corporate performance.
- IAG supports amendments to the *Corporations Act 2001* to remove the current "100 member rule" which allows as few as 100 members to requisition general meetings and extraordinary general meetings of listed companies.
- IAG is supportive of reform that seeks to maintain a balance between the need to facilitate shareholder participation against the need to manage the associated costs to companies

INTRODUCTION

INSURANCE AUSTRALIA GROUP (IAG)

IAG is the parent company of an international general insurance group, with operations in Australia, New Zealand, the United Kingdom and Asia. Its current businesses underwrite over $9 billion of premium per annum and pay over $6 billion in claims per annum. IAG employs more than 13,600 people of whom around 9,000 are in Australia. Across our portfolio of brands IAG insures 7.7 million cars, 2.9 million homes, 103,000 farms, 117,000 employers and nearly 400,000 businesses. IAG had more than 16.1 million policies in force in financial year 2012.

Within Australia, IAG's Direct Insurance business provides personal insurance products as well as business insurance packages targeted at sole operators and smaller businesses in NSW, ACT, Queensland and Tasmania primarily under the NRMA Insurance brand. SGIO is the primary brand in Western Australia, and SGIC in South Australia. In Australia, IAG also has a distribution agreement with RACV (underwritten by Insurance Manufacturers of Australia – owned 70% IAG; 30% RACV) in Victoria. Products are distributed through branches, call centres, the internet and representatives.

Within Australia, IAG's intermediated insurance products are sold nationally, primarily under the CGU Insurance and Swann Insurance brands through a network of more than 1,000 intermediaries, such as brokers, agents, motor dealerships and financial institutions. CGU is also a leading provider of workers' compensation services in Australia.

IAG'S INTEREST

IAG's interest in the Corporations and Market Advisory Committee (CAMAC) *Discussion Paper – The AGM and Shareholder Engagement* (September 2012) is driven by our large, predominantly retail shareholder register. IAG has more than 808,000 shareholders (as at August 2012). IAG's register is the third largest in Australia.

Moreover, IAG's interest is driven by a commitment to achieving sustainable corporate governance that meets the needs of shareholders, customers, as well as the wider community. We remain conscious of our responsibilities as a corporate citizen and to our shareholders.

To ensure we create value for our shareholders in a sustainable way, IAG is committed to the highest standard of corporate governance. Our approach to governance is based on the view that it must be more than just compliance. Whilst we already have the systems to help comply with a multitude of regulations, codes, rules and practices which govern how we operate, we believe the best protection for a company is a healthy risk management culture based on strong values and a commitment to achieving the company's goals.

IAG believes annual general meetings (AGMs) provide a forum for shareholder participation in the process of director accountability and engagement by shareholders towards scrutiny of company management. IAG considers the AGM provides a valuable forum to facilitate effective corporate governance. IAG believes shareholders understanding and exercising their rights compliments the legal obligation on directors and management to promote and encourage accountability and company performance.

IAG'S ENGAGEMENT OF SHAREHOLDERS

IAG's corporate governance framework is designed to facilitate and protect the exercise of shareholders' rights. It is based on the premise that shareholders have the right to contribute to, and to be sufficiently informed on, decisions impacting significantly on corporate performance.

In keeping with IAG's *Code of Conduct* and the spirit of continuous disclosure, the Group is committed to ensuring shareholders are informed of significant developments for the Group. Regular announcements to the ASX are proactively relayed by the company through an email messaging service to shareholders and other users who are registered to receive such emails, as well as being posted on the company's website.

IAG maintains a Shareholder Centre page on its website at www.iag.com.au/shareholder/ which provides shareholders with access to their holdings of IAG securities. This web page is actively promoted to shareholders.

Over 164,000 ordinary shareholders, representing approximately 20.3% of total shareholders at 2 August 2012, have registered their email address, an increase of approximately 3% in the last 12 months following targeted approaches to shareholders. Shareholders who use this service will be advised when communications including the annual and interim reports, annual reviews, dividend advices and holding balance statements are available to be accessed via the internet.

IAG also has an email system to alert investors, beneficial owners, and other interested parties who may not be shareholders to receive important media releases, financial announcements, presentations and annual reports as they are released to the market through the ASX.

Media coverage of key events is also sought as a means of delivering information to shareholders, investors and the market. Formal communication with shareholders and investors is also conducted via the annual and interim reports, annual review and at the AGM which is also webcast for viewing by interested parties including shareholders.

IAG is mindful of the need to adopt best practices in the drafting of notices for AGMs and other communications with shareholders to ensure that they are honest, accurate, informative and not misleading. All AGM material can be found on IAG's website www.iag.com.au/shareholder/agm/.

Online proxy and direct voting are available to IAG shareholders and authorised intermediaries such as custodians and help to facilitate lodgement by shareholders of their votes on resolutions put to AGMs.

Shareholders are encouraged to attend AGMs and ask questions of the Chairman and the Board. For shareholders who are unable to attend the AGM, a question form is included with their notice of meeting. Their questions are collated and during the course of the general meeting the Chairman or CEO will respond where possible to the issues raised.

Shareholders and investors may raise any issues or concerns at any time by contacting the company by email.

The external auditor attends AGMs and is available to answer shareholders' questions concerning the conduct of the audit, the preparation and content of the auditor's report, the accounting policies adopted and audit independence.

IAG'S ENGAGEMENT OF SHAREHOLDERS

IAG believes matters relating to the conduct of meetings, including discussions on resolutions, should properly be left to the Chairman of the meeting. It is neither practical nor appropriate to mandate a minimum discussion time.

IAG is committed to ensuring all investors have access to information on IAG's financial performance. IAG posts on its website all investor and media material released to the ASX, comprising:

- Annual and interim reports;
- Investor and media releases and presentations of half-year and full-year results;
- Notices of general meetings and explanatory material;
- Real-time webcasts of CEO and CFO presentations at half-year and full-year results announcements for those unable to be physically present;
- Archived recordings of the same events for reference after the event;
- The Chairman's and CEO's addresses to the AGM;
- Investor and media releases and presentations regarding divestments and acquisitions;
- Investor and media presentations given at investor strategy sessions and other one off events; and
- All other information released to the market.

IAG reports annually on its social, economic and environmental performance against a series of indicators. The quantitative results of IAG's business sustainability performance are incorporated into the Company's annual review. The results of IAG's business sustainability performance are summarised in the Company's annual review, and full disclosure is shown in the 2012 Sustainability Report. This approach to the reporting of IAG's business sustainability performance demonstrates the ongoing commitment to ensuring business sustainability issues are considered as part of IAG's overall performance.

IAG'S ENGAGEMENT OF SHAREHOLDERS

IAG notes the *Discussion Paper* highlights "In Australia alone, there is also a right for 100 shareholders to requisition a meeting regardless of how much share capital they hold collectively. The issue is whether any shareholder numerical test should remain". (page 27)

The Australian business community has been in ongoing discussion with the Australian Government to amend the *Corporations Act 2001*, to raise the threshold required for shareholders to call special general meetings of a corporation.

Section 249D(b) of the *Corporations Act 2001* requires a corporation to hold a Special General Meeting if it is petitioned to do so by at least 100 members who are entitled to vote at a general meeting.

IAG supports amendments to the *Corporations Act 2001* to remove the current "100 member rule" which allows as few as 100 members to requisition general meetings and extraordinary general meetings of listed companies.

The intention behind the amendment of the 100 member rule is to encourage appropriate shareholder participation in corporate governance, while reducing the associated costs of such participation, especially when meetings are called for frivolous or vexatious reasons.

IAG notes the *Discussion Paper* highlights a CASAC Report recommendation that "..the shareholder numerical test be repealed and that only shareholders who, collectively, hold at least 5% of the votes that may be cast at a general meeting should have the power to requisition a general meeting of a listed public company" (page 27)

We believe raising the threshold required for shareholders to call meetings will ensure that for entities with large and diverse member registers, funds are not wasted by the actions of minority special groups, at the expense of the majority of shareholders.

In our submissions made to both the Parliamentary Secretary and the Joint Parliamentary Committee in April 2005, we stated:

> *"…IAG is confident that the amending legislation will not have a deleterious effect upon the proper activities and involvement of shareholders and will militate against wasteful use of shareholders' funds that can result in the calling of unscheduled meetings of listed companies…"*

However, we do note that the shareholders can continue to raise legitimate issues of concern, via the AGM process and through mechanisms voluntarily introduced by public companies (ie investor feedback emails).

We remain conscious of our responsibilities as a corporate citizen and to our shareholders. We continue to believe that the expense of these meetings is not the most appropriate use of members' funds and that members ought to be encouraged to place motions on notice at scheduled meetings - an option available to them through s.249N *Corporations Act 2001*.

CONCLUSION

IAG is supportive of reform that seeks to maintain a balance between the need to facilitate shareholder participation against the need to manage the associated costs to companies.

Submission to the Corporations and Markets Advisory Committee

The AGM and Shareholder Engagement Discussion Paper

By the UWS Law of Associations Group

School of Law- University of Western Sydney
Web: www.uws.edu.au
Locked Bag 1797
Penrith South DC NSW 1797

Introduction

This submission addresses the release of the CAMAC's discussion paper on the *AGM and Shareholder Engagement* (September 2012). The UWS Law of Associations Group wishes to provide an informed debate on the critical issues raised by the discussion paper. Some of the suggestions that have been provided in this submission are of a policy nature and consider how to improve shareholders' engagement at AGMs.

If any of the responses require further explanation please contact Dr Marina Nehme at the UWS School of Law at m.nehme@uws.edu.au.

Members involved in producing this response

NEHME; Marina is a Senior Lecturer at the University of Western Sydney in the Parramatta Campus. She has a doctoral research on enforceable undertakings. Her research is primarily in corporate law, regulation, indigenous corporate governance and financial services laws.

HANNOUF; Waill is a Commerce/Law student at the University of Western Sydney. He has a keen interest in corporate law, employment law and property law issues.

ILLIC; Aleksandra Ilic is Arts (Philosophy)/Law student at the University of Western Sydney and a summer clerk at KWM. Her prior professional experience includes volunteering at NSW Legal Aid Commission and working at a suburban law practice.

KHOUCHABA; Danielle is an Economics/Law student at the University of Western Sydney. She is interested in specialising in corporate law issues.

ORAHA; Dalya is an Arts/Law student at the University of Western Sydney. She is a part time paralegal in a firm called Lex Fori Lawyers. She is mainly involved in Personal Injury Claims and Family Law Matters.

General Observations:

The Discussion paper, *The AGM and Shareholder Engagement*, considers the future of AGMs in Australia and discusses the introduction of strategies that may improve shareholders' engagement at AGMs. The observations of the UWS Law of Associations Group can be summarised in the following manner:

- Corporate briefing content should be available to retail shareholders;
- The '100 member rule' should be abolished. In its place, s 249D should provide that 5% of the shareholders in the company may request a meeting from the directors;
- Reforms need to be made to the reporting requirements. Changes to the reporting system need to be accompanied with a safe-harbor to directors (see [4.3]);
- The statutory time frame for AGMs need to be extended;
- Any member should be able to place items on the agenda of an AGM to encourage shareholders involvement;
- Direct voting prior and during the meeting should be introduced;
- Greater use of technology is needed to enhance different aspects of AGMs such as notices, the meetings themselves, the reporting requirements...
- The AGM should not be abolished but its format should be changed. AGMs should take the form of hybrid physical-online meetings. This should be compulsory for listed public companies and a replaceable rule for unlisted public companies.

Consideration Chapter 3

[3.1] The role of the board collectively as it relates to engagement with institutional/retail shareholders throughout the year, including leading up to the AGM

We do not support the introduction of legislation in this area. We believe that, under the current system, there is enough guidance for companies and directors regarding this matter. Consequently, the implementation of initiatives to engage shareholder should be left in the hand of the board of directors.

[3.2] The role of particular board members, such as the board chair or the chairs of board committees, in relation to engagement with institutional/retail shareholders

We do not support the introduction of legislation in this area. It should be up to each company to decide on the manner in which they engage their shareholders. Consequently, this matter should be left to the discretion of each company.

[3.3] The role of institutional shareholders throughout the year, including leading up to the AGM. In this context:

– is there a problem with having a peak AGM season and, if so, how might this matter be resolved

The problem that arises from having a peak AGM season is highlighted in Chapter 5 of the CAMAC discussion paper. This problem may be resolved by extending the AGM period. See [5.1] of this submission for further discussion on this point.

– should at least some institutional shareholders be required or encouraged to report on the nature and level of their engagement with the companies in which they invest, in the manner provided for in the UK Stewardship Code or otherwise

We do not support the introduction of a Stewardship Code equivalent in Australia because institutional shareholders partake in a broad cross-section of the Australian corporate market and the imposition of reporting requirements would pose an undue burden. This burden would arise on two fronts. First, the requirement that institutional investors detail the nature and extent of their investments would be difficult to monitor and maintain. Second, the requirement would incur costs (which are likely to be substantial, given the diversity and scope of most institutional shareholders' investments). We contend that this requirement is untenable.

[3.4] Corporate briefings

We agree with the statement made in the Parliamentary Joint Committee's *Better Shareholders - Better Company Report* that limited shareholders' engagement is the result of 'company or shareholder inertia or apathy, or companies' cultural resistance to acknowledging the views of investors.'[1] It is therefore necessary for companies to actively

[1] Parliamentary Joint Committee on Corporations and Financial Services, *Better Shareholders – Better Company: Shareholder Engagement and Participation in Australia*, June 2008.

encourage and facilitate shareholder participation through corporate briefings.

We contend that ensuring equality of access to corporate briefing information, by way of advance notice to shareholders and employment of technological alternatives (such as making recordings, transcripts, or summaries available), is fundamental to facilitating optimal pre and post-briefing shareholder engagement. Moreover, the corporate briefings should be made publically accessible in circumstances where they contain material information which could impact on the share price of the company. Failure to make these briefings public may result in the breach of the continuous disclosure obligations by the company and, if any person acted in accordance with the information obtained in the course of the briefing, the conduct could constitute insider trading.

[3.5] The role of proxy advisers, including:

– standards for investors using proxy advisers, including the extent to which these investors should be entitled to rely on the advice of proxy advisers in making voting decisions, or, alternatively, whether those investors should have some obligation to bring an independent mind to bear on these matters.

Even though there may be blind reliance by investors on the recommendations of proxy advisers, no regulation is required or recommended to address this issue. It is the right of investors to decide how to use the information they have acquired. They must be able to decide whether or not to follow the information conveyed. Ultimately, it is the investor's choice. Further, the implementation of any regulation may be costly and difficult to enforce.

– standards for proxy advisers

The introduction of a disclosure obligation is necessary to regulate any conflicts of interest that may arise. Accordingly, we recommend that a statutory obligation be imposed requiring proxy advisers to disclose any material interests to their shareholders, irrespective of whether the motions they have been party to and/or have participated in pass or fail.

[3.6] Any other aspect of shareholder engagement?

No comment regarding this matter.

[3.7] Could greater use be made of technology to promote shareholder engagement outside the AGM and, if so, how?

Yes, greater use of technology can be made to maximise shareholder engagement outside the AGM. We recommend that:

- Proxies could be voted electronically.
- The conduct of corporate briefings and AGMs could be supplemented by alternative means of communication including telephone, video conferencing, Skype calls.
- Records, transcripts and summaries of meetings and corporate briefings should be made available by each company on their website and to shareholders by email after the minutes are approved by the chair.

[3.8] Should there be an amendment to the right of 100 members to call a general meeting of a company?

The proposal to repeal or amend the '100 member rule' isn't a novel one. It has been raised and discussed at length in the past decade. [2] The most compelling reasons for which this issue is raised time and time again are:

- There is no 'degree of parity between five per cent of votes and 100 members.'[3] The arbitrariness of the 100 member rule was highlighted by Windeyer J in *NRMA v Snodgrass*[4] when his Honour noted that it is 'extraordinary that in a company… with about 2 million members a general meeting can be summoned by requisition of 100 members, namely one in every 20,000 or 0.005 percent.'

- The repeal of the 100 member rule will bring s 249D in line with s 249F and thereby ensure consistency in the *Corporations Act 2001* (Cth).

- The cost of complying with requests made by a small proportion of shareholders is substantial.

Most compelling counter-arguments include the assertion that:

- The *Corporations Act 2001* (Cth) imposes the satisfaction of the requirements that the call for a general meeting be made for a 'proper purpose.'[5] This requirement acts as a countermeasure against any potential abuse by shareholders of the 100 member rule;

- The 100 member rule encourages shareholders engagement;[6] and

- The expense to shareholders under s 249F would operate as a deterrent to any vexatious shareholders. Consequently, the 100 member rule is not appropriate in that context.

Ultimately, it is our position that amendment to the right of 100 members to call a general meeting should be made. In the continuum of proprietary and listed/unlisted public companies, the 100 member rule is arbitrary as it is unlikely to be relied on in the case of a proprietary company (see membership requirements under s 113(1) of the *Corporations Act*

---

[2] Parliamentary Joint Statutory Committee on Corporations and Securities, *Report on Matters arising from the Company Law Review Act 1998*, 1999 noted that the 100 shareholder threshold was "administratively complex and uncertain"; the Companies and Securities Advisory Committee, *Shareholder participation in the Modern Listed Public Company: Final Report*, June 2000, 9 recommended that the 5% of share capital be the sole criterion for member initiated general meetings; the *Corporations Amendment Regulation 2000* altered the 100 member rule to 5% of shareholders but was repealed by the Senate in June 2000 and further, unsuccessful amendment attempts were made by virtue of the *Corporations Amendment Bill (No. 4) 2002* (Cth) and the *Corporations Amendment Bill (No. 2) 2006* (Cth).

[3] New South Wales Young Lawyers, *Response to the Eposure Draft Bill for Consultation – Corporations Amendment Bill (No. 2) 2006*, 2006, 4.

[4] [2001] NSWSC 76, [10].

[5] *Corporations Act 2001* (Cth) s 249Q.

[6] See for example, Michael Rawling, 'Australia Trade Unions as Shareholder Activists: The Rocky Path Towards Corporate Democracy' (2006) 28 *Sydney Law Review* 227.

2001 (Cth)) or it may be misused by a bare minority (in the case of a public company that has millions of shareholders). In our view, this further illustrates the need to amend the 100 member rule in favour of 5% of shareholders requirement. This requirement will still support minority shareholders engagement.

Consideration Chapter 4

[4.1] Do the current reporting requirements produce any unnecessary information ('clutter') in annual reports and, if so, how might this be reduced

An annual report should provide an organisation with an 'effective method of managing external expectation.'[7] However, this outcome has not always been achieved in practice. For instance, the PJC's *Better Shareholders – Better Company* indicated clearly that retail shareholders are finding it difficult to access the information needed to make decisions.[8] Additionally, the Australian Shareholder's Association (ASA) found that shareholders just 'look at them [reports] but give up before reading them'[9] because the reports are 'too voluminous' for shareholders to even read or consider. [10] Further, the Financial Reporting Council noted the 'clutter' of immaterial information present in the annual report.

This reality is problematic as 'the annual report is the primary source of information regarding a company's activities and strategies.'[11] Consequently, it is important for all shareholders – both retail and institutional – to read the reports to be able to make informed decisions about their investments. Currently, the clutter of information provided by the reporting requirements defeat the purpose of the actual report.

Consequently, we propose the introduction of a new reporting regime that makes information regarding the company more accessible to all shareholders. The company may issue two reports:

- The annual report (the information that needs to be in the report would be consistent with our proposal found in 4.2); and

- A short form report which contains the main information or a summary of the information present in the annual report.

The short form report is to be sent to all shareholders. If shareholders would like to receive more information, then they can ask for the annual report to be sent to them. Such an approach provides the shareholders with the necessary information they need to make their

[7] D. Neu, H. Warsame and K. Pedwell, 'Managing Public Impressions: Environmental Disclosures in Annual Reports' (1998) 23(3) *Accounting, Organizations and Society* 265, 269.
[8] Parliamentary Joint Committee on Corporations and Financial Services, *Better Shareholders – Better Company: Shareholder Engagement and Participation in Australia* (2008) 11.
[9] Commonwealth of Australia, *Parliementary Debates*, Joint Committee on Corporations and Financial Services, 16 April 2006, 21 (Claire Doherty).
[10] Ibid.
[11] Allens Linklaters, *Allens Listed Client Survey CAMAC Review of Annual General Meetings* (2012),10.

decision. Further, it will still allow the company to rely on the annual report as an effective marketing tool to send a certain corporate image or message to investors.[12]

[4.2] Should the reporting requirements be redesigned in any respect, including along any of the lines adopted, or under consideration, in overseas jurisdictions, such as having a strategic report and an annual directors' statement

Reporting requirements should be reviewed and redesigned to ensure that the shareholders are provided with clear and precise information. We believe that the annual report should consist of three parts:

- The first being a strategic report which will be similar to that of the UK's version, however adapted to Australian conditions;

- The second report should be the annual directors' statement which will also be similar to that of the UK's version, however adapted to Australian conditions; and

- The third report called the Shareholder's Report will be purely based on what the shareholders of the company think or acknowledge would be the appropriate information for them. During the AGM, the shareholders would be asked to vote on what information they would like next year's report to include. Voting regarding this matter will be conducted by show of hands (not by poll) to give a voice to retail shareholders. This model may promote shareholder's engagement as they will have a say in what additional information may appear in the report.

[4.3] What, if any, issues of liability might arise in the event of changes to the reporting requirements, particularly in relation to forward-looking statements, and how might this matter be dealt with

Introducing any new reporting system needs to be accompanied with clear guidelines and rules. Anything less may lead to the current problem of complex reporting. Company directors have an increased aversion to risk especially in existing litigious business environment. Consequently, when they are unsure if a matter should be reported on, they would disclose it to escape any potential liability.[13] This uncertainty creates the clutter referred to previously in this submission.[14] Unclear guidelines regarding a new reporting regime will lead to the same clutter of information that is currently present in the annual report.

Further, forward-looking statements of belief or judgement may raise additional liability on directors. It is important to note that this is currently the case as Australian companies do include forward-looking statements in their annual reports.[15] A study conducted by Kent and

[12] Madonna O'Sullivan, Majella Percy and Jenny Stewart, 'Australian Evidence on Corporate Governance Attributes and their Association with Forward-Looking Information in the Annual Report' (2008) 12(1) *Journal of Management and Governance* 5, 6.
[13] Financial Reporting Council, *Managing Complexity in Financial Reporting* (2012) 6.
[14] See for example, [4.2].
[15] *Corporations Act 2001* (Cth), 299.

Ung further indicated that larger companies with less volatile earnings are more likely to provide prospective information then smaller companies with relatively volatile earnings.[16]

While directors may be liable for information in the annual report, they do not have a safe-harbour available to them. The FRC proposed the introduction of such a safe-harbour or a business judgement provision. We do believe that a safe-harbour should be available to directors. However, we do not believe it should be in the form of a business judgement rule akin to the one present under s 180(2) of the *Corporations Act 2001* (Cth). The reason behind this is that the business judgement rule is problematic and needs to be amended.[17] The safe-harbour we propose should be akin to the one present in s 731 of the *Corporations Act 2001* (Cth). Consequently, the safe-harbour would be available if the directors:

- Made all inquiries that were reasonable in the circumstances; and

- Based on these inquiries, the directors believed on reasonable grounds that the statement was not misleading and that there was no omission in the annual report.

This safe-harbour may protect directors from liability when annual reports are issued.

[4.4] How might technology best be employed to increase the accessibility of annual reports

Technology can be best employed through two different methods:

- Firstly, the annual reports should be published online in a pdf format. This will allow members to quickly access the information they need;

- Secondly, a quick summary of the report should be available online with key information. This report has to meet the users' needs by providing interactive information to members. It will further allow the users not only to filter the specific information they require but also to access the level of detail that best suits them. This approach is best implemented with the use of graphical and animated media to express to shareholders who lack financial or business knowledge the desired information in a simple visual display. An example of this can be found in the Barclays Annual Report 2011.[18] Such a report allows interested parties to quickly click on the desired part of the report without contending with the pages ahead.

In addition to this, an offline soft copy version of the report should also be provided. This will help shareholders who lack the resources to access the internet. This can be done by providing the WebPages of the report in an offline format, which can be easily done, as WebPages can be created in an offline format. This type of copy should be distributed through either a Compact Disc or a USB flash drive.

[16] Pamela Kent and Karen Ung, 'Voluntary Disclosure of Forward-Looking Earnings Information in Australia' (2003) 28(3) *Australian Journal of Management* 273.
[17] UWS Corporate Law Academics, *Submission to the Commonwealth Treasury, Review of Sanctions in Corporate Law Consultation Paper*, 31 May 2007.
[18] Baclays, *Barclays Annual Report 2011*,
<(http://reports.barclays.com/ar11/strategicreport/leadership/barclaysataglance.html?cat=m>.

[4.5] What, if any, initiatives might be introduced to cater for future innovations in reporting (for instance, would it be beneficial to establish the equivalent of a Financial Reporting Laboratory)?

If companies adopt the reporting approach proposed at [4.2], there will not be a need to establish a Financial Reporting Laboratory. The existence of a Shareholder's Report will act like a Financial Reporting Laboratory since shareholders can constantly change the third report to better suit their dynamic needs.

Consideration Chapter 5

[5.1] Should there be any change to the statutory time frame for holding an AGM?

The majority of public companies hold their AGM between November and December due to the statutory time requirement imposed by the *Corporations Act 2001* (Cth). This has led to a 'congestion' of AGM in a short period of time.

Allens has issued the results of its client's survey regarding this question. The majority of the respondents were opposed to any changes to the statutory time frame for holding an AGM.[19] Similarly, the ASA did not support an increase in the window for the holding of the AGM as such an extension may not necessarily lead to a better quality of shareholders' engagement. The ASA has noted that companies who have held their AGM outside the two months period – because they received an extension from ASIC regarding this matter – do not necessarily have a better engagement or participation from shareholders.[20]

Even though this may be the case, the extension of the statutory time frame to three months instead of two months may:

- Provide more time for shareholders to consider each motion. Accordingly, this proposal may actually allow the AGM to facilitate shareholders' engagement.

- Allow directors to have greater access to institutional shareholders during peak members' meeting season. They currently do not have such access due to the fact that institutional shareholders are focused on lodging their voting;[21]

- Will add to the flexibility in managing the timing of AGMs; and

- Will not add any extra costs for the corporations.

Consequently, in view of the fact that changing the statutory time frame for holding an AGM is cost neutral, may lead to greater flexibility and more shareholders' engagement, we support the extension of the period in which an AGM has to be held.

[19] Allens, *Allens Listed Client Survey: CAMAC Review of Annual General Meetings* (2012), 13.
[20] Australian Shareholders Association, *ASA Submission: Rethinking the AGM* (2008) 2.
[21] Australian Institute of Company Directors, *Institutional Share Voting and Engagement: Exploring the Links between Directors, Institutional Shareholders and Proxy Advisers* (2011) 4.

[5.2] In what respects, if any, might the requirements for information to be included in the notice of meeting for an AGM be supplemented or modified?

The existing system already requires the AGM meeting's notice to contain full and timely details of company meetings. Further, according to s 249L(3) of the *Corporations Act 2001* (Cth) the information included in the notice must be stated in a 'clear, concise and effective manner.'

Consequently, the information required under the statute and the common law is enough to allow shareholders to make an informed decision about the meeting. Further, the requirements are in accordance with the recommendations of the OECD *Principles of Corporate Governance*. As a result, we do not believe that any change needs to be made in this area.

How might technology be used to make this notice more useful to shareholders?

A provision similar to the one present under s 300 of the *Companies Act 2006* (UK) may be introduced. Such a provision requires companies to post the notice of a meeting on its website. The notice will be available on the website throughout the period beginning with the date of that notification and ending with the conclusion of the meeting. Additionally, information regarding the meeting may be texted or emailed to members if the shareholders opted for this.

Might any other documents usefully be sent with the notice of meeting, and, if so, what?

It would be beneficial for the company to make available to shareholders any private briefing issued by the company to institutional shareholders regarding the matters discussed in the meeting. This will ensure that all shareholders have access to the same information.

[5.3] Should there be provisions for companies to send information about an AGM directly to the beneficial owners of shares held by nominees and, if so, what type of information?

Such a requirement is unnecessary for the reasons highlighted by the *CASAC Report*.[22]

Should there be any provision for beneficial owners of shares in a company to participate in the AGM of that company and, if so, how?

No, there should not be any provision for beneficial owners of shares in a company to participate in the AGM of a company. It is up to these beneficial owners to decide the level of their engagement with the company.

[22] Companies and Securities Advisory Committee,*Shareholder Participation in the Modern Listed Public Company Final Report* (2000) [2.43].

[5.4] Should there be any change to the threshold tests for shareholders placing matters on the agenda of an AGM?

Different countries have different requirements regarding this matter. For example, in the United Kingdom, shareholders may place a matter on the agenda of an AGM if:[23]

- members representing at least 5% of the total voting rights of all the members who have a relevant right to vote (excluding any voting rights attached to any shares in the company held as treasury shares), or
- at least 100 members who have a relevant right to vote and hold shares in the company on which there has been paid up an average sum, per member, of at least £100.

In Sweden, on the other hand, the situation is very different. In Sweden, every shareholder (irrespective of the amount of shares they have) may place a matter on the agenda of the AGM.[24] The latest model encourages shareholder engagement as it promotes the freedom to be heard and the right to receive answers to questions that retail shareholders may have. This method may be one way to boost attendance at meetings as retail shareholders have a say in the shaping of the agenda as long as their motion is for proper purpose (in accordance with s 249D). Consequently, we support this proposal.

[5.5] Should there be any change to the timing requirements for the calling of an AGM, including for shareholders to place matters on the agenda of an AGM, to seek the circulation of statements concerning any resolution, or to nominate persons for the position of director? Should companies be required to publish a pre-agenda notice and, if so, what should be the contents and timing of that notice?

No comment regarding these matters.

[5.6] Does the current law concerning excluded material either create undue difficulties for shareholders who wish to criticise directors or, conversely, unduly restrict directors in vetting out information to be circulated to shareholders at the company's expense?

The current regime regarding excluded material is fair and reasonable. Consequently, we do not propose any changes to the current regime.

[5.7] Should there be any rule regarding the failure to present a resolution at an AGM?

We recommend that the regime remain as is.

[5.8] Should shareholders have greater scope for passing non-binding resolutions at AGMs?

Shareholders should not have a greater scope in passing non-binding resolutions at AGM's as such a proposal may transfer the powers of the board of directors to the members. The reasons behind this are the following:

- Shareholders, unlike directors, have no common law, equitable or statutory duties imposed on them. As a consequence, their actions can be self-motivated and not

[23] *Companies Act 2006* (UK), s 314.
[24] *Companies Act 2005* (Sweden), Chapter 7, s 16.

necessarily for the best interest of the members as a whole. Accordingly, shareholders should not micro-manage the affairs of the company;

- Giving greater scope of power to members may diminish the accountability of directors; and

- It would be contrary to the OECD recommendation.

[5.9] What, if any, additional legislative or best practice procedures should be adopted for companies to seek the views of shareholders on issues they would like discussed at the AGM, or to invite shareholders to submit questions prior to the AGM?

We believe that the proposal outlined in the Business Council of Australia Discussion Paper, *Company and Shareholder Dialogue: Fresh approaches to communication between companies and their shareholders* (2004), should be adopted. Hence, the AGM would have two parts:

- Formal business of the meeting: this will allow shareholders to continue voting on the formal business of the meeting, as usual; and

- Specific issues raised by the shareholders on which they cannot vote on.

Should there be some obligation on the auditor (or the representative of the auditor) to speak at the AGM?

We support the current position. Auditors should continue to have a right to speak or answer questions at the AGM. This position also ensures that we are following the OECD standards of good corporate governance.

What, if any, obligations should a company or a company auditor have to answer questions from shareholders?

No comment regarding this matter.

[5.10] Should any matter be excluded from or, alternatively, added to the business of the AGM?

No comment regarding this matter.

[5.11] What, if any, changes are needed to the current position concerning:

- the general functions and duties of the chair

We do not recommend a change to these functions.

- the chair ensuring attendance of particular persons at the AGM

The procedure in the United Kingdom Corporate Governance Code regarding this matter[25] should be adopted in Australia. This means that the chair should arrange for audit,

[25] UK Corporate Governance Code, s E2.3.

remuneration and nomination committees to be present and able to answer questions at the AGM. This proposal will enhance the accountability regime embedded within the AGM.

- the chair moving motions

We do not recommend any changes to the law regarding this matter.

- motions of dissent from a chair's rulings?

We do not recommend any changes to the law regarding this matter.

Should a chair be obliged to provide shareholders with a reasonable opportunity to discuss a resolution before it is put to the vote?

No comment regarding this matter.

Should a chair have the power to impose any time, or other, limits on an individual shareholder speaking at the AGM?

No comment regarding this matter.

[5.12] What changes, if any, should be made to the current requirements concerning:

- informing shareholders of their right to appoint a proxy
- the proxy form
- pre-completed proxies
- notifying the company of the proxy appointment
- providing an audit trail for lodged proxy votes
- the record date and the proxy appointment date
- irrevocable proxies
- directed and undirected proxies
- renting shares
- proxy speaking and voting at the AGM, or
- any other aspect of proxy voting.

No comment regarding this matter.

[5.13] Should direct voting before the meeting be provided for by legislative or other means, and if so what matters should be covered in any regulatory structure?

Direct voting prior and during the AGM should be provided for by legislation. The regulatory structure needs to cover:

- the form of voting to be implemented;
- the time limits for lodging the direct votes;
- what should happen if there is a change in voting intention from the time that a direct vote is lodged prior to a meeting to the time of the meeting.

[5.14] In what circumstances, if any, should access to pre-meeting voting information be permitted?

Pre-meeting voting information should be restricted and not accessible to anyone other than an independent third party. This person is independent from the board and will be in charge of receiving, collating and checking proxy votes prior to the meeting. He/she will have a duty not to disclose any information about the votes received. Accordingly, pre-meeting voting should remain strictly confidential and off-limits to both directors and shareholders.

This would eliminate the current possibility of directors using their powers to obtain pre-meeting voting information that is not publicly available to solicit votes or to influence the result of resolutions by publishing a progressive tally of pre-meeting voting directions.[26] Additionally, as pre-meeting voting information is not directly related to the function of managing the company, it may be argued that director's access to this information is irrelevant given that it concerns matters within the control of the shareholders, not the directors.[27]

Lastly, disclosing pre-meeting voting information at a meeting may have significant implications when debating a particular resolution.

[5.15] In what manner if any, should access to pre-meeting voting information be regulated before discussion on a proposed resolution?

Before discussion on a proposed resolution is completed, only the independent person who is in charge of collating the votes should be able to access to pre-meeting voting information. The reasons behind this are stated in [5.14].

[5.16] In what manner, if any, should the current requirements concerning the disclosure of pre-meeting votes before voting on a resolution be amended?

The current requirements concerning the disclosure of pre-meeting votes before voting on a resolution should be amended to only allow an independent person receiving and collating the pre-meeting votes to access this information.

[5.17] Should there be legislative or other recognition of online voting during the course of an AGM and, if so, in what respects should this form of voting be regulated?

Whilst it has been argued that it is sufficient for companies to allow for online voting in their constitutions, [28] Australian companies are nevertheless cautious in embracing online voting with the absence of legislative support.[29] With no legislative support, various challenges may arise concerning the validity of the voting obtained through online voting. This may

[26] Companies and Securities Advisory Committee, *Shareholder Participation in the Modern Listed Public Company*, Final Report (2000) 52, <http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2000/$file/Shareholder_final_reportJun00.pdf>.
[27] Ibid, 48.
[28] Bob Austin and Michelle Milligan, 'Online participation in shareholder meetings- how could it work?' (Minter Ellison Lawyers, 12 September 2011).
[29] Corporations and Markets Advisory Committee, *The AGM and shareholder engagement*, Discussion Paper (2012), [5.11].

consequently discourage the utilisation of online voting. Accordingly, we propose the introduction of specific legislation dealing with online voting as it has a number of advantages.

Online voting during the course of the AGM has the potential to increase shareholder engagement as it would provide shareholders unable to attend a physical meeting with the opportunity to take part in the meeting from their home or offices. Further, it will allow them to vote on a matter after hearing the discussion that has taken place about the topic. Consequently, it is time for Australia to implement such online voting. This will put Australia in line with other countries that have introduced online voting.[30] It will further make Australia more competitive in this area. Consequently, we support the introduction of legislation that officially recognises online voting.

The use of direct voting will require some legislative reform. An expansion of the meaning of 'meeting' from a traditional physical understanding to an understanding that regards the online attendant as 'present' in the meeting is essential. The online attendants shouldn't be considered as absentees as they are taking part in the meeting.

[5.18] Do any issues arise concerning voting exclusions on resolutions that must, or may, be considered at an AGM and, if so, how might those issues best be resolved?

No comment regarding this matter.

[5.19] Should any changes be made to the current provisions regarding voting by show of hands?

Whilst the current method of voting by a show of hands has been criticised as being undemocratic in the sense that it does not represent the true voting position of a company's shareholders, we nevertheless believe that no changes should be made to the provisions regarding this method of voting. The reason behind this is because the section dealing with show of hands (s 250J) is a replaceable rule. Consequently, the company should be the one who decides if it would like to have such a voting system in place.

Further, whilst resolutions passed on a show of hands are said to disenfranchise institutional shareholders who cannot attend meetings and result in low transparency,[31] the method nevertheless allows non-contentious matters to be dealt with inexpensively and fast.

However, we note that a potential issue may arise if online voting during the course of the AGM is introduced. This issue can easily be remedied by a change in the provisions that identify an electronic equivalent to a show of hands.[32]

---

[30] Elizabeth Boros, 'The online Corporation: Electronic corporate communications' (Discussion Paper, Centre for Corporate Law & Securities Regulation, December 1999), [3.11]; see for example Delaware *General Corporations Law*, s211.

[31] Dean Paatsch and Simon Connal 'The dark side of proxy voting', *Business Spectator* (online), 1 November 2012 <http://www.businessspectator.com.au/bs.nsf/Article/proxy-voting-Australia-custodian-shareholders-pd20121024-ZD4E6?opendocument&src=rss>.

[32] Boros, above n 30.

[5.20] What legislative, or other, verification initiatives, if any, should be introduced concerning voting by poll at an AGM? Should one or more verification requirements apply in all instances or only if, say, a threshold number of shareholders require it?

No comment regarding these matters.

[5.21] Should any steps be taken to promote more consistency in the disclosure to the market of voting results?

Policy initiatives that promote consistency in the disclosure to the market of voting results would be beneficial. It would provide a formal method for companies and markets to analyse the voting behaviour of shareholders, including the degree to which they are likely to engage their voting rights.[33] Disclosure of voting results to the market is a requirement in many other countries around the world, and has been dubbed as a vital element to an analysis of an engagement strategy.[34] As such we believe that introducing a regime that promotes consistent disclosure of voting results would be helpful in determining the effectiveness of other policy initiatives aimed at increasing shareholder engagement.

[5.22] Following the AGM, what, if any, rights of access should shareholders generally, or the person proposing a resolution, have to voting documents?

No comment regarding this matter.

[5.23] What, if any, changes should be made to the requirements concerning the recording of details of voting in the minutes of the AGM?

If amendments are made to recognise direct votes, the legislation should require details on direct voting during the meeting to be minuted. Other than this, we believe that no changes should be made to the requirements concerning the recording of details of voting in the minutes of the AGM.

[5.24] Should there be a statutory minimum period for retention of records of voting on resolutions at an AGM and, if so, for what period?

We propose the introduction of a seven year statutory period for retention of records on voting on resolution at an AGM. This will not be onerous as the information can be kept online.

[5.25] Should there be any legislative initiatives in regard to the election of directors, including in relation to:

- the frequency with which directors should stand for re-election
- the right of shareholders to question candidates (and receive answers)
- the voting procedure?

No comment regarding this matter.

[33] Paul Hewitt, 'The Exercise of Shareholder Rights: Country Comparison of Turnout and Dissent' (Working paper No 3, OECD Corporate Governance, August 2011).
[34] Ibid.

[5.26] Are there any matters concerning dual-listing that should be taken into account in the regulation of AGMs?

No comment regarding this matter.

[5.27] Are there any problems in the voting or other aspects of AGMs for overseas holders of shareholding interests in Australian regulated companies?

No comment regarding this matter.

Consideration Chapter 6

For some or all public companies, should the functions of the AGM be changed in some manner, or the obligation to hold an AGM be abolished? In this context, what technological developments might be taken into account in considering the possible functions of the AGM? For some or all public companies, and if the AGM is retained in some manner, what legislative or other initiatives, if any, should there be in regard to the possible formats of the AGM? In this context, what technological developments might be taken into account in considering possible formats for the AGM?

The AGM is an essential mode of communication between shareholders and management as it is an instrument of corporate governance that allows shareholders – retail and institutional – to question the board about the performance of the company.[35] It consequently provides shareholders with an unmediated opportunity to call management to account for their actions. As a result, AGMs should not be abolished. Efforts need to be made to ensure greater engagement in the process by all the shareholders.

One way this can be achieved is by changing the format of the AGM. We propose that AGMs take the form of a hybrid physical–online meeting. Such a format will allow all shareholders – irrespective of where they reside – to take part in the meeting, ask questions and vote even though they are not physically at the meeting. The legislation may make the format of such meetings compulsory to listed public companies and a replaceable rule to unlisted public companies. Such flexibility is essential as one size does not fit all.

UWS Law of Associations Group

14 December 2012

[35] Bino Catasus and Gustav Johed, 'Annual General Meetings – Rituals of Closure or Ideal Speech Situations? A Dual Analysis' (2007) 23 *Scandinavian Journal of Management* 168, 169.

CHARTERED SECRETARIES
AUSTRALIA

Leaders in governance

19 December 2012

John Kluver
Executive Director
Corporations and Markets Advisory Committee
GPO Box 3967
SYDNEY NSW 2001

By email: john.kluver@camac.gov.au
cc : camac@camac.gov.au

Dear John

The AGM and shareholder engagement

Chartered Secretaries Australia (CSA) is the independent leader in governance and risk management. As the peak professional body delivering accredited education and the most practical and authoritative training and information in the field, we are focused on improving organisational performance and transparency.

Our Members have primary responsibility to develop and implement governance frameworks in public listed, unlisted and private companies, and not-for-profit and public sector organisations. In listed companies they have primary responsibility to deal with the Australian Securities Exchange (ASX) and interpret and implement the Listing Rules. Our Members have a thorough working knowledge of the operations of the markets and the needs of investors, as well as compliance with the Corporations Act (the Act). We have drawn on their experience in our submission.

CSA welcomes the discussion paper, *The AGM and shareholder engagement* (the discussion paper). CSA Members are deeply involved in the preparation and running of the annual general meeting (AGM). They also assist boards to prepare the narrative elements of annual reports. As the key governance advisers in listed and unlisted public and private companies, they act as the nexus between the board and shareholders on corporate governance matters.

CSA's views on the AGM

Members of CSA have primary responsibility for the organisation and implementation of AGMs and, as such, are uniquely placed to comment on the future of the AGM.

History

The institution of the AGM is steeped in history and has remained (relatively) unchanged. It was created in an era of horse and coach; pen and ink; limited printing and a fledgling postal service, all of which dictated that members (or their duly appointed representatives) would physically meet with directors annually. Shareholders could gather physically without difficulty, and a large company would be one consisting of 100 shareholders.

Today, we live in a vastly different world and it is one that was not envisaged when these rules were enshrined.

Functions of the AGM

In CSA's view, the AGM has historically carried out two functions:

- as ***the*** forum for two- way collective engagement with shareholders, and
- as a decision-making ***event*** for the passing of resolutions

Current performance

CSA believes it can be demonstrated that the AGM ***as an event*** fails in the effective/efficient carrying out of those functions.

As to engagement, in the technological age there are numerous other forums now available, with much more timely information regarding the company made publicly available. Attendances at AGMs continue to fall.[1] There are 2,200+ companies listed on the Australian Securities Exchange (ASX). Outside of the ASX300, many companies, despite outlaying significant expense in holding a physical meeting, struggle to meet quorum requirements. Research by Computershare[2] shows that only ***0.16 per cent*** of shareholders attend AGMs.

As to being a decision-making event, in the overwhelming number of cases, the outcome of resolutions is determined before the event of the meeting, as institutional shareholders have voted either by proxy or by direct vote (where available).

By and large, retail shareholders neither attend nor vote. Research by Computershare[3] shows that across all channels and types of shareholders, only ***5.6 per cent*** of retail shareholders vote. In the same research, ***49 per cent*** of retail shareholders stated that they would not be voting as they considered that their small shareholding is insignificant.

CSA notes that the 2012 National Australia Bank (NAB) AGM illustrates how the AGM does not function as a decision-making event. Commentary at the time noted that 'The annual meeting has become a lightning rod for shareholder dissatisfaction with NAB's broader performance'.[4] However, CSA contends that these comments should not be directed at the meeting as an event. Reports from those present at the meeting were that attendance numbers were down and there was little discussion of the resolutions. The poll results show that the meeting as an *event* had no effect on how the vote went. Going into the AGM, there were 185,976,868 proxy votes against the remuneration report. Following the meeting, the results of the poll show that 'against' votes only went up to 186,070,149 — an increase of just 0.05% of the number of 'against' votes cast.

Positives of current system

Despite the fact that the AGM as an event does not effectively or efficiently carry out its functions, there are a number of positives about the institution that is the AGM:

- The holding of a physical meeting is generally agreed to be beneficial by being the one time of the year when boards are required to front shareholders and give them the opportunity to ask questions (regardless of whether shareholders take up that

---

[1] CSA's research over 10 years shows that shareholder attendance at AGMs is declining. In 2011, among the ASX top 200 (that is, companies with very large shareholder bases) the number of AGMs attracting 300 or more shareholders remained constant with the 2009 level at 20 per cent. When viewed as a percentage of the shareholder base, CSA research of the AX200 shows that attendance rates at the AGMs are down from 1.5% in 2007 — already a very small percentage o shareholders — to 0.6% in 2011. All statistics from CSA's *Benchmarking Governance in Practice in Australia*, June 2012.

[2] Greg Dooley, Managing Director, Computershare, *Breaking News*, Presentation to CSA's 2012 Annual Conference, Melbourne, December 2012

[3] Greg Dooley, Managing Director, Computershare, *The future of the AGM*, Presentation to CSA's 2012 Annual Conference, Melbourne, December 2012

[4] Attributed by Eric Johnston to Dean Paatsch, 14 December 2012

opportunity). It is considered the one time of the year when retail shareholders can engage with directors.
- The planning for an AGM focuses a company's board and executives on its shareholders. It has been said to compel boardroom behaviour.

Home truths

Our view is that the AGM doesn't really work as an event, yet it is a necessary element of the governance of a company. In looking at reforming the AGM to make it effective, we must have the courage to face and accept a number of things:

- The AGM as an event in its current form will never be a forum for institutional shareholder engagement. **The AGM as an event in its current form is all about the engagement of retail shareholders, and it fails at that.**
- Australia is the world's sixth largest country (7,682,300 sq km[5]) and shareholders are dispersed geographically. Physical attendances at AGMs will never approach a meaningful percentage of the number of holders a company has — nor in the case of large companies (some of which now have well over 1,000,000 shareholders) would that be desirable.
- By and large, the votes of individual retail shareholders will never influence the outcome of a resolution.
- A number of years ago, the Corporations Act embraced technology by creating an 'opt-in' system for shareholders to receive a hard copy of the annual report. The world did not fall off its axis. Generally less than 10 per cent of holders opt in to receive a hard copy annual report.
- Other than the change to the annual report delivery requirements, the Corporations Act has not kept pace with the exponential improvements in technology.
- The holding of an AGM in the current regulatory climate has significant cost implications for companies.
- Because of the linkage of the AGM to a company's balance sheet date through having to put the annual financial statements to shareholders for discussion (but not resolution), and the remuneration report for resolution, many companies have their AGMs around the same time, and there are many that unavoidably conflict with each other on a time/date basis. This further acts as a disincentive for retail shareholders to attend.
- Because of that linkage with the financial statements, the AGM is required to look at historical data. Why would a retail shareholder want to attend a meeting to discuss old data?
- The debate at AGMs is currently of little value and in companies with large shareholder bases that are also customer bases, the discussion tends to be about customer issues rather than shareholder issues.
- Shareholders are often more comfortable asking questions of the directors and senior management after the formal AGM than during the meeting. They engage more easily with directors and senior management at non-statutory investor briefings than at the AGM.
- Anecdotal evidence from companies' experience shows that retail shareholders are more engaged (and more likely to attend) an informal shareholder meeting where they can just hear from the board and executives and ask questions about a company's present condition and performance, rather than sit through a lengthy and highly formal meeting structured around the resolutions that need to be passed.
- The research from Computershare (see above) indicates that shareholders are more engaged when they vote directly themselves rather than distancing themselves from the event by appointing someone else to vote on their behalf.

[5] www.australia.gov.au

Next steps

The AGM is not working but is a necessary element in the governance framework. In any reform of the AGM, CSA believes that the focus should be on:

- making it more cost effective for companies (and therefore shareholders)
- increasing the engagement of all shareholders, with an emphasis on encouraging the engagement of retail shareholders.

Any reform needs to recognise that there are a range of companies operating across a variety of sectors, with vastly different shareholder profiles. Any new framework should have sufficient flexibility for all companies to engage with their shareholders in the most effective manner.

Quick wins

CSA believes there are a couple of very quick wins that could assist the existing AGM in working better:

1. Embrace technology

Move to an opt-in system for receiving hard copy meetings materials. A company would be required to announce to the ASX (and then place on its website in a clearly defined section):

- when the AGM will be held (as is currently the case, prior to the expiration date of an individual's right to nominate an external director)
- when the annual report and meeting materials are available online and how to access them and vote online. Voting online (by either online proxy lodgement or our preferred method, online direct voting, would be the default option, with shareholders being able to request hard copy voting forms). Shareholders who have provided their email address to a company and provided consent for electronic communication could be notified of this (as is currently the case).

The United Kingdom moved to a joint opt-in framework for the combined release of the annual report and notice of meeting — we have the precedent in another jurisdiction that an opt-in system for receiving hard copy meetings materials works. With hindsight, when Australia moved to an opt-in legislative framework for receiving hard copies of the annual report, it was probably a missed opportunity that we did not also move to an opt-in for hard copy meetings materials simultaneously.

2. Implement direct voting in its entirety and mandate voting via a poll

Do away with the system of proxy voting (which is a transfer of the rights of shareholders to attend and vote to another person), as this is anachronistic and a symbol of a bye-gone age where people had the need to appoint an individual to attend and vote on their behalf. We have seen many problems with the current system, some of which have required legislative intervention.

For example, amendments to the Corporations Act have been required to specify the duties of proxies and the chair's ability to vote undirected proxies on the remuneration report and spill meeting resolutions. Voting exclusions saw the introduction of the chairman's box for certain resolutions on the voting form under the ASX Listing Rules, which is still misunderstood by many retail shareholders leading to many lost votes. The complexities of the proxy voting system have also seen lost votes from institutional shareholders.

Most proxy forms are necessarily highly legalistic and may be difficult for shareholders, particularly retail shareholders, to understand, due to the complexities of the proxy voting system, which is yet another disincentive for retail shareholders to vote. If shareholders received a direct voting form only, it would consist of a simple form setting out a series of resolutions on which they were asked to vote, but there would be no lengthy and complex explanation, as now, of:

- how the appointment of a proxy works
- the effect of appointing a proxy in relation to any voting exclusions
- the difference between a directed and undirected proxy
- the need to expressly authorise the chair to vote on a shareholder's behalf.

For those shareholders accustomed to placing their faith in the chair by appointing the chair as their undirected proxy, a simple statement on the voting form would indicate the recommendation of the chair in relation to each resolution, but the shareholder would still vote directly.

By replacing the system of proxy voting with direct voting, and mandating direct voting and voting via a poll, all of these issues become redundant and the system ensures that the result of all resolutions is the will of the eligible shareholders that voted on them. Voting could be undertaken online as well as through more traditional means. Shareholders would still retain the right to appoint a representative to attend the meeting and speak on their behalf.

The current problems with lost votes and the complexities of the proxy voting system fall away as institutional shareholders vote directly online. Adjustments could also be made to the voting entitlement date vis-à-vis the poll deadline (for example, the voting entitlement date could be a business day or two prior to the poll deadline) to ensure that custodians and other nominees have time in which to finalise and verify the voting instructions of the underlying beneficial holders.

CSA would be happy to take CAMAC through the details of how this would work in practice and the changes that would need to take place to implement this.

PART I: Blue-sky developments

In this section, we put a number of ideas forward for consideration in order to assist the process of major change for how the AGM could be improved in the future. **For the two ideas submitted, mandatory poll voting would be required at the bare minimum, but both are ideally predicated on each of CSA's 'quick wins' described above being implemented**.

1. De-linking functions of the AGM

As set out above, CSA believes that the AGM as an event in its current form does not function well as a decision-making forum. Institutional shareholders will always vote in advance; retail shareholders disengage and don't attend because:

- their attendance doesn't mean anything from a decision-making point of view
- the formality of the meeting means there are (often lengthy) recitals of the resolutions to be considered (even with a relatively small number of resolutions, it can take significant amounts of time just to recite the resolutions and proceed through the formalities, without any meaningful debate on the resolutions taking place, and this disengages shareholders at the meeting and discourages them from attending future meetings)
- of the time taken to vote (by poll or on a show of hands), and
- the meeting is required to focus on historical financial statements.

CSA therefore recommends that that consideration be given to removing the decision-making function of the AGM.

A listed company would still have a statutory obligation to hold a meeting of shareholders at least once every calendar year.

No decision-making business would be carried out at that meeting. Shareholders and their duly appointed representatives would be required to be given a reasonable opportunity to comment on and/or ask questions regarding at least the following:

- the directors' stewardship of the company (collectively and individually)
- the financial position and performance of the company (although not required to be linked to the last annual report)
- the operations of the company
- the strategy of the company
- the culture and governance of the company
- remuneration practices and outcomes for key management personnel (although not required to be linked to the last remuneration report)
- the outcomes of any shareholder business conducted since the last shareholder meeting.

In this way, the meeting would encourage the engagement with both retail and institutional shareholders. As a discussion of company performance and prospects, it would certainly attract institutional shareholders and the media and could also attract analysts. It would engender more meaningful discussion and improve the quality of the debate from what is currently seen at AGMs.

CSA is aware that some retail shareholder bodies currently express a desire to be included in the questioning of directors and senior management by the media that takes place after many AGMs and by analysts and institutional shareholders outside of the AGM, due to the quality of the debate. For those large companies with large retail shareholder bases that are also customer bases, many of them already provide different forms of non-statutory engagement throughout the year where shareholders can ask customer-related questions (Telstra being a good practical example).

Focusing the debate on shareholder issues at the meeting will assist retail shareholders to differentiate between customer and shareholder issues. Many retail shareholders are not professional investors, and providing them with access to a more meaningful discussion could assist in improving their financial literacy, which is a bipartisan policy goal.

Importantly, this provides retail shareholders with the same access at the meeting to the board and senior management to discuss company performance and prospects. It would not diminish the engagement that takes place with institutional shareholders that currently takes place prior to the AGM, as this engagement will continue to take place throughout the year and prior to voting.

The meeting need not be linked to the reporting season (although some companies will choose to do so) and it will ensure that the entire meeting is focused on what shareholders and their representatives wish to discuss and is not based on historical performance.

The matters that currently require shareholders' votes (for example, re-election of directors, the remuneration report, constitutional change etc) will still be required to be transacted. However, they will be transacted via direct voting and on a poll, separately from the meeting (with a default of online voting). There would be a requirement for companies to keep the polls open for a set period of time (for example, 28 days) and the poll results would be announced as soon as practicable after the polls close (to allow for a proper review to ensure validity of voting). During the 28 days, companies would need to be mindful of their continuous disclosure obligations. Voting results are still open to public scrutiny. Our earlier comments regarding adjusting voting entitlement dates to be earlier than polls closing to allow custodians and other nominees to properly vote on behalf of the underlying beneficial holders apply here also.

Engagement (on the resolutions) would be a matter for both the company and its shareholders, noting that with the requirement to publish the results and still hold a meeting about the company during the year, the company would remain open to public scrutiny for its actions. Those companies that engage will consider how best to provide for such engagement; this may include providing telephone dial-in access to ask questions about the resolutions; creating blogs to speak to the resolutions; and setting up social media discussion groups (such as via LinkedIn) where shareholders can ask questions about the resolutions. CSA can point to its own experience in this regard. Members of the international body, the Institute of Chartered Secretaries and Administrators (ICSA), debated the resolutions to be voted on at the 2011 member-requisitioned EGM and the performance of the member body in an ongoing LinkedIn discussion group over many weeks prior to the meeting being held in London. Directors of the international divisions, as well as members, participated in the discussion. Members felt far more informed as a result of this process.

If voting is contentious, or shareholders are dissatisfied with company performance since the last shareholder meeting, they are not constrained from expressing their views. The immediacy of social media means that any individual can express their views and find an audience. Shareholders can go to the press, write to the company, set up their own blog or discussion group online or ask the ASA to engage with the company on their behalf. Social media is not always a forum that companies can control — if companies choose not to engage actively with their shareholders, shareholders will find ways to make their views heard and it will be to the company's disadvantage.

The current decision-making forum is archaic and bound by centuries of formulaic law. Technology will continue to evolve and companies will innovate as to how best to provide for shareholder engagement. As that process of innovation unfolds, there need be no concern that, as is currently the case, the meeting is not being validly held should the technology fail.

Industry bodies such as CSA can provide guidance and education as engagement practice evolves. The law needs to provide a framework within which companies can continue to evolve engagement practices — it is vitally important that an archaic institution and framework is not replaced with another highly regulated framework that will quickly become out-of-date.

Voting would be on the same regulatory timetable as operates currently. The only difference would be that the annual report would **not** be formally required to be laid before shareholders (as shareholders would have the right to ask comment on and ask questions on the company's financial position and performance at the de-linked meeting). Of course, the annual report would still be required to be prepared and made available to them within the normal regulatory timetable.

2. Non-physical meetings for smaller companies

As stated earlier, many smaller companies struggle to attract shareholders to attend an AGM. Some even struggle to maintain a quorum (when directors are barred from voting their shares on resolutions such as the one to adopt the remuneration report).

This second idea revolves around companies outside of the ASX300 (or other similar measure such as market capitalisation) being able to elect to not hold a physical meeting but to hold a non-physical meeting instead. This is not predicated on idea 1 being implemented (although it would be eminently suited to it). The introduction of mandatory poll voting would be required, as would a safeguard for meetings to still be validly held, despite any technological glitches that may unexpectedly affect individual participation.

The intention to hold a non-physical meeting (and how it would be held, for example, webcast or via telephone briefing) would be required to be announced to ASX six months before the AGM date and published on the company's website.

Shareholders would be given the right to notify the company if they want a physical meeting. If within one month 100 shareholders (or shareholders representing five per cent of issued capital) request a physical meeting, the company would be required to hold a physical meeting.

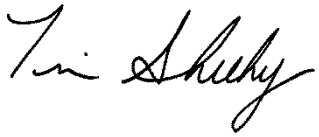
While ensuring that the cost of holding a physical meeting is not imposed on those companies that attract very few shareholders, it does not hinder shareholders being able to call a physical meeting if they have concerns with the board's stewardship and are seeking to voice their concerns.

Again, CSA would be happy to take CAMAC through the details of how these ideas would work in practice.

Our comments on how the current system of general meetings and shareholder engagement could be improved, including through technical innovation, and our responses to the questions set out in the discussion paper are set out in Part II of this submission.

Our recommendations on those questions are set out in Appendix A. However, we caution that reading our recommendations without also considering the context for them as set out in Part II is potentially misleading. We have provided them simply as a means of enabling CAMAC to have quick access to our recommendations after consideration of our reasoning for them.

Yours sincerely



Tim Sheehy
CHIEF EXECUTIVE

Responses to questions for consideration

Part II: How the current system of general meetings and shareholder engagement could be improved, including through technical innovation

It is important to note here that all responses in this section should be read in light of our earlier comments in this submission, particularly around the 'quick wins' and 'blue-sky developments'.

Shareholder engagement

Should legislative or other initiatives (for instance, additional ASX Corporate Governance Council, or other, guidance) be adopted, and if so for what reasons, concerning:

- **the role of the board collectively as it relates to engagement with institutional/retail shareholders throughout the year, including leading up to the AGM**
- **the role of particular board members, such as the board chair or the chairs of board committees, in relation to engagement with institutional/retail shareholders**
- **any other aspect of shareholder engagement?**

Shareholder engagement can be considered as the extent to which the shareholders:

- are aware of the company and its performance and prospects
- support the plans of the board and executives for its growth and success
- are prepared to stay shareholders to be part of that growth and success
- will continue to support the board if and when the company may hit bumps in the road, and suffer setbacks in volatile and highly competitive times.

Engagement between entities and their shareholders is not a matter of information alone. It is also about building relationships, and providing clarification on both sides as to why decisions are made and in what context.

There are no legislative or regulatory barriers to the ability of institutional shareholders to engage and participate in the relevant corporate affairs of the companies in which they invest. However, CSA is on the record as having commented on the challenges retail shareholders face in engaging and participating in the corporate affairs of the companies in which they invest, given that the AGM is the prime forum for such engagement for this body of shareholders and it is not attracting significant numbers to it.

The role of the board

Directors and officers control the destiny of the company, not for their own benefit but rather for the benefit of all members. They are the stewards of the company's property and operations and they are accountable for that stewardship. They have statutory duties to act in good faith and for a proper purpose in the best interests of the company. Their statutory responsibilities to act with care and diligence, not misuse position or information and avoid placing themselves in a position of conflict where personal interest or duty conflicts with their duty to the company reside under these overarching duties.

Corporations legislation, in Australia and other common law countries, is very clear as to the division of responsibilities in companies. The business of a company is to be managed by or under the direction of a board of directors appointed by and accountable to the shareholders, and the directors exercise all powers of a company except those that are required to be exercised in a general meeting (s 198A of the *Corporations Act 2001* (Cth)) (the Corporations Act).

At no point has corporations legislation either here or overseas contemplated shareholder participation in the management of listed and broadly held companies on a day-to-day basis. That is, corporations legislation recognises that it would be impractical for shareholders to be involved in every decision. Indeed, it would paralyse a company if each decision had to go before shareholders. This is also recognised at common law: see *National Roads & Motorists Assn v Parker (1986)* 6 NSWLR 517

Equally, corporations legislation recognises that mechanisms are required for the review of decisions taken by directors. As part-owners, shareholders should be engaged in the corporate governance of companies. They should engage with companies on long-term strategic and governance issues to provide a real test to the thinking and behaviour of boards and management, and to ensure that boards properly oversee management.

Corporations legislation recognises the role that directors play as agents for shareholders, with their fiduciary duties to act in the best interests of the company as a whole encompassed by statute and common law. Directors have responsibility to take decisions concerning the company on a wide range of matters, and shareholders should continue to have the capacity to hold directors accountable for their decisions affecting the performance of a company.

Australia has a set of robust shareholder rights, including the right to remove directors at the AGM should board decision making be found to be unsatisfactory; the right to vote in an advisory capacity on the remuneration-report resolution; and the right to spill the board should the board's decision-making on remuneration prove unsatisfactory over two years.

While CSA did not support the introduction of the two-strikes rule in legislation, CSA Members acknowledge that its introduction has led to greater shareholder engagement. Those companies that received a first strike in 2011 engaged with their shareholders on remuneration, with decisions taken to forego bonuses, salary increases, adjust performance hurdles (both short-term and long-term) and make changes to the cash components of executive pay. The vast majority of those companies did not receive a second strike in the 2012 AGM season — that is, the outliers were brought into the fold in terms of shareholder engagement. Nine companies (as at the beginning of December) had received a second strike — given there are 2,200+ companies listed on ASX, this constitutes a mere 0.004 per cent of listed companies that have not, from the shareholders' perspective, engaged sufficiently.

However, CSA is aware that not all first and second strikes related to remuneration, with some second strikes against the remuneration report being an expression of general dissatisfaction with the company's performance, other aspects of board decision-making and even to provide pressure on incumbent boards facing a potential takeover bid. Notwithstanding this unintended (by the legislator) use of the vote, CSA Members are of the view that the two-strikes rule has provided a strong incentive for companies to do a better job of engaging with their shareholders. This of itself is a good governance outcome.

Corporate behaviour has already been modified in response to investors engaging with boards and discussing matters of concern. The current arrangements have provided greater transparency for investors, and this in turn means fewer surprises and more opportunities for dialogue and engagement.

Companies will make choices as to how best to engage with shareholders based on a number of factors. However, we note that it is accepted best practice for the chair of the board and the chair of key board committees to meet and engage with investors.

CSA therefore does not see the need for either further legislative reform or additional ASX Corporate Governance Council guidance on the role of the board or board committees and their

chairs as it relates to engagement with institutional/retail shareholders throughout the year, including leading up to the AGM. There is strong investor support for the 'if not, why not' regime of the ASX Corporate Governance Council's guidelines, specifically because it assists investors to understand board decision making about governance arrangements. However, this is different from using the Principles and Recommendations to suggest that one particular form of engagement is preferable to another.

CSA is of the view that market practice is evolving, and should be allowed to continue to evolve. Bodies such as CSA develop and will continue to develop guidance on best practice in shareholder engagement, which itself continues to evolve.

Should legislative or other initiatives (for instance, additional ASX Corporate Governance Council, or other, guidance) be adopted, and if so for what reasons, concerning:

- **the role of institutional shareholders throughout the year, including leading up to the AGM. In this context:**
  - **is there a problem with having a peak AGM season and, if so, how might this**
- **matter be resolved**
  - **should at least some institutional shareholders be required or encouraged to report on the nature and level of their engagement with the companies in which they invest, in the manner provided for in the UK Stewardship Code or otherwise**

Effective investor stewardship, including effective shareholder engagement with the companies in which they invest, is central to good corporate governance.

As with the decisions taken by boards as to how best and when to engage with shareholders, best practice investor stewardship is also a work in progress.

However, investors are not homogenous. Shareholders today are a diverse group, dispersed geographically (including internationally) and, in many large companies, can number in the thousands, if not the millions. With dynamic and global investment strategies, shareholders may include an individual resident in Australia planning for his or her retirement, a large institution with billions of dollars under management, a foreign investor, a global hedge fund, and an investor with no interest in the company beyond a short-term trade. The traditional retail investor in Australian equities may represent a small proportion of the capital of a large ASX-listed company. Investors now have many different financial and other interests in companies and are not necessarily long-term investors (they can be less than 24-hour investors, never actually appearing on the share register). The concept of the community of shareholders known both to each other and the directors is no longer operative.

Not all investors wish to engage with the companies in which they invest. The investors who are most interested in engagement are those with long-term investment interests in the companies in which they invest. In Australia, many companies seek to meet their largest long-term investors at least annually as a matter of routine to review strategy, governance and related matters.

CSA believes it is important to look at the overall interaction a company has with its shareholders when considering shareholder engagement. For example, results announcements, analysts' briefings, investor roadshows, 'investor days' (or shareholder briefings), the AGM and other forms of communication all form part of engaging with shareholders. There is a range of options available to companies to communicate with their shareholders and, to a lesser extent, for shareholders to communicate with the companies in which they invest.

CSA considers that shareholders are seeking satisfactory performance from the companies in which they invest and, to the extent it is linked to performance, good governance. Shareholder engagement is a means for shareholders to achieve this end, not an end in itself. On this basis, CSA believes that companies need to review their communication with shareholders and analyse which forms of communication work and why. Companies and shareholders alike need to understand and clearly articulate the objectives they are hoping to attain through enhanced shareholder engagement.

The peak season

The AGM/proxy advisory process occurs annually.

- Issuers release their annual results, including the directors' report and the remuneration report.
- Issuers send the notice of meeting and annual report to shareholders.
- Institutional investors and proxy advisory services consider the proposed resolutions and other governance issues to be voted on at the AGM or other general meeting.
- Proxy advisory services dispatch their report on issuers, including recommendations on how to vote on proposed resolutions, to their institutional investor clients up to 18 to 20 days in advance of the AGM. Some proxy advisory services subsequently make a copy of the report available to the issuer.
- Institutional shareholders vote prior to the AGM. The complications of the proxy voting mechanisms in Australia mean that offshore and domestic institutional investors must vote well in advance of the AGM in order for their vote to arrive by the 48-hour cut-off.
- The AGM is held and the results of voting are announced.

The current requirements under the Corporations Act in relation to the release of the results and the general meeting are:

- lodgement of accounts with the Australian Securities and Investments Commission (ASIC) three months after the end of the company's financial year for listed public companies and disclosing entities
- public companies must hold an AGM once a year no later than five months after the end of the company's financial year
- a minimum of 28 days' notice for a shareholders' meeting for listed companies.

In practice, this means that for the vast majority of listed companies (those with a 30 June balance date) the results are issued at the end of August and the AGM is held on a day in the two-month period from October to December. With the majority of companies' end of financial year coinciding, this results in the majority of AGMs occurring within the same two-month period of the year. This introduces constraints into the system, as multiple annual reports and notices of meeting are issued at much the same time, requiring analysis by institutional investors and proxy advisory services within a very tight time frame. This period takes place from mid-September to mid-November. This is referred to as the 'peak period'.

When institutional investors and proxy advisory services wish to enter into a dialogue with issuers in relation to information in the annual report or proposed items of business in the notice of meeting, time is constrained due to the process for lodging proxies that involves a 'chain of hands'. International institutional investors need to lodge votes 18 to 20 days before the meeting to ensure that it will make its way through the chain of custodians and end up with the nominee in Australia in time to meet statutory deadlines for the lodgement of proxies. In turn, this means that the standard cut-off date for dialogue between issuers and institutional investors and proxy advisory services is more than 20 days before the general meeting, with a drop-dead date of 14 days before the meeting. When notices of meeting are issued no later than 28 days prior to the AGM as required by the Corporations Act, this can leave a very narrow window of time in which communication can take place.

With discussion between an issuer and institutional investor or proxy advisory service needing to take place 18 to 20 days before the AGM, in order for any dialogue to be productive, particularly in relation to issues of proposed items of business at the general meeting, any communication needs to take place very soon after the notice of meeting goes out.

Governance advisers, proxy advisory services and institutional investors note that the companies that receive shareholder approval of their decisions concerning remuneration plans and structures engage their investors early, providing a context and rationale for their decisions. Conversely, companies that struggle to achieve shareholder approval often leave communication to the last minute, providing no time for dialogue, or they do not conduct a dialogue at all.

Some issuers are now providing more than 28 days' notice of the meeting, which reduces the bottleneck of the peak period and encourages productive communication. The issue of a notice of meeting as early as possible does need to take account of the requirement to wait for the close of nominations for directors. CSA does not, therefore, recommend any legislative reform on this front.

CSA Members note that companies can enter into a dialogue with institutional investors (and proxy advisory services) outside the peak period. CSA conducts research into the governance practices of the ASX top 200 companies biennially. The results of the 2011 survey were issued in the 2012 report, *Benchmarking Governance in Practice in Australia*. New questions in the 2011 survey sought to discover more about the engagement process which companies are undertaking prior to the AGM. These questions looked at engagement with institutional shareholders, proxy advisory firms acting on behalf of institutional investors and the Australian Shareholders' Association acting on behalf of retail shareholders.

The 2012 report shows that, of the ASX top 200:

- 90 per cent of companies engaged with institutional investors
- 78 per cent engaged with proxy advisory firms
- 86 per cent engaged with the Australian Shareholders' Association.

The results suggest that many companies still do not fully comprehend when they need to engage. Only 22 per cent of companies reported engaging before the issue of the notice of meeting for the AGM, with 78 per cent of the ASX top 200 engaging after the issue of the notice of meeting. Investors and proxy advisory firms have indicated that engaging after the issue of the notice of meeting will frequently be too late to address any concerns that they may have or otherwise give investors sufficient comfort that their issues are being taken into account.

However, CSA Members are strongly of the view that an educational process is underway, whereby market practice is evolving, as companies and boards learn from their investors that engagement needs to take place over the investing year and not just after the release of the notice of meeting. CSA is of the view that neither legislation nor additional ASX Corporate Governance Council guidance is required to drive this evolving market practice.

Stewardship Code

The exercise by institutional investors of the voting right attached to the shareholding represents the most visible tool available to them to exert influence over the governance practices of companies in which they invest.

CSA Members note that institutional investors need to clarify responsibility for engagement with companies within their organisations. For example, the governance team and the investment team within institutional investor groups do not always work together. Companies may engage with the governance team while the investment team is busy selling the stock, or companies may engage with the investment team and only too late realise that they have no participation in

the decision on how to vote. Moreover, companies can receive mixed signals from the governance staff and the investment staff. This can lead to unexpected outcomes when voting results are tabulated.

Institutional investors need to ensure that there is good communication between their governance and investment teams, and also ensure that companies have clarity as to who to engage with, and who will make the voting decisions.

CSA firmly believes that institutional shareholders should not be required by legislation to vote, or required to disclose by legislation how they vote on individual companies. A decision to abstain from voting on a matter, which may result in no proxy form being lodged and no attendance at a meeting, may be in accord with an investor consideration or policy. Some institutional investors have decided not to vote on director elections, but to sell the stock if they do not agree with the board's decisions.

CSA Members strongly encourage institutional shareholders to develop policies on voting, and disclose those policies to their members, and notes that their industry bodies can have requirements for members in this regard. The Financial Services Council (FSC), representing retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks, trustee companies and Public Trustees (funds under management of $1.8 trillion) is proposing a revised proxy voting Standard (mandatory for all members) requiring members to:

- maintain and disclose a complete proxy voting record to members (including abstentions) on Australian-listed entities' company resolutions (so reporting on an individual meeting basis rather than an aggregate basis)
- formulate and maintain a voting policy, accessible to members, and
- disclose the engagement of proxy advisers.

The Stewardship Code was introduced in the United Kingdom following the global financial crisis, when it was suggested that institutional investors had 'been asleep at the wheel'. The argument was tendered that shareholders had insufficiently engaged with companies to test directors' thinking and decision-making, and that this had contributed to the poor financial outcomes experienced by many UK listed entities.

Australian companies weathered the global financial crisis much better than their UK counterparts. There was no discussion in Australia as to shareholders having failed to challenge the boards of Australian listed entities. Indeed, rather than a discussion ensuing in Australia (as it did in Europe and the UK) that shareholder rights might be curtailed, additional shareholder rights were granted in Australia.

For these reasons, CSA is of the view that a Stewardship Code may not be required in Australia. CSA Members believe that best practice guidelines developed jointly between companies and investors may enhance shareholder engagement more fruitfully and productively than a Stewardship Code. It is also the long-term investors who wish to be good stewards over time who will engage in the development of such guidelines.

We note that the Productivity Commission, in its 2010 report on executive remuneration, recommended that any codes on investor stewardship should be voluntary codes developed by industry bodies. As both the FSC and ACSI have developed such codes, CSA sees no need for regulatory intervention. We query why regulation would be required for an industry that is already regulating itself well.

CSA also notes that the ASX Corporate Governance Council will be consulting on changes to the Principles and Recommendations in 2013, including revisions to Principle 6 on respecting

the rights of shareholders. It is likely that revisions will address shareholder engagement more comprehensively than at present.

Should legislative or other initiatives (for instance, additional ASX Corporate Governance Council, or other, guidance) be adopted, and if so for what reasons, concerning:

- **corporate briefings**

At present, the continuous disclosure provisions (s 674) of the Corporations Act and the requirement under Listing Rule 3.1 to disclose any information that is material and price-sensitive are in place to keep the investing public informed of events and circumstances that could affect the price or value of a company's securities. Continuous disclosure regulation is designed to ensure that investors have timely and equal access to price-sensitive information in relation to traded securities.

Any information, therefore, that could have a material impact on the price of the company's shares that is disclosed in a company briefing, be it private or public, *must* be disclosed by a company to the market immediately.

CSA notes that webcasting information provided in a public or private briefing could be an effective way of expeditiously disclosing such information, regardless of whether it is price-sensitive or not (subject, of course, to the Listing Rule requirement that price-sensitive information is first lodged with the ASX).. CSA encourages all companies to provide either a live webcast or an archive of a private or public briefing, to ensure a large range of shareholders have access to the information. However, webcasting should not be mandated, as CSA notes that issues of cost may prevent companies from taking up webcasting at this point in time, and forcing additional costs on companies affects shareholder value. Webcasting of public and private briefings is best practice for large companies with large shareholder bases, and such companies are more able to sustain the costs attached to webcasting.

CSA believes in the general principle of ensuring that there is no restriction on access to information provided by a company, but does not see a role for further regulation in this area. For example, CSA has previously called for the media briefings that follow company AGMs to be open to all shareholders.

CSA was also a strong supporter of the 2010 amendments to Principle 6 of the Principles and Recommendations encouraging companies to provide access to any briefing of analysts, by, for example, telephone, to ensure shareholders have access to the information provided at such briefings. In large part, such access dispels the mystique attached to such briefings and reduces the misperception that analysts are granted access to information that is withheld from shareholders.

CSA notes that some analysts raised concerns at the time of the amendments to Principle 6 that their intellectual property rights could be infringed by making analysts' briefings available to all shareholders. While CSA notes that analysts' questions are likely to be more sophisticated than those asked by retail shareholders, any response from the company that contains information that is material and price-sensitive must be disclosed to all investors. Selective disclosure cannot be justified on the basis of sophisticated questions being posed to a company.

We note that many companies now provide retail shareholder access to corporate briefings. We do not recommend that the provision of such access be mandated. This is a matter for evolving market practice.

Should legislative or other initiatives (for instance, additional ASX Corporate Governance Council, or other, guidance) be adopted, and if so for what reasons, concerning:

- **the role of proxy advisers, including:**
  - **standards for investors using proxy advisers, including the extent to which these investors should be entitled to rely on the advice of proxy advisers in making voting decisions, or, alternatively, whether those investors should have some obligation to bring an independent mind to bear on these matters.**
  - **standards for proxy advisers**

Proxy advisory services play an important role in promoting good governance in Australian entities by undertaking a research, assessment and advisory role. They evaluate the numerous resolutions proposed by entities and make recommendations to institutional investors on how to vote on these resolutions.

Australian institutional investors generally hold positions in hundreds of listed Australian companies. Often they do not have the 'in-house' capability or resources to conduct independent research about each agenda item for each company's ballot at general meetings, including the AGM. Proxy advisory services analyse publicly available information about entities in order to provide independent advice to institutional investors about the governance practices of those entities. In Australia, some proxy advisory services also enter into a dialogue with issuers to better understand and assess their governance practices, in order to provide better quality advice to institutional shareholders.

Where they have a mandate or ability to do so, institutional investors take seriously their responsibility to vote their shares on resolutions put to members at general meeting and consider the governance of the entities in which they invest. Superannuation funds and fund managers are required to assess agenda items with care and caution, and exercise their votes in a manner consistent with their fiduciary duties. Even the best-resourced funds require quality, independent information gathered by proxy advisory services. Accessing quality, independent information in relation to a range of issues assists institutional investors to discharge their voting responsibilities. Such information, which includes recommendations on voting on proposals to be put to shareholders, may have a material effect on voting results.

Some entities have expressed a concern that proxy advisory services 'control' the votes of their clients. However, institutional investors that have a mandate or ability to vote have an obligation to make their own decisions and vote accordingly. Yet proxy advisory services do wield influence — the recommendations put forward by proxy advisory services will be attended to by those who commissioned the research. In some instances, investors may be reluctant to vote against the recommendations of proxy advisory services.

However, while the proxy advisory services concentrate on the provision of independent research and advice, it is the institutional investors who seek engagement with the company and who may seek changes in the governance practices of the entities in which they invest. They may use the research and advice received from proxy advisory services to develop their engagement with companies, but CSA is of the view that the great majority of institutional investors make their own decisions on how they want to vote.

We also note that there is a move towards more institutional investors developing in-house resources to analyse governance practices within the companies in which they invest. The independent research and advice provided by proxy advisory services then becomes just one more piece of information in their ongoing research and analysis. CSA is of the view that where possible long-term institutional investors should be encouraged to develop such resources in-house.

CSA is strongly of the view that proxy advisory services are an important connection between institutional investors and the entities in which they invest. They provide a commercial, independent research capacity. Proxy advisory services in Australia are not subject to the conflicts of interest that bedevil their counterparts overseas, and CSA sees no need for a regulatory framework to be attached to the provision of their services. Institutional investors are free to engage their services or not, and free to heed their voting recommendations or not.

Notwithstanding this, CSA does recommend that proxy advisory services should disclose on their website their own voting and governance guidelines and any changes to those guidelines. Any changes should be updated immediately, so that investors and companies have access to the current guidelines against which governance practice is being judged. This could form part of the best practice shareholder engagement guidelines rather than being mandated in legislation.

Could greater use be made of technology to promote shareholder engagement outside the AGM and, if so, how?

CSA strongly recommends that the Corporations Act embraces technology, by moving to an opt-in system for receiving hard copy meetings materials. A company would be required to announce to the ASX (and then place on its website in a clearly defined section):

- when the AGM will be held (as is currently the case, prior to the expiration date of an individual's right to nominate an external director)
- when the annual report and meeting materials are available online and how to access them and vote online. Shareholders who have provided their email address to a company and provided consent for electronic communication could be notified of this (as is currently the case).

The United Kingdom has moved to a joint opt-in framework for the combined release of the annual report and notice of meeting — we have the precedent in another jurisdiction that an opt-in system for receiving hard copy meetings materials works. With hindsight, when Australia moved to an opt-in legislative framework for receiving hard copies of the annual report, it was probably a missed opportunity that we did not also move to an opt-in for hard copy meetings materials simultaneously.

Should there be an amendment to the right of 100 members to call a general meeting of a company?

CSA has advocated for many years on the need to repeal s 249D allowing 100 members to requisition general meetings of companies (the 100 member rule). CSA welcomed the release of the Corporations Amendment Bill (No 2) 2005, which proposed the repeal of this provision. The Parliamentary Joint Committee on Corporate and Financial Services' held an inquiry into the bill and in its report, *Inquiry into the Exposure Draft of the Corporations Amendment Bill (No 2) 2005*, recommended reform. The report noted that while there is little history of the rule being abused, its potential for abuse remains clear. The reform was again introduced in 2006 in the Corporations Amendment Bill (No 1) 2006.

CSA's support for the proposal in the Corporations Amendment Bill (No 2) 2005 and the Corporations Amendment Bill (No 1) 2006 for removing the 100-member rule in s 249D of the Corporations Act for calling a special general meeting and maintaining the requirement for five per cent of the votes that may be cast at the general meeting is based on the following reasons:

- We are opposed to the vexatious use of the 100 member rule in s 249D to call an EGM at substantial cost to the company, and therefore its shareholders, when:
    - the avenue remains open of raising the issue of concern by placing a resolution on the agenda of the AGM and having statements relating to that resolution

distributed to members at the cost of the company through the utilisation of ss 249N(1)(b) and 249P(1)(b), and
    - it has been noted by those who have called an EGM that it is not expected that the resolutions put forward at the EGM will carry. To put corporations and their shareholders, the majority of whom are not expected to support the resolutions put forward at an EGM, to the expense of the meeting, is mischievous.
- It prevents mischief — given that while there is little history of the rule being abused, in its report, the Parliamentary Joint Committee on Corporate and Financial Services clearly noted its potential for abuse remains clear. It has been suggested by some commentators that, as the 100 member rule has not been greatly used, it no longer requires reform, but the threat of calling an EGM by splitting 100 shares, giving people one share each, then calling a meeting between annual meetings, toys with the company's profit and, consequently, the share price and dividend stream. Thus, it is shareholder return that is being threatened when the threat to invoke s 249D (the 100 member rule) is made. CSA is aware of special interest groups that have built up a database of general supporters/shareholders where they could get 100 members at short notice, and they have indicated to a number of companies that they will use this. The issues they raise are not shareholder issues, but special interest group issues. Both political parties have noted when proposals for reform were released that it is not necessary for parliament to wait until some quota of abuses is observed before reforming the provision.
- Requiring five per cent of total voting shares to requisition a special general meeting is a reasonable balance of the rights of shareholders to have matters addressed with the importance of allowing directors to effectively run the company and is in line with overseas practice.
- It brings Australian law into line with overseas practice. Comparable jurisdictions employ a percentage test for shareholder-requisitioned general meetings:
    - United Kingdom 10%
    - USA 10%
    - Canada 5%
    - New Zealand 5%
    - European jurisdictions between 5% and 20%
- The retention of ss 249N(1)(b) and 249P(2)(b) preserve the rights of members to use a 100-member test to put a resolution on the agenda of the AGM and request the company to distribute a statement to all its members. These provisions protect the rights of small groups of members to have their concerns addressed. This shareholder right is of particular importance to retail shareholders, who, unlike institutional investors, do not necessarily have the opportunity to meet with the company prior to the AGM. As noted above, most resolutions put forward on the AGM agenda, through the use of the 100 member rule in ss 249N(1)(b) and 249P(2)(b) have not been carried. However, the debate generated by such resolutions has been central to shareholder engagement with corporations, and we support this. Our support for the repeal of the 100-member rule only applies to the calling of special meetings.
- The amendments proposed in the bill are expressed to apply only to companies and not to managed investment schemes which since 1998 have been subject to the same requirements under s 252B of the Corporations Act. The 100-member rule should also be removed from this section.
- It avoids the complications of the tiered solutions (such as the square root rule) that have been recommended from time to time. This will ensure that neither companies nor shareholders suffer additional costs.

At the time that the Corporations Amendment Bill (No 2) 2005 was released, it had bipartisan support. However, various state governments stated they would not support the amendment to the Corporations Act as set out in the bill. They noted they were concerned that the repeal of the 100-member rule will work against the interests of minority shareholders, constituting the

general public. However, the 2005 report of the Parliamentary Joint Committee on Corporations and Financial Services clearly notes that the reform encourages appropriate shareholder participation in corporate governance, while reducing the associated costs of such participation, especially when meetings are called or threatened to be called for frivolous or vexatious reasons.

The annual report

Should legislative or other changes be adopted, and if so for what reasons, concerning any aspect of the annual report requirements? In this context:

- **do the current reporting requirements produce any unnecessary information ('clutter') in annual reports and, if so, how might this be reduced?**

One of the key barriers to effective shareholder engagement, particularly for retail shareholders, is information overload. It is not unusual for the statutory annual reports of large listed companies to run to 300 pages or more of detailed financial and accounting disclosures which are largely impenetrable to the lay reader.

CSA strongly supports the simplification of reporting requirements. CSA believes that the aim of reporting should be to ensure that shareholders want to and can read the disclosures, and remain knowledgeable about the entity they invest in and engaged. However, given the reluctance of governments to review and reduce existing legislation, the challenges inherent in streamlining existing reporting obligations are considerable.

For example, CSA notes that the concise report was originally introduced into the Corporations Act to facilitate shareholder communication, but it was added to existing regulation rather than being introduced to replace existing regulation. Additional statutory requirements were added to the concise report, which saw it increase dramatically in length, such that it no longer met the needs of shareholders. The increased length of concise reports and the recognition by companies that the majority of shareholders want only specific and very concise information has led some companies to seek additional means of communication with their shareholders, such as introducing short-form non-statutory financial reports.

The high success of such initiatives highlights that any regulatory reform in relation to annual reports has the potential to lead to further regulatory information overload, rather than meeting the information needs of shareholders. CSA notes that a 'one-size-fits-all' approach to the annual and concise report clearly shows that regulating one model does not meet the differing needs of shareholders.

CSA strongly supports short-form reports to shareholders, but recommends that:

- companies be left to communicate directly with their shareholders as to what form of non-statutory reports shareholders would like to receive
- such short-form reports remain non-statutory.

CSA also recommends a holistic review of the different pieces of legislation and the Accounting Standards aimed at:

- deleting duplication
- reducing reporting requirements to ensure more simple, effective reporting.

Importantly, CSA recommends that any reform consider, review and report on the impact of any planned reform of the existing legislative and regulatory framework. Adding layer upon layer of further legislation or regulations on companies is not streamlining or clarifying reporting and disclosure.

Integrated reporting

We note that while there is significant global interest in integrated reporting, it is not expected to reduce the 'clutter' at present. It will sit alongside existing annual reporting, although its long-term aim is to replace it. However, a holistic review could facilitate one of the aims of integrated reporting which is to reduce the 'clutter'.

CSA supports the premise integrated reporting and its long-term aim. However, we are strongly of the view that it is premature to either legislate it, mandate a listing rule requirement or include it as a reporting trigger in the Principles and Recommendations.

We note that the Prototype Framework was released on 26 November 2012 as an interim step intended to demonstrate progress towards defining key concepts and principles that underpin integrated reporting. This is not a formal consultation but stakeholders can comment on the prototype. A formal Consultation Draft of the framework will be released in April 2013 for public feedback, and it is intended that a final version (Version 1.0) will be released in December 2013. Clearly, until such time as there is a final version it is premature to in any way mandate integrated reporting.

CSA is of the view that integrated reporting is really integrated thinking — the benefits come from companies looking inward and changing their approach to disclosure. An integrated reporting framework helps to break down silos between teams and leads to better connected departments. It is really a change management process, with the integrated report the outcome of that change management process, rather than the process itself.

CSA also notes that three Australian companies participated in the pilot program (NAB, Stockland and mecu Bank) and there will be great interest from other Australian companies in the reports they have developed as part of the pilot. We are aware of a number of other Australian companies that have voluntarily undertaken an integrated report and we expect to see more companies move in this direction. CSA believes it is more useful to the ongoing development and uptake of integrated reporting for companies:

- to review these first reports
- start a dialogue with those within the three pilot program companies as to any lessons they learnt in the process
- form Steering Committees internally to put integrated reporting on the agenda
- begin the process internally of bringing together disparate groups in silos to start talking about how integrated thinking might work within the company.

Allowing this process to unfold organically within each company is likely to be far more productive in terms of engaging 'hearts and minds' than any regulatory requirement being imposed on companies, which will inevitably be viewed as a compliance exercise in the face of 'one more report'.

CSA also notes that the International Integrated Reporting Council has noted that director liability in relation to forward-looking statements in reports is a much bigger issue in Australia than in other jurisdictions, given the lack of a safe harbour provision.[6] Directors and officers are subject to extensive liability under various sections of the Corporations Act and under myriad other state and territory legislation. Australia also has an unregulated class action industry.

The existing statutory business judgement rule is too narrow, as it is only applicable to one section of the Corporations Act. CSA recommends that either a broader business judgement rule or a specific safe harbour from liability for such disclosures should be introduced. Other jurisdictions, such as the UK, have a specific safe harbour from liability for such disclosures.

[6] Damon Kitney, 'Director liabilities cloud reporting scheme', *The Australian*, 5 December 2012

CSA is of the view that a broader business judgment rule or a safe harbour in the Corporations Act would ameliorate the concerns held towards integrated reporting, allowing it to flourish.

Should legislative or other changes be adopted, and if so for what reasons, concerning any aspect of the annual report requirements? In this context:

- **should the reporting requirements be redesigned in any respect, including along any of the lines adopted, or under consideration, in overseas jurisdictions, such as having a strategic report and an annual directors' statement**

CSA notes that extensive consultation has taken place in the UK on narrative reporting and reporting requirements generally. While CSA Members note that any companies listed in different jurisdictions should not be obliged to comply with multiple conflicting obligations, appropriate consultation with Australian stakeholders should occur before any reform from another jurisdiction is introduced in Australia.

Moreover, any reform to annual reporting requirements could hinder evolving market practice in relation to integrated reporting by introducing new obligations.

Importantly, CSA recommends that any reform consider, review and report on the impact of any planned reform of the existing legislative and regulatory framework. Adding layer upon layer of further legislation or regulations on companies is not streamlining or clarifying reporting and disclosure.

Should legislative or other changes be adopted, and if so for what reasons, concerning any aspect of the annual report requirements? In this context:

- **what, if any, issues of liability might arise in the event of changes to the reporting requirements, particularly in relation to forward-looking statements, and how might this matter be dealt with**

Directors and officers are subject to extensive liability under various sections of the Corporations Act and under myriad other state and territory legislation. Australia also has an unregulated class action industry. The existing statutory business judgement rule is too narrow, as it is only applicable to one section of the Corporations Act. A broader business judgement rule should be introduced. Other jurisdictions, such as the UK, have a specific safe harbour from liability for forward-looking disclosures.

CSA recommends that the introduction of a broader business judgment rule would be useful in relation to developments in integrated reporting and directors making forward-looking statements.

Should legislative or other changes be adopted, and if so for what reasons, concerning any aspect of the annual report requirements? In this context:

- **how might technology best be employed to increase the accessibility of annual reports**

The provision of information to shareholders electronically has found favour with shareholders. For example, the 2007 amendments to the Corporations Act to allow companies to elect to distribute annual reports by making them available on their websites ensures that shareholders have access to as much or as little information as they require. The amendments provided shareholders with greater flexibility as to what information they wish to review, given that the information needs can differ substantially between individual shareholders and groups of shareholders (such as retail and institutional shareholders). CSA Members report that 10 per cent or less of shareholders across a variety of organisations now request the annual report in hard copy.

In similar fashion, CSA advocated for a change to the Australian Securities Exchange (ASX), ASX Listing Rules requirement relating to the provision of an independent expert's report to shareholders when a shareholder resolution on a corporate transaction is required. CSA recommended to the ASX that Listing Rule 10.10.2 be amended to require that companies ensure the full independent expert's report is available on the company's website and easily accessible, and provide a hard copy of the full independent expert's report, free of charge, to any shareholder upon request. ASX has since amended the Listing Rules to effect this change.

Similarly, CSA recommends that a summary of key items in the remuneration report could be published in the annual report with the full remuneration report being available on the website.

CSA believes that generic information which is applicable to all shareholders (for example, annual reports, ASX announcements, independent experts' reports) should be available on the company's website with a hard copy available to any shareholder, free of charge, on request.

However, CSA does not see the need for any legislative amendment to enable the provision of information to shareholders through the use of technology. CSA would be very concerned that any legislative provisions concerning technology could be out-of-date before enacted, and could hinder evolving technological capacity and innovations in market practice.

Should legislative or other changes be adopted, and if so for what reasons, concerning any aspect of the annual report requirements? In this context:

- **what, if any, initiatives might be introduced to cater for future innovations in reporting (for instance, would it be beneficial to establish the equivalent of a Financial Reporting Laboratory)?**

As identified by the Australian Financial Reporting Council's (FRC's) Task Force on Managing Complexity in Financial Reporting (2012), the current regulatory framework is not optimal as requirements by different bodies may be duplicative or inconsistent. CSA is also concerned with the manner in which legislators and regulators respond to business and market developments by introducing further statutory requirements in financial and shareholder reporting.

CSA is of the view that the FRC could consider undertaking a project similar to that of the Financial Reporting Laboratory of the FRC (UK) on *A single figure for remuneration*. In the first instance, this body could review existing reporting requirements holistically, with a view to recommending simplification. The work could also extend to exploring, testing and trialling new financial reporting models and concepts (without liability) to enable greater innovation in the market.

The work could extend from reviewing and making recommendations on current reporting requirements in order to simplify them, to making recommendations for future innovations in reporting.

CSA cautions that such a body would need to have a broader base than the current FRC (Australia), which has representatives from accounting, audit and shareholder bodies, but which has no representatives from those charged with the responsibility for narrative reporting, such as company secretaries.

Calling the AGM

Should there be any change to the statutory time frame for holding an AGM?

Please refer to the first part of our submission regarding our ideal proposed solution to this issue.

The information contained in the annual report is already out-of-date by the time the AGM is held, due to the time-lag and the continuous disclosure environment.

Extending the statutory period for holding the AGM could ameliorate the current difficulty of the vast majority of AGMs being held within the period from October to December, although evidence (such as when time frames for financial results were amended in the ASX Listing Rules) suggests that for most smaller companies, AGMs would just be held later. In addition, extending the time frame for holding the AGM will not assist in bringing more shareholders to the meeting under the current statutory framework. As noted above, the AGM deals with historical information, which is already out-of-date by the time the meeting is held. Extending the time frame renders the information dealt with at the AGM very stale indeed.

Providing additional time for the holding of AGMs would only facilitate greater engagement should the current structure of the AGM change, and the general meeting becomes an investor briefing looking forward rather than a meeting looking back (see Part I for our blue-sky ideas on reform to the AGM to provide for such a change).

If the time frame for holding the AGM is reduced, this in turn reduces the time available for all the AGMs to be held. This would put considerable pressure on institutional investors, proxy advisory firms and entities. For example, at present, many entities hold full-year results roadshows in August and September, prior to the AGM being held in October or November. Holding the AGM earlier would reduce the time available for such roadshows.

CSA therefore does not recommend any changes to the statutory time frame for holding an AGM within the current context. However, adjustments could be made to the voting entitlement date vis-à-vis the poll deadline (for example, the voting entitlement date could be a business day or two prior to the poll deadline) to ensure that custodians and other nominees have time in which to finalise and verify the voting instructions of the underlying beneficial holders.

In what respects, if any, might the requirements for information to be included in the notice of meeting for an AGM be supplemented or modified?

CSA Members take a conservative view of the notice of meeting, noting that shareholders require all reasonable information in order to make decisions. CSA Members are of the view that the current requirements meet this need.

CSA Members also note that they have not received any complaints in relation to the notice of meeting, or feedback from shareholders that they are ill-informed due to the requirements relating to the notice of meeting.

CSA recommends that no change be made to the requirements for information to be included in the notice of meeting.

How might technology be used to make this notice more useful to shareholders?

CSA notes that shareholders can currently elect to receive information electronically.

However, CSA recommends that Australia move to an opt-in system for receiving hard copy meetings materials. A company would be required to announce to the ASX (and then place on its website in a clearly defined section):

- when the AGM will be held (as is currently the case, prior to the expiration date of an individual's right to nominate an external director)
- when the annual report and meeting materials are available online and how to access them and vote online. Shareholders who have provided their email address to a company and provided consent for electronic communication could be notified of this (as is currently the case).

The United Kingdom moved to a joint opt-in framework for the combined release of the annual report and notice of meeting — we have the precedent in another jurisdiction that an opt-in system for receiving hard copy meetings materials works. With hindsight, when Australia moved to an opt-in legislative framework for receiving hard copies of the annual report, it was probably a missed opportunity that we did not also move to an opt-in for hard copy meetings materials simultaneously.

Might any other documents usefully be sent with the notice of meeting, and, if so, what?

As noted above, CSA Members have had considerable success with initiatives such as a non-statutory short-form shareholder review. Many more shareholders elect to receive this document than the annual report.

CSA reiterates that when statutory requirements are imposed on such initiatives, they inhibit both the freedom of the entity to explore better ways to engage shareholders with innovative forms of information, and shareholder engagement as they turn away from the documents required by statute. CSA again recommends short-form reports to shareholders, but recommends that:

- companies be left to communicate directly with their shareholders as to what form of non-statutory reports shareholders would like to receive
- such short-form reports remain non-statutory.

Should there be provisions for companies to send information about an AGM directly to the beneficial owners of shares held by nominees and, if so, what type of information?

CSA Members believe that companies should work with custodians and other nominees to foster better relations and communication, and many companies do.

However, in terms of regulatory intervention in this space, companies may only have obligations in respect of the registered shareholder, as the constitution acts as a contract between the company and the shareholder (s 140 of the Corporations Act). To attempt to extend obligations further than this falls outside of privity of contract and, given the breadth of different types of custodians and nominees and the extreme bureaucracy that is the tracing notice regime, this would be unreasonable.

Notwithstanding this, CSA notes with interest the Canadian model, where issuers, and some other entities, ***may*** make available documents concerning the affairs of the issuer, including annual reports, financial statements and other proxy-related material, directly to beneficial owners of the reporting issuer's securities if the beneficial owner does not object to having beneficial ownership information (including that person's contact information and securities holdings) disclosed to the reporting issuer or other entity. The issuer is to be advised on these matters by the nominee registered shareholder, pursuant to the instructions of the beneficial owner to that shareholder. The securities legislation restricts the use of beneficial ownership information to matters relating to the affairs of the reporting issuer.

Should there be any provision for beneficial owners of shares in a company to participate in the AGM of that company and, if so, how?

CSA notes that there is no legal relationship between the company and the beneficial owners. There is a legal relationship between the company and the registered holder. Shareholders choose to structure their holdings in this manner. CSA does not believe that there should be any provision for beneficial owners to participate in the AGM. Other avenues of engagement are open to them for engagement. However, if a company is aware of the relationship, it does have the option of allowing those underlying holders to attend and speak, and this does not require any legal intervention.

Should there be any change to the threshold tests for shareholders placing matters on the agenda of an AGM?

CSA is strongly of the view that there should be no changes to the threshold tests for shareholders placing matters on the agenda of an AGM.

The retention of ss 249N(1)(b) and 249P(2)(b) preserve the rights of members to use a 100-member test to put a resolution on the agenda of the AGM and request the company to distribute a statement to all its members. These provisions protect the rights of small groups of members to have their concerns addressed. This shareholder right is of particular importance to retail shareholders, who, unlike institutional investors, do not necessarily have the opportunity to meet with the company prior to the AGM.

Most resolutions put forward on the AGM agenda, through the use of the 100 member rule in ss 249N(1)(b) and 249P(2)(b) have not been carried. However, the debate generated by such resolutions has been central to shareholder engagement with corporations, and we support this. Our support for the repeal of the 100-member rule only applies to the calling of special meetings.

The majority of companies believe it is important to communicate with special interest groups before the meeting and that, provided the input is cordial and measured, the contribution of special interest groups can be productive. CSA Members recognise that it is important for special interest groups, such as the Australian Shareholders' Association (ASA), to demonstrate to their members that they are actively seeking to further their interests. This may explain why some groups asked questions at the AGM which had apparently been previously discussed with the company before the meeting. For example, the ASA has met privately with many companies before their AGM for a discussion on specific questions. The ASA also used the forum of the AGM to raise some of these issues publicly.

However, CSA notes that the AGM has the potential to be hijacked by special interest groups, with more than 50 per cent of discussion at times being taken up on the one issue, to the vexation of other shareholders. The Corporations Amendment Bill (No 2) 2005 proposed a lowering of the threshold from 100 to 20 for the number of members needed to add a resolution to the agenda of an annual general meeting. CSA Members believe that the reduction of the threshold could see a range of minor, irrelevant, vested issues being included on the agendas of general meetings, which would only serve to make AGMs larger and longer, to the detriment of members and companies.

Granting the capacity to 20 members from special interest groups to weigh down the agenda of an AGM with issues that are of no interest to the majority of members is not an effective means of providing for minority shareholders to examine the affairs of the company and its members. CSA recognises that if an issue is supported by 100 members, it is an issue that rightly deserves to be discussed at an AGM. If it focuses the attention of only 20 members, its

relevance to the greater number of members is far less certain. Similarly the same issues arise in the context of managed investment scheme meetings

Should there be any change to the timing requirements for the calling of an AGM, including for shareholders to place matters on the agenda of an AGM, to seek the circulation of statements concerning any resolution, or to nominate persons for the position of director?

CSA does not recommend any changes to the timing requirements for the calling of an AGM, including for shareholders to place matters on the agenda of an AGM, seek the circulation of statements concerning any resolution or nominate person for the position of director.

While we recognise that institutional shareholders may feel there is insufficient time, given the layering inherent in the holdings of shares through custodians (see our comments earlier on the 'peak season'), we do not believe that adding a few more weeks to the timing requirements for calling an AGM will ameliorate their concerns. Mandating direct voting would have far greater effect, as it would reduce the time currently spent on votes being relayed from the beneficial owner through a layered system of registered holders.

Should companies be required to publish a pre-agenda notice and, if so, what should be the contents and timing of that notice?

CSA does not support any requirement to publish a pre-agenda notice.

Does the current law concerning excluded material either create undue difficulties for shareholders who wish to criticise directors or, conversely, unduly restrict directors in vetting out information to be circulated to shareholders at the company's expense?

CSA does not believe that the current law concerning excluded material creates undue difficulties for shareholders who wish to criticise directors. Companies can receive material from shareholders that they wish to have distributed to all investors in the company, but the material is defamatory. Under the current law, the company cannot distribute defamatory material — nor should it be required to do so. Notwithstanding this, many companies will seek to digest the material received from the shareholder, ensuring that it is no longer defamatory so that it can be distributed. On this basis, it is also clear that the current law concerning excluded material does not unduly restrict directors from vetting out material to be circulated to all shareholders at the company's expense.

Should there be any rule regarding the failure to present a resolution at an AGM?

CSA does not believe that there should be any legislative amendment regarding the failure to present a resolution at an AGM.

Should 100 shareholders contact the company to put a resolution on the agenda of the AGM and validly request the company to distribute a statement to all its members, the Corporations Act obliges the company to fulfil this shareholder right. As stated previously, shareholders have a contractual relationship with each other, the company and the directors and officers and this provides ample scope for remedies.

The right of the company to not present a resolution at an AGM should be preserved, as companies need flexibility to respond to changing circumstances. For example, if a director who is nominated for election or re-election should meet with an accident just prior to the AGM, the company needs the right to withdraw the resolution. At present, if a resolution is withdrawn, any shareholder at the AGM can ask the chair to explain why it was withdrawn.

Should shareholders have greater scope for passing non-binding resolutions at AGMs?

Corporations legislation, in Australia and other common law countries, is very clear as to the division of responsibilities in companies. The business of a company is to be managed by or under the direction of a board of directors appointed by and accountable to the shareholders, and the directors exercise all powers of a company except those that are required to be exercised in a general meeting (s 198A of the Corporations Act 2001 (Cth)) (the Corporations Act).

At no point has corporations legislation either here or overseas contemplated shareholder participation in the management of listed and broadly held companies on a day-to-day basis. That is, corporations legislation recognises that it would be impractical for shareholders to be involved in every decision. Indeed, it would paralyse a company if each decision had to go before shareholders.

Equally, corporations legislation recognises that mechanisms are required for the review of decisions taken by directors. As part-owners, shareholders should be engaged in the corporate governance of companies. They should engage with companies on long-term strategic and governance issues to provide a real test to the thinking and behaviour of boards and management, and to ensure that boards properly oversee management.

Corporations legislation recognises the role that directors play as agents for shareholders, with their fiduciary duties to act in the best interests of the company as a whole encompassed by statute and common law. Directors have responsibility to take decisions concerning the company on a wide range of matters, and decisions on those issues are not taken in isolation. Boards are best placed to take into account the financial and operational circumstances of the company when making decisions about the company.

While CSA notes that the non-binding vote on the remuneration report resolution has enhanced shareholder engagement, it is equally clear that this engagement covers a wide range of topics and is not restricted to remuneration. Hence, further non-binding resolutions would not increase the engagement, but does start to stray into involving shareholders in decision making. Further non-binding resolutions become plebiscites on every decision taken by the directors.

CSA points to the existing shareholder right to remove directors should board decision making be found to be unsatisfactory and the two–strikes rule, which can see shareholders ‘spill’ the board. The ASX Listing Rules require directors to submit themselves to re-election every three years, which also ensures that directors are subject to shareholder scrutiny on a regular basis.

Given these existing shareholder rights, CSA is strongly of the view that it serves no benefit to provide shareholders with greater scope for passing non-binding resolutions at the AGM.

What, if any, additional legislative or best practice procedures should be adopted for companies to seek the views of shareholders on issues they would like discussed at the AGM, or to invite shareholders to submit questions prior to the AGM?

CSA has published a booklet. *Effective AGMs*, which sets out ‘best practice procedures’ in relation to shareholder engagement. One such procedure which is strongly encouraged in the booklet is for companies to call for issues before the AGM. The booklet states:

> An important way in which companies can build engagement with shareholders is to call for questions concerning the management and performance of the company ahead of the AGM. Calling for questions can help identify common themes of shareholder interest and concern. It also obviously helps in preparing suitably informative answers for shareholders. It is useful to include in the call for questions a

> disclaimer that individual responses may not be sent to every question. This can help maintain flexibility in the process.

CSA is of the view that as guidance on 'best practice procedures' already exists there is no need to recommend that further guidance be developed. Moreover, the booklet also notes that:

> Company secretaries, and their colleagues in investor relations where appropriate, should not underestimate the amount of effort which may be involved in collecting, reviewing and preparing answers to the questions received. Before taking up the process of calling for questions from shareholders ahead of the meeting you should ensure that there is high-level management and board buy-in to the process, and agreement on the provision of information and resources to answer them.

CSA also recommends that no additional legislative requirements need be introduced.

Should there be some obligation on the auditor (or the representative of the auditor) to speak at the AGM?

Under s 250PA, shareholders of listed companies are entitled to submit written questions to the auditor on the content of the auditor's report or the conduct of the audit of the annual financial report. Shareholders must give the question to the company not less than five days before the meeting. The company in turn must, as soon as practicable after it receives the question, pass it on to the auditor, even if it believes the question does not relate to a matter about which a shareholder is permitted to question the auditor. Copies of the questions must be made available to shareholders attending the AGM.

CSA notes that this right has almost never been utilised. CSA is extremely doubtful that legislating that an auditor must speak at the AGM will enhance shareholder engagement, given the lack of interest shown by shareholders in questioning the auditor.

Notwithstanding this, CSA also notes that the majority of questions about the accounts are directed at the board at the AGM. The auditor is present and can take questions but should not be obliged to speak.

What, if any, obligations should a company or a company auditor have to answer questions from shareholders?

The provisions of s 250T require the chairman to allow the shareholders a reasonable opportunity to ask questions of the auditor or their representative relevant to:

- the conduct of the audit
- the preparation and content of the auditor's report
- the accounting policies adopted by the company in the preparation of the financial statements and
- the independence of the auditor in relation to the conduct of the audit.

The chairman must also allow the auditor a reasonable opportunity to answer any written questions which have been submitted to the auditor under s 250PA.

Business of the AGM

Should any matter be excluded from or, alternatively, added to the business of the AGM?

CSA does not recommend that any matters be either added to or excluded from the business of the AGM. We note earlier in this submission that the formality of working through the resolutions at an AGM stifles meaningful discussion on company performance and prospects.

We refer to our idea set out in Part I of this submission on delinking the meeting from voting, and thereby encouraging the meeting as a lively forum where shareholders can discuss any matter relating to the company.

What, if any, changes are needed to the current position concerning:

- **the general functions and duties of the chair**
- **the chair ensuring attendance of particular persons at the AGM**
- **the chair moving motions**
- **motions of dissent from a chair's rulings?**

CSA Members are of the view that no changes are required to the current position concerning the role and responsibilities of the chair. Currently, most companies maintain a manual setting out the procedural aspects of the AGM, and the company secretary is on hand to assist the chair at any point, with reference to the manual.

CSA's publication, *Effective AGMs*, states that:

> Joske notes that 'Where there is no specific provision in the Corporations Act 2001, one may refer to the common law of meetings'. The Corporations Act goes into detail on procedural issues only in relation to a few specific items, such as voting on a show of hands and on a poll. There is therefore a large body of meeting practice applicable to AGMs and other company meetings which relies on common law. There are a number of highly regarded and accessible texts such as Joske and Horsley which set out the procedural issues in detail.

CSA has also published *Guide to Procedures at AGMs*, which provides guidance on these and other matters.

We refer back to our 'delinking' idea set out in the first part of this submission. Should that be enacted, the physical meeting aspect of the AGM will be much less formulaic, giving chairs greater flexibility in running the meeting, which should encourage innovation in how the meetings are held, including the increased participation of other directors and senior management, which CSA would support.

Should a chair be obliged to provide shareholders with a reasonable opportunity to discuss a resolution before it is put to the vote?

The scope of the discussion on the resolution before the meeting is currently at the discretion of the chair.

Most chairs will actively canvass shareholder opinion on each resolution before it is put to the vote. However, as noted earlier, debate on resolutions is frequently limited.

CSA Members are of the view that there is insufficient evidence pointing to problems with the current manner of dealing with procedural issues at AGMs and does not recommend change.

Should a chair have the power to impose any time, or other, limits on an individual shareholder speaking at the AGM?

At the moment s 250S provides that the chair of an AGM must allow a reasonable opportunity for the members as a whole at a meeting to ask questions or make comments on the management of the company.

At present, chairs judge the mood of the meeting in terms of judging whether one shareholder may have spoken for too long, or asked the same question multiple times using slightly different language. Chairs will issue warnings and also delegate the authority to security to remove a person should they be disruptive.

Alternatively, another shareholder may be asking questions of merit that other shareholders are interested in and it would not be in shareholders' interests to have the speaker forced to cease speaking.

CSA Members are of the view that the majority of chairs find the balance between affording shareholders a reasonable opportunity to question and comment on resolutions before the meeting, and maintaining sufficient order so that all shareholders can feel that the meeting is being conducted fairly, is not being hijacked by particular people or groups, and is not wasting people's time. CSA Members believe that chairs should retain the right to exercise their judgment in this regard.

CSA's publication, *Effective AGMs*, also recommends that:

> other ways to deal with concerns raised by shareholders with special interests ... include ...ensuring that customer issues do not become meshed with shareholder issues by having information booths available at the meeting where shareholder customers can discuss their issues directly with company representatives.

What changes, if any, should be made to the current requirements concerning:

- **informing shareholders of their right to appoint a proxy**
- **the proxy form**
- **any other aspect of proxy voting.**

CSA is of the view that no changes are needed to the current requirements concerning the proxy form and the other related issues set out above.

The proxy form is already a complex document and now more complex again as a result of the voting exclusions introduced in the *Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Act 2011*. The Act introduced amendments to the Corporations Act (s 250BD) prohibiting key management personnel (KMP) and their closely related parties from voting undirected proxies on remuneration-related resolutions. In addition, the amended Act (ss 250R(4) and 250V(2)) prohibits any KMP (which includes the directors), the details of whose remuneration appears in the remuneration report, and their closely related parties from casting a vote (in any capacity) on a resolution to adopt the remuneration report or a spill resolution.

In conjunction with legal advisers, companies decide how the proxy form will be set out so that shareholders have clarity as to how to appoint a proxy or vote directly; how any voting exclusions operate, and the chair's voting intentions.

CSA notes that:

- it has previously published a best practice proxy form, which was used by both major share registries, and
- has been asked by ASIC to develop a new best practice proxy form to reflect the changes brought in by the two-strikes rule.

CSA refers to the earlier part of this submission where we recommend that direct voting be mandated. This would replace and abolish the current archaic system of proxy voting (which is a transfer of the rights of shareholders to attend and vote to another person), as this is anachronistic and a symbol of a bye-gone age where people had the need to appoint an

individual to attend and vote on their behalf. We have seen many problems with the current system, some of which have required legislative intervention.

Most proxy forms are necessarily highly legalistic and may be difficult for shareholders, particularly retail shareholders, to understand, due to the complexities of the proxy voting system. If shareholders received a direct voting form only, it would consist of a simple form setting out a series of resolutions on which they were asked to vote, but there would be no lengthy and complex explanation, as now, of:

- how the appointment of a proxy works
- the effect of appointing a proxy in relation to any voting exclusions
- the difference between a directed and undirected proxy
- the need to expressly authorise the chair to vote on a shareholder's behalf.

For those shareholders accustomed to placing their faith in the chair by appointing the chair as their undirected proxy, a simple statement on the voting form would indicate the recommendation of the chair in relation to each resolution, but the shareholder would still vote directly.

By replacing the system of proxy voting with direct voting, and mandating direct voting and voting via a poll, the system ensures that the result of all resolutions is the will of the eligible shareholders that voted on them. Voting would be undertaken online as the default with shareholders being given access on request to more traditional means. Shareholders would still retain the right to appoint a representative to attend the meeting and speak on their behalf.

The current problems with lost votes and the complexities of the proxy voting system fall away as institutional shareholders vote directly online.

What changes, if any, should be made to the current requirements concerning:

- **pre-completed proxies**

CSA is of the view that pre-completed proxy forms are not good governance practice generally. However, it is not only the company that can issue a proxy form — a shareholder also has the right to issue a proxy form. Dissenters can use a pre-completed proxy form to seek to gain support for their case.

Notwithstanding this, it is good governance practice for a proxy form to provide shareholders with the ability to vote either 'yes' or 'no' on each resolution or abstain. CSA recommends that pre-completed proxy forms be banned.

What changes, if any, should be made to the current requirements concerning:

- **notifying the company of the proxy appointment**

A company and its board of directors can have an information advantage if legislation stipulates that proxies must be sent either to the company or to any other entity or entities nominated by the company and cannot be sent to a third party who lodges the proxies by the due date. A dissenter could be seeking tactical support in a campaign against the board of directors by seeking to be appointed the proxy of other shareholders. Changing the law to stipulating that only the company or its nominated third party would receive proxies would entrench the power of the company and leave the dissident unaware of whether the campaign seeking support from other shareholders was successful or otherwise.

While CSA Members acknowledge that a company would prefer to know how voting was progressing in any such circumstances, and would also prefer not to have mass proxies lodged at the last minute by a third party, CSA is of the view that the legislation should not thwart any shareholders' attempts to fight an incumbent board or garner support for voting against board-

recommended resolutions. Indeed, CSA points to its own experience when it acted as a third party garnering support from Australian members to vote against a resolution from the UK-dominated International Council ICSA. CSA gathered proxies and lodged them with ICSA en masse by the due date. CSA recommends that the legislation should remain as it currently stands, with a third party having the right to solicit proxies and collect them, but obliged to lodge them with the company by the due date.

Rather than stipulating that only the company or its nominated third party can receive lodged proxy votes, CSA Members recommend that any third party receiving proxy votes be required by law not to cherry pick and be required to lodge all proxies received. Of course, this whole thorny issue goes away in its entirety if direct voting is mandated, as per our earlier proposal.

What changes, if any, should be made to the current requirements concerning:

- **providing an audit trail for lodged proxy votes?**

CSA is of the view that electronic voting will assist in maintaining the integrity of the voting process, as it would provide an audit trail for lodged proxy votes.

It is important to note that online voting is different from so-called electronic voting used by a number of companies where shareholders attending AGMs use handsets to communicate their votes.

CSA also recommends the mandating of direct voting (see our earlier comments). Direct voting provides an audit trail to the shareholder (their vote is confirmed) and also to the company. Regardless of the method of voting, a dissident shareholder may still request a copy of the register to solicit votes.

What changes, if any, should be made to the current requirements concerning:

- **the record date and the proxy appointment date**

CSA agrees that electronic proxy voting and electronic direct voting have major advantages over paper-based proxy voting, both ensuring an audit trail for votes and enabling the maximum cut-off time for lodging proxy appointments to be shortened.

CSA would prefer to see electronic voting develop further than see legislative change introduced to extend the record date to five business days before the meeting. CSA agrees with the Productivity Commission that extending the record date in this manner can cause disadvantages, such as increasing the risk that shareholders who no longer have a substantive interest in the company may vote or shareholders who purchase shares after the record cut-off date are unable to vote.

Notwithstanding this, as we note in Part I of this submission, the voting entitlement date could be a business day or two prior to the poll deadline to ensure that custodians have time in which to finalise and verify the voting instructions of their underlying beneficial holders.

CSA also recommends the mandating of direct voting (see our earlier comments).

What changes, if any, should be made to the current requirements concerning:

- **irrevocable proxies**

CSA is of the view that this is not a requirement that needs to be retained.

What changes, if any, should be made to the current requirements concerning:

- **directed and undirected proxies**

The Corporations Amendment (Proxy Voting) Act 2012 was passed in June 2012 to clarify that the chair of an annual general meeting (AGM) can also vote undirected proxies on the nonbinding resolution to adopt the remuneration report and on a spill resolution where the shareholder provides the chair with express authorisation to do so. That is, the chair is now able to exercise undirected proxies on all remuneration-related resolutions, including the remuneration report and the spill resolutions.

CSA advocated for this change and continues to support it strongly within the current regulatory framework. The majority of undirected proxies that are lodged, particularly by retail shareholders, appoint the chair as their proxy. Their choice to appoint the chair as their proxy to vote on their behalf is a vote of confidence in the chair and the board. Removing their right to appoint the chair as their proxy denied the shareholder the right to exercise their vote, unless they could either physically attend the meeting or appoint another proxy to exercise that right for them. The 2011 AGM season saw two-thirds of retail shareholders' votes lost due to the drafting anomaly that the amendment addresses.

However, in the long run, CSA recommends that direct voting be mandated. Most proxy forms are necessarily highly legalistic and may be difficult for shareholders, particularly retail shareholders, to understand, due to the complexities of the proxy voting system. If shareholders received a direct voting form only, it would consist of a simple form setting out a series of resolutions on which they were asked to vote, but there would be no lengthy and complex explanation, as now, of:

- how the appointment of a proxy works
- the effect of appointing a proxy in relation to any voting exclusions
- the difference between a directed and undirected proxy
- the need to expressly authorise the chair to vote on a shareholder's behalf.

For those shareholders accustomed to placing their faith in the chair by appointing the chair as their undirected proxy, a simple statement on the voting form would indicate the recommendation of the chair in relation to each resolution, but the shareholder would still vote directly.

By replacing the system of proxy voting with direct voting, and by mandating direct voting and voting via a poll, all of these issues become redundant and the system ensures that the result of all resolutions is the will of the eligible shareholders that voted on them. Voting could be undertaken online as well as through more traditional means. Shareholders would still retain the right to appoint a representative to attend the meeting and speak on their behalf.

The current problems with lost votes and the complexities of the proxy voting system fall away as institutional shareholders vote directly online.

What changes, if any, should be made to the current requirements concerning:

- **renting shares**

CSA notes that, depending on the particulars of stock lending arrangements, superannuation funds and managed investment funds are potentially putting at risk the share price when they lend stock, and that investors should be in a position to make their investment decisions in full knowledge of a fund's policy on stock lending. It could be argued that any appointment of an undirected proxy is a form of stock lending.

CSA notes the importance of superannuation to the Australian economy and the retirement incomes of the Australian population. With superannuation a long-term investment, investors

need certainty that stock lending arrangements do not unduly place at risk the value of their investments.

However, there is an economic value attached to shares and shareholders should be able to take advantage of that economic right. CSA is of the view that the policy on stock lending is a matter between the investor and the fund in which they invest and renting shares should not be banned. Moreover, CSA queries how any such ban could be policed, as large institutional shareholders hold stock through custodians.

CSA is of the view that disclosure underpins the Australian market. In order to ensure consistency in the application of the principles of disclosure by all market participants, CSA recommends that superannuation funds and managed investment funds should disclose whether or not they permit stock lending by their investment managers/agents in relation to their investments.

CSA also notes that if enough stock is borrowed to ensure a meaningful interest in the company (which could influence voting outcomes) this would need to be disclosed under a substantial shareholder notice.

What changes, if any, should be made to the current requirements concerning:

- **proxy speaking and voting at the AGM**

CSA Members note that, currently, special interest groups can buy one or two shares across 100 people, to provide them with the right to agitate at meetings on non-shareholder related issues.

CSA recommends that direct voting be mandated. This provides the best means of transparency as to voting at the AGM.

A shareholder would still have the right to appoint a representative to attend a meeting and vote on their behalf.

Direct voting before the meeting

Should direct voting before the meeting be provided for by legislative or other means, and if so what matters should be covered in any regulatory structure?

CSA has been a longstanding supporter of direct voting. We issued a discussion paper in 2006 on direct voting (*Expressing the voice of shareholders: a move to direct voting*) and then issued *CSA's Guide to Implementing Direct Voting in 2007*.

While currently legislative change is not required to effect direct voting, as it can be implemented, in most cases, with only minor changes to the company constitution, CSA strongly recommends that direct voting be mandated. As discussed earlier, direct voting should replace the appointment of a proxy.

CSA is also of the view that an introduction of online voting as the default option for voting will further facilitate direct voting.

CSA recommends that any legislative provision simply mandate direct voting. All matters relating to the rules governing the exercise of direct voting should be a matter for the company to decide. CSA refers to the discussion in Part I of this submission for further comment on the value of mandatory direct voting.

Disclosure of pre-meeting voting

In what circumstances, if any, should access to pre-meeting voting information be permitted?

CSA Members note that directors cannot force any shareholder to vote in a particular way. They engage with shareholders to seek their vote in accordance with recommendations put forward by directors. CSA notes that the majority of votes are received in the final 24 hours.

CSA notes that it is assumed that if directors have access to pre-meeting voting information that it provides them with an unfair advantage. However, CSA Members are of the view that, generally, directors are not given and do not take an unfair advantage by having access to this information. Indeed, CSA Members know of instances where directors have engaged with shareholders yet the vote when it arrives does not tally with the sentiment expressed by the shareholders during the engagement process. When queried, the shareholder discovers that a voting error occurred and rectifies the vote to accord with their intention. For example, proxy platforms can lodge an incorrect vote, although CSA notes that fewer problems of this kind have occurred since online voting was introduced for institutional investors.

CSA Members also note that there could be circumstances where continuous disclosure obligations require companies to disclose pre-meeting voting.

CSA Members understand why shareholders would want access to pre-meeting voting information in contentious situations. We note above why we believe that third parties should be able to solicit proxies, but we do not believe that shareholders should have access to pre-meeting voting other than any proxies they actively solicit. CSA is of the view that access of this kind could be abused by special interest groups, or distorted by the media, where a running commentary could be held as to how the voting was developing, causing changes to voting outcomes based on speculation and mischief rather than any real interest in the integrity of the voting process.

CSA notes that a shareholder holding more than 20 per cent of available shares could have the right to access the pre-meeting voting information and also access the poll results after the meeting. The shareholder would pay the auditor to check the validity of the process.

Alternatively, 100 shareholders could be given the right to access this information.

Without a materiality threshold, the cost could not be justified by the shareholding.

CSA does not support an independent scrutineer being mandated. For large companies, this would be an additional large cost. CSA notes that 99.9 per cent of votes on resolutions are not contentious. CSA also notes that, following the introduction of the two-strikes rule, ASIC reviewed voting at multiple AGMs (in 2011 and 2012) and found there was no problem with the integrity of the voting process. Mandating a scrutineer for the very small percentage of contentious resolutions would be out of proportion to any issue.

CSA recommends that the legislation could provide that a shareholder could ask for a scrutineer to be appointed and pay for such an appointment.

In what manner if any, should access to pre-meeting voting information be regulated before discussion on a proposed resolution?

One argument for disclosing the proxies at the commencement of the discussion is that such disclosure could reveal that, where institutional shareholders have already voted, there may not

be consistent support for a company's position on a particular resolution. This could assist the discussion at the AGM, clarifying which areas of company performance or action require further clarification through questioning of the directors.

However, shareholders, particularly retail shareholders, can feel that disclosure of the pre-meeting voting can stifle discussion. Knowing how the institutional investors have voted can appear to make any contribution of retail shareholders to the discussion meaningless.

CSA believes it would be undesirable to prescribe in legislation whether pre-meeting voting information should be disclosed in advance of a discussion on a particular resolution. CSA recommends that this be left to the discretion of the chair.

In what manner, if any, should the current requirements concerning the disclosure of pre-meeting votes before voting on a resolution be amended?

Currently, the chairman must inform the meeting of how votes lodged by proxy are to be cast before the vote is held (s 250J(1A)). This is a replaceable rule.

The disclosure of proxy votes before the vote is taken may give a company an opportunity to demonstrate transparency in the voting process, and reassure shareholders that there will be a fair result on the resolution being considered. However, some shareholders may feel that any such disclosure stifles debate at the meeting, given that the result of the vote is known in advance. Shareholders can feel intimidated by or resentful of being advised of the outcome of the vote before discussion has taken place. CSA notes that the majority of the major listed companies disclose the pre-meeting voting after discussion for this very reason.

CSA believes it would be undesirable to prescribe in legislation whether pre-meeting voting information should be disclosed in advance of the vote. CSA recommends that this be left to the discretion of the chair.

Should there be legislative or other recognition of online voting during the course of an AGM and, if so, in what respects should this form of voting be regulated?

CSA Members note that online voting is legally enabled and are of the view that market practice will evolve to provide for online voting as the norm.

CSA Members believe that there is a danger of any regulation in this area not keeping pace with technology and thereby stifling the development of online voting and the use of mobile devices and other devices not yet on the market.

CSA Members also believe that any regulation in this area will be difficult given the range of company size in Australia. The large companies have the resources and large shareholder bases to innovate and be leaders in this area. Smaller companies are unlikely to be market leaders in online voting and may find it difficult if it is mandated.

CSA strongly recommends market-led practice in this area and that the law remains conducive to and encouraging of best practice rather than mandating one approach.

Exclusions from voting

Do any issues arise concerning voting exclusions on resolutions that must, or may, be considered at an AGM and, if so, how might those issues best be resolved?

In 2011, ASIC asked CSA to develop *Guidelines on managing voting exclusions on remuneration-related resolutions*. The guidance is available on the CSA website, and is freely available.[7]

The guidance sets out good practices and processes that companies can put in place to manage voting exclusions. However, CSA Members note that the law does not provide companies with any means of certainty that they have complied, given that the voting exclusion is a personal statutory obligation.

Companies can assist by:

- notifying persons that the company considers them to be a member of KMP
- explaining the prohibitions on voting that apply to any remuneration-related resolution being considered at the forthcoming general meeting
- explaining the extended definition of 'closely related party' under the Act and 'associate' under the ASX Listing Rules, as applicable
- explaining the consequences of breaching the prohibitions on voting outlined to them
- asking the members of the KMP to identify to the company each closely related party or associate who may have shares in the company of which they are a KMP, and if known, provide the details of any such shareholdings
- asking the members of the KMP if they own shares through a nominee company or a trust, and if so, to advise in whose name within the nominee company or trust the shares are held (if this not already monitored by the company)
- requesting that the KMP inform their closely related parties and associates (if applicable) of the voting restrictions applicable to them.

A company can also instruct their share registry of what voting exclusions should apply to particular resolutions. Given that not being able to vote their shares due to their relationship with the member of the KMP (no matter how arm's length that relationship may be in real life) will be a new concept to many individuals captured by the new definition of closely related party, and given that nominee companies and trusts may be unfamiliar with having to not vote a particular parcel or parcels of shares, it is of great assistance if the share registry can stop any vote being cast or counted should an invalid instruction to vote be incorrectly placed. Companies may also give consideration to seeking assurances from KMP that they have not (and will not) cast any votes on remuneration-related resolutions other than in accordance with the Act.

The company can establish all these procedures to manage voting exclusions to:

- satisfy itself it has carried out reasonable steps to promote integrity in the voting process
- assist members of the KMP to ensure they do not put themselves at risk of breaching their personal statutory obligations
- reasonably satisfy itself that people have not cast votes other than in accordance with the Act

but it cannot guarantee that beneficial owners have not voted. The link between the custodian and the beneficial owner is not in the control of the company and the company cannot take responsibility for this.

[7] http://www.csaust.com/media/397700/managingvotingexclusions_24jul12.pdf

Notwithstanding this, CSA Members are of the view that there are no significant issues that require legislative change.

Should any changes be made to the current provisions regarding voting by show of hands?

Voting by show of hands is the primary method used where the outcome of the resolution before the meeting is predictable or the resolution is a formal one whose success is not in doubt. A show of hands may also be useful in taking the temperature of the meeting, even if the outcome is not in doubt. At present, voting on a show of hands is frequently referred to by retail shareholders as the only means available to express a position to directors and the Australian Shareholders' Association (ASA) has long expressed a preference for voting in this fashion. However, we note that the ASA is reviewing its policy of preferring a vote on a show of hands.

Given the importance of ensuring that all shareholders are provided with the opportunity to vote on the resolution relating to the remuneration report, with its attendant very serious consequences, it is advisable for the vote on the remuneration-report resolution not to be held on a show of hands, given that the shareholders present at the AGM represent a tiny portion of total shareholders.

Deciding the vote on the remuneration-report resolution by poll is advisable in the interests of transparency and to include the proxy votes that have been lodged prior to the meeting. At present, voting on a show of hands is frequently referred to by retail shareholders as the only means available to express a position to directors. The chair will need to explain to shareholders why the vote is being decided by poll if the company decides this is the preferred method for the remuneration-report resolution (and subsequent spill resolution, if required).

CSA is of the view that no change is required to the current provision regarding voting by a show of hands. Market practice will shift according to need, as it has with the vote on the remuneration-report resolution. Again, we note that the ASA has indicated it is reviewing its policy of preferring a vote on a show of hands.

CSA also notes that, if direct voting is mandated (and conducted electronically) voting will automatically take place on a poll.

Independent verification of votes cast on a poll

What legislative, or other, verification initiatives, if any, should be introduced concerning voting by poll at an AGM?

The chairman is likely to call a poll when they are aware from the proxies received that there may be a different result from voting on a show of hands, including when they are aware that there is a significant negative vote. Actions by ASIC against some companies have indicated that it considers that a chairman would have a duty to call a poll in those circumstances. Significant shareholders would also be likely to call a poll where the combined effect of smaller shareholders voting on a resolution on a show of hands would outweigh the number of larger shareholders present and voting.

CSA Members note that many companies and their registries already have adopted a robust process to manage the processing and counting of proxies received, including excluding any holdings as directed by the company. This process has been rigorously reviewed following the introduction of the two-strikes rule and its attendant voting exclusions.

Some companies, particularly when they have before a meeting decided that a poll on resolutions will be called, will employ an independent third party (sometimes their external

auditors) to scrutineer the work of the share registry. The level of scrutiny should be agreed between the company, the third party and the share registry and may involve random testing of whether voting instructions (either online, by fax or by mail) have been processed properly and that any holdings specified by the company to the share registry as needing to be excluded from voting on particular resolutions have in fact been excluded from voting.

If an external scrutineer is used, the company will usually request them to attend the general meeting to supervise the performance of any poll that is called to ensure that voting instructions are properly carried out. Companies may also disclose that they have appointed an external scrutineer and the details of their role.

CSA is of the view that current market practice as set out above is providing for confidence in the voting process at present. We note that ASIC conducted a review of voting at AGMs in 2011 and again in 2012 to ensure that companies can demonstrate to their shareholders that votes at general meetings are properly conducted. ASIC was satisfied that voting processes did demonstrate proper conduct.

CSA notes that the chair of the meeting also needs to be satisfied that, in declaring the result of a resolution, only those votes that are permitted under the law have been counted.

Should one or more verification requirements apply in all instances or only if, say, a threshold number of shareholders require it?

CSA notes that a shareholder holding more than 20 per cent of available shares could have the right to access the pre-meeting voting information and also access the poll results after the meeting. The shareholder would pay the auditor to check the validity of the process.

Alternatively, 100 shareholders could be given the right to access this information.

Without a materiality threshold, the cost could not be justified by the shareholding.

Disclosure of voting after the AGM

Should any steps be taken to promote more consistency in the disclosure to the market of voting results?

CSA strongly recommends greater consistency in the disclosure to the market of voting results.

CSA recommends the ASX Listing Rules could include a form for the announcement of voting results, which would ensure consistency.

CSA also recommends that the contract with share registries should ensure that the registries produce an automatic form providing the information to companies, so that they can easily fill in the ASX form. The form would provide for the disclosure of the percentage of shares voted for, against and abstained on each resolution, not the number of shares.

Following the AGM, what, if any, rights of access should shareholders generally, or the person proposing a resolution, have to voting documents?

CSA notes that a shareholder holding more than 20 per cent of available shares could have the right to access the pre-meeting voting information and also access the poll results after the meeting. The shareholder would pay the auditor to check the validity of the process.

Alternatively, 100 shareholders could be given the right to access this information.

Without a materiality threshold, the cost could not be justified by the shareholding.

What, if any, changes should be made to the requirements concerning the recording of details of voting in the minutes of the AGM?

CSA does not believe that any changes should be made to the requirements concerning the recording of details of voting in the minutes of the AGM – there is sufficient detail in the requirements of the Corporations Act and it is widely known that AGM minutes are one of least read documents ever.

The preparation of minutes involves professional judgment. Furthermore, if the public data on the ASX Markets Announcements platform is consistent, shareholders have access to the information they need.

Should there be a statutory minimum period for retention of records of voting on resolutions at an AGM and, if so, for what period?

CSA Members recommend that there should be a statutory minimum period of 12 months for retention of records of voting on resolutions at an AGM.

Method of election

Should there be any legislative initiatives in regard to the election of directors, including in relation to:

- **the frequency with which directors should stand for re-election**
- **the right of shareholders to question candidates (and receive answers)**
- **the voting procedure?**

CSA does not believe there should be any legislative requirements introduced in regard to the election of directors.

Market practice is changing in relation to director elections. For example, in the 2012 AGM season, the chairman of Mirvac voluntarily stood for re-election to test shareholder sentiment in regards to the board's decision to dismiss the CEO.

Importantly, it is only the FTSE300 in the UK that have been required to move to annual elections, and then only on an 'if not, why not' basis, under the UK Corporate Governance Code. If annual elections were introduced in Australia (which CSA believes would only be equitable if the two-strikes rule was abolished) then we would recommend that it only apply to the ASX top 300.

We refer you to our *Guide for Procedures at AGMs* in relation to methods of election (as quoted in the discussion paper).

Except as per the first part of this submission, CSA also does not believe that there should be any legislative requirements introduced in regard to

- the right of shareholders to question candidates (and receive answers)
- voting procedures.

Dual-listed companies

Are there any matters concerning dual-listing that should be taken into account in the regulation of AGMs?

Dual-listed companies will often face additional regulatory burden as they are required to comply with more than one set of regulation, which may or may not be very compatible.

Globalisation

Are there any problems in the voting or other aspects of AGMs for overseas holders of shareholding interests in Australian regulated companies?

The main problem is how an overseas holder is noted on the share register. The manner in which the custodian deals with is not in the control of the company and cannot be legislated. The company can only deal with the registered holder. Information flows between the registered holder and the underlying holder are a matter for those parties.

For some or all public companies, should the functions of the AGM be changed in some manner, or the obligation to hold an AGM be abolished?

See our ideas set out in Part I of this submission in relation to changing the functions of an AGM.

As we note in Part I, we strongly support the AGM as a means of shareholder engagement and do not support it being abolished. However, we equally strongly believe that it needs significant reform.

In this context, what technological developments might be taken into account in considering the possible functions of the AGM?

Again, we refer to Part I of this submission, where we set out ideas for the reform of the AGM.

However, even if our ideas for reform of the AGM are not taken up, CSA Members note that the increased use of technology, including webcasting and online direct voting, and online participation in meetings, will assist shareholder engagement.

CSA strongly recommends that the legislative framework encourage the use of technology but not prescribe any particular approach, given the likelihood that the technology could be out-of-date once the legislation is enacted. It is vitally important that any legislation provides companies with the flexibility to use technology to enhance shareholder engagement and innovate as to different means of engaging with shareholders.

Future of the AGM

Please refer to Part I of this submission for our ideas on the future of the AGM.

Appendix A: Recommendations

Shareholder engagement

Should legislative or other initiatives (for instance, additional ASX Corporate Governance Council, or other, guidance) be adopted, and if so for what reasons, concerning:

- **the role of the board collectively as it relates to engagement with institutional/retail shareholders throughout the year, including leading up to the AGM**
- **the role of particular board members, such as the board chair or the chairs of board committees, in relation to engagement with institutional/retail shareholders**
- **any other aspect of shareholder engagement?**

CSA does not recommend either further legislative reform or additional ASX Corporate Governance Council guidance on the role of the board or board committees and their chairs as it relates to engagement with institutional/retail shareholders throughout the year, including leading up to the AGM.

CSA is of the view that market practice is evolving, and should be allowed to continue to evolve. Bodies such as CSA develop and will continue to develop guidance on best practice in shareholder engagement, which itself continues to evolve.

Should legislative or other initiatives (for instance, additional ASX Corporate Governance Council, or other, guidance) be adopted, and if so for what reasons, concerning:

- **the role of institutional shareholders throughout the year, including leading up to the AGM. In this context:**
  - **is there a problem with having a peak AGM season and, if so, how might this**
- **matter be resolved**
  - **should at least some institutional shareholders be required or encouraged to report on the nature and level of their engagement with the companies in which they invest, in the manner provided for in the UK Stewardship Code or otherwise**

CSA Members are strongly of the view that an educational process is underway, whereby market practice is evolving, as companies and boards learn from their investors that engagement needs to take place over the investing year and not just after the release of the notice of meeting. CSA does not recommend either legislation or additional ASX Corporate Governance Council guidance to drive this evolving market practice.

CSA does not recommend a Stewardship Code in Australia. CSA Members believe that best practice guidelines developed jointly between companies and investors may enhance shareholder engagement more fruitfully and productively than a Stewardship Code. It is also the long-term investors who wish to be good stewards over time who will engage in the development of such guidelines.

Should legislative or other initiatives (for instance, additional ASX Corporate Governance Council, or other, guidance) be adopted, and if so for what reasons, concerning:

- **corporate briefings**

CSA believes in the general principle of ensuring that there is no restriction on access to information provided by a company, but does not recommend a role for further regulation in this area.

We note that many companies now provide retail shareholder access to corporate briefings. We do not recommend that the provision of such access be mandated. This is a matter for evolving market practice.

Should legislative or other initiatives (for instance, additional ASX Corporate Governance Council, or other, guidance) be adopted, and if so for what reasons, concerning:

- **the role of proxy advisers, including:**
  - **standards for investors using proxy advisers, including the extent to which these investors should be entitled to rely on the advice of proxy advisers in making voting decisions, or, alternatively, whether those investors should have some obligation to bring an independent mind to bear on these matters.**
  - **standards for proxy advisers**

CSA is strongly of the view that proxy advisory services are an important connection between institutional investors and the entities in which they invest. They provide a commercial, independent research capacity. Proxy advisory services in Australia are not subject to the conflicts of interest that bedevil their counterparts overseas.

CSA does not recommend a regulatory framework be attached to the provision of their services. Institutional investors are free to engage their services or not, and free to heed their voting recommendations or not.

CSA does recommend that proxy advisory services should disclose on their website their own voting and governance guidelines and any changes to those guidelines.

Could greater use be made of technology to promote shareholder engagement outside the AGM and, if so, how?

CSA strongly recommends that the Corporations Act embraces technology, by moving to an opt-in system for receiving hard copy meetings materials. A company would be required to announce to the ASX (and then place on its website in a clearly defined section):

- when the AGM will be held (as is currently the case, prior to the expiration date of an individual's right to nominate an external director)
- when the annual report and meeting materials are available online and how to access them and vote online. Shareholders who have provided their email address to a company and provided consent for electronic communication could be notified of this (as is currently the case).

Should there be an amendment to the right of 100 members to call a general meeting of a company?

CSA recommends the repeal of s 249D allowing 100 members to requisition general meetings of companies (the 100 member rule).

Should legislative or other changes be adopted, and if so for what reasons, concerning any aspect of the annual report requirements? In this context:

- **do the current reporting requirements produce any unnecessary information ('clutter') in annual reports and, if so, how might this be reduced**

CSA recommends that:

- companies be left to communicate directly with their shareholders as to what form of non-statutory reports shareholders would like to receive
- such short-form reports remain non-statutory.

CSA also recommends a holistic review of the different pieces of legislation and the Accounting Standards aimed at:

- deleting duplication
- reducing reporting requirements to ensure more simple, effective reporting

CSA recommends that any reform consider, review and report on the impact of any planned reform of the existing legislative and regulatory framework. Adding layer upon layer of further legislation or regulations on companies is not streamlining or clarifying reporting and disclosure.

CSA recommends that it is premature to either legislate integrated reporting, mandate a listing rule requirement concerning it or include it as a reporting trigger in the Principles and Recommendations.

CSA recommends the introduction of a broader business judgment rule or a safe harbour in the Corporations Act to ameliorate the concerns held towards integrated reporting, allowing it to flourish.

Should legislative or other changes be adopted, and if so for what reasons, concerning any aspect of the annual report requirements? In this context:

- **should the reporting requirements be redesigned in any respect, including along any of the lines adopted, or under consideration, in overseas jurisdictions, such as having a strategic report and an annual directors' statement**

CSA recommends that appropriate consultation with Australian stakeholders should occur before any reform from another jurisdiction is introduced in Australia.

CSA recommends that any reform consider, review and report on the impact of any planned reform of the existing legislative and regulatory framework. Adding layer upon layer of further legislation or regulations on companies is not streamlining or clarifying reporting and disclosure.

Should legislative or other changes be adopted, and if so for what reasons, concerning any aspect of the annual report requirements? In this context:

- **what, if any, issues of liability might arise in the event of changes to the reporting requirements, particularly in relation to forward-looking statements, and how might this matter be dealt with**

CSA recommends that the introduction of a broader business judgment rule would be useful in relation to developments in integrated reporting and directors making forward-looking statements.

Should legislative or other changes be adopted, and if so for what reasons, concerning any aspect of the annual report requirements? In this context:

- **how might technology best be employed to increase the accessibility of annual reports**

CSA does not recommend any legislative amendment to enable the provision of annual reports to shareholders through the use of technology. CSA would be very concerned that any legislative provisions concerning technology could be out-of-date before enacted, and could hinder evolving technological capacity and innovations in market practice.

Should legislative or other changes be adopted, and if so for what reasons, concerning any aspect of the annual report requirements? In this context:

- **what, if any, initiatives might be introduced to cater for future innovations in reporting (for instance, would it be beneficial to establish the equivalent of a Financial Reporting Laboratory)?**

CSA recommends that the FRC could consider undertaking a project similar to that of the Financial Reporting Laboratory of the FRC (UK) on *A single figure for remuneration*. In the first instance, this body could review existing reporting requirements holistically, with a view to recommending simplification. The work could also extend to exploring, testing and trialling new financial reporting models and concepts (without liability) to enable greater innovation in the market.

Calling the AGM

Should there be any change to the statutory time frame for holding an AGM?

Please refer to the first part of our submission regarding our ideal proposed solution to this issue.

CSA does not recommend any changes to the statutory time frame for holding an AGM within the current context. However, adjustments could be made to the voting entitlement date vis-à-vis the poll deadline (for example, the voting entitlement date could be a business day or two prior to the poll deadline) to ensure that custodians and other nominees have time in which to finalise and verify the voting instructions of the underlying beneficial holders.

In what respects, if any, might the requirements for information to be included in the notice of meeting for an AGM be supplemented or modified?

CSA recommends that no change be made to the requirements for information to be included in the notice of meeting.

How might technology be used to make this notice more useful to shareholders?

CSA recommends that Australia move to an opt-in system for receiving hard copy meetings materials. A company would be required to announce to the ASX (and then place on its website in a clearly defined section):

- when the AGM will be held (as is currently the case, prior to the expiration date of an individual's right to nominate an external director)
- when the annual report and meeting materials are available online and how to access them and vote online. Shareholders who have provided their email address to a company and provided consent for electronic communication could be notified of this (as is currently the case).

Might any other documents usefully be sent with the notice of meeting, and, if so, what?

CSA recommends short-form reports to shareholders, but recommends that:

- companies be left to communicate directly with their shareholders as to what form of non-statutory reports shareholders would like to receive
- such short-form reports remain non-statutory.

Should there be provisions for companies to send information about an AGM directly to the beneficial owners of shares held by nominees and, if so, what type of information?

CSA recommends against extending obligations outside of privity of contract, that is, companies may only have obligations in respect of the registered shareholder, as the constitution acts as a contract between the company and the shareholder (s 140 of the Corporations Act).

CSA recommends that consideration be given to the Canadian model, where issuers, and some other entities, ***may*** make available documents concerning the affairs of the issuer, including annual reports, financial statements and other proxy-related material, directly to beneficial owners of the reporting issuer's securities if the beneficial owner does not object to having beneficial ownership information (including that person's contact information and securities holdings) disclosed to the reporting issuer or other entity. The issuer is to be advised on these matters by the nominee registered shareholder, pursuant to the instructions of the beneficial owner to that shareholder. The securities legislation restricts the use of beneficial ownership information to matters relating to the affairs of the reporting issuer.

Should there be any provision for beneficial owners of shares in a company to participate in the AGM of that company and, if so, how?

CSA does not recommend any legislative provision for beneficial owners to participate in the AGM.

Should there be any change to the threshold tests for shareholders placing matters on the agenda of an AGM?

CSA recommends that there should be no changes to the threshold tests for shareholders placing matters on the agenda of an AGM.

Should there be any change to the timing requirements for the calling of an AGM, including for shareholders to place matters on the agenda of an AGM, to seek the circulation of statements concerning any resolution, or to nominate persons for the position of director?

CSA does not recommend any changes to the timing requirements for the calling of an AGM, including for shareholders to place matters on the agenda of an AGM, seek the circulation of statements concerning any resolution or nominate person for the position of director.

Should companies be required to publish a pre-agenda notice and, if so, what should be the contents and timing of that notice?

CSA does not support any requirement to publish a pre-agenda notice.

Does the current law concerning excluded material either create undue difficulties for shareholders who wish to criticise directors or, conversely, unduly restrict directors in vetting out information to be circulated to shareholders at the company's expense?

CSA does not believe that the current law concerning excluded material creates undue difficulties for shareholders who wish to criticise directors.

Should there be any rule regarding the failure to present a resolution at an AGM?

CSA does not believe that there should be any legislative amendment regarding the failure to present a resolution at an AGM.

Should shareholders have greater scope for passing non-binding resolutions at AGMs?

Given existing shareholder rights, CSA recommends that no further shareholder non-binding resolutions be introduced.

What, if any, additional legislative or best practice procedures should be adopted for companies to seek the views of shareholders on issues they would like discussed at the AGM, or to invite shareholders to submit questions prior to the AGM?

CSA recommends that as guidance on 'best practice procedures' already exists there is no need to recommend that further guidance be developed, and nor is there any need to introduce additional legislative requirements.

Should there be some obligation on the auditor (or the representative of the auditor) to speak at the AGM?

CSA recommends that there be no obligation on the auditor to speak at the AGM, given how infrequently the existing right to submit written questions to the auditor on the content of the auditor's report or the conduct of the audit of the annual financial report is utilised by shareholders.

What, if any, obligations should a company or a company auditor have to answer questions from shareholders?

CSA recommends that no further additional obligations need be introduced for a company auditor to have to answer questions from shareholders.

Business of the AGM

Should any matter be excluded from or, alternatively, added to the business of the AGM?

CSA does not recommend that any matters be either added to or excluded from the business of the AGM.

We refer to our idea set out in Part I of this submission on delinking the meeting from voting, and thereby encouraging the meeting as a lively forum where shareholders can discuss any matter relating to the company.

What, if any, changes are needed to the current position concerning:

- **the general functions and duties of the chair**
- **the chair ensuring attendance of particular persons at the AGM**
- **the chair moving motions**
- **motions of dissent from a chair's rulings?**

CSA recommends that no changes are needed to the current position concerning the general functions and duties of the chair; the chair ensuring attendance of particular persons at the AGM; the chair moving motions; and motions of dissent from a chair's rulings.

We refer back to our 'delinking' idea set out in the first part of this submission. Should that be enacted, the physical meeting aspect of the AGM will be much less formulaic, giving chairs greater flexibility in running the meeting, which should encourage innovation in how the meetings are held, including the increased participation of other directors and senior management, which CSA would support.

Should a chair be obliged to provide shareholders with a reasonable opportunity to discuss a resolution before it is put to the vote?

CSA is of the view that there is insufficient evidence pointing to problems with the current manner of dealing with procedural issues at AGMs and does not recommend change.

Should a chair have the power to impose any time, or other, limits on an individual shareholder speaking at the AGM?

CSA does not recommend any change to the right of the chair to exercise their judgment on the time provided to shareholders to speak at the AGM.

What changes, if any, should be made to the current requirements concerning:

- **informing shareholders of their right to appoint a proxy**
- **the proxy form**
- **any other aspect of proxy voting.**

CSA recommends that no changes are needed to the current requirements concerning the proxy form and the other related issues set out above.

CSA refers to the earlier part of this submission where we recommend that direct voting be mandated. This would replace and abolish the current archaic system of proxy voting (which is a transfer of the rights of shareholders to attend and vote to another person). By replacing the system of proxy voting with direct voting, and mandating direct voting and voting via a poll, the system ensures that the result of all resolutions is the will of the eligible shareholders that voted on them. Voting would be undertaken online as the default with shareholders being given access on request to more traditional means. Shareholders would still retain the right to appoint a representative to attend the meeting and speak on their behalf.

What changes, if any, should be made to the current requirements concerning:

- **pre-completed proxies**

CSA recommends that pre-completed proxy forms be banned.

What changes, if any, should be made to the current requirements concerning:

- **notifying the company of the proxy appointment**

CSA recommends that the legislation should remain as it currently stands, with a third party having the right to solicit proxies and collect them, but obliged to lodge them with the company by the due date.

What changes, if any, should be made to the current requirements concerning:

- **providing an audit trail for lodged proxy votes?**

CSA recommends electronic voting and the mandating of direct voting (see our earlier comments).

What changes, if any, should be made to the current requirements concerning:

- **the record date and the proxy appointment date**

CSA recommends allowing electronic voting to develop further rather than introducing legislative change to extend the record date to five business days before the meeting.

Notwithstanding this, as we note in Part I of this submission, the voting entitlement date could be a business day or two prior to the poll deadline to ensure that custodians have time in which to finalise and verify the voting instructions of their underlying beneficial holders.

CSA also recommends the mandating of direct voting (see our earlier comments).

What changes, if any, should be made to the current requirements concerning:

- **irrevocable proxies**

CSA recommends that this is not a requirement that needs to be retained.

What changes, if any, should be made to the current requirements concerning:

- **directed and undirected proxies**

CSA recommends that direct voting be mandated. By replacing the system of proxy voting with direct voting, and by mandating direct voting and voting via a poll, the system ensures that the result of all resolutions is the will of the eligible shareholders that voted on them. Voting could be undertaken online as well as through more traditional means. Shareholders would still retain the right to appoint a representative to attend the meeting and speak on their behalf.

What changes, if any, should be made to the current requirements concerning:

- **renting shares**

CSA recommends that superannuation funds and managed investment funds should disclose whether or not they permit stock lending by their investment managers/agents in relation to their investments.

What changes, if any, should be made to the current requirements concerning:

- **proxy speaking and voting at the AGM**

CSA recommends that direct voting be mandated. A shareholder would still have the right to appoint a representative to attend a meeting and vote on their behalf.

Direct voting before the meeting

Should direct voting before the meeting be provided for by legislative or other means, and if so what matters should be covered in any regulatory structure?

CSA recommends that any legislative provision simply mandate direct voting. All matters relating to the rules governing the exercise of direct voting should be a matter for the company to decide. CSA refers to the discussion in Part I of this submission for further comment on the value of mandatory direct voting.

Disclosure of pre-meeting voting

In what circumstances, if any, should access to pre-meeting voting information be permitted?

CSA recommends that a shareholder holding more than 20 per cent of available shares could have the right to access the pre-meeting voting information and also access the poll results after the meeting. The shareholder would pay the auditor to check the validity of the process.

Alternatively, 100 shareholders could be given the right to access this information.

CSA does not recommend that an independent scrutineer be mandated. CSA recommends that the legislation could provide that a shareholder could ask for a scrutineer to be appointed and pay for such an appointment.

In what manner if any, should access to pre-meeting voting information be regulated before discussion on a proposed resolution?

CSA recommends against legislation being introduced prescribing whether pre-meeting voting information should be disclosed in advance of a discussion on a particular resolution. CSA recommends that this be left to the discretion of the chair.

In what manner, if any, should the current requirements concerning the disclosure of pre-meeting votes before voting on a resolution be amended?

CSA recommends against legislation being introduced prescribing whether pre-meeting voting information should be disclosed in advance of the vote. CSA recommends that this be left to the discretion of the chair.

Should there be legislative or other recognition of online voting during the course of an AGM and, if so, in what respects should this form of voting be regulated?

CSA recommends market-led practice in this area and that the law remains conducive to and encouraging of best practice rather than mandating one approach. CSA Members note that online voting is legally enabled and are of the view that market practice will evolve to provide for online voting as the norm.

Exclusions from voting

Do any issues arise concerning voting exclusions on resolutions that must, or may, be considered at an AGM and, if so, how might those issues best be resolved?

CSA does not recommend legislative change (see CSA's *Managing voting exclusions on remuneration-related resolutions* for guidance on dealing with the issues that arise).

Should any changes be made to the current provisions regarding voting by show of hands?

CSA recommends against any change is required to the current provision regarding voting by a show of hands. Market practice will shift according to need, as it has with the vote on the remuneration-report resolution. CSA also notes that, if direct voting is mandated (and conducted electronically) voting will automatically take place on a poll.

Independent verification of votes cast on a poll

What legislative, or other, verification initiatives, if any, should be introduced concerning voting by poll at an AGM?

CSA recommends against any legislative or other verification initiatives being introduced concerning voting by a poll.

Should one or more verification requirements apply in all instances or only if, say, a threshold number of shareholders require it?

CSA recommends that a shareholder holding more than 20 per cent of available shares could have the right to access the pre-meeting voting information and also access the poll results after the meeting. The shareholder would pay the auditor to check the validity of the process.

Alternatively, 100 shareholders could be given the right to access this information.

Disclosure of voting after the AGM

Should any steps be taken to promote more consistency in the disclosure to the market of voting results?

CSA strongly recommends greater consistency in the disclosure to the market of voting results.

CSA recommends the ASX Listing Rules could include a form for the announcement of voting results, which would ensure consistency.

Following the AGM, what, if any, rights of access should shareholders generally, or the person proposing a resolution, have to voting documents?

CSA recommends that a shareholder holding more than 20 per cent of available shares could have the right to access the pre-meeting voting information and also access the poll results after the meeting. The shareholder would pay the auditor to check the validity of the process.

Alternatively, 100 shareholders could be given the right to access this information.

What, if any, changes should be made to the requirements concerning the recording of details of voting in the minutes of the AGM?

CSA recommends against any changes being made to the requirements concerning the recording of details of voting in the minutes of the AGM.

Should there be a statutory minimum period for retention of records of voting on resolutions at an AGM and, if so, for what period?

CSA Members recommend that there should be a statutory minimum period of 12 months for retention of records of voting on resolutions at an AGM.

Method of election

Should there be any legislative initiatives in regard to the election of directors, including in relation to:

- **the frequency with which directors should stand for re-election**
- **the right of shareholders to question candidates (and receive answers)**
- **the voting procedure?**

CSA recommends against any legislative requirements being introduced in regard to the election of directors.

If annual elections were introduced in Australia (which CSA believes would only be equitable if the two-strikes rule was abolished — see Part I of our submission in this regard) then we would

recommend that it only apply to the ASX top 300 and be applied on an 'if not, why not' basis under the ASX Corporate Governance Council Principles and Recommendations.

Except as per the first part of this submission, CSA also does not believe that there should be any legislative requirements introduced in regard to

- the right of shareholders to question candidates (and receive answers)
- voting procedures.

Dual-listed companies

Are there any matters concerning dual-listing that should be taken into account in the regulation of AGMs?

CSA recommends that due consideration be given to the regulatory impact on dual-listed companies if they are required to comply with more than one set of regulation, which may or may not be compatible.

Globalisation

Are there any problems in the voting or other aspects of AGMs for overseas holders of shareholding interests in Australian regulated companies?

The main problem is how an overseas holder is noted on the share register. The manner in which the custodian deals with is not in the control of the company and cannot be legislated. The company can only deal with the registered holder. Information flows between the registered holder and the underlying holder are a matter for those parties.

For some or all public companies, should the functions of the AGM be changed in some manner, or the obligation to hold an AGM be abolished?

See our ideas set out in Part I of this submission in relation to changing the functions of an AGM.

As we note in Part I, we strongly support the AGM as a means of shareholder engagement and do not support it being abolished. However, we equally strongly believe that it needs significant reform.

In this context, what technological developments might be taken into account in considering the possible functions of the AGM?

Again, we refer to Part I of this submission, where we set out ideas for the reform of the AGM.

However, even if our ideas for reform of the AGM are not taken up, CSA Members recommend the increased use of technology, including webcasting and online direct voting, and online participation in meetings.

CSA strongly recommends that the legislative framework encourage the use of technology but not prescribe any particular approach, given the likelihood that the technology could be out-of-date once the legislation is enacted. It is vitally important that any legislation provides companies with the flexibility to use technology to enhance shareholder engagement and innovate as to different means of engaging with shareholders.

Future of the AGM

Please refer to Part I of this submission for our ideas on the future of the AGM.

ashurst

20 December 2012

CAMAC DISCUSSION PAPER

THE AGM AND SHAREHOLDER ENGAGEMENT

SEPTEMBER 2012

SUBMISSION BY ASHURST AUSTRALIA

INTRODUCTION

Ashurst Australia advises a wide range of listed companies where shareholder engagement, corporate governance and the AGM are key issues for the Board and management.

We have reviewed CAMAC's Discussion Paper *The AGM and Shareholder Engagement* and are pleased to make this submission on a number of the issues raised. We have not commented on all aspects of CAMAC's Discussion Paper.

ENGAGEMENT WITH LISTED COMPANIES ON THE DISCUSSION PAPER

With a view to exploring our clients' views on the issues raised by CAMAC, we held two 'roundtable' discussions in October and November this year in Sydney and in Melbourne.

These were attended by company secretaries and general counsel from over 25 leading ASX listed companies. The discussions canvassed the experiences and views of companies in a wide range of different industry sectors.

A variety of opinions were expressed in response to the issues raised for discussion by CAMAC. In the table below we have summarised the prevailing views on these issues. We submit that these views are a useful source of information for CAMAC (reflecting the actual experience of listed companies in relation to AGM's and associated issues).

In our view, most companies do not appear to be seeking radical change to the current AGM structure. They accept that the annual exchange of questions and ideas between the board, management and shareholders is an important part of accountability and engagement.

However, there are concerns amongst directors that the proxy adviser process in relation to institutional shareholders can result in recommendations which do not properly reflect the underlying facts, the views of the institution or the position of the listed company and/or which can effectively disenfranchise the shareholder itself.

In relation to annual reports, the consensus amongst participants was that retail shareholder communication is being adequately addressed by 'Shareholder Review' type documents and that no change to the annual report/concise annual report structure is required.

In respect of the digital age, most participants were supportive of facilitating electronic voting and participation in meetings (subject to any voting security issues having been

addressed) as another way of enhancing shareholder participation. In that regard, we note that New Zealand has recently amended its *Companies Act 1993* to allow electronic shareholder voting, attendance at meetings and appointment of proxies.

SUMMARY OF ROUNDTABLE DISCUSSIONS WITH LISTED COMPANIES

We put to the representatives of listed companies a number of key questions arising from CAMAC's Discussion Paper including –

- *What is the future of the AGM – should it be retained and/or changed?*
- *How should companies engage with institutional and retail shareholders?*
- *With the increasing influence of proxy advisers, should they be more regulated in their activities?*
- *How effective are annual reports in communicating with shareholders? What is the role of the Shareholder Review?*
- *What other changes should be made to shareholder issues (eg the 100 shareholder rule)?*

Their views on these and other issues raised by CAMAC are summarised in the table below.

What is the future of the AGM - Should it be retained and , if so, should its structure be changed?
Although participants had some reservations about AGMs, they were generally in favour of keeping the AGM because it provides a key forum for retail shareholders to 'eyeball' directors and ask questions of the Board and management. Likewise, Boards of listed companies are conscious of the 'discipline' which the AGM brings to the annual presentation of the company's activities, financial position and prospects. The reservations expressed by participants included declining shareholder attendance, the significant cost of holding AGMs and the formalities of the AGM. Despite this, the participants were generally in favour of retaining the AGM.
Should there be any change to the statutory time frame for holding an AGM?
Participants disagreed with a proposal to extend the statutory time frame for holding an AGM from 5 months to 6 months after financial year end, as this would push the AGM into the Christmas period for most listed companies.
Should the structure of the AGM be changed to split the voting from other aspects?
Splitting voting from the AGM was supported by a number of participants who felt that, where the voting outcome is usually determined by (institutional) proxies lodged before the AGM, the voting process is a distraction and detracts from

shareholder engagement. They see the AGM as more valuable as an information session where the whole of the company's business can be discussed rather than a narrow agenda.

How should companies engage with institutional and retail shareholders?

Most participants believe that the current approach to these two groups of stakeholders is appropriate. That is, institutional shareholders should continue to receive direct briefings from the company (subject to continuous disclosure requirements) and be able to engage in a dialogue with management (and the Chairman) over the course of the year.

Retail shareholders on the other hand are now provided with an increased range of information relevant to their investment needs through the internet (company website), shareholder briefings and, importantly the increased use of a 'Shareholder Review' as an adjunct to the formal annual report to provide plain English, high level strategic, financial and operational information for those investors, in the way the CAMAC Discussion Paper contemplates (see further below).

With the increasing influence of proxy advisers, should they be more regulated in their activities?

All participants expressed concern about the role of proxy advisers. This arises from the influence of proxy adviser recommendations on voting decisions, their often limited knowledge of the issues concerned and the company's views on those issues and the effective disenfranchisement of the institutional shareholders who appoint them.

All participants would like to see some regulation or policy which provides transparency and restores the balance between their advisory role and the responsibility of the shareholder to exercise its own judgement.

Should technology be used to maximise shareholder engagement and communication

This was strongly supported by all participants who noted that companies are already making extensive use of email and the internet for shareholder engagement. For example, one company has approximately 30,000 to 40,000 shareholders on an email contact list.

Webcasts were considered useful but relatively expensive, especially for smaller companies.

Permit online voting

Participants generally agreed that, to maximise shareholder participation in decision making, online voting should be introduced as soon as practicable (and subject to addressing the security issues in relation to internet voting).

It was noted that online voting is different from so-called electronic voting used by a number of companies where shareholders attending AGM's use handsets to communicate their votes.

Introduce an Australian Stewardship Code
Most participants were more concerned with the issue of proxy advisers than with a Code for the conduct of institutional shareholders. They doubted that a voluntary Code would result in any significant change in how institutional shareholders operate.
How effective are annual reports in communicating with shareholders? Should the annual report be split?
Participants were not in favour of splitting the Annual Report because they believe the current framework achieves the right balance with the choice/combination of – • the full Annual Report; • the concise Annual Report; and • the 'Shareholder Review' which many listed companies are now using to provide high level strategic and financial information in an easily readable format.
Keep shareholder briefings (subject to continuous disclosure)
Participants believe that shareholder briefings should be retained in their current form as they provide important engagement with institutional shareholders (and are subject to continuous disclosure rules).
Abolish the 100 shareholder rule
Participants agreed that this rule should be abolished. It is not used in other markets and the 5% test provides a more appropriate threshold.
Don’t change the election of directors
Participants did not support annual elections of directors. They expressed concern at the use of the 'two strikes' rule for tactical purposes rather than in relation to remuneration.
Polls should not be mandatory
Although it was noted that polls are widely used by a number of listed companies (in preference to a show of hands), participants did not feel that polls should be made mandatory. However, some participants said that the remuneration report resolution should be put to a poll.
Direct voting should get legislative backing
Participants did not see this as a priority given that listed companies already use direct voting without legislative backing. Some concern was expressed about expanding the choices which already exist for shareholder voting.

ashurst

ASHURST AUSTRALIA'S SUBMISSION ON ISSUES RAISED BY THE CAMAC DISCUSSION PAPER

Our comments below address a number of the issues raised in CAMAC's Discussion Paper.

4.1 The Future of the AGM

Since the *Joint Stock Companies Act* of the 1840's, the right of shareholders to meet at least once a year in general meeting has been a fundamental right of investors.

However, the technological advances over the last 170 years mean that just as the email and computers have revolutionised the communication and delivery of corporate information and documents, a physical meeting of individual members, proxies and representatives is now not the only way that shareholders can engage. The question arises therefore as to why the AGM has remained largely unchanged despite all these developments in technology.

In our view, the AGM continues to perform an important purpose as one part of the overall corporate governance spectrum by which shareholders can engage with management and the Board in an open forum. We are not aware of any other common law jurisdiction which proposes to abolish AGM's, despite making other changes in relation to shareholder communication and reporting issues.

Indeed, the Commonwealth Government, when requesting CAMAC to undertake its review said –

> '*The AGM is an essential part of the shareholder engagement framework…whilst the AGM will continue to be a forum for shareholders to have their say, the way in which this occurs will continue to evolve.*'[1]

Accordingly, in our view, the question is not <u>whether</u> the AGM should be retained, but rather '*In what format?*'

As has been the approach in overseas jurisdictions (notably in the US and the UK and in our region, New Zealand), the Government should, in our view, provide a legislative framework which facilitates and enables (rather than compels) companies to adopt new approaches to holding AGM's as technology, market practice and shareholder sentiment 'evolves'.

This would mean that all aspects of the AGM could be addressed electronically –

- attendance;
- participation and discussion; and
- voting.

However, we expect that the AGM would remain a hybrid physical and virtual meeting until the use of technology became widely accepted and used in the market.

[1] Media Release – Parliamentary Secretary to the Treasurer, 6 December 2011.

For example, although the take-up of virtual meetings in jurisdictions such as UK has been relatively low, we don't believe this should affect this initiative because if the reform objective is soundly based, the Government should accept that it may take time for companies and their shareholders to take up the opportunity for change.

In its Report *'UK AGM Season Review 2012' (*September 2012) Computershare noted that –

> *'In the last six months, two FTSE companies have undertaken studies to investigate the feasibility of migrating form a physical meeting to a virtual meeting. We might see a UK company taking the decision to host a virtual meeting as early as 2013.'*[2]

In the US, virtual meetings are legally permitted in many States and have been used by a number of companies (with the benefit of the necessary technology). There has been significant research in the US as to the availability and use of virtual meetings under applicable State laws and their benefits and drawbacks (see, for example, *'Virtual Shareholder Meetings Reconsidered' Lisa M Fairfax, 40 Seton Hall Law Review 1367 (2010)).*

Given the falling attendances at AGM's, we believe it is appropriate to provide a new framework for AGM's which has the potential to alter that trend by encouraging a broader base of shareholders to participate (the AGM is just 'a click away').

4.2 The structure of the AGM

During our Roundtable, some participants expressed the view that the decision making function of the AGM might be better separated from the reporting, questioning and deliberative function. This view arises, in part, from the limited role which actual voting at the AGM plays in the outcome of resolutions, due to the level of votes which are exercised by proxy and known 48 hours before the meeting.

In addition, this separation would allow a more general discussion/Q&A about the company's business rather than the narrow AGM agenda which could lead to greater shareholder engagement.

In 2008, this Firm (as it then was) and Chartered Secretaries Australia, jointly published the Paper '*Rethinking the AGM*' which recommended the separation of these functions at the AGM.

For the reasons stated in that Paper (and noted by CAMAC in its Discussion Paper (at section 6.2.2)), Ashurst Australia supports that position on the following basis –

- the separation should be optional and not mandatory to allow different companies to respond to different shareholder constituencies;
- voting should be extended for 48 hours after the meeting (to allow the discussion at the meeting to be considered but without unreasonably delaying the result);

[2] Computershare, 'UK AGM Season Review 2012', page 19

- proxies lodged should be announced before the discussion at the AGM, noting that other shareholders may lodge votes after the meeting which could affect the result; and
- votes would be cast either by proxy, attorney or by direct voting (if authorised by the Constitution) but not by a show of hands.

We believe that these changes will provide the flexibility for listed companies to retain their current AGM structure or adopt the new approach (for example, where market practice shows that it produces a better outcome for companies and their shareholders).

4.3 Annual Reports

Whilst Ashurst acknowledges there is some concern about the form and content of annual reports, in our view, they remain an indispensable part of the accountability of companies and before any major changes are made, we believe the following issues should be reviewed.

(a) What are the requirements of investors?

Web traffic statistics compiled by Google in the US[3] show that investors spend less than 5 minutes reviewing annual meeting materials. The same report also shows that younger investors (aged 18-34) are spending almost no time reviewing these documents. The report suggests that the problem may be as simple as the information being of little interest to investors since it is typically stale by the time it is published.

This raises the question as to how shareholders are using annual reports in Australia. In our view, further research into the issue of who are the users of Annual Reports and what are their needs and requirements, should be undertaken before there is any significant change to the existing laws on annual reports.

(b) Should there be a Strategic Report?

CAMAC has asked whether the reporting requirements should include a 'Strategic Report' and an 'Annual Directors' Statement' as proposed in the UK.

(i) The use of the 'Shareholder Review' in Australia

We do not support a 'Strategic Report' being statutorily required, separate from a Directors' Report. We note that many leading companies (including major Australian banks, Telstra, Qantas and Westfield amongst others) already produce a similar type of report under the title of a 'Shareholder Review' or 'Strategic Review' and do so because of a wish to engage and communicate effectively with (retail) shareholders rather than because of a statutory requirement to do so.

These reports might be said to be already meeting the narrative requirements to which CAMAC refers to in its Discussion Paper –

[3] Investors Spend Just 5 Minutes on Annual Reports – Stats" by Dominic Jones May 12 2011 irwebreport.com

- *'a concise overview of a business, its strategic objectives [and] the challenges that it faces…' (FRC – Effective company Stewardship – 2011); and*

- *'a clear, concise overview of the business of the company, its strategy, its business mode, performance and key financial data, significant changes to governance and the directors' views of the challenges, opportunities and risks facing the company' (BIS – The future of narrative reporting – 2011).*

It is our understanding that these reports are particularly useful and informative for retail investors, their advisors and other users, thereby meeting a key area of concern in shareholder engagement.

In our view, such reports represent 'good practice' for large ASX listed companies with large retail shareholders bases although they may be less relevant for smaller listed companies. The current market approach allows companies to choose whether to use this form of communication rather than there being a single statutory requirement for all companies, regardless of size.

(ii) Existing narrative reporting in the operating and financial review (OFR)

We also note that within the formal Annual Report/Directors' Report framework under the *Corporations Act*, there is scope for adopting a more narrative approach.

In our view, *ASIC Consultation Paper 187 "Effective Disclosure In An Operating and Financial Review"* demonstrates that the enforcement of the existing section 299A of the Act responds to many of the things which CAMAC suggests may be desirable in Directors' Reports. For example, ASIC states that the OFR *"should contain an analysis and narrative to supplement and complement the information in the entity's annual financial report…"*.

ASIC sets out in detail how it interprets the current legislative requirements (section 299A) and, in our view, this addresses many of the concerns raised in the CAMAC Discussion Paper.

(c) Removing 'clutter'

CAMAC has asked how unnecessary information in annual reports could be reduced. In our view, there are at least two ways this could be improved –

- allowing incorporation by reference from the financial statements into the Directors' Report to reduce 'clutter' and avoid unnecessary duplication; and

- including a requirement for "searchability" in online versions of annual reports, to assist all users in navigating the detailed information in annual reports.

(d) Some specific suggestions for the OFR

In our view, there are two issues which should be addressed in relation to the OFR, even if no major reforms are made to the requirements for Annual Reports -

(i) Unreasonable Prejudice/Carve Outs from Continuous Disclosure

Uncertainty exists as to whether matters falling within the carve outs from continuous disclosure would be protected from disclosure under section 299A(3) as constituting "unreasonable prejudice" to the disclosing entity.

This is an important issue in preparing the OFR as it concerns confidential and market sensitive information and proposals which would otherwise be exempt from disclosure. The operation of section 299A(3) in this context needs to be clear so that companies can ensure that disclosure obligations as well as legitimate commercial interests are protected.

In our submission, continuous disclosure carve outs should constitute "unreasonable prejudice" and therefore be exempted from disclosure in the OFR.

(ii) Prospects

The Courts have considered the requirements of issuers to disclose their "prospects" in the context of scrip takeovers and we think this provides appropriate guidance for the purposes of the OFR.

We submit that the position referred to in ASIC Regulatory Guide 170 (at paragraph 170.11) is a sensible test for disclosure by a Board of "prospects" in the context of the OFR:

> *"…The general test of whether prospective financial information must be disclosed is whether it is:*
>
> *a) relevant to its audience; and*
>
> *b) reliable (i.e. there must be a reasonable basis for it: see GIO Australia Holdings Ltd v AMP Insurance Investment Holdings Pty Ltd (1998) 29 ACSR 584).*
>
> *Information is not material to investors if it is 'speculative or based on mere matters of opinion or judgment': see AAPT v Cable & Wireless Optus Ltd (1999) 32 ACSR 63. While these cases relate to takeovers, we consider that they state principles that apply equally to disclosure made in a disclosure document or PDS."*

Ashurst opposes any extension to the existing law on requirements to make forward looking statements in the OFR or otherwise in annual reports because –

- in our view, it would expose directors to unnecessary additional liability unless new 'safe harbours' were introduced which may, in themselves, detract from responsibility in disclosure; and
- the existing provisions can provide sufficient information in a regime which ensures accountability from directors.

4.4 An Australian Stewardship Code

Although the full impact and effectiveness of the *UK Stewardship Code* is not yet clear, we believe that a 'comply or explain' Australian equivalent Code would help to improve transparency and voting practices by institutional shareholders.

For example, the (non-binding) ASX Corporate Governance Principles have resulted in listed companies raising their standards of corporate governance and disclosure despite the voluntary nature of those Principles.

There is no reason to believe that institutional shareholders would not respond in a similar way to a Stewardship Code, developed with appropriate consultation and having regard to the UK Stewardship Code.

4.5 Proxy advisers

Our Roundtable participants agreed that the influence of proxy advisers is increasing as institutional shareholders find less time and resources to deal with the 'voting season' at AGM's.

In an Article titled *'The Rise and Rise of Proxy Advisors'* (in its Report *'UK AGM Season Review 2012')* Computershare noted that –

> *'Some institutional investors will simply vote according to recommendations made from their proxy advisor, whereas other investors will consider a recommendation alongside other factors, including the company's commitment to governance, engagement and voting…*
>
> *it is imperative that issuers engage with the relevant proxy advisors well in advance of their meeting, as a proxy advisor's recommendation can be the difference between a passed or defeated resolution.'*[4]

Given the importance of proxy advisers in relation the decision making function at the AGM, we submit that the Government should take steps to improve the standards, transparency and accountability of proxy advisers in two ways -

- first, through the enforcement of existing Australian Financial Services Licence ("**AFSL**") conditions applying to proxy advisers; and
- secondly, by the inclusion of proxy advisers in an Australian Stewardship Code.

(a) AFSL conditions

Part 7.6 of the *Corporations Act* deals with the licensing of providers of financial services including proxy advisers. Specifically, section 912A of the *Corporations Act* places a range of obligations on licensees such as:

- doing all things necessary to ensure that the financial services covered by the license are provided efficiently, honestly and fairly;

[4] Computershare, 'UK AGM Season Review 2012', page 15 (see the article titled 'The Rise and Rise of Proxy Advisors')

- establishment of adequate arrangements for the management of conflicts of interest that may arise wholly, or partially, in relation to activities undertaken by the licensee;

- maintaining the competence to provide financial services; and

- ensuring that representatives are adequately trained, and are competent, to provide those financial services.

Furthermore, section 914A of the *Corporations Act* allows ASIC, after following certain procedures, to impose conditions or additional conditions on a licence.

Accordingly, we believe that some of the issues raised by listed companies (as reflected in our Roundtable) in relation to proxy advisers (e.g. basing recommendations on wrong information or not seeking the company's views on relevant issues) could be rectified through a more stringent enforcement of the current licensing system. We suggest that this should be an area of greater focus for ASIC given the influence which proxy advisers have over voting decisions.

(b) Including proxy advisers in an Australian Stewardship Code

In order to ensure greater transparency and accountability of proxy advisers, Ashurst proposes that proxy advisers be included in an Australian Stewardship Code (also covering institutional shareholders).

An Australian Stewardship Code would allow the introduction of best practice guidelines for proxy advisers on a non-binding basis similar to the approach taken in ASX Corporate Governance Principles.

This would allow proxy advisers to adopt change without prescriptive regulation. That is a process which, in the case of the ASX Corporate Governance Principles, successfully resulted in major changes to the way listed companies treated corporate governance and disclosure issues.

An Australian Stewardship Code covering proxy advisers would require proxy advisers to comply with best practice guidelines, and if they fail to do so, then provide reasons. Best practice guidelines would be established by consultation between ASIC, listed companies, institutional shareholders and proxy advisers. In our view, that consultation process would, of itself, be useful by providing an opportunity for the parties to identify the areas of concern from their different perspectives.

The guidelines would be less intrusive than other regulatory tools, whilst facilitating the improvement of the services provided by proxy advisers through greater market scrutiny of their practices. Such a framework could include requirements for proxy advisers to:

- disclose methodologies and procedures in developing voting policy guidelines and voting recommendations;

- disclose procedures to mitigate or address conflicts of interest;

- implement policies to give issuers an opportunity (for example 24 to 48 hours) to review draft reports from proxy advisers and for proxy advisers to respond to issuer comments prior to a report being issued; and

- disclose policies for correcting errors in their reports that are reported by the issuer and disclose their communication and distribution protocols.

In summary, Ashurst submits that the inclusion of proxy advisers in an Australian Stewardship Code, in conjunction with stronger enforcement of the current licensing system would improve the standards, transparency and accountability of proxy advisers and address the concerns expressed by listed companies.

4.6 Direct voting before the AGM

CAMAC has asked in its Discussion Paper '*Should direct voting before the meeting be provided for by legislative or other means, and if so what matters should be covered in any regulatory structure?*'

In our view, changes to the *Corporations Act* are not required in respect of direct voting. Companies can, in their constitutions, adopt rules to permit direct voting and a number of major listed companies have already done so.

However, if legislative changes are being proposed, we raise with CAMAC whether this is not already addressed by the changes to directed proxy appointments made by the *Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Act 2011* (Cth).

As a result of those amendments, Section 250BB(1) now provides that -

> *An appointment of a proxy may specify the way the proxy is to vote on a particular resolution. If it does:*
>
> *…*
>
> *(c) if the proxy is the chair of the meeting at which the resolution is voted on – the proxy must vote on a poll, and must vote that way; and*
>
> *(d) if the proxy is not the chair – the proxy need not vote on the poll, but if the proxy does so, the proxy must vote that way.*

And Section 250BC provides:

> *If:*
>
> *(a) an appointment of a proxy specifies the way the proxy is to vote on a particular resolution at a meeting of the company's members; and*
>
> *(b) the appointed proxy is not the chair of the meeting; and*
>
> *(c) at the meeting, a poll is duly demanded on the question that the resolution be passed; and*
>
> *(d) either of the following apply:*

(i) if a record of attendance is made for the meeting – the proxy is not recorded as attending;

(ii) the proxy does not vote on the resolution;

the chair of the meeting is taken, before voting on the resolution closes, to have been appointed as the proxy for the purposes of voting on the resolution at that meeting.

The effect of sections 250BB(1) and 250BC of the *Corporations Act* is that all shareholders are assured that a proxy vote lodged before the meeting will be voted as directed on a poll.

These provisions provide, in effect, for a system of direct voting; by returning a proxy form appointing the chairman (or any other person) and directing the proxy how to vote, the shareholder's directions on how to vote will be given effect on a poll.

We note, however, that unless a poll is properly demanded (either by shareholders at the meeting or the chairman), an item of business can be determined by a show of hands alone. Without a poll on the item of business, the Act does not require the proxy attending the meeting to vote on a show of hands. However, as noted in section 5.13.2 of CAMAC's Discussion Paper, the common law requirement is that a chairman of a meeting who holds sufficient proxies contrary to the decision on a show of hands is obliged to demand a poll.

Accordingly, the shareholder's direction should still be followed (as a poll would be taken). Alternatively, the Act could require that polls are conducted on all resolutions.

In summary:

- we submit that legislative support for direct voting is unnecessary as it is already permissible through amendment to the Company's Constitution; and
- if legislative changes are proposed for direct voting, we raise with CAMAC whether the existing provisions of the Act relating to proxy appointments already effectively provide a system of direct voting (if polls are used to determine the outcome of the resolutions).

ASHURST AUSTRALIA

Submission

by

Australasian Centre for Corporate Responsibility

(ACCR)

to

Corporations and Markets Advisory Committee

(CAMAC)

in regard September 2012 discussion paper *"The AGM and shareholder engagement"*

December 2012

Australasian Centre for Corporate Responsibility (ACCR)

Quaker Meeting House, Bent St, Turner ACT, 2601

12 Dec 2012

Mr John Kluver

By email john.kluver@camac.gov.au

Cc: camac@camac.gov.au

RE: Request for submissions in regard to issues raised in CAMAC discussion paper "*The AGM and shareholder engagement*"

Dear Mr Kluver,

Please find attached below our submission on some of the issues raised in the September 2012 discussion paper.

This submission is not confidential. We would be happy to speak further to its content if you have any queries.

By way of background the ACCR is a recently established association whose primary purpose is to promote ethical investment, in particular shareholder engagement and advocacy**,** with the aim that corporate activity assists humanity live more justly and within the carrying capacity of supporting ecosystems. It is modelled on the US Interfaith Center on Corporate Responsibility.

Yours sincerely

Howard Pender

Office Bearer, ACCR

on behalf of ACCR establishment committee (Liz Cham, Robert Howell, John McKinnon, Howard Pender and Jill Sutton)

Executive summary

1. Healthy corporate democracy can and should be a vital part of the Australian commercial landscape.
2. Public policy should support intellectual engagement between shareholders and boards in order to nurture healthy corporate democracy whilst deterring vexatious engagement.
3. Current Australian legal arrangements fail to adequately protect shareholder interests when they endeavour to engage with other shareholders and the boards of the companies they own.
4. The paper "The AGM and shareholder engagement" misses an opportunity to canvass proposals and describe possible arrangements (based on overseas experience) which would enhance the functioning of Australian corporate democracy.
5. We propose Australian law should be amended to: make it easier for shareholders to put resolutions at AGM's (and to requisition the distribution of statements prior to the AGM by the company to all shareholders); make it harder to call meetings; & to empower ASIC to act as an "instant arbiter" in regard shareholder/board disputes over these sort of issues (much like the US SEC is able to do at present).

1. General comments

a. The paper overstates the practical power of shareholders in Australian registered and listed companies. In some cases dated opinions as to the legal situation are stated without reference to recent practical experience**.**
b. The paper is deficient in omitting to frame its discussion with a view to the economics of corporate governance. In particular no mention is made of three fundamental economic issues the law of corporate governance deals with:
    - firstly, the principal agent problem - boards are agents of shareholders with incentives to shirk that responsibility and avoid transparency in regard their discharge of that role;
    - secondly, the free rider problem amongst shareholders - it's not in any one shareholders interest to devote due resourcing to monitoring an individual board's discharge of its role, so the state has an interest in encouraging such scrutiny provided it does not become vexatious;
    - thirdly, a substantial fraction of the listed ASX market is owned by index funds which, by construction, seek to enjoy the benefits of share ownership without discharging any of the responsibilities.
c. The paper fails to describe the healthy dimensions of corporate democracy in other jurisdictions particularly the US and Scandinavia. Some of these are:

- the very different practical arrangements in the US (as compared to those in Australia) for the placing and consideration of shareholder resolutions. The US Interfaith Centre on Corporate Responsibility coordinates hundreds of resolutions each year, an activity virtually unknown in Australia. The typical levels of support in the US (often building over some years) is 20%;
- the clear statement by the SEC as to what constitutes management business and the way the SEC acts as an instant arbiter in regard disputes over a proposed shareholder resolution;
- legal arrangements which enable shareholders to have an intellectual disagreement with a board on an issue without it becoming an issue of personal conflict.

d. The paper contained very little sense of recent statistics in regard formal shareholder engagement and attempted placement of resolutions with boards. The following statistics deal with ASX 200 companies and the period since 2000. We are aware of 4 campaigns by unions which involved a request for distribution of statements & lodging of resolutions. In addition we are aware of 10 requests to distribute statements or place resolutions on AGM agendas lodged by non-union groups. Out of these 10 resolutions:
    - one was withdrawn as the board agreed to the request (Oilsearch,2011);
    - in three cases the board refused to put the resolution on the notice of meeting arguing that shareholders did not have the power to pass a resolution dealing with the content of a board report to shareholders (ANZ,2011;Paladin Energy,2010 & Aquila Resources,2010). In one of these cases (ANZ,2011) the board refused to even distribute a statement to all shareholders (though the request satisfied the procedural requirements), implicitly arguing the content of the directors report to shareholders wasn't a matter for consideration at a general meeting. These sort of issues were conclusively addressed (in favour of shareholder's rights) long ago in regard US law[1];

[1] In a 1954 case Auer v. Dressel , a US appeal court held that shareholders could propound and vote upon resolutions which, even if adopted, would be purely advisory.

In a 1970 case Medical committee for Human Rights v SEC a US appeal court considered an SEC decision supporting a company which had refused to put a resolution on its agenda to amend the charter of Dow Chemical such that "napalm shall not be sold to any buyer unless that buyer gives reasonable assurance that the substance will not be used on or against **human** beings." The court found against the SEC stating

"*the proposal relates solely to a matter that is completely within the accepted sphere of corporate activity and control. No reason has been advanced in the present proceedings which leads to the conclusion that management may properly place obstacles in the path of shareholders who wish to present to their co-owners, in accord with applicable state law, the question of whether they wish to have their assets used in a manner which they believe to be more socially responsible but possibly less profitable than that which is dictated by present company policy."*

In fact it appeared profit would increase if napalm production for military use was to be ceased.

- six resolutions were considered by shareholders (Woolworths,2012; Woodside,2011; Gunns & Boral,2003;CBA & NAB,2002), of these five were special resolutions, the average level of support for these six resolutions was 10%;
- no resolution has ever been put multiple years in a row as is standard US practice.

On the basis of these statistics there does not appear to be any problem with vexatious abuse of shareholder rights in Australia. To the contrary the statistics support the view that current arrangements unduly stymy the exercise of shareholder rights and responsibilities.

2. Specific comments

Chapter 2

1. P 13, the discussion implies shareholders are able to vote on the content of the annual financial report, director's report and auditor's report. This contention, though perhaps not strictly theoretically inaccurate, is quite misleading as a matter of practice. Shareholders are unable in Australia by virtue of practice to consider "pious" [2]resolutions commenting on the content of the annual financial report, director's report or auditor's report. See the discussion above which sets out experience with recent resolutions. Despite the fact these reports are addressed to shareholders, company secretaries have prevented shareholders considering a resolution commenting on the content of such reports. There is one law firm which we understand is happy to provide company secretaries with an opinion that Australian law precludes shareholders formally even commenting on the content of an annual financial report, director's report or auditor's report despite the fact these are addressed to the shareholders in general meeting.

Chapter 3

1. The discussion on pages 28 to 34 describing the UK situation omits a number of important issues:
    - firstly, the situation in Australia in regards the relationship between the board and the general meeting does not apply in the UK. Shareholder resolutions in the UK are explicitly expressed as " The shareholders direct the board… ", which would be nonsensical in Australia;
    - secondly, voting by institutional shareholders is easier as a result of explicit "board must look through custodian" provisions in UK law.

[2] A "pious" resolution expresses the sentiment of a meeting without mandating a course of action.

This section would have been much more useful, as a stimulus to Australian discussion, if it contained some description of the situation in the US. Routinely, foundations, religious groups, US state governments and concerned individuals place resolutions on US company AGM agendas.

2. Answer to query in regards "3.4 Questions for consideration"

“Should there be an amendment to the right of 100 members to call a general meeting?”

Yes, as part of a quid pro quo which makes it easier to put resolutions and harder for boards to resort to legal tactics to avoid shareholder scrutiny. The latter would best be achieved by ensuring ASIC can and does act like the SEC in regard shareholder/board disputes over AGM resolution and related issues.

The ACCR does not in general support requisition by members of EGM’s. However, in our view arrangements to promote awareness amongst all shareholders of scrutiny by individual shareholders without imposing undue cost on all shareholders are best provided by making it harder to call meetings but easier to put resolutions (& requisition the distribution of statements) in regard meetings which have been/must be called. In light of the experience since 2000 (described above) with the 100 member rule there is unlikely to be a problem with vexatious behaviour if this rule was relaxed in regard to requiring distribution of statements/placement of resolutions. In our view use of the same numeric test (100 members) as a threshold to both put a resolution and to call a meeting is poor public policy. We support continuation of the 5% threshold in both situations.

Chapter 5

3. P 64,the first paragraph under heading 5.4.2 omits to canvass an important distinction in current Australian practice:
    - a shareholder statement does not have to concern a resolution and the ACCR is aware of 2 recent situations where the board has rejected pious resolutions (whereby shareholders sought to comment on the content of the annual directors report to shareholders) on the grounds such comment is not shareholder business;
    - but the boards did distribute statements on the matter because it could be considered at an AGM;

4. p 65 The CASAC suggestion of requiring each of the 100 shareholders hold a minimum $1,000 parcel is almost superfluous because it's hard to get a parcel less than a marketable parcel $500. The exception is where the value of the shares of the company have decreased a lot. And in this situation it is arguable those shareholder should have a right to put resolutions.
5. P 66, Footnote 236, this listing rule is very commonly not complied with.

OWNERSHIP MATTERS

Suite 4, Level 5, 167 Queen St, Melbourne VIC 3000 **T** +61 3 9602 4548 **www.ownershipmatters.com.au**

16 August 2012

Mr John Kluver
Executive director
Corporations & Markets Advisory Committee (CAMAC)

Email: john.kluver@camac.gov.au; camac@camac.gov.au

RE: Submission on 'The AGM and shareholder engagement' discussion paper

Dear Mr Kluver,

Thank you for the opportunity to comment on CAMAC's discussion paper, 'The AGM and shareholder engagement'. Ownership Matters (OM), formed in 2011, is an Australian owned governance advisory firm serving institutional investors. The opinions contained in this submission are those of OM and not those of its clients.

This submission will respond only to those 'questions for consideration' in the discussion paper where OM considers its views are relevant. In general, OM supports the retention of the physical AGM as a requirement for listed companies as it provides an opportunity for shareholders large and small to engage with company boards and management directly, an opportunity unlikely to be available to small shareholders outside of the AGM. OM understands that the costs of a physical AGM for a large company – excluding costs of delivering company documents such as annual reports along with meeting notices – are immaterial. OM observes that many companies hold general meetings (the cost of which is largely the same as that of an AGM) for the sole purpose of seeking approval for equity grants to executives or for relatively trivial purposes such as name changes.

In relation to specific 'questions for consideration':

- **The role of the board in engagement with shareholders:** OM does not see any need for legislative or other initiatives to be adopted in relation to engagement between listed entity boards and their constituent directors and investors. The level of meaningful engagement between listed entities and their institutional investors has increased substantially over the past five years, with both the quantum and quality of engagement increasing over this time. A notable feature has been the increasing role that non-executive directors have played in discussing issues with shareholders and groups representing shareholders – as an example, in the past 12 months OM has had face-to-face or phone discussions with approximately 100 directors of S&P/ASX 300 entities **in addition** to discussions with executives.
- **The role of proxy advisers:** A substantial proportion of OM's operations relate to proxy advisory services for its institutional investor clients. OM holds an Australian Financial Services Licence (Number 423168) and operates in a market where there is no requirement for investors to purchase its services, with low barriers to entry and highly sophisticated and value-conscious clients. There is no evidence of any

dysfunction in the proxy advisory market and OM notes the Productivity Commission's findings in this regard.

- OM also notes that the CAMAC discussion paper references regulatory reviews of proxy advisers in Europe, Canada and the US; in each of these reviews OM also notes there is no empirical evidence produced to back claims concerning the negative influence of proxy advisory firms. This point has been acknowledged by several of the regulatory bodies conducting these reviews.
- OM also notes that as a matter of practice it makes copies of its reports available at no cost to listed entities upon publication to clients. OM also as a matter of practice contacts listed entities to obtain more information about problematic issues prior to publication of reports in order to provide that information to clients. OM views this as a key competitive advantage and part of its promise to its clients. It is also aware that institutional investors routinely discuss voting items with directors and management of listed entities prior to deciding how to vote and do not simply follow our advice without careful consideration.
- **Timing requirements of AGM items:** OM considers there to be merit in improving the ability of shareholders to utilise their rights to submit resolutions and candidates for election at company AGMs by adapting the current requirements of the New Zealand Stock Exchange's Listing Rules. NZSX Listing Rule 3.3.5 requires a listed entity to make an announcement to the market at least 10 business days prior to the closing date for director nominations ahead of the AGM. A similar requirement under the ASX Listing Rules for listed entities to make an announcement 10 business days prior to the deadline for nominations and shareholder resolutions would give investors greater certainty about the applicable deadline for submitting candidates for election or resolutions for consideration. This would address the uncertainty noted in section 5.4.3 of the CAMAC discussion paper.
- **Obligation on auditor to answer questions:** A statutory obligation for the auditor to respond to written or spoken questions at a company's AGM would improve shareholders' ability to seek information on the financial accounts of the company, one of the key rationales for the AGM.
- **Additions to the business of the AGM:** The discussion paper notes that the rights of shareholders in listed companies are confined to a handful of matters – the election of directors, major transactions, related party transactions, constitutional amendments and other statutory requirements such as remuneration report matters. Australian shareholders at present under the Act and the ASX Listing Rules have limited rights in relation to the allocation of shares to executives and other employees – there is no requirement for shares to be allocated only under shareholder approved incentive schemes and no limit on allocations under incentive schemes other than the general limit on new issues of 15 percent over any 12 month period without preemptive rights to non-related parties.
- Australia's liberal related party regime also means companies are not required to seek approval for the purposes of the Corporations Act or Listing Rule related party provisions for equity incentives so long as they do not involve the issue of shares to a director. Companies are able to avoid the limited protection under ASX Listing Rule 10.14 by simply using shareholder funds to acquire company shares on-market on behalf of directors.

- This lack of shareholder control over allocation of company shares to insiders such as executives and other employees under incentive schemes creates significant potential for dilution and abuse. It could be remedied by requiring any allocation of equity, whether by the issue of new shares or acquisition of shares on-market using shareholder funds, as part of remuneration from the company to be made under a scheme approved in advance by shareholders, with such approval to include limits on the number of shares that may be allocated over any three year period under the approval. Any such change should also consider the submission by the ASX to the Productivity Commission inquiry into executive remuneration suggesting that provisions presently in the Listing Rules dealing with matters of remuneration and related party issues be shifted to the Corporations Act.[1]
- **Proxy voting:** In relation to the questions raised around the proxy voting process, including voting exclusions, OM endorses the recommendations contained in the Australian Council of Superannuation Investors' research paper, *Institutional Proxy Voting in Australia*, on improving the integrity and efficiency of the voting system.
- **Access to voting information prior to the AGM:** Section 672B of the *Corporations Act* presently allows listed companies (or those working on their behalf) to demand custodians disclose the voting instructions they have received from shareholders **prior** to the AGM. These voting instruction provisions are necessary to ensure companies (and regulators) are able to identify shareholders acting in concert and/or potentially in breach of foreign investment or takeover laws but OM is aware that presently there is widespread use of these provisions by companies to demand that custodians disclose voting information on items such as the adoption of the remuneration report. There does not appear any justification for allowing companies and their advisers to demand voting information of this kind prior to AGMs for a fee of $5 (proscribed under the Corporations Regulations).
- **Record keeping:** OM supports a statutory requirement for retention of voting records for all company meetings for a period of at least 15 months.
- **Voting procedure for directors:** OM supports the present framework for director elections at Australian companies (subject to the recommendations of the ACSI paper noted above). It also endorses the 2011 amendments to the Corporations Act that prohibit an incumbent board from declaring there to be 'no vacancy' on the board in response to a non-board endorsed director candidate unless shareholders have endorsed the present size of the board.

Please feel free to contact us concerning any aspect of our submission.

Yours sincerely,

[1] See Australian Securities Exchange, 'Regulation of director and executive remuneration in Australia', Submission to Productivity Commission, 29 May 2009, available at http://www.pc.gov.au/__data/assets/pdf_file/0003/89544/sub064.pdf.

Dean Paatsch & Martin Lawrence

Ownership Matters Pty Ltd

The AGM and shareholder engagement-CAMAC enquiry

1.2 & 1.3 Introduction

My comments in this submission are as an active/ sophisticated retail investor.

In my submission I am discussing only listed companies.

It may be reasonable for some of the requirements that apply to listed companies to be relaxed for unlisted companies; however, I would be wary of exempting some smaller listed companies from certain requirements, based solely on their size.

The CAMAC paper refers only to companies: despite its length and detail, it is unfortunate that it makes no reference to the serious omission that listed Australian trusts are not required to have AGMs - either under the law or the Listing Rules. This is completely contrary to the spirit of investor engagement, and unsatisfactory given that all listed entities have at some time raised capital from the public, irrespective of their capital structure. For example, in recent years I lost substantial investments in listed property trusts that raised money from the public through prospectuses, and after 4 or 5 years went into liquidation with a 100% capital loss to their investors; not once did those Boards and managements meet their investors. I made this point to the recent inquiry on MIS regulation. Some of the submissions to that enquiry from legal theorists stated that it was not a problem, or pointed to the right that groups of investors have to call for an (extraordinary) meeting: that is beside the point, and it should not be up to investors to incur the cost and the effort. One wonders why a listed entity that purports to care about its investor engagement would refuse to offer one meeting a year. I urge the committee to consider how this problem can be remedied: it may be complicated to change the law, but an amendment to the Listing Rules could easily be made to require all listed trusts to hold an AGM each year, even if there were no resolutions to be voted upon.

As a general point, I believe that requirements and changes re AGMs, Annual Reports etc that arise from this enquiry should preferably be mandated by law, rather than left to the Listing Rules.

3.4. Questions for consideration re shareholder engagement

As noted in the second paragraph of 2.4.3, institutional shareholders may prefer to raise matters directly with their investee companies as they arise, rather than wait until the AGM to exercise their right to question, comment or vote.

It's acceptable, and productive, for large shareholders to have discussions and briefings with the Boards and management throughout the year—but a pity that other shareholders don't directly get the benefit of these. Part of the wider problem is that institutions rarely participate at AGMs, so retail shareholders don't have the benefit of their questions, insights and concerns. This is not so much a matter of disclosure of sensitive information—the content and manner of presentation of such briefings may be more commercially useful than the formal requirements for communications to the market.

Boards (and corporate lawyers) often complain that AGMs are largely a waste of time and/ or garner ill-informed and irrelevant questions. The quality of engagement could be greatly improved by putting their AGM presentations on their websites a week or so before the AGM, so that shareholders can absorb the material and prepare for the meeting. For retail shareholders, it is often overwhelming to hear the presentations only at the AGM, especially as some are very long. Some companies do publish useful presentations with their annual results to the ASX (i.e. within the 2 month limit after balance date) but many don't. In any case, there can be a long gap between that time and the AGM, during which little investor-friendly information is published (especially in those cases where the Annual Reports provide little more than the regulatory minimum).

The town hall style meetings as suggested on page 10 are a good idea, but should be voluntary and not replace the formal AGM. They could be usefully held about halfway through the company's financial year, after the half year result is announced. Companies should encourage shareholders to summit questions in advance of these to improve the quality of preparation and discussion.

4.4 Questions for consideration on the Annual Report

4.1.4 The extracts in footnotes 159 and 161 are still, unfortunately, true of many Australian annual reports and concise reports, in 2012.

Many concise reports are of limited value, and too simplistic, but some are excellent. I suggest that Annual Reports (both full and concise) be required by law to provide a substantial summary of key financial data, results and ratios for at least the 5 most recent financial years (or since listing if shorter). Some companies do this very well, but others provide little or nothing. Such a summary needs to be much more informative than the usually very limited table of 5 years' information that now appears in Remuneration reports. Some companies have used this recent requirement in the Remuneration disclosures as an excuse to remove what they previously supplied as more useful voluntary information.

One almost never sees companies discussing how they performed in the current year compared with the aspirations stated in their previous Annual Report. There is often a lack of continuity or consistency between years which is an impediment to understanding and analysis. These problems could be remedied by adopting the actual or proposed UK practices noted below.

Use of presentations does help to allay these problems. P48 refers to the FRC report and it welcomed the development of integrated reporting (IR) in improving communication between companies, their shareholders and "other stakeholders". There is, however, a risk that IR will shift attention to "other stakeholders"; whilst those parties may have a legitimate interest in the activities of companies, it is important to recognise that shareholders own the company and should receive priority in the focus of reporting, especially on financial and strategic matters. The major banks have placed emphasis on IR and "sustainability" in recent years. Although his may well be important for their objectives of communication with other stakeholders, I believe that this emphasis is misplaced and excessive, and has been to the detriment

of disclosing financial information to shareholders, at least in their concise reports, and has added clutter and too much self-promotional material.

The objectives of the business review in the UK law mentioned in 4.2.2 should be adopted in Australia.

4.2.4 Reducing clutter. I suggest removing all the material on corporate governance and ASX principles from hard copy Annual Reports. That could easily be referenced online- especially as most of it is generic and differs little from year to year, or even between companies. Although I read almost all the content of Annual Reports of my investee companies, I invariably skim the CG segment which has become predictable and verbose. Remuneration reports have also become very lengthy (and almost incomprehensible to most retail shareholders): on balance, it would be a big improvement to make these available online instead, with just a 2 or 3 page summary with cross references in the (hard copy) Annual Report.

4.2.6 The UK proposal for a Strategic Report and Annual Directors Statement would be a very welcome approach for Australia to adopt.

4.2.7 Hard copy v online. As an active investor, I find it essential to be able to annotate an Annual Report (AR); this would be much more difficult if ARs were only available online, leaving shareholders to print their own copies. I expect that the additional cost of printing ARs (beyond the cost of preparing the online version) would not be substantial. It is obviously desirable to reduce waste, and send printed ARs only to shareholders who want them. The current Australian regime strikes the right balance—shareholders should be able to get a printed AR if they want one, but must opt in to receive them.

5 Conducting the AGM

5.3.1 Statutory time frame. The paper notes the concentration of many AGMs in a short period – and says that it's a problem for institutional investors. However, it's also a problem for retail shareholders with more than a handful of investments. The suggestion of extending the statutory 5 month period by 1 month is sensible, although there is a risk that many of the smaller companies might just bunch together again at the end of the longer period. It is mainly the small companies that now hold AGMs in the last few weeks of the permitted period—it would be valuable to ask them directly why they do this—i.e. don't rely solely on the responses and preferences of institutions on this point.

5.3.2 Notice of Meeting. Often the form and content is very legalistic—they are obviously written by company secretaries or lawyers. They clearly concentrate on compliance with Listing Rules and legal form but at the expense, sometimes, of omitting material that would be helpful or commercially relevant to making a decision on the resolutions. Very often the Notices are not "clear, concise and effective". The Notice would benefit from the CFO or other senior commercial executives (and/or the Board) reading it for a "common sense" and clarity test.

It would be useful to disclose the % voting on the *prior* year's Remuneration report, in the context of the general information in the Notice about 2 strikes, so that

shareholders can see easily whether the matter of a strike is even *potentially* relevant to the coming AGM, without having to check the previous year's voting rests themselves. Without this context, the generic mention of the 2 strikes rule can be confusing.

I suggest not using the term "special business" in a Notice of Meeting as it adds little and can be confusing to non-lawyers on whether resolutions are ordinary or special.

5.4.2 (and 3.1.6) Shareholding Threshold. This point is often raised as a problem of cost or being vexatious—but it may be largely a theoretical objection - how many such resolutions / EGMs have in fact been put up in the last 5 years? The 5% test should not be the only criterion—in most cases that would represent hundreds or thousands of small shareholders, unless they were able to get a large shareholder to support their cause. The alternative suggestion to require a materiality threshold of a minimum 100 shareholders in number x minimum $1000 value per person is sensible.

5.4.3 AGM notice period. I agree with the suggestion that companies should give at least 3 months' notice of their AGM date. At least, the timing of the AGM date announcement and the deadlines to lodge resolutions or nominate directors should be linked so that there is a window of at least 10 business days.

5.5.1 Questions before the AGM. Some companies—not necessarily the largest- do seek questions from shareholders before the meeting, with or without a form to submit. This should be considered best practice.

Many invite only questions to the auditor [even though S 250PA does not appear to require this], but fail to take the opportunity to solicit other questions. This is unfortunate, especially as in practice very few questions are raised for auditors. Companies should be required to state clearly in the Notice of Meeting that shareholders are welcome to submit questions on all matters relevant to the AGM, the annual report or the company's performance - in writing or by email up to say 5 business days before the AGM, with the necessary email/ postal address details. It would help to include a printed question form, which shareholders could return with their proxies. Some companies do attempt to answer (some) prior questions in the AGM speeches, but often only the most obvious or superficial questions. A very small number of companies select a wider range of questions and place them, with answers, on their website. This should be regarded as best practice and it would be ideal if they could do this before the meeting, perhaps updated for other significant matters that arise within the AGM.

5.5.2 Auditor - where questions to the auditor have been submitted before the meeting, within the permitted time frame, the auditor should be obliged to answer them, unless the Chair rules that they are clearly inappropriate. The Clerp 9 footnote implies that the auditor should not be obliged to answer oral questions. In principle, I don't see why that is appropriate—if the question is prima facie relevant, the auditor should either answer it at the meeting or supply an answer promptly afterwards for publication on the company's website.

5.5.3 Proposal and points to be considered

The suggestion of an Other Business section is good i.e. to allow discussion at the end of the meeting as well as (not merely instead of) after the presentations and financial report, as is conventional. Some companies do this already. It would allow the meeting to flow better and enable the formal matters to be concluded more promptly. Some shareholders may feel inhibited from asking questions immediately after the presentations and financial report section but more comfortable doing so at the end of the meeting. The Notice of Meeting should make clear whether the AGM will be conducted in this manner, so that shareholders do not inadvertently miss the opportunity to ask questions. There is some merit in publishing a list of topics of "Other Business", providing it is clear that it is not exclusive, to avoid inhibiting shareholders from bringing up other matters worth discussion.

5.8.9 Renting of votes. How widespread is this practice? It should be prohibited - voting rights should be an inseparable part of the long-term rights and obligations of a shareholder. One should not be able to detach such rights for short-term purposes, which may be to the detriment of shareholders as a whole, as noted in footnote 351.

5.10.1 Pre-AGM votes. I agree that they should only be received and held by a share registry, auditor or other independent party, until the deadline for proxy lodgements is reached, so that the information cannot be used to by directors or others to solicit votes or benefit particular parties.

5.13 Show of hands v poll. As ASCI noted, the show of hands method is undemocratic—conversely, it is fair to take the sense of the AGM from the people who have attended in person. The best practice would be for the Chair to say in advance (preferably in the Notice of Meeting) that he will do both i.e. take a vote on a show of hands to obtain that opinion (which is likely to be representative of smaller shareholders) but then move to a poll on <u>all</u> resolutions to ensure that all those who provided proxy votes are allowed for. This should be done for all resolutions, to avoid the impression of "cherry picking". One should recognise that many of the proxy votes come from small shareholders who can't attend—it is not simply a matter of absent institutions versus present retail shareholders.

5.15.1 Consistency of presenting AGM voting results. This should probably be a matter for the Listing Rules rather than law. Percentage values as well as absolute numbers of votes would be helpful. However, if percentages are used, they should be of the total shares validly *voted* (not the total issued capital, which is irrelevant for this purpose).

5.16 Election of directors. The minimum window of time to nominate directors is 5 business days: this is inconsistent with the problem outlined in 5.4.3 regarding other resolutions—and is also inconsistent with the time suggested there to allow at least a month's window. It would be worthwhile to extend the minimum window available for nominating directors at the same time as changing the other resolution dates discussed in 5.4.3. Also I note that the UK Corporate Governance Code recommends that all directors [excluding the Managing Director?] in FTSE 350 companies stand for re-election at each AGM. This is a good idea that encourages accountability, and should be adopted as best practice in Australia, at least for the ASX 200 companies. The law (not Listing Rules) should also ensure that shareholders are allowed to put questions to directors regarding their re-election.

6.2.1 Holding an AGM is a good discipline for boards and managements. I endorse the comments in footnotes 446/7/8. The crucial need is to make the AGM more amenable to retail shareholders, and less intimidating—less dominated by the Chair and CEO with long speeches. This change of culture obviously can't be regulated but should be encouraged and refined towards best practice.

As noted in 6.2.1 the AGM is not a compliance exercise but a means of achieving informational and governance goals that are integral to investor relations activities. Two of the primary functions as described in this section, viz reporting and questioning, are equally applicable to listed trusts. This is why I repeat my plea for listed trusts to be required to have an AGM—the mere fact that there are no resolutions to be voted on does not eliminate the need for investor engagement. It is hard to understand why some entities refuse to do this, since the time and cost involved would not be significant. Although it would be difficult to prove this contention, I suspect that better shareholder engagement leads to lower cost of capital.

6.2.2 Option 1. Discussion of the formal resolutions, including elections of directors, is frequently only a small part of the AGM time, with few if any questions (apart from remuneration matters). Placing Q&A on the website is an excellent idea but one still needs a forum where shareholders can hear the debate *and participate* in "real time".

Option 2 As stated in 6.3.1, best practice should be to webcast AGMs both live and for archive. Many smaller companies do not yet do this. This would be especially important to give effect to the suggestion of allowing voting after the meeting. I believe votes should be allowed after the meeting, for up to 2 weeks - as well as before.

Option 3 There may be merit in having different requirements for unlisted companies, but I would be wary of creating distinctions between different sets of listed companies. This could cause more confusion and problems than the limited "efficiency" benefit that might be gained. As stated earlier, I submit that it's very unsatisfactory that listed trusts are not required to have an AGM at all—so for them, unless their Board/ RE does so voluntarily, to encourage disclosure and debate, the entire thrust of this paper is redundant.

Option 4 I do not support the idea of abolishing AGMs, and would be discouraged from investing in companies if the law adopted such an extreme change.

6.3.1 Web casting ought to become standard practice- preferably mandated through a Listing Rule. However, as the paper says, whilst this is beneficial it is not sufficient. Shareholders need direct and contemporaneous means of participation.

6.3.2 Technological options for change. Options 2 and 3 are unsatisfactory—they would alienate small shareholders and reduce engagement and accountability. Although the question of cost of holding (physical) AGMs and printing annual reports is frequently stated as an objection, it is never quantified—and I suspect is small by comparison with, say, the size of the NED fee pool. The use of webcasts should be best practice, but the lower technology costs of having *only* an online meeting are not a sufficient justification.

I am sceptical about Option1; quite apart from the risk of possible technical problems, how would one be confident that shareholder questions are not being ignored by the Chair?

ethinvest
ABN: 53 003 843 874 Australian Financial Services Licence: 223718

Ethinvest Pty Ltd
11 / 16-18 Malvern Ave Chatswood 2067
PO Box 692 Chatswood NSW 2057
T (02) 9413 9558
F (02) 9413 9379
E info@ethinvest.com.au
www.ethinvest.com.au

Mr John Kluver
john.kluver@camac.gov.au
camac@camac.gov.au

Submission to the Corporate and Markets Advisory Committee

With reference to "The AGM and Sharholder Engagement" Discussion Paper September 2012

Dear Mr Kluver,

Thank you for the opportunity to comment on The AGM and Shareholder Engagement" Discussion Paper September 2012.

Ethinvest is an investment advisory company that manages nearly 400 direct share portfolios on behalf of individuals, trusts, private foundations and not for profit organisations. Our company specialises in providing "Ethical Investment" advice, and as a result, many of our clients take a keen interest in the companies in which they invest, and more specifically in the environmental and social performance of those companies.

As part of our service, we provide assistance to our clients in engaging with the companies in which they invest, on environmental, social and governance issues.

Yours Sincerely,

Trevor Thomas
Managing Director

General Comments

During the last year, we are aware of only one single resolution regarding environmental or social issues that was put to the shareholders of an Australian Listed Company. (That was a resolution put to Woolworths shareholders regarding gambling). This is in stark contrast to the United States of America where shareholder resolutions are an integral part of their system of Shareholder Engagement with Corporations.

"According to a report by the US-based CERES, "Proxy Power Shareholder Successes on Climate, Energy and Sustainability" February 2012; *"Over the past three years, 230 sustainability-focused resolutions were filed by investors in Ceres' network. Many of these achieved positive outcomes. Nearly half, or 110 resolutions, were withdrawn by investors after the companies agreed to address their issues of concern."*

In our view the Australian system is not conducive to shareholder resolutions for the following reasons.

- The "threshold test" requiring 100 shareholders is fairly onerous.
- There is a lack of clarity in the rules as to what is or is not a valid shareholder resolution. (In the USA the Securities and Exchange Commission has a clear set of rules backed up by case law.)
- There is no independent arbiter to determine if a shareholder resolution is valid and should be put to shareholders. (In the USA the Securities and Exchange Commission acts as the final arbiter on whether or not a resolution should be put to the AGM.)

We believe that the ability of shareholders to put resolutions to company AGMs is an important principle in our corporate system, but because of the above reasons, it is not being exercised.

5.4 Shareholders placing matters on the AGM agenda.

Question: Should there be any change to the threshold tests for shareholders placing matters on the agenda of an AGM?

The current "Threshold Test" of 100 shareholders or shareholders representing 5% of the total votes that can be cast by shareholders is a fairly high threshold to be achieved given the organization required by shareholders. This is likely to result in fewer resolutions being lodged than if the threshold were lowered. In the USA a single shareholder (subject to some requirements) is able to put a Shareholder Resolution.

We believe a threshold needs to be set that will discourage "frivolous" resolutions but encourage shareholders who wish to engage with a company in a

constructive manner through the resolution process.

Whilst there is no scientific way of determining the most effective threshold figure, we propose that 50 shareholders would be a more appropriate threshold.

5.4.4 Excluded material

Question: Does the current law concerning excluded material either create undue difficulties for shareholders who with to criticize directors or conversely, unduly restrict directors in vetting out information to be circulated to shareholders at the companies expense?

Currently, the Company Secretary effectively determines what is or is not excluded material. If a resolution from shareholders is rejected by the Company Secretary, and the shareholders disagree, there is no independent body that can make a determination. In the USA the SEC acts as the final arbiter in such a situation.

By way of example, in 2011 a number of our clients attempted to put a resolution to the ANZ Bank's AGM regarding the reporting of funding for coal fired power stations. (The risk for investors that coal fired power stations could become "stranded assets" if the price of carbon rises over the next 10 – 15 years makes it an issue of genuine shareholder concern in our view).

Despite having fulfilled all of the requirements for putting such a resolution, ANZ refused to both put the resolution to its AGM and to circulate the accompanying statement. This was done on the basis that "the proposed resolution sought to bind management to undertake certain actions. It is clear to ANZ that under company law an annual general meeting of shareholders does not have the power to do this. So as you would understand it would have been wrong for the directors to put such a resolution to this meeting." (Please see attached our shareholders resolution and ANZ's reply)

Our legal advice suggested that we had proposed a valid resolution but our shareholders did not have the resources or the desire to pursue the matter further, particularly if legal action was required.

The lack of clarity in the laws governing such resolutions makes it easy for listed companies to avoid such resolutions unless they are framed as a change to the Company's Constitution.

The end result is that the legitimate concerns of over 100 shareholders were not circulated to shareholders or voted upon at the companies AGM.

We propose that ASIC would be the appropriate body to be given the role that the SEC performs in the USA.

ASIC should be responsible for preparing and publishing a clear set of guidelines as to what constitutes "exclude material" and what constitutes a valid resolution. ASIC should also be the final independent arbiter in the event of a dispute over the validity of a shareholder resolution.

Ernst & Young Building
8 Exhibition Street
Melbourne VIC 3000 Australia
GPO Box 67 Melbourne VIC 3001

Tel: +61 3 9288 8000
Fax: +61 3 8650 7777
www.ey.com/au

21 December 2012

Mr John Kluver
Executive Director
Corporations and Markets Advisory Committee
GPO Box 3967
SYDNEY NSW 2001

via email to: john.kluver@camac.gov.au
cc to: camac@camac.gov.au

Submission on Discussion Paper: *The AGM and Shareholder Engagement*

Dear Mr Kluver

Thank you for the opportunity to provide a submission on the Corporations and Markets Advisory Committee ("CAMAC") Discussion Paper entitled *The AGM and Shareholder Engagement* ("the Discussion Paper" or "DP"). We believe that the Discussion Paper provides a timely consideration of the role and future of the Annual General Meeting ("AGM") in Australia, including the role of the AGM as part of the broader issue of shareholder engagement, and the content and format of the annual report as the principal document for consideration by shareholders at the AGM.

We have not undertaken a survey of company shareholders to elicit their views on the DP. Our comments in Appendix A arise from our role as auditors and observations through our interactions with shareholders and others with an interest in the matters covered by the DP. As such our comments are limited to those matters raised in the DP upon which we feel able to provide relevant input.

We support in principle the AGM as a key part of broader shareholder engagement and as a corporate governance and management accountability mechanism. We believe it provides an important opportunity for shareholders to engage directly with the board. Further, it is a mechanism by which boards are held accountable to the shareholders. We do however have some concerns regarding the timing of the AGM and the consequences this has for the timeliness of information provided and therefore for shareholder engagement more generally. We suggest consideration be given to alternative more timely approaches to provision of information to shareholders, with the formal AGM being a forum for shareholders to ask questions of the board arising from the information previously provided.

We agree that while the annual report is the principal document for consideration at the AGM, there is considerable concern regarding the length of the annual report, including the production of unnecessary information ('clutter') in financial reports. We note that there are a number of recent papers and reports issued by various bodies that have considered aspects of this issue, and that activity in this area is ongoing. We support the International Accounting Standards Board's proposal to address the issue of disclosure in the financial report and consider it is the appropriate body to undertake such a project to develop a framework for disclosure requirements within the financial report. With respect to the directors' report, we have concerns that much of the information included in it, is not commonly relied upon by users as the primary source of information about the company's financial position, performance and business strategies. Technological developments have overtaken the directors' report as a source of such information. Accordingly we agree that a fundamental review of the requirements of the directors' report and its purpose should be undertaken.

We do not support imposing an obligation upon the auditor to formally address the AGM, but strongly support the auditor having the opportunity to do so should there be matters they consider ought to be brought to the attention of shareholders, and being required to be available at the AGM to answer any questions from shareholders. This will be facilitated by the IAASB proposals on expanding the audit report to include auditor commentary highlighting matters of likely interest to shareholders.

Finally, while recognising the important opportunity a physical AGM provides for shareholders to engage with the board, we support the notion of investigating the use of technological developments and resultant alternative formats of conducting the AGM (such as online or virtual meetings).

Should you have any questions regarding the comments provided in this letter please do not hesitate to contact Denis Thorn (denis.thorn@au.ey.com or (03) 8650 7637) or Lynda Tomkins (lynda.tomkins@au.ey.com or (02) 9276 9605).

Yours sincerely

Ernst & Young

Ernst & Young

Appendix A

1. Shareholder engagement

We support in principle retaining the AGM, as it is an important mechanism for broader shareholder engagement, corporate governance and management accountability. We believe it is an important opportunity for shareholders to engage directly with the board, and provides a mechanism by which boards are held accountable to shareholders.

Timing of the AGM

We do however have a concern that the timing of the AGM (up to five months after balance date) may result in shareholders not being provided a timely opportunity to engage with the board and to obtain information necessary for such engagement to be effective. In general, analysts' briefings occur well in advance of the AGM, and are a forum in which a significant amount of commentary on the company's results and prospects is provided but which is not available to all shareholders, who do not attend these briefings.

Alternative forums for shareholder engagement

In our view consideration might be given to whether other forums (which might be held via use of technology such as webcasts) may provide an opportunity to address shareholders and provide them with such information much earlier in the process. In such a regime the formal AGM may more appropriately provide an opportunity for shareholders to ask questions of the board based on the information conveyed to them in these earlier forums

2. The annual report

'Clutter' in annual reports

We agree with the observation made in the DP that while the annual report is the principal document for consideration at the AGM there is considerable concern amongst stakeholders regarding the length of the annual report, including the production of unnecessary information ('clutter'). This and related matters have been raised in a number of recent discussion papers and reports issued by various bodies, both in Australia and internationally. These have generally, although not exclusively, been concerned with the issue in relation to the financial report rather than other components of the annual report. Examples of such papers and reports include:

- UK FRC Discussion Paper *Cutting Clutter* (April 2011)
- Australian FRC Report *Managing Complexity in Financial Reporting* (May 2012; Ernst & Young has submitted a comment letter on this Report.)
- EFRAG Discussion Paper *Towards a Disclosure Framework for the Notes* (July 2012; the Global firm of Ernst & Young will be submitting a comment letter by the due date of 31 December 2012.)
- UK FRC Discussion Paper *Thinking about disclosures in a broader context* (October 2012)

Other recent publications aimed at improving the usefulness of information presented within the annual report, include:

- IIRC Discussion Paper *Towards Integrated Reporting: Communicating Value in the 21st Century* (September 2011) which explores initial proposals for the development of an international integrated reporting framework and outlines the next steps towards it creation and adoption. (The Global firm of Ernst & Young has submitted a comment letter on this Discussion Paper.)
- ASIC Consultation Paper 187 *Effective disclosure in an operating and financial review* (September 2012) proposing guidance on the presentation of useful and meaningful information and analysis to investors through the Operating and Financial Review (OFR) presented as part of the directors' report by listed companies, pursuant to section 299A of the *Corporations Act*. (Ernst & Young has submitted a comment letter to ASIC on this Consultation Paper.)

As reflected in these papers/reports, the issue of 'clutter' extends beyond the quantity of disclosure contained in the annual report to matters of quality, usefulness and timeliness of all information provided. Determining what, if any, information currently provided in the annual report is unnecessary is a complex matter involving consideration of the interests of the many stakeholders concerned. From the perspective of the financial report, which as auditors is the component of the annual report with which we have most significant engagement, we note that the International Accounting Standards Board ("IASB"), as part of its agenda consultation, has identified strategies for improving financial reporting disclosures as a priority. In our view the IASB, as the body promulgating International Financial Reporting Standards (which form the basis of Australian Accounting Standards), is the appropriate body to be considering this issue, with appropriate input and context provided by the various reports and discussion papers cited above.

Changes to annual reporting requirements

With respect to the directors' report there is clearly greater scope for change to the nature and extent of disclosure required given these requirements are determined locally and arise from the *Corporations Act*. We note above that ASIC has issued CP 187 relating to the operating and financial review. As we indicated in our comment letter on the ASIC CP, we have concerns that much of the information included in the directors' report, which is usually not issued until at least three months after year end, is not commonly relied upon by stakeholders as the primary source of information for the purposes of understanding a company's financial position, financial performance and business strategies. There are a large number of other sources of information that shareholders and other market participants may access, including investor reports, quarterly updates, company websites and documents released as part of a listed entity's continuous disclosure requirements. In this context we believe that developments in technology, which make much of the information in the directors' report more readily available on a timelier basis, indicate that a fundamental review of the requirements of the directors' report and its purpose should be undertaken.

The DP refers to certain other initiatives that have been adopted or considered in overseas jurisdictions; for example, the UK Business Innovations and Skills consultation paper proposal to introduce a Strategic Report to provide a clear, concise overview of the business of the company, its strategy, business model, performance and key financial data, changes to governance, and the directors' views of the challenges, opportunities and risks facing the company. We believe that there is merit in considering such a report in Australia. This would encourage a greater focus on the continuing operations and prospects of the company, as opposed to the currently largely historical focus of the information provided. However, we believe this would best be considered as part of the fundamental review of the requirements of the directors' report referred to above. This would help ensure that there is a coherent and consistent framework for the provision of information that is useful to stakeholders, and avoid the potential for inconsistent or duplicative requirements emerging.

With respect to the third identified component of the annual report, namely the auditor's report, we have provided some comments below in the context of the IAASB proposals to revise the auditors' report and the relationship to the auditor's obligations at the AGM.

Other initiatives with potential to impact annual reporting requirements

We recognise the potential for technology (e.g., XBRL) to improve accessibility of information presented in the annual report. As indicated in our comments to the FRC on its *Managing Complexity in Financial Reporting* report, we believe use of XBRL has the potential to provide users increased flexibility with respect to how they consume information and greater ability to analyse and compare information between companies. We do caution that adoption of XBRL would increase the burden on preparers of the annual report, and recommend that it would be prudent to leverage the lessons learned in other

jurisdictions on their adoption of XBRL. For instance, we understand that XBRL lodgement of financial report information is mandatory in certain countries such as the USA, UK, Singapore and Japan.

3. The AGM

Auditor's obligations at the AGM

With respect to the conduct and future of the AGM, and in particular whether there should be an obligation on the auditor to speak at the AGM and/or to answer questions from shareholders, we do not think it is necessary to enshrine in legislation or other regulatory requirements an obligation on auditors to address the AGM. We can envisage situations where shareholder concerns relating to the conduct or outcome of the audit may not exist and where therefore any requirement for the auditor to address the AGM would be unnecessary. We do, however, support the auditor being provided the opportunity or right to speak at the AGM and being available to answer questions at the AGM. This affords the auditor the opportunity to address any issues relating to the conduct and outcomes of the audit that in their view warrant being explicitly highlighted to shareholders, and any matters that are of express concern to shareholders and upon which they wish the auditor to specifically comment.

We note that the expanded audit report proposals outlined in the IAASB *Invitation to Comment: Improving the Auditor's Report* (June 2012) suggests measures to enhance the communicative value and relevance of the auditor's report through proposed revisions to ISA requirements that address its structure and content. As indicated in our comment letter to the IAASB, we support the concept of Auditor Commentary as a means of highlighting matters that are likely to be most important to users' understanding of financial statements and drawing attention to management's disclosures of those matters. Such additional commentary by the auditor would enhance the quality of information provided to stakeholders and provided the auditor has the opportunity to address matters of significance would obviate the need to compel the auditor to address the AGM, while facilitating shareholders' ability to ask questions on the matters raised should they wish to do so.

Future format of the AGM

Finally, while recognising the important opportunity a physical AGM provides for shareholders to engage with the board, we support the notion of investigating the use of technological developments and resultant alternative formats of conducting the AGM (such as online or virtual meetings). This we believe would be particularly helpful in improving access to the AGM by larger institutional shareholders and overseas investors, who in some cases are unable to attend physical AGMs. We therefore encourage further investigation and consideration of use of technology to do this, but stress that we consider the ability of shareholders to interact with and question directly the board at the AGM to be a key factor in its usefulness as a corporate governance and accountability mechanism.

21 December 2012

Mr John Kluver
Executive Director
Corporations and Markets Advisory Committee

By email: john.kluver@camac.gov.au
cc: camac@camac.gov.au

Dear John

The Annual General Meeting and Shareholder Engagement

Telstra welcomes the opportunity to contribute to the ongoing discussion regarding the future of the Annual General Meeting (AGM) and the engagement of shareholders in Australia. Our submission on the Discussion Paper issued by the Corporations and Markets Advisory Committee (CAMAC) on 14 September 2012 regarding 'The AGM and Shareholder Engagement' (the Discussion Paper) is attached.

We look forward to hearing CAMAC's recommendations following the consultation process and would welcome the opportunity to further discuss these issues with CAMAC.

If you have any queries or would like to discuss our submission further, please contact my office on (03) 8647 2629.

Yours sincerely

Damien Coleman
Company Secretary

The AGM and Shareholder Engagement

Telstra Corporation Ltd Submission

Issue 1: Shareholder engagement

Telstra places strong emphasis on shareholder engagement. To this end, we place a high degree of importance on our communications with both retail and institutional shareholders, and on facilitating opportunities for shareholder engagement and shareholder feedback. Telstra engages with shareholders, both formally and informally, and our AGM is a significant part of this process.

The most appropriate and effective way for each company to engage with its shareholders will vary depending on its particular circumstances, including changes in those circumstances over time. It is our view that a company is best placed to determine the most effective way in which to communicate and engage with its shareholders within the regulatory framework, and having regard to existing industry body guidelines. We consider there is adequate flexibility for companies to address company/industry specific shareholder engagement issues. We do not believe the introduction of further regulation or legislation is necessary or desirable as each company's circumstances will be different, and accordingly we do not believe legislative change is required in this area.

Our observations on the shareholder engagement issues raised in the Discussion Paper are set out below.

Alternative forums for shareholder engagement (outside of the AGM)

Telstra believes in the importance of providing shareholders with an opportunity to directly engage with the Board and with management about company specific issues. The AGM is an important aspect of this engagement (please see comments below in relation to Issue 3: Conducting the AGM). Telstra provides a number of alternative forums for shareholder engagement which, in our experience, have positively contributed to engagement with our shareholders. In addition to conducting the AGM, retail shareholders have also been invited to attend annual shareholder briefing sessions which are held in a number of locations across Australia following the announcement of the company's full year financial results. Held ahead of the AGM, these briefings are led by the CEO, CFO and other members of senior management and provide an opportunity for retail shareholders, who may not otherwise have the opportunity to attend the AGM, to be able to hear directly on matters affecting the company and to ask questions and raise issues and concerns. Shareholders who are unable to attend can view a webcast of the event on our Investor Relations website. The smaller and less formal environment of these shareholder briefings has, in our experience, resulted in a greater number of shareholders actively engaging with the company.

Use of technology in shareholder engagement

Telstra is a strong supporter of the use of technology to facilitate shareholder engagement and believes that increasing innovations in this area will serve to further enhance and expand engagement. However, we are of the view that companies will be best placed to determine the most effective way to communicate with their shareholders and that the current legislative framework provides adequate flexibility to companies to implement a range of measures with that objective. For instance, we provide regular ongoing communications with our retail shareholders using a range of technologies. We provide relevant materials on our Investor Relations website including copies of materials lodged with the ASX announcements platform, access to live webcasts of significant announcements, email alert broadcasts to shareholders advising specific events or availability of shareholder information, and access to archived webcasts. The CEO has also recorded a video message to retail shareholders following recent results announcements which is available on the Investor Relations website. Telstra also provides an interactive version of its shareholder documents, such as the Annual Report.

In addition, retail shareholders are able to contact the Investor Relations department via email, an on-line webform, mail or a 1800 telephone number. All of these contact details are available on the Investor Relations website and are listed in all material sent to retail shareholders.

Institutional shareholder engagement

As outlined above, we support the approach of allowing companies to formulate their own engagement strategy with reference to existing industry body guidelines. We do not believe that there is a need for further regulation in this area.

In line with industry guidelines, institutional shareholders are invited to engage with Telstra both through the formal full and half year results announcement briefings, Q&A sessions and Investor Day presentations. We also engage with institutional shareholders, both domestically and internationally, through meetings with the CEO and CFO and other senior management to explain our results after the full and half year. Any materials from our results announcements and Investor Day presentations, together with relevant transcripts and a webcast of the event are also made available to all shareholders via the ASX announcements platform and on the Investor Relations website.

Role of proxy advisors

Telstra welcomes discussion on the role of the proxy advisors and their possible influence on investors and notes the interest this topic is receiving in a number of jurisdictions outside Australia. In the interests of good governance, Telstra believes any moves which provide transparency and accountability in this important area would be welcomed by all those involved. In particular, disclosure of the following, possible on the advisor's website, would provide greater transparency for all relevant stakeholders:

- the qualifications of the advisors;
- an outline of the advisor's general voting policies; and
- the methodologies used in formulating their analysis.

Telstra also strongly supports the view that advisors should engage with the issuer on particular issues prior to producing their reports. Advisors should also be required to provide their reports to issuers at the same time as clients so issuers can address any factual errors and engage with shareholders on issues raised in the report.

Issue 2: The Annual Report

Current reporting requirements - issues

Telstra supports measures to improve disclosures to shareholders. We consider the current reporting requirements result in Annual Reports that are lengthy, duplicative in many sections and potentially confusing to shareholders. In our view, this is affecting the utility of the Annual Report to shareholders. For this reason, Telstra strongly supports the simplification of existing reporting requirements to enhance shareholders' understanding of the companies in which they have invested.

In relation to the current legislative framework regarding remuneration disclosure, Telstra considers the framework complex and unnecessarily prescriptive. This results in Remuneration Reports which are lengthy and complex, and may not be well understood by all shareholders. There are a number of ways in which the remuneration disclosure legislative framework could be amended to enhance the relevance and readability of Remuneration Reports to shareholders. For example, in the Annual Report the focus of remuneration disclosures should be on the value of remuneration which actually crystallised during the period. Any necessary theoretical accounting valuations of remuneration could be placed in the financial statements and notes and accompanied by an explanation of the differences. We refer to previous submissions to CAMAC by industry bodies and corporates (including Telstra) on this subject.

We also refer to Consultation Paper 187 recently released by ASIC in respect of the requirements for an Operating and Financial Review section of the Directors' Report. As stated in Telstra's submission to ASIC, if companies are required to include forward looking statements in an Annual Report, boards

are likely to take a prudent approach to compliance. As a result, they are likely to include significantly more information in the document, which may detract from its effectiveness and would be counter-productive to the objective of providing useful and meaningful information to shareholders.

Review of reporting requirements – enhancement measures

Telstra would welcome a review of the different pieces of legislation and the Accounting Standards with a view to deleting duplication and reducing reporting requirements, to provide for a simpler, more effective, reporting framework for shareholders.

Telstra supports the concept of restructuring existing reporting requirements to provide companies with flexibility to make the complex, more prescriptive financial and other information, publicly available by other means.

By way of illustration, information on a Company's operations and performance (similar in style to Financial Highlights information) could be included in the Annual Report, with the Company's full Financial Report available on its website for those shareholders and other stakeholders who find this information of value. Similarly, information regarding a Company's remuneration strategy, policies, structure and outcomes could be included in the Annual Report, with the more detailed and prescriptive information required under the existing legislative framework made available online to meet the needs of all shareholders and other stakeholders.

Such an approach would provide companies with the ability to streamline and tailor the content of their Annual Reports to target their shareholder audience in a more effective and meaningful way.

The Annual Report is an important channel of communication between the Company and its shareholders, the market and other stakeholders. It is, however, by no means the only channel. Shareholders and other market participants are not a uniform group, and they have different areas of need and interest. Companies should have the flexibility and discretion to determine how best to communicate with their shareholders and other stakeholders (including the level and type of information that is provided and the manner in which it is provided) in accordance with the standards set out in the legislative framework.

Issue 3: Conducting the AGM

Should the AGM be abolished?

The AGM continues to have relevance and significance to shareholders, in particular retail shareholders, and has an important role to play in terms of a company's shareholder engagement. The AGM in its current form allows shareholders to hold directors accountable for their performance directly, provides opportunity for face to face contact between shareholders and all members of the Board and senior management, and enables shareholders to observe the interactions and dynamics between the Chairman, members of the board and the CEO.

As noted above, it has been Telstra's practise in recent years to conduct retail shareholder briefings at a number of venues in different parts of Australia after the full year financial results and prior to the holding of the AGM. This has provided an additional forum for retail shareholders to have face to face communications with senior management and has contributed to the issues raised by shareholders at the AGM to a greater extent being relevant to shareholders as a whole.

Telstra also encourages its shareholders through its notice of meeting to provide questions to the company in advance of the AGM, by either submitting questions electronically via a web portal or returning a hardcopy form. Questions are then collated and where possible addressed specifically or collectively by the Chairman and/or CEO during the meeting. Telstra believes that this process has further enhanced retail shareholder engagement in the AGM by providing another avenue for retail shareholders to voice issues. However, Telstra notes that this practice may not be appropriate for all companies or at all times. In our experience, the number of shareholders who choose to engage in this way varies depending on the current issues facing the company.

Changes to the format, function and voting at the AGM (including non-binding resolutions)

Telstra considers while there are some limitations in the current legislative regime relating to the calling of a meeting, requisitioned meetings and resolutions, distribution of notices and other materials including shareholder statements, the business of the AGM, obligations on the auditors, proxy appointments etc has some limitations, by and large the process is well understood and delivers an effective outcome. The current legislative regime provides an appropriate structure for conducting a shareholder meeting and Telstra does not envisage any legislative change in this area that would enhance the process or encourage greater shareholder participation. In particular, we do not support introduction of non-binding shareholder resolutions as we believe this may reduce rather than increase the effectiveness of the AGM. Shareholders already have adequate opportunity to ask questions and engage with the Board on a range of issues relevant to the affairs of the company during the discussion of the financial report (pursuant to section 250S of the Corporations Act). We do not believe introducing additional non-binding resolutions will positively contribute to shareholder engagement on the affairs of the company. As noted above, the existing legislative framework provides an effective method for allowing shareholders to raise issues for consideration by the company.

Telstra also believes that the current practices and processes for submitting votes prior to the meeting, and casting votes at the AGM, is a stable and robust process that is reliable and well understood by shareholders. Telstra does not envisage any legislative change in this area (e.g. introduction of electronic voting pre-AGM) would enhance the voting process or encourage greater shareholder participation. In this regard, Telstra has offered shareholders the opportunity to cast their vote directly since 2008. In Telstra's experience shareholders have not embraced direct voting over the traditional method of appointing a proxy.

Time to hold the AGM

Telstra recognises there are a number of issues associated with having a 'peak' AGM season. One way in which this issue could be addressed would be to allow companies greater flexibility to provide a shorter notice period for the AGM, which may have the effect of 'spreading' AGMs if companies have the ability to hold their meeting 'earlier' during the AGM season.

Chairman's powers

In relation to the duties and role of the Chairman at the AGM, we believe this issue is adequately addressed under the common law and in a company's constitution. Accordingly, no further legislative change is required in this area. Instead, we believe it continues to be appropriate to have regard to existing industry body guidelines on this topic which provide appropriate flexibility for the Chairman of an AGM to manage the meeting in the interests of all shareholders.

We look forward to hearing CAMAC's recommendations following the consultation process and would welcome the opportunity to further discuss these issues with CAMAC.

Telstra Corporation Ltd

21 December 2012

21 December 2012

Mr John Kluver
Executive Director
Corporations and Markets Advisory Committee
Level 16, 60 Margaret Street
SYDNEY NSW 2000

Via email: john.kluver@camac.gov.au
Cc: camac@camac.gov.au

Dear Mr Kluver,

The AGM and Shareholder Engagement

The Australian Council of Superannuation Investors (ACSI) is pleased to make the attached submission in response to CAMAC's September 2012 Discussion Paper on *The AGM and Shareholder Engagement*.

ACSI represents 38 profit-for-members superannuation funds that collectively manage over $350 billion in investments on behalf of Australian superannuation fund members. ACSI aims to enhance sustainable long-term value for the retirement savings that are entrusted to our members as fiduciary institutional investors. We do this by representing the collective rights and interests of our members on the management of environmental, social and corporate governance (ESG) investment risks.

ACSI's mission is to achieve genuine, measurable and permanent improvements in the ESG performance of companies in which our members invest, and in the ESG investment practices of our members and their investment managers, advisers and other service providers. The AGM and Shareholder Engagement framework are critical mechanisms for achievement of these goals in relation to the Australian equity component of our members' portfolios, which collectively comprise approximately 30% of total funds under management of our member funds, and over 10% of total market capitalisation of the ASX.

As detailed in our submission, ACSI believes that the AGM, disclosure framework and shareholder engagement process are vital accountability mechanisms in Australia's corporate regulatory landscape.

There are certain areas upon which ACSI believes some modest regulatory changes are necessary to meet reasonable expectations of shareholders, particularly in the management of environmental, social and governance (ESG) investment risks. We also make a number of specific recommendations to improve operational aspects of the current proxy voting administration process, building on a significant evidence base gathered through a detailed research project recently completed into all S&P/ASX300 AGMs undertaken in 2011.

Please don't hesitate to contact myself or Paul Murphy, ACSI's Manager, Institutional Investments (pmurphy@acsi.org.au or (03) 8677 3987), should you require any clarification of the matters raised in our submission.

Yours sincerely - and with best wishes for the festive season.

Ann Byrne
Chief Executive Officer

ACSI Submission to the Corporations & Markets Advisory Committee (CAMAC)

'The AGM and Shareholder Engagement'

December 2012

Table of Contents

Contents

INTRODUCTION

ACSI is very pleased to participate in CAMAC's review of the *AGM and Shareholder Engagement* in Australia.

The CAMAC Discussion paper raises a very broad range of issues. We do not seek to address literally all of these in our response. Instead, our approach is to focus on those issues upon which ACSI and its members have strong views and/or practical suggestions for improvements to the existing system. These include issues raised in Parts 3, 4 and 5 of the Discussion Paper, concerning Shareholder Engagement, the Annual Report and conducting the AGM respectively.

In relation to the topics we have chosen *not* to address, it can generally be assumed that ACSI's members are comfortable with the existing position, or do not have sufficiently strong views on the questions raised in the Discussion Paper to seek any particular changes.

We would like to preface our formal comments by emphasising that ACSI believes the AGM is - and should remain – a vital accountability mechanism in Australia's corporate regulatory framework.

Although in some quarters it might be expected that a body representing large institutional investors would like to do away with the formalised AGM in favour of a more streamlined format for obtaining shareholder approval and feedback, we believe the requirement for a formal annual meeting in which all shareholders can participate on a reasonably equal footing is a major contributor to the health of the company/shareholder relationship, for institutional and retail investors alike.

Within that framework, however, we do believe that there are opportunities to make better use of modern communication technologies, to improve administrative processes, to provide shareholders with a more effective voice on issues of concern to them, and to update regulatory arrangements to enhance the effectiveness of interactions between companies and their shareholders.

In general, ACSI favours a non-prescriptive, principles-based approach which allows companies and shareholders to adapt regulatory and disclosure requirements to suit their particular circumstances. Nevertheless, there are some areas in which ACSI believes some modest regulatory changes are necessary to clarify the accountability of companies, in particular to meet reasonable expectations of shareholders in the management and disclosure of environmental, social and governance (ESG) investment risks.

We also make a number of specific recommendations to improve operational aspects of the current proxy voting administration process, building on a significant evidence base gathered through a detailed research project recently completed into all S&P/ASX300 AGMs undertaken in 2011.[1]

ACSI looks forward to working with CAMAC, regulators and other industry participants to improve the accountability, reporting and engagement process for Australian companies and their shareholders.

[1] ACSI, *Institutional Proxy Voting in Australia* (September 2012), at www.acsi.org.au

SUMMARY OF RECOMMENDATIONS

In summary form, our recommendations (referenced to the relevant section of the CAMAC Discussion Paper) are as follows:

Part 3 – Shareholder Engagement	
CAMAC Discussion Paper Reference(s)	**ACSI Recommendation/Position**
Legislative Guidance for Boards/Directors?	*ACSI does not believe that prescriptive legislative measures are required to clarify the role of the board in engaging with shareholders.* *ACSI is however supportive of the adoption of policies and practices that encourage meaningful engagement with investors, and encourages companies and investor bodies to continue to meaningfully develop these going forward.*
Peak AGM Season	*ACSI believes that the current peak AGM season is a manageable phenomenon in Australia's corporate regulatory landscape and on balance our system does not require any additional measures to extend or re-schedule the cycle of company meetings.*
Need for formal engagement and reporting framework as per UK Stewardship Code?	*The need for a formal equivalent to the UK Stewardship Code in Australia is obviated by the existence and widespread adoption of broadly-equivalent guidelines and practices such as the UNPRI, ACSI and FSC Guidelines, and imminent MySuper regulatory reforms.* *Efforts should be made to extend the coverage and penetration of these existing principles within the institutional investment community, rather than through the adoption of an additional or substitute Code.*
Regulation of investors using proxy advisers?	*Legislation or other constraints regarding the use of proxy advisors by investors, over and above those captured in existing fiduciary obligations on trustees, are unnecessary.*
Regulation of proxy advisers themselves?	*There is no need for further regulation of proxy advisors in the Australian market. Investors must be able to access proxy research, just as company boards have access to expert advisors and consultants.*
Threshold for shareholders to call an EGM?	*In the absence of evidence that the rule is being misused, there is no compelling rationale for amending the right of 100 members to call a general meeting, so the existing mechanism should remain in place.*

Part 4 – The Annual Report	
CAMAC Discussion Paper Reference(s)	**ACSI Recommendation/Position**
Improvements to Annual Reports?	*More purposeful requirements around annual company disclosures should be introduced, as has been done in leading reporting jurisdictions around the world.* *In particular, ACSI believes the Operating and Financial Review (OFR) section of the Directors' Report should be expanded to fill this information gap, along the lines detailed in ACSI's submission to ASIC on the OFR Review in November 2012 (Appendix 1).*
Re-design of Annual Report content or layout?	*ACSI is generally supportive of the changes set out in the UK reforms requiring separation between a Strategic Report and Annual Directors Statement.* *However the intended content and applicability of this format to Australian company disclosure requires a separate consultation and should not be conducted in conjunction with this present review.*
Impact on directors' liability?	*ACSI does not believe that enhancing disclosure requirements in the directors' report such as the inclusion of environmental, social and governance risk exposure will impact upon directors' liability.*

Part 5 – Conducting the AGM	
CAMAC Discussion Paper Topic/ Reference(s)	**ACSI Recommendation/Position**
Additional scope for non-binding resolutions?	*ACSI believes that investors should have greater scope to put forward non-binding resolutions at AGMs, and to avoid the artifice of having to frame resolutions as constitutional amendments.* *In particular, given the increasing importance investors place on ESG issues in investment decision-making, and the current lack of ability to effectively price ESG factors into investment models, we believe that a non-binding resolution on companies' ESG performance disclosures would be a powerful stimulus for improved practices, along similar lines to what we have seen with non-binding votes relating to remuneration issues.*
Proxy Voting Audit Trail (Section 5.8.5A)	*Section 250 of the Corporations Act should be amended to require companies to acknowledge that the proxy votes of shareholders have been processed (or discarded), and to confirm what proportion of the final results their votes represented.*
Record date and proxy appointment date (Section 5.8.6)	*Regulation 7.11.37 (3) of the Corporations Regulations should be amended to replace "not more than 48 hours" with "five (5) business days".* *The effect of this amendment would be to allow for more efficient reconciliation of votes lodged and administration of any voting exclusions in a feasible timeframe, without unduly affecting the rights of incumbent or new shareholders.*
Vote Renting (Section 5.8.9)	*ACSI does not support any restrictions on vote 'renting' that would have the effect of limiting or preventing their ability to enter into reasonable securities lending arrangements.* *The specific issue of control interests being approached or acquired through the use of derivative instruments without having to comply with normal substantial shareholder disclosure rules should be addressed in the context of the current Treasury review of certain aspects of Australia's takeovers laws.*
Exclusions from Voting (Section 5.8.10)	*ASX Listing Rule 14.11 should be amended to accommodate the terms of the standard waiver granted by the ASX in cases where beneficial owners confirm to the nominee that they did not (or will not) participate in the share issue that is the subject of a placement approval resolution.* *In conjunction with this amendment, online proxy voting platforms should be upgraded to enable their users to record whether they have participated in a share placement so they can give effect to this confirmation or indicate their ineligibility, as appropriate.*
Voting by Show of Hands (Section 5.13)	*Corporations Act Section 250 should be amended to make poll voting mandatory for all listed companies*
Independent verification of votes cast on a poll (Section 5.14)	*Amend Corporations Act Section 250 to add the equivalent of Sections 342-344 of the UK Companies Act so that shareholders representing more than 5% of total equity (as well as issuers themselves) can appoint an independent assessor to oversee or review a poll.*

DETAILED COMMENTS

PART 3 - Shareholder Engagement

Should legislative or other initiatives (for instance, additional ASX Corporate Governance Council, or other, guidance) be adopted, and if so for what reasons, concerning:

- **the role of the board collectively as it relates to engagement with institutional/retail shareholders throughout the year, including leading up to the AGM**
- **the role of particular board members, such as the board chair or the chairs of board committees, in relation to engagement with institutional/retail shareholders**

ACSI strongly supports constructive engagement between company boards and their investors, and encourages any efforts to promote and improve these interactions. However, we do not believe that formal legislative or quasi-legislative measures are required to clarify the role of the board (or of individual directors) in engaging with shareholders.

The reason we feel no legislative prescription is required is that there is already a high level of engagement between Australian boards and institutional investors. While further improvements can of course be made in this area, there are positive signs that these are already occurring in a self-initiated fashion, through increased commitment to constructive engagement by both Boards and investors.

Against this background, the adoption of a more formal regulatory or guidelines-based approach would in our view risk returning these positive trends to a more process-driven or compliance-focused exercise, reducing the flexibility that has evolved through mutual commitments to engagement on the part of both boards and shareholder representatives.

For over a decade, ACSI has engaged with Australia's largest listed companies both in the lead up to an Annual General Meeting and throughout the year. This engagement is conducted on behalf of our member superannuation funds to improve standards of governance and raise material environmental, social and corporate governance (ESG) issues.

We also note that engagement levels have increased markedly between Boards and other institutional investors and representative bodies during this period, and that these trends are now accelerating through the adoption of governance standards issued by the Financial Services Council (FSC) as the peak body representing Australia's investment management industry.

In short, the benefits of engagement between institutional investors and company boards are now widely accepted in the Australian market. In relation to the AGM, one clear benefit of engagement is that it minimises the potential for surprises or uncertainty in a shareholder vote.

The board of a company, through the Chairman or through the Chair of a significant board committee, often has to anticipate what may be a contentious issue and therefore put in place a strategy to both discuss and seek the imprimatur of shareholders through engagement, and ultimately through a vote at a general meeting. From the perspective of ACSI and its member funds, the relationship with the chair of a company provides a critical insight into a company's governance practices.

Recommendation: ACSI does not believe that legislative measures are required to clarify the role of the board in engaging with shareholders. ACSI is however supportive of the adoption of policies and practices that encourage meaningful engagement with investors, and encourages companies and investor bodies to continue to meaningfully develop these going forward.

Is there a problem with having a peak AGM season?

Across the S&P/ASX200, the distribution of AGMs meetings is roughly 75% of companies between September through to December and 25% between April through to June in any one year. This distribution is a result of the requirement to hold an AGM within 5 months of a financial year end, with 30 June and 31 December the most popular balance dates.

Without the massive disruption of changing the financial year end of a large proportion of Australia's largest listed companies, it is difficult to see how this peak meeting season can be avoided.

From ACSI's perspective, while undoubtedly involving intense workload pressures at certain times of the year, the system works reasonably well, is predictable and does not create an impossible task for shareholders to review and where relevant engage directly during the 'AGM season'.

Moreover, from an administrative perspective, the AGM 'season' sits relatively neatly between other peak load periods in the annual corporate actions calendar for service providers to the institutional investment community, in particular custodians and share registries – for example, relating to dividend payments, unit trust distributions etc.

Any significant extension or change to the peak season for company AGMs may run over into these other areas and not necessarily address the underlying administrative pressures relating to AGMs themselves.

Having said this, ACSI does believe that significant changes can be made to the administrative and communication aspects of the proxy voting process, and one result of this should be to relieve some of the timing pressures experienced under the current system (particularly with regard to the coincidence between the record date and voting eligibility date 48 hours prior to the AGM). A number of specific recommendations in this area are included in our commentary on Section 7 of the CAMAC Discussion Paper below.

In terms of the on-going interaction between companies and shareholders, ACSI believes that engagement can never happen too early with major shareholders. For example, in circumstances where a resolution has not yet been submitted by a company and a board wishes to 'test the waters' on a matter, a broad based discussion about a proposal has in our experience been mutually beneficial and provided a company with a litmus test of shareholder attitudes on pertinent issues

For this reason, ACSI has experienced an increase in engagement activity outside the reporting season to ensure that feedback is not rushed within the 28 day period leading up to the general meeting. This is a pleasing development that further serves to take pressure off the peak AGM season, although ACSI also continues to value engagement that occurs in the immediate lead up to an AGM - particularly following the release of resolutions and relevant general meeting shareholder documentation.

Recommendation: ACSI believes that the current peak AGM season is a manageable phenomenon in Australia's corporate regulatory landscape and on balance does not require any additional measures to extend or re-schedule the cycle of company meetings.

Should at least some institutional shareholders be required or encouraged to report on the nature and level of their engagement with the companies in which they invest, in the manner provided for in the UK Stewardship Code or otherwise.

While the UK Stewardship Code is an important international precedent and codification of best practice principles for asset owners and managers, ACSI does not believe that a similar instrument is necessary for Australian investors.

The reason for this is that unlike the situation in many other jurisdictions, many major investment institutions have already adopted a transparent approach through opt-in initiatives including the UN-backed Principles for Responsible Investment (UNPRI) and Financial Services Council (FSC) standards.

Disclosure of corporate governance policy and proxy voting is also now a requirement of new standards for all default superannuation providers in relation to the MySuper reforms recently passed by the Federal Parliament[2].

Australian investors represent the third largest signatory base (125 signatories) of the UN-backed Principles for Responsible Investment and ACSI is confident that these signatories take their responsible investment practices seriously. In particular, Principle 2 states that "We will be active owners and incorporate ESG issues into our ownership policies and practices".

Actions taken by signatories under this principle include:

- Developing and disclosing an active ownership policy consistent with the UNPRI;
- Exercising voting rights;
- Developing an engagement capability (whether internally or externally);
- Engaging with companies on a range of ESG issues; and
- Participating in collaborative engagement initiatives.

In addition, industry organisations such as ACSI and Regnan undertake detailed engagement with companies on behalf of their investor members. Organisations like this, that represent such a large portion of the local asset-owner market operating on a collective basis, do not exist in jurisdictions such as the UK.

It is also worth noting that unlike the situation in Australia, the UK Stewardship Code was introduced from a very low base, with the intention of encouraging investors to engage in a market where engagement by pension funds on ESG issues is somewhat limited. Australian investors (in particular, superannuation funds) are already very active in their ownership practices compared to many of their UK counterparts. Therefore, we believe that if a similar code were to be introduced in Australia, it would be somewhat inconsequential and potentially send confusing signals to companies and investors.

Recommendations:
The need for a formal equivalent to the UK Stewardship Code in Australia is obviated by the existence and widespread adoption of broadly-equivalent guidelines and practices such as the UNPRI, ACSI and FSC Guidelines, and imminent MySuper regulatory reforms.
Efforts should be made to extend the coverage and penetration of these existing principles within the institutional investment community, rather than through the adoption of an additional or substitute Code.

[2] *Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Act* 2012. Under this Act, which received Royal Assent on December 2012, the Corporations Act will be amended to require trustees to publish information on their websites that is sufficient to identify "each of the financial products or other property in which assets, or assets derived from assets, of the entity are invested", and their value as at 30 June and 31 December each year. The intention is that trustees publish the fund's portfolio holdings on a six monthly basis. In relation to proxy voting policy and voting disclosures, details are expected to be included in Regulations issued under the Act in early 2013.

Should legislative or other initiatives (for instance, additional ASX Corporate Governance Council, or other, guidance) be adopted, and if so for what reasons, concerning the role of proxy advisers, including:

- **standards for investors using proxy advisers, including the extent to which these investors should be entitled to rely on the advice of proxy advisers in making voting decisions, or, alternatively, whether those investors should have some obligation to bring an independent mind to bear on these matters.**
- **standards for proxy advisers.**

Standards for investors using proxy advisors

ACSI is concerned with the apparent premise of this question, that reliance on proxy advisors has removed the 'independent mind' of institutional investors when making voting decisions.

ACSI's experience is that investors make judgments on voting decisions based on feedback from a variety of sources including their investment managers, analysts, internal specialists and of course from companies themselves, as well as from external proxy advisers.

Importantly, those proposals are also routinely assessed against known guidelines or standards, such as ACSI's own Corporate Governance Guidelines or the FSC's equivalent "Blue Book", which are themselves in the public domain and which should give companies a reasonable degree of predictability about how a particular proposal is likely to be received by the investment community, including by proxy advisers.

Given the complexity and time pressures involved in proxy voting issues, investors have every right to supplement their analysis with the assistance of specialist proxy advisers, in the same way that companies routinely seek expert opinions from lawyers, remuneration advisors, investment banks and a wide range of consultants in formulating their proposals.

However, in seeking advice, this does not result in superannuation funds somehow abrogating their obligation to vote and engage in their member's best interests to their proxy advisor.

Voting decisions made by superannuation funds regularly involve the internal policy and investment expertise of the superannuation fund, external proxy advice from one or more sources, *and* significant input from one or a number of fund managers engaged by the relevant fund.

ACSI regularly observes that funds cast votes which do not accord with ACSI's recommendations, particularly in cases where the issue under consideration entails a 'line ball judgment' or a trade-off between ideal governance principles (for example relating to Board composition) and the particular circumstances of a company at a given point of time. On the other hand, in cases where ACSI members' votes are unanimous or near-unanimous in opposition to a company proposal, we are confident that the proxy voting advice will in all cases reflect a clear transgression of a core principle set out in our public guidelines – for example, the need to align executive remuneration with long-term shareholder value, to achieve a suitable balance in board structure and diversity, or to avoid undue diminution of existing shareholders' interests with unduly dilutive capital raisings.

Moreover, as fiduciaries, superannuation funds are already required by law to act in the best interests of all fund members and apply the sole purpose test[3] . These standards apply to a funds use of proxy advisors as they would to any other external provider including legal and investment advisors. If there is any actual incidence of investors merely 'ticking boxes' in their use of proxy advisers then they could be pursued through this avenue rather than through another layer of regulation relating to one or more of their external service providers.

Finally, as the Productivity Commission concluded following an extensive review of this topic in 2009 'since investors are not obliged to follow the guidance of proxy advisers, even if some have that as their default position, such a proposal seems excessive and could perversely result in a reduction in the availability of relevant market information.' [4]

Recommendation: Legislation or other constraints regarding the use of proxy advisors by investors, over and above those captured in existing fiduciary obligations on trustees, are unnecessary.

Standards for proxy advisors

As pointed out in the Discussion Paper, proxy advisers in Australia that issue voting recommendations on investment-related issues all hold an Australian Financial Services Licence (AFSL) issued by ASIC, and advisors are therefore regulated and subject to various specific statutory obligations.

Although it does not itself operate as a commercial proxy advisor and refrains from making investment-related recommendations, ACSI provides an efficient collective mechanism for the provision of governance and other relevant voting recommendations to its member funds.

ACSI's approach includes extensive engagement with companies prior to meetings, and follow up on specific issues following AGM season. This process allows for a balanced and informed assessment of company resolutions. There is no conflict of interest in this process, and ACSI often provides a copy of its advice to a company on which it has reported on request at no cost.

As with the selection of any external advisor, it has been ACSI's experience that subscription to proxy advisors is market based. If a firm is making poor quality recommendations they will not be followed, and institutional investors are unlikely to retain the services of a firm that provides inaccurate or substandard research.

Beyond the market practice and regulatory standards already in place, ACSI therefore does not see the need to introduce proscriptive legislative requirements to regulate proxy advisors. The practices outlined above appear to meet the majority of standards on transparency and accountability outlined in the Discussion Paper.

ACSI notes the non-mandatory recommendations produced by the French Autorité des Marchés Financiers (AMF concerning the supply of draft reports to issuers prior to making recommendations. In ACSI's view, this approach is far too prescriptive and is unnecessary in the Australian context. The requirement to mandate issuer input into all proxy advice would be extremely difficult in practice and could clearly compromise the independence of advice.

[3]See *Superannuation Supervision Act 1993* (Cth), section 62.
[4]Productivity Commission Report *Executive remuneration in Australia* (December 2009) at p. 314.

ACSI observes that equivalent requirements do not exist in any other area of financial services research, and would be equivalent to requiring brokers to provide research to companies prior to distributing it to their clients.

A mandatory right for companies to amend (or veto) unfavourable broker research or credit rating reports be considered inappropriate. In this context, ACSI does not see a reason for special regulatory treatment of proxy advisors.

Recommendation: There is no need for further regulation of proxy advisors in the Australian market. Investors must be able to access proxy research, just as company boards have access to expert advisors and consultants.

Should there be an amendment to the right of 100 members to call a general meeting of a company?

The rights to call a meeting of the company and to propose resolutions are fundamental shareholder rights. ACSI sees no reason to amend the 100 members rule and s249D(1)(b) in the absence of evidence that it has been used unreasonably.

Our experience over the past decade indicates that the provision has been used very rarely. Within the S&P/ASX200 these provisions have only been used by shareholders on a handful of occasions. We estimate a frequency of no more than 1 shareholder resolution per year over the period and even fewer general meetings convened under the 100 members rule.

Similarly, despite a relatively low threshold for the nomination of director candidates, we have also seen very few shareholder-nominated candidates being put forward over the same period.

There is one clear guard against the misuse of the 100 shareholders rule for both companies and investors – that is, the ultimate shareholder vote. If an EGM is called by 100 shareholders, the resolutions put forward at such a meeting are decided by a shareholder vote.

It is possible that an EGM *could* be called for insignificant or frivolous reason; however, in practice, this has never happened.

Recommendation: In the absence of evidence that the rule is being misused, there is no compelling rationale for amending the right of 100 members to call a general meeting, so the existing mechanism should remain in place.

PART 4 – The Annual Report

Should legislative change or other changes be adopted, and if so for what reasons, concerning any aspect of the annual report requirements?

ACSI believes that increased guidance on corporate annual reporting is required to improve the quality of information available for investment decision-making.

ACSI supports the view that annual reporting requirements should avoid being too prescriptive to allow for companies to tailor information as required by their stakeholders. However, ACSI also believes that annual reports are currently lacking adequate disclosure on aspects of business risk and performance related to long-term environmental, social and governance risk exposure, which are important in providing a holistic perspective of a company's position.

This particular issue has been recognised in a number of jurisdictions worldwide, resulting in reforms to enhance annual reporting requirements in the United Kingdom, France, Denmark and South Africa.

In November 2012 ACSI prepared a submission to ASIC's Consultation Paper on Effective Disclosure in Operating & Financial Reviews (OFRs). In this submission we made the detailed case that Australia's performance in the area of Environmental, Social and Governance (ESG) investment risk disclosure is disappointing, and well below the levels that might be expected for what in most other respects is a mature and accountable corporate regulatory system.

A copy of our submission to ASIC on this matter is attached as an Appendix and we would ask that also be incorporated into our submission to CAMAC.

We believe that together, ASIC's OFR Review and CAMAC's Review of the AGM and Shareholder Engagement present a timely opportunity to improve Australia's poor standing against its international peers in the area of meaningful disclosure and analysis of ESG investment risks.

Do the current reporting requirements produce any unnecessary information ('clutter') in annual reports and, if so, how might this be reduced?

The use of boilerplate statements and marketing material in annual reports is a persistent concern for investors. While financial reporting is predominantly quantitative and leaves little room for nuances, the qualitative and narrative aspects of annual reports often fail to address major business risks in adequate detail.

As noted by ACSI's longitudinal study on the reporting practices of S&P/ASX200 companies, many companies continue to disclose vague and generalised narrative with regard to the environmental, social and governance risks of their operating environments. In some cases reporting on ESG risks is combined with community or philanthropic activities of the company, demonstrating a lack of understanding as to what information investors are interested in and how best to present that information[5].

[5] The Sustainability Reporting Practices of the S&P/ASX 200 as at March 2012, Australian Council of Superannuation Investors

ACSI supports the current format of annual reporting via the directors' report and the financial report. However ACSI perceives scope for the strengthening of requirements around the directors' report to prioritise substance over form in the disclosure of information pertaining to operations, business strategy, risks, future prospects and financial position.

In particular, as noted above, there is scope to expand the guidance for disclosures under the Operating and Financial Review.

Recommendation: *More purposeful requirements around annual company disclosures should be introduced, as has been done in leading reporting jurisdictions around the world.*

In particular, ACSI believes the Operating and Financial Review section of the Directors' Report should be expanded to fill this information gap, along the lines detailed in ACSI's submission to ASIC on the OFR Review in November 2012 (Appendix 1).

Should the reporting requirements be redesigned in any respect, including along any of the lines adopted, or under consideration, in overseas jurisdictions, such as having a strategic report and an annual directors' statement.

A number of jurisdictions globally have introduced specific regulatory or legislative requirements to strengthen the quality of content in the annual report.

In July 2010 the UK Government reinstated the directors' annual reporting requirements to ensure that directors' social and environmental duties are covered in reporting through accountability and transparency. Specifically, the Operating and Financial Review was revised to bring the directors report into alignment with the purpose of annual reports as per the Companies Act 2006, which provides that the business review should address environmental, employee and social issues where they are relevant to the development, performance or position of the company[6].

In South Africa, the introduction of the Code of Corporate Practices and Conduct, more commonly referred to as the King Code, introduced mandatory integrated reporting for all corporate entities in South Africa, alongside a suite of other 'comply or explain' corporate governance measures. The Code is premised on the belief that governance, strategy and sustainability are inseparable. Therefore economic, social and environmental issues should be included in corporate strategy, management, reporting and assurance throughout the year, in the same way that financial matters are dealt with[7].

Based on the similar principles, France introduced the New Economic Regulations ('NRE') Law in 2001 which mandated the disclosure of specific social, territorial and environmental indicators and items on an annual basis[8]. In 2008, Denmark also introduced similar disclosure requirements through an amendment to its Financial Statements Act (Accounting for CSR in large businesses)[9]. In the European Union, the Accounts Modernisation Directive amendment under Article 46 now requests disclosure of environmental and employee data, where appropriate for the overall review of operations[10].

[6] http://www.frc.org.uk/Our-Work/Publications/ASB/UITF-Abstract-24-Accounting-for-start-up-costs/Reporting-Statement-Operating-and-Financial-Review.aspx
[7] https://www.saica.co.za/TechnicalInformation/LegalandGovernance/King/tabid/626/language/en-ZA/Default.aspx
[8] http://www.bendickegan.com/pdf/Egan_ICCA_Final.pdf
[9] http://www.csrgov.dk/sw51190.asp
[10] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:178:0016:0022:en:PDF

These changes demonstrate a growing consensus amongst policy-makers that financial reporting needs to be supplemented with information regarding exposure to environmental and social risk issues in order to provide investors with an accurate reflection of a company's position.

As noted by the KPMG *International Survey of Corporate Responsibility Reporting*, Australian companies are significantly lagging behind their international counterparts in the disclosure of environmental, social and governance risks. In 2011 Australia was rated at 23 out of 34 countries in terms of the percentage of companies reporting on their corporate responsibility initiatives. This approximates the disclosure levels of companies in Australia with the disclosure levels of companies in Russia and Bulgaria. Conversely, peer countries including the United Kingdom, the United States, Brazil, Japan and South Africa rank in the top 10 best performers, all achieving over 80% disclosure on reporting[11].

ACSI's own longitudinal study on sustainability reporting, which now covers five consecutive years of company-specific reporting data, also confirms that a large proportion of the ASX200 still fails to provide meaningful disclosure on risks that are important to investors[12].

As such, ACSI recommends that the Australian government should adopt reforms similar to those in other jurisdictions, and require that annual reports expressly address environmental, social and governance risk exposure and provide management perspectives on how such exposures will be mitigated.

Recommendation: *ACSI is generally supportive of the changes set out in the UK reforms requiring separation between a Strategic Report and Annual Directors Statement. However the intended content and applicability of this format to Australian company disclosure requires a separate consultation and should not be conducted in conjunction with this overall review.*

What, if any, issues of liability might arise in the event of changes to the reporting requirements, particularly in relation to forward-looking statements, and how might this matter be dealt with?

ACSI believes the issue of directors' liability is generally over-stated as a barrier to improved disclosure of medium to longer-term risks, and that directors' legitimate safeguards are adequately addressed under current provisions in the *Corporations Act*[13].

In relation to forward-looking statements specifically, ACSI is unaware of any statutory reporting requirements for companies to make binding forward looking statements within an annual report. In this context, ACSI is supportive of the UK view that 'under the current regime, directors are liable for any reckless or fraudulent misstatements made in the Directors Report. The Government believes that the current framework provides protection for users from malpractice, while enabling directors to make statements about the future (for example on risk) which, necessarily, have an element of uncertainty.[14]'

Recommendation: ACSI does not believe that enhancing disclosure requirements in the directors' report such as the inclusion of environmental, social and governance risk exposure will impact upon directors' liability.

[11] http://www.kpmg.com/au/en/issuesandinsights/articlespublications/pages/kpmg-international-survey-corporate-responsibility-reporting-2011.aspx

[12] *The Sustainability Reporting Practices of the S&P/ASX 200* as at March 2012, Australian Council of Superannuation Investors

[13] See generally, *Corporations Act 2001*, section 180.

[14] FRC, *Developments in Corporate Governance 2011: The impact and implementation of the UK Corporate Governance and Stewardship Codes* (December 2011) at paragraph 4.19.

How might technology best be employed to increase the accessibility of annual reports?

ACSI is supportive of electronic annual reports accompanied by downloadable PDF copies and hard copies available upon request. The disclosure of annual reports in an electronic format should not affect the usability of reports.

Where the primary report is launched online, investors should have ability to download the full report in a single PDF or similar widely-accessible electronic file format. Furthermore where the electronic presentation of the report is interactive, we believe users must still have access to a non-interactive plain text printable version of the report.

What, if any, initiatives might be introduced to cater for future innovations in reporting (for instance, would it be beneficial to establish the equivalent of a Financial Reporting Laboratory?)

ACSI believes that there is sufficient guidance available to companies to assist in the development of good reporting practices.

Whilst the use of a body such as the Financial Reporting Laboratory in the UK would be beneficial, a separate review would need to determine whether the resources and expertise employed to maintain such a body represents the most efficient and effective method for achieving better reporting.

PART 5 - Conducting the AGM

5.4.6 Should shareholders have greater scope for passing non-binding resolutions at AGMs?

ACSI strongly supports the suggestion that shareholders could have greater scope for proposing non-binding resolutions at AGMs.

During the past 12 months, there have been two examples in which significant shareholder resolutions have been required to be put as constitutional amendments, requiring at least 75% approval (as opposed to a simple majority), which may have been more appropriately put to shareholders as non-binding resolutions. These examples were Woodside Petroleum, in relation to climate change disclosure in 2011, and Woolworths, in relation to electronic gaming machines during the recent 2012 AGM season.

In both cases, ACSI believes constitutional amendments were not the most appropriate means for achieving change in these areas.

ACSI understands that arguments have been put forward suggesting that expanding the range of topics on which non-binding resolutions can be put forward may impact the distinction between the role of the board and that of shareholders at the AGM. It has been suggested that this may lead to diminished director accountability or give the impression that companies are run through shareholder plebiscite. However, given the success of the non-binding vote on remuneration, ACSI does not submit to such arguments.

Non-binding resolutions in relation to executive remuneration have been an exceptionally productive tool for shareholders, giving them the ability to raise concerns in relation to remuneration practices, without causing wider unintended consequences for the company – which may be the case where constitutional amendments are sought. In addition, the introduction of non-binding resolutions on remuneration has improved the level and quality of engagement between issuers and shareholders; and this has further improved since the introduction of the Two Strikes rule.

One topic to which we believe particular consideration should be given is the inclusion of a non-binding resolution on a company's disclosure around its ESG (or non-financial) performance. This proposal would we believe work well in tandem with our recommendations earlier about incorporation of ESG information into companies' Operating & Financial Reviews. Other resolutions that gave voice to shareholder concerns around disclosure or management practices in relation to specific company issues would also warrant inclusion in this category.

Recommendation:

ACSI believes that investors should have greater scope to put forward non-binding resolutions at AGMs, and to avoid the artifice of having to frame resolutions as constitutional amendments.

In particular, given the increasing importance investors place on ESG issues in investment decision-making, and the current lack of ability to effectively price ESG factors into investment models, we believe that a non-binding resolution on companies' ESG performance disclosures would be a powerful stimulus for improved practices, along similar lines to what we have seen with non-binding votes relating to remuneration issues.

5.8 Proxy Voting

This section of CAMAC's Discussion Paper raises a number of issues concerning the administrative processes and practices involved in the management of Australia's proxy voting system.

As noted in the Discussion Paper, many of these issues were the subject of detailed examination and case study examples in ACSI's recent research report, *Institutional Proxy Voting in Australia* (October 2012)[15].

ACSI's research report was based on a detailed empirical investigation of all 1,895 voting resolutions considered at 370 AGMs and EGMs of S&P/ASX300 companies in calendar year 2011. Its findings highlight that, despite a relatively low frequency of major errors and some improvements over recent years, Australia's proxy voting system has significant room for further improvement, both in the systems and procedures used by industry participants and in the overall regulatory arrangements that govern the system.

5.8.5A – Audit Trail for lodged proxy votes

The Discussion Paper summarises the comments in ACSI's research report that under current arrangements (i.e. in the absence of mandatory reporting requirements), issuers and/or their registry providers do not provide shareholders with any definitive acknowledgment that their proxy votes have actually been received and processed (or, where applicable, excluded from consideration for one reason or another).

Not only does this create an imperfect audit trail between the various institutional parties involved in the voting process, but it is also likely to compromise the integrity of reports from institutional investors back to their own end-investors (e.g. superannuation fund members).

Many super funds and fund managers have already taken a lead in disclosing details of their proxy voting activities[16], and such disclosure is rapidly becoming a more general industry best-practice standard – for example, under the new Financial Services Council's binding standards on superannuation governance (taking effect from 1 July 2013)[17], and in the new disclosure standards applicable to default "MySuper" products under the "Stronger Super" legislative package[18].

However, the constraints of current regulatory practices means that this reporting is only able to include proxy voting instructions *lodged* by the relevant investors, and kept as passive records in systems maintained by their custodians and voting agents. This data does not always tally with the number of votes actually *counted* by companies, for a variety of reasons including voting exclusions imposed by issuers (discussed further under Section 5.12 below), failure by the investor or their service providers to submit votes within required deadlines and, occasionally, simple administrative failures or changes to portfolio holdings between the time an instruction is lodged and the date for determining eligibility.

[15] Available on ACSI's website at www.acsi.org.au

[16] Many major superannuation funds disclose their voting policies and outcomes in some detail on their public websites, including AustralianSuper, CARE Super, Catholic Super, CBUS, CSC, HESTA, UniSuper, and VicSuper.

[17] http://www.fsc.org.au/policy/superannuation/consultation-on-new-and-revised-fsc-standards-superannuation-governance-and-proxy-voting.aspx

[18] Refer Footnote 2 on page 7 above.

This means that there is a real risk of voting reports issued by superannuation funds to their members and fund managers to their clients being an inaccurate representation of what happened in practice. At worst, such reports might even be actively misleading as a gauge of the real influence these investors may have had over actual voting outcomes. This risk in turn undermines the public policy rationale of measures such as the Stronger Super reforms to promote more expansive proxy voting disclosure to end-investors.

A further issue, referred to in ACSI's research report, is the implications of a 2009 Federal Court decision, which in effect held that a Chair is not necessarily bound to vote undirected proxies in accordance with the intention that had been communicated in the Notice of Meeting[19]. Any instances of this discretion being adopted, and their impact on outcomes, would only become known to affected shareholders if a full end-to-end audit process was in place.

Accordingly, ACSI submits that companies should be required to acknowledge each institutional shareholders' votes (including, where applicable, voting exclusions), and to confirm what proportion of the final results those votes represented.

ACSI appreciates that this reporting requirement will entail an additional process step for registries and other service providers; however if developed as a standardised electronic message (such as in a SWIFT/ISO 2022 compatible format) applied universally across the industry, the cost impact on issuers should be negligible.

Recommendation: *Section 250 of the Corporations Act should be amended to require companies to acknowledge that the proxy votes of shareholders have been processed (or discarded), and to confirm what proportion of the final results their votes represented.*

5.8.6 Record date and proxy appointment date

The Discussion Paper discusses in some detail the administrative pressures created by current legal requirements that result in the record date (for determining eligibility to vote) and the proxy appointment date usually coinciding on the same day, just 2 days prior to the AGM.

This situation is accentuated by the structural aspects of institutional shareholdings, which typically involve the 'bundling' of multiple beneficial owners' interests under a single nominee entity, and the likelihood of significant changes in underlying holdings by one or more parties in the time since the voting instruction was lodged.

Taken together, these factors magnify the risks of significant errors occurring, such as the exclusion of an entire nominee entity's voting entitlement (as opposed to that of a single beneficial holder who is in an over-voting position), with little or no practical opportunity to address the situation prior to the AGM.

This problem is especially acute for AGMs scheduled on the first or second business days of a week, as the current requirement is based on lapsed days not business days (i.e. there is little or no opportunity to rectify errors when the only available time to do so is on a weekend).

[19] *Campbell v Jervois Mining Ltd* [2009] FCA 401

ACSI's 2012 research paper and previous investigations (such as AMP Capital's 2006 investigation[20]) uncovered numerous instances of these errors, with a strong likelihood that further significant instances will have occurred among institutional investors outside the specific investor cohort under review.

Based on previous Government reviews into this issue, there is widespread support within the institutional investment community for the implementation of an earlier date for determination of voting entitlements, with a general consensus of an acceptable period being 5 business days prior to the meeting, rather than 48 hours[21].

An earlier record date will provide sufficient time for reconciliation of votes lodged and clearance of anomalies such as over-voting and checking of voting exclusions, and further facilitate the creation of an audit trail and accurate reporting back to institutional investors, as discussed in the previous recommendation. At the same time, a gap of 5 business days is still close enough to the meeting date to ensure that the voting turnout will be closely representative of the actual current shareholder profile.

ACSI agrees that the alternative remedy of increasing the take-up of electronic voting, floated in the Productivity Commission in 2009[22], would obviate the need for an earlier record date. However, unfortunately this appears unlikely to occur in practice without more far-reaching regulatory intervention and cost incursion across the industry. ACSI's 2012 research noted that electronic proxy lodgements currently represent only 17% of total votes lodged on behalf of institutional investors[23], largely due to the operational procedures of some of the dominant service providers to the industry who operate on a global basis with standardised systems.

The ideal scenario of a fully automated "straight-through processing" system, while obviously appealing, therefore appears beyond the likely capacity of the Australian system to adopt at this time.

The Discussion Paper also notes some potential disadvantages with the establishment of an earlier record date – for example, disenfranchisement of investors who only purchase their shares after the record date, or the possibility of contrived share purchases to exercise proxy votes at the record date and then divest before the AGM itself. However, ACSI does not consider that these disadvantages are likely to be material in practice, recognising that some degree of 'arbitrage' will in theory be possible under any rules established in this area.

<u>Recommendation</u>: *Regulation 7.11.37 (3) of the Corporations Regulations should be amended to replace "not more than 48 hours" with "five (5) business days".*

The effect of this amendment would be to allow for more efficient reconciliation of votes lodged and administration of any voting exclusions in a feasible timeframe, without unduly affecting the rights of incumbent or new shareholders

[20] AMP Capital, *Corporate Governance Report*, January 2006)
[21] Various submissions to Parliamentary Joint Committee on Corporations & Financial Services *Inquiry into Shareholder Engagement & Participation* (2008).
[22] Productivity Commission, *Executive Remuneration in Australia* (December 2009) pp. 312-13
[23] ACSI Report*, Institutional Proxy Voting in Australia* (2102)

5.8.9 Renting shares

ACSI notes that the practice of 'renting' votes for the purpose of gaining a controlling interest and/or circumventing substantial shareholder disclosure requirements is currently among the issues being reviewed by the Treasury in its review of various aspects of Australia's takeovers laws.

Based on an industry Round Table discussion in which ACSI participated in November 2012, there appears to be a reasonable consensus that the disclosure framework should be upgraded to require substantial shareholder notifications when effective interests above the relevant statutory thresholds are gained through derivative instruments rather than through direct share purchases.

A measure along these lines seems sensible to ACSI, and would be consistent with the underlying intent and purpose of the disclosure rules. We would suggest that any exploration of this aspect of the vote-renting issue by CAMAC should be co-ordinated with the consultation process that is currently being progressed by the Treasury.

In relation to the impact of share renting on the proxy voting process specifically, many institutional investors including ACSI members do participate in securities lending agreements that involve passage of economic interests in shares to other parties for periods of time that might in some cases include the AGM notice period.

However, the standard practice of most major superannuation funds, via their custodians, is to recall stock on loan for the purposes of exercising proxy votes, so there is expected to be minimal scope for undue influence to be exercised over voting proposals by counterparties using borrowed stock. Given this, and recognising that securities lending contributes to market liquidity and cost reductions, we do not believe that any regulatory measures should be adopted that would have the effect of constraining the securities lending flexibility for asset owners generally.

Recommendation: *ACSI does not support any restrictions on vote 'renting' that would have the effect of limiting or preventing their ability to enter into reasonable securities lending arrangements.*

The specific issue of control interests being approached or acquired through the use of derivative instruments without having to comply with normal substantial shareholder disclosure rules should be addressed in the context of the current Treasury review of certain aspects of Australia's takeovers laws.

5.12 Exclusions from Voting

ACSI supports the underlying policy intent of the voting exclusions enshrined in the Corporations Act relating to non-participation of a company's KMP in votes on the remuneration report (s. 250R(4)) or on board spill resolutions in the event of a second 'strike' (s. 250V(2)), and those of related parties in relation to votes on transactions that may be of benefit to those parties (s 224).

We also strongly support the policy intent behind the exclusion in the ASX Listing Rules (14.11 and 14.11.1) of shareholders that have participated (or may participate) in share placements from voting resolutions approving (or ratifying) the issue of 15% or more of a company's capital. This exclusion is a crucial protection on minority shareholders' interests in cases where those interests would otherwise be exposed to significant dilution and/or disadvantage compared to shareholders who are more favoured by a company's management.

As detailed in ACSI's recent research report, however, there appear to be a number of issues with the way these voting exclusions (relating to capital-raising resolutions specifically) are administered on behalf of beneficial institutional shareholders by the various service providers involved in the proxy voting administration chain. This conclusion is exemplified by the fact that in approximately 40% relevant cases among S&P/ASX300 companies in 2011, voter turnout on placement approval/ratification resolutions was about the same as on other resolutions at the same meetings, strongly suggesting that the relevant voting exclusions were being applied inconsistently (or perhaps not at all in some cases)[24].

A further apparent anomaly identified in the research is that, when voting exclusions are applied, some issuers' practice is to exclude *all* votes on capital raising resolutions from the relevant sub-custodian, even if the relevant capital raising was only participated-in by a single beneficial holder. In other cases, issuers took steps to exclude only that beneficial holder, while still apportioning votes by other beneficial holders who had not participated in the raising.

In the latter case, the practices adopted align with the terms of a waiver that can be obtained from the ASX on the request of an issuer, to permit the votes of beneficial holders to be counted if those holders confirm that they did not or will not participate in the share issue in question. While routinely granted by the ASX in relation to capital raising resolutions, this waiver was however only formally sought in 8 out of 32 possible occasions in 2011 among companies in the S&P/ASX300[25].

The practical solution we propose to address these anomalies is to simply codify the terms of the standard ASX waiver into the Listing Rule itself, to ensure that beneficial holders who did not participate in share placement are still able to vote on their approval/ratification without being 'bundled' into a more sweeping vote exclusion at the sub-custodian level.

A further, consequential reform to stem from this change would be a requirement for voting agents used by institutional shareholders to include a new field in their voting platforms, where beneficial holders can confirm their non-participation in the share issue in question. This would enable transparency in compliance with the ASX waiver condition and a much better audit trail in the event of closely-contested or disputed proxy voting outcomes.

Recommendations:

ASX Listing Rule 14.11 should be amended to accommodate the terms of the standard waiver granted by the ASX in cases where beneficial owners confirm to the nominee that they did not (or will not) participate in the share issue that is the subject of a placement approval resolution.

In conjunction with this amendment, online proxy voting platforms should be upgraded to enable their users to identify whether they have participated in a share placement so they can give effect to this confirmation or indicate their ineligibility, as appropriate.

5.13 Voting by Show of Hands

The issues of poll voting and the transparency of voting results are major ongoing concerns for institutional investors and for the conduct of AGMs in Australia.

Whilst recognising the importance of all investors being given an opportunity to voice their views and influence a company's affairs at the AGM, this should not come at the expense of the fundamental governance principle of one share, one vote, or provide a de facto advantage to those shareholders who are able to physically attend the meeting, or potentially, be more likely to be 'swayed' to support management proposals that are opposed by investors who are absent from the meeting.

[24] ACSI Research Report, *Institutional Proxy Voting in Australia*, (2012) p. 38
[25] Ibid. p. 48

In this regard, it needs to be remembered that the majority of institutional investors including all of ACSI's member funds and many offshore counterparts, are fiduciary investors, representing the combined interests of many millions of individual superannuation fund members and pensioners. It is not a reasonable to depict these institutional shareholdings as being monolithic and somehow disconnected from the interests of retail investors, solely because their scale of investments and operational requirement generally do not permit physical attendance at every investee company's AGM.

In practice, the majority of Australian companies still pass resolutions by a show of hands rather than declaring a poll. ACSI's 2012 research noted that among S&P/ASX300 companies in 2011, only 31.7% of resolutions (at 30% of companies) were put to a poll. Among these, there was at least one instance where the data suggest a poll may have triggered a 'first strike' on a remuneration report recommendation, but this was avoided by the resolution being passed on a show of hands at the AGM[26].

ACSI views the show of hands approach as a fundamentally undemocratic and problematic mechanism. ACSI's expectation is for companies to call a poll to provide transparency on the outcome of all resolutions, but especially where a vote is closely contested.

Recommendation:

Corporations Act Section 250 should be amended to make poll voting mandatory for all listed companies.

5.14 Independent verification of votes cast on a poll

A further issue highlighted in ACSI's research was a specific instance during the 2011 AGM season in which an independent scrutineer appointed by an issuer uncovered an anomaly in the proxy votes lodged by a sub-custodian. The effect of this discovery was to reduce the votes counted against the resolution (which related to adoption of a remuneration report) to just below the 25% threshold required to incur a first 'strike' under the then-recently introduced two strikes rule on remuneration reports[27].

This incident highlights the safeguard that is available to companies to retrospectively identify and rectify an anomalous voting outcome in cases where the initially-declared outcome is not to their liking. This is a reasonable facility for the company to invoke in closely-contested situations, insofar as it can uncover those anomalies and set the record straight as regards the actual voting intentions and eligibility statuses of shareholders. However, under current Australian regulation, shareholders do not have the same entitlement to appoint an independent assessor when then declared result on a closely-contested resolution goes the other way.

In the UK, there are provisions that address this issue and allow shareholders representing more than 5% of total securities on issue (the same threshold at which EGMs can be called in Australia) to call immediately for the poll to be reviewed by an independent assessor. The UK provisions also entitle shareholders to have an independent assessor appointed ahead of a poll being taken, in order to oversee the poll process.[28]

Recommendation:

Amend Corporations Act Section 250 to add the equivalent of Sections 342-344 of the UK Companies Act so that shareholders representing more than 5% of total equity (as well as issuers themselves) can appoint an independent assessor to oversee or review a poll.

[26] Ibid, p. 49.
[27] Ibid. pp. 37 and 48
[28] UK *Companies Act* 2006 ss. 342-344

APPENDIX 1

ACSI SUBMISSION TO ASIC ON EFFECTIVE DISCLOSURE IN OPERATING & FINANCIAL REVIEWS

23 November 2012

Crystal Kwan
Executive Assistant, Financial Reporting & Audit
Australian Securities and Investments Commission
GPO Box 9827
Sydney NSW 2001

By email: policy.submission@asic.gov.au

Dear Ms. Kwan,

Submission to Consultation Paper 187 – Effective disclosure in an operating and financial review

The Australian Council of Superannuation Investors (ACSI) would like to make the following submission in response to the ASIC Consultation Paper 187 entitled *Effective disclosure in an operating and financial review*.

ACSI represents 38 profit-for-members superannuation funds who collectively manage over $350 billion in investments on behalf of Australian superannuation fund members. ACSI aims to enhance sustainable long-term value for the retirement savings that are entrusted to our members as fiduciary institutional investors. We do this by representing the collective rights and interests of our members on the management of environmental, social and corporate governance (ESG) investment risk.

ACSI works to achieve genuine, measurable and permanent improvements in the ESG performance of entities in which our members invest and in the ESG investment practices of our members and their investment advisors and managers. ACSI believes that a key platform for the communication of this performance is through the annual reporting framework, and thus a key part of ACSI's work is centred upon improving the quality of company disclosures to ensure that information relevant to investor decision-making is made available.

As such, ACSI is highly supportive of ASIC's consultation to strengthen the annual disclosures issued by companies in their Operating & Financial Review (OFR). In particular, we see this as a timely opportunity to improve Australia's poor standing against its international peers in the area of meaningful disclosure and analysis of ESG investment risks.

Key Themes

Setting the scene for our comments on the specific questions raised in the Discussion Paper, ACSI believes that Australia's performance in the area of ESG investment risk disclosure is disappointing, and well below the levels that might be expected for what in most other respects is a mature and accountable corporate regulatory system.

The recently-released KPMG International Survey of Corporate Responsibility Reporting, for instance, notes that Australian companies are significantly lagging their international counterparts in the disclosure of environmental, social and governance risks. In 2011, Australia was rated at 23 out of 34 countries in terms of the percentage of companies reporting on their corporate responsibility initiatives. This puts the disclosure levels of Australian companies in Australia on par with those of Russia and Bulgaria. Conversely, peer countries including the United Kingdom, the United States, Brazil, Japan and South Africa rank in the top 10 best performers, all achieving over 80% disclosure on reporting.[29]

ACSI's own longitudinal study on sustainability reporting also confirms that a large proportion of the ASX200 still fails to provide meaningful disclosure on risks that are important to investors.[30]

These findings add significant weight to the argument for improved annual disclosure requirements around economic, environmental and social risks for Australian companies, and underpin all of our comments below in relation to specific questions raised by the Discussion Paper.

[29] http://www.kpmg.com/au/en/issuesandinsights/articlespublications/pages/kpmg-international-survey-corporate-responsibility-reporting-2011.aspx

[30] The Sustainability Reporting Practices of the S&P/ASX 200 as at March 2012, Australian Council of Superannuation Investors

Responses to CP 187 Questions

B1Q1 Do you agree with our view of what an OFR is, and broadly what it should contain? If not, please explain why not.

ACSI broadly agrees with the OFR definition stated under Section B of the draft regulatory guide.

We suggest that the scope of the OFR definition would be enhanced by including in the list at RG000.23 an expectation that an OFR should include analysis and discussion of the impacts of environmental, social and governance risks faced by the company, in addition to a discussion of its broad business strategies, key transactions and events.

Further, in providing an overview of the entity's business strategies and prospects for future financial years, we recommend that forward-looking perspectives on the environmental, social and governance risk exposure of the company should also be explicitly addressed.

B1Q2 Do you agree with our view that an OFR should be a major source of information about an entity's business to meet the information needs of investors? If not, please explain why not.

ACSI agrees that an OFR should be a major source of information about a company for meeting investors' decision-making needs. Importantly, we believe that the OFR is the appropriate place for company boards to provide concise and detailed information about the areas of material business risk not traditionally covered by financial reporting, including environmental, social and governance risk. Increasingly the disclosure of this information impacts upon investor decision-making and company valuation. The omission of such information in the OFR would thus be seen as a major oversight.

B2Q1 Is there other additional guidance that would be useful about the relationship between disclosures in other documents and the disclosures made in the OFR?

The OFR should in our view remain a standalone section of the annual report. However it is acceptable that the OFR makes reference to other company disclosures that provide more detailed information on particular issues raised within the OFR, including references to where more comprehensive performance data or trend analysis may be found within other annual disclosures or on the company website.

Ideally, where an OFR refers to company frameworks, performance or policy statements, it should provide reference to where further details on such issues can be found.

ACSI also recommends as noted above that RG000.23 includes that an OFR should specifically refer to impacts of changes in economic, natural and social environment and provide reference to where further details on those impacts can be found in annual disclosures or on the company website.

B3Q1 Do you agree with our view on the level of disclosure required? If not, please explain why not and suggest alternatives.

ACSI agrees that the OFR does not need to provide the scope or depth of detail of a full prospectus. ACSI finds that the 'Information that investors would reasonably require to make an informed assessment' criterion is sufficient for what disclosures should be made.

To strengthen the disclosures made under this section, ACSI suggests that between RG000.31 – RG000.34 reference is made to providing analysis of underlying environmental, social and governance risk exposure as is relevant to assessment of a company's financial position. ACSI believes that this information falls directly within the parameters of what investors in the entity would 'reasonably require to make an informed assessment' of the matters listed in s299A(1)(a)-(c).

C1Q1 Do you consider that the proposed guidelines on the specified contents of an OFR (as set out in the draft regulatory guide) are appropriate? If not, please explain why not and suggest alternatives.

ACSI agrees that the specified contents of an OFR as set out in the draft regulatory guide are broadly appropriate. However, we recommend the addition of a company's approach to material economic, environmental and social business risks to be addressed in the guide as a specific type of information required in the OFR disclosure. As outlined in previous questions, we believe that reference to this requirement can be included under RG000.23 and RG000.31.

We also submit that RG000.14 should include the following:

c) *Discussion of relevant material economic, environmental and social risks to which the business is exposed, whether or not it is managing these risks (and if so, how) and forward-looking expectations.*

ACSI notes that a number of jurisdictions globally have introduced similar requirements in their guidance on annual disclosures to strengthen the quality and content of reporting.

This includes:

- Changes to annual reporting currently being considered in the United Kingdom include a commitment to require a strategic report to ensure that directors' social and environmental duties have to be covered in company reporting[31];
- Introduction of the 'King Code' in South Africa requiring economic, environmental and social issues to be included in corporate strategy, management reporting and assurance throughout the year[32];
- New Economic Regulations Law in France (2001) mandating company disclosures of social, territorial and environmental indicators[33]; and
- Accounts Modernisation Directive, Article 46 in the European Union requiring environmental and social data where relevant to overall review of operations.[34]

These changes have been significant contributors to the improved rankings of those jurisdictions in the recent KPMG Survey noted above, and to Australia's declining position relative to its international peers.

C1Q2 Do you agree with the examples of disclosure set out in Tables 1 and 2 of the draft guide? If not, please explain why not. If you think that there is a preferable way of illustrating our guidance, please suggest alternatives.

ACSI agrees with the examples of disclosure set out in Tables 1 and 2 of the draft guide.

With regard to Table 1, ACSI believes that an additional example would provide further clarity as to the nature and detail of information required by investors. ACSI has compiled this example based on a collection of best practice disclosures by ASX200 companies as per our research. We suggest an addition to Table 1 along the lines of the following:

Example of disclosure that is likely to be inadequate	**Examples of better disclosure with a level of details that is more likely to be appropriate**
All operations were conducted in accordance with our commitment to sustainable business practice. *(Comment: there is a lack of discussion on what the fulfilment of this commitment is).*	All operations were conducted in accordance with our sustainable business practice framework. During the term the company fulfilled targets across all areas as outlined in Figure 1 (include reference to framework). As demonstrated by the performance data in our Sustainability Report, the business was successful in achieving its objectives of reducing carbon emissions across key operations, reducing water use across all operations, reducing LTIFR by 50%, increasing employee training and greater community engagement through educational and cultural projects. Details of these activities can be found in the Sustainability Report alongside summaries of other projects undertaken by the company. Furthermore, the economic implications of carbon pricing in Australia are expected to impact upon the business in a number of ways. The implications of carbon pricing on our business are expected to be minimal and a number of strategies are underway to ensure this remains so into the near future. These strategies are discussed further in Section 4 of the Sustainability Report.

With regard to Table 2, ACSI again believes that an additional example is necessary to articulate the type of information required by investors. Again, ACSI has compiled this example based on our research into the annual disclosures of ASX200 companies. Based on a collection of best practice disclosures, we suggest the following additions to Table 2 (page 42):

[31] http://www.bis.gov.uk/assets/biscore/business-law/docs/f/11-945-future-of-narrative-reporting-consulting-new-framework
[32] https://www.saica.co.za/TechnicalInformation/LegalandGovernance/King/tabid/626/language/en-ZA/Default.aspx
[33] http://www.bendickegan.com/pdf/Egan_ICCA_Final.pdf
[34] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:178:0016:0022:en:PDF

Example of disclosure that is likely to be inadequate	Examples of better disclosure with a level of details that is more likely to be appropriate
The company is subject to a number of internal and external risks. The company regularly reviews the possible impact of these risks and seeks to minimise this through a commitment to its corporate governance principles and its various risk management functions. *(Comment: There is insufficient detail about the specific key risks relevant to the company, the reasons for the risk and the steps the company is taking to manage the risk.)*	The company is subject to a number of internal and external risks, and adopts a conservative approach to risk management. We regularly review the possible impact of these risks and seek to minimise their impact through a commitment to corporate governance principles, and various risk management functions. The major risks faced by the company and how we manage them include: • *Foreign exchange*—[…]; • *Technological obsolescence*—[…]; • *Reduction in demand from China*—[…]; • *Expansion of production capacity*—[…]; [AMENDMENT] • *Environmental impact* – Given the introduction of the latest 5 Year Plan in China which specifically regards the environmental management requirements on suppliers, we have taken a number of steps towards reducing emissions intensity, water use and waste so that the company remains competitive. The environmental management framework can be found in the Sustainability Report and performance against fixed benchmarks is located in Figure 10. A number of research and development projects are also underway to assess the climate change impacts of our long-term projects. Details of these projects can be found on the website. • *Employee Management* – Given the high exposure to OH&S risk in the industry a number of areas were monitored during the year to ensure best practice management. During the year the company achieved a small reduction in its LTIFR rate and there are plans for further OH&S training to 65% of employees during the next financial year. A number of staff development programs have also been launched. Plans to improve gender diversity are underway with a number of changes expected in the forthcoming period. Performance against these measures can be found in the Sustainability Report. • *Social Licence to Operate* – Given the prevalence of community disputes in the countries and territories in which the group operates a number of initiatives were undertaken to ensure strong communication and engagement with the local and indigenous communities. This included programs to ensure local community participation in land management practices, job skills training and employment opportunities, labour and human rights education and health and immunisation services. Details about the number of individuals trained and programs conducted can be found in the Sustainability Report.

Other possible areas that could be included under Table 2, depending on the material relevance to the company's operations, include:

- Political Risk
- Supply-chain Failures
- Commercial Changes
- Resource Scarcity

ACSI also draws attention to Principle 7 of the ASX Corporate Governance Council Guidelines, which provides that measures of risk include material economic, environmental and social business risks. We therefore recommend that such disclosures should be included and are consistent with the information needs of investors with regards to company operations and financial position as they provide context to the strategic direction, management capability and prospects of the company.

C1Q3 Do you think that there is any other key information that should be included in an OFR that has not been referred to in our draft guidance?

As outlined in previous answers, ACSI believes that the material economic, environmental and social risks faced by the company should be discussed in the OFR. This should include narrative, analysis and reference to performance against these risks.

Investors are increasingly using information about economic, environmental and social risks in their due diligence and company valuation techniques. A number of fund managers integrate these considerations into Discounted Cash Flow models and balance their equity portfolios with consideration to the management of such risks.

As discussed under C1Q1 a number of jurisdictions around the world have recognised the need for this type of information for investment decision making and formalised the requirement to provide such information under law. ACSI is supportive of such measures and strongly encourages ASIC to strengthen the OFR to fulfil investor needs in this area as suggested by ACSI's recommendations in this submission.

C2Q1 Do you consider that our proposed guidance on disclosure about an entity's operations (as set out in the draft regulatory guide) is appropriate? If not, please explain why not and suggest alternatives.

ACSI agrees that the proposed guidance on disclosure about an entity's operations as set out in the draft regulatory guide is appropriate.

C3Q1 Do you agree that the reference to RG 228 in relation to business models is useful? If not, please explain why not and suggest alternatives.

ACSI broadly agrees with the requirements set out under the draft guidance RG000.43-000.45.

C4Q1 Do you consider that our proposed guidance on disclosure about an entity's financial position (as set out in the draft regulatory guide) is appropriate? If not, please explain why not and suggest alternatives.

ACSI agrees with the requirements set out in RG000.46 and RG000.47 in the draft guide.

ACSI suggests that a possible addition to RG000.46 (c) would be as follows:

> *Where relevant and material, the impact of economic, environmental and social risks on the companies' financial position should be explained.*

C5Q1 Do you consider that our proposed guidance on disclosure about an entity's business strategies and prospects (as set out in the draft regulatory guide) is appropriate? If not, please explain why not and suggest alternatives

ACSI broadly agrees with the draft guidance regarding RG000.51 – RG000.66.

Specifically, ACSI agrees that information disclosed regarding business strategies and prospects for future years should include disclosure of the main risks that could adversely affect the successful fulfilment of the business strategies of the entity.

To further strengthen this disclosure, ACSI recommends that the discussion of business strategies and prospects should include, where relevant, the impact of material economic, environmental and social risks on the successful completion of business strategies and the influence of these factors on the entity's prospects. Specifically, under RG000.61, ACSI recommends that *external risks* are defined to include environmental and social risks alongside economic and legislative risks.

ACSI recognises that companies and other parties are concerned regarding potential liability issues associated with forward-looking statements around risk and performance. ACSI would accept a "safe harbour" provision being included by companies to allow for the protection of directors in the event that forward-statements on the likely impact of material economic, environmental and social risks do not accurately reflect future outcomes. This issue is discussed further in our response to C7Q1.

The "prospects for future financial years" in s299A(1)(c) include the near future, but also allow for a longer term view. Therefore, as long-term investors this type of information is important to ACSI's members in making an informed assessment of the viability of an entity's business objectives and the likelihood of its prospects.

C7Q1 Do you agree with our interpretation of the exemption requirement? If not, please explain why not.

ACSI agrees with the interpretation of the exemption requirement as outlined under RG000.67 – RG000.78.

ACSI is cognisant that the issue of directors' liability in relation to the disclosure of material economic, environmental and social business risks has previously been raised. ACSI notes that the protections provided to directors' as outlined under RG000.67 - RG000.78 sufficiently address directors' liability concerns regarding unreasonable prejudice, confidential information and practical considerations.

In particular we note under RG000.73 that:

[I]it would be rare to establish that unreasonable prejudice is likely for the disclosures of business strategies and prospects in an OFR if that information has already been disclosed or can be otherwise inferred from documents or other material in the public domain.

ACSI believes that material economic, environmental and social business risks fall within this category of information that is otherwise publicly perceivable, and therefore the requirement to identify economic, environmental and social business risks in the OFR should not constitute unreasonable prejudice. Companies who report are likely to be better managers of these risks than their competitors, who will be subject to the same risks.

Furthermore, ACSI notes that where companies are unsure whether forward-looking statements on economic, environmental or social business risks will result in directors' liability, corporate disclaimers and other legal instruments are available to protect them against litigation.

ACSI does not therefore believe that the risk of directors' liability on providing forward looking statements on economic, environmental and social risks is sufficient to prevent the reporting of such risks.

C7Q2 Do you agree that, when information has been omitted in reliance on the exemption, a summary of the type of information omitted and the reasons for the omission should be disclosed, where possible? If not, please explain why not.

ACSI agrees that, where information is omitted in reliance on the exemption, a summary of the type of information omitted and the reasons should be disclosed. We believe that this nature of disclosure is consistent with the 'if not, why not' principles for disclosure.

C7Q3 Do you agree with the final example of disclosure (relating to the use of the unreasonable prejudice exemption), which is set out in Table 2 of the draft regulatory guide? If not, please explain why not.

ACSI agrees with the final example of disclosure relating to unreasonable prejudice exemption as set out in Table 2.

C7Q4 Are there other matters of practical guidance that should be included? If so, please describe these matters and explain why you think they should be included.

ACSI recommends that the guidance provides examples as to best practice OFR reporting. Best practice OFR reporters as per ACSI's research include BHP Billiton, Rio Tinto and ANZ Banking Group.

Aside from this ACSI is satisfied the Table 3 provides adequate guidance as to the OFR format.

C7Q5 Do you agree with our suggestion for internal record keeping? If not, please explain why not.

ACSI supports the suggestion for internal record keeping. We believe that internal record keeping ensures that management is cognisant of the details of reports and remains aware of excluded information. Ultimately this should contribute to better management practices and a more holistic approach to risk mitigation.

C8Q1 Do you consider that the proposed good disclosure practices in Table 3 of the draft regulatory guide are appropriate? If not, please explain why not and suggest alternatives.

ACSI agrees that the good disclosure practices in Table 3 adequately capture the needs of OFR users. The four areas covered in the table appear to ensure substance over form in the reporting of information.

C9Q1 Do you agree that it is not appropriate to include guidance on integrated reporting at this stage? If you think guidance should be included, please explain why.

ACSI is very supportive of the movement towards integrated reporting and of the work being done by the International Integrated Reporting Council (IIRC). ACSI recognises that integrated reporting is in its early renditions and is subject to review until it reaches a universally acceptable format. However, ACSI notes that the integrated reporting pilot is currently taking place and a number of leading Australian companies have made notable advancements in the area. ACSI recommends that ASIC makes reference to integrated reporting in the OFR guidance and clearly states that the integrated reporting concept represents the ideal disclosure standard for investors. ACSI believes that the inclusion of references to integrated reporting in the OFR guidance will encourage companies to pursue the development of their reporting practices towards this goal.

Investors, regulators and companies have a role to play in commencing dialogue and action towards greater disclosure of economic, environmental and social risks alongside financial information. ACSI believes it is important to harness the existing methods available to improve corporate behaviour in this area, including OFR submission requirements. Increasing transparency and accountability through clear reporting guidance will support companies in their transition to better reporting practices and contribute to the global momentum towards enhanced corporate disclosure.

Conclusion

ACSI believes that the responses and recommendations contained in this submission will serve to improve the quality and content of annual disclosures in Australian companies, and raise the level of reporting in Australia to better align with global best practice. As long-term fiduciaries of $350 billion in retirement savings, ACSI is confident that the expansion of OFR reporting requirements as outlined in this submission will initiate the changes required in corporate reporting practices to improve transparency and accountability in Australian markets.

We commend ASIC for its efforts in this area and continue to support and encourage such endeavours.

Yours sincerely,

Ann Byrne
Chief Executive Officer

18 December 2012

Mr John Kluver
Executive Director
Corporations and Markets Advisory Committee
Level 16, Metcentre
60 Margaret Street
Sydney NSW 2000

Dear Mr Kluver,

The AGM and shareholder engagement

Thank you for the invitation to respond to the CAMAC discussion paper on the AGM and shareholder engagement. Below are various points we would like to raise, at this stage of the process, in relation to some of the issues outlined in the discussion paper.

Annual General Meetings

Improvements in technology and other processes have seen the format and structure of annual general meetings evolve. While the AGM now plays a less critical role in the decision making process for major companies, it provides a date by which decisions need to be made and a means to finalise those decisions. It also continues to provide small shareholders in particular, an opportunity to meet the board and management and voice their opinions.

We support continuation of AGMs as a means of engaging with shareholders, but note the AGM is often now in effect a closing ceremony to end of year activities and the sophisticated processes leading up to this event.

We believe technology can effectively be used to help broaden shareholder participation in AGMs, and support further use of technology at these meetings provided that it is not disruptive and can be appropriately monitored.

Threshold for placing matters on the Annual General Meeting agenda

We support supplementing the 100 shareholder test with a requirement that each such shareholder holds a minimum economic interest. This maintains the opportunity for placing matters on the agenda or proposing resolutions, but assists in limiting disproportionate influence over the business of the meeting, particularly for those companies with many tens of thousands of shareholders.

Shareholders calling general meetings, independently of the AGM

Holding a general meeting can be a costly and time consuming exercise. We therefore support removing the option for 100 shareholders to requisition an extraordinary general meeting, thereby leaving only the 5% share capital threshold test in place.

Standards for proxy advisers

Proxy advisers play an important role and have the ability to influence the outcomes of resolutions at AGMs. We therefore believe that minimum standards for proxy advisers should be in place, particularly in relation to communication with a company on matters of concern which could lead to the proxy adviser recommending a 'no' vote on a resolution.

Renting shares

We do not support the ability of parties to rent shares from shareholders and then cast votes on those shares at general meetings. This practice can be subject to abuse and should therefore be regulated.

Access to pre-meeting voting information before discussion on a proposed resolution

We believe that access to pre-meeting voting information before discussion on a proposed resolution should not be regulated, but left to the Chairman's discretion.

Notice of Meeting

In our opinion, the introduction of provisions for companies to send information about an AGM directly to the beneficial owners of shares held by nominees would impose too great an administrative and financial burden on companies, especially if there was a requirement to send information in hard copy. We agree with the reasoning set out in the discussion paper (which summarises the conclusions of the CASAC Report 'Shareholding Participation in the Modern Listing Public Company'). We also note that technology has advanced, and additional options are available to beneficial owners who wish to obtain information about AGMs, such as setting up information alerts on the ASX website or, where available, on the company's website.

There was one issue not addressed in your discussion paper which we believe is worthy of consideration. This concerns the requirement to send a copy of AGM materials to an address we know to be incorrect, as previous mail has been returned as undeliverable. Companies are currently required to continue mailing AGM materials for six years to an old address, if a new address has not been provided.

This requirement causes a number of problems:

1. Security – while AMP chooses not to print the individual shareholder reference number (SRN) on proxy forms after they have been returned as undeliverable, we are concerned we are still sending shareholder information to locations where we know they do not live.

2. Brand reputation – new residents will often return incorrect mail the first time they receive it, to let us know the person no longer lives at that address. However, because we are required to continue mailing the AGM materials for the following five years, the new residents often lose patience. They do not understand this is something we are required to do and assume AMP is either ignoring their previous notification or has poor data management practices. Either way this has a detrimental effect on the perceptions and reputation of AMP (or any other company in the same position).

3. Environment and expense – the paper used to print and mail the notice of meeting and proxy form to shareholders who we know will not receive their copy because their address is incorrect is considerable. In 2012, AMP was required to use more than two tonnes of paper and corresponding postage to mail parcels we knew would never be opened.

AMP would like to see the requirement for mailing AGM materials to returned mail holdings changed to a two year period.

Our preference would also be for hard copy AGM materials to only be mailed to those shareholders who have expressed interest in receiving a copy of these materials, as we do with the annual report. This would dramatically reduce paper wastage. In 2012 AMP mailed around 700,000 copies of the notice of meeting and emailed a link to the documents to another 200,000 shareholders; yet only 322 people attended the meeting and less than 40,000 shareholders voted by proxy.

AMP was required to use around 45 tonnes of paper in order to produce the notice of meeting alone for the 2012 AGM. As technology is playing an increasingly important role in our communication with our shareholders, we believe shareholders who are interested in participating in the AGM would be willing to either:

1. receive a written notification that an electronic copy of the annual report and AGM materials is available online (including direct website addresses for the annual report, notice of meeting and online proxy appointment system); or

2. elect whether they would prefer to receive hard or electronic copies of AGM materials, in the same way we currently provide copies of the annual report.

We would be happy to discuss these issues with you in more detail.

Yours sincerely

Darryl Mackay
Company Secretary

AUSTRALIAN INSTITUTE
of COMPANY DIRECTORS

The AGM and Shareholder Engagement

This submission sets out the Australian Institute of Company Directors' response to the Corporations and Markets Advisory Committee's paper "The AGM and Shareholder Engagement" of September 2012.

21 December 2012

AUSTRALIAN INSTITUTE of COMPANY DIRECTORS

Contents

1. Introduction

The Australian Institute of Company Directors is pleased to provide comments on the Corporations and Markets Advisory Committee's discussion paper *The AGM and Shareholder Engagement* (CAMAC Discussion Paper).

The Australian Institute of Company Directors is the second largest member-based director association worldwide, with individual members from a wide range of corporations, publicly-listed companies, private companies, not-for-profit organisations, charities and government and semi-government bodies. As the principal Australian professional body representing a diverse membership of directors, we offer world class education services and provide a broad-based director perspective to current director issues in the policy debate.

Throughout our response to the CAMAC Discussion Paper we refer to research and publications previously undertaken by the Australian Institute of Company Directors. These include:

- *Institutional Share Voting and Engagement: Exploring the Links between Directors, Institutional Shareholders and Proxy Advisers* – this research, commissioned by the Australian Institute of Company Directors, was conducted by Mercer and released in September 2011. We refer to this research as the Institutional Share Voting and Engagement Report throughout this document;

- *Annual General Meetings a Guide for Directors* – this publication was released by the Australian Institute of the Company Directors in 2009 and is referred to throughout this document as the AGM Guide.

In addition, the Australian Institute of Company Directors conducted a survey of its members who held or previously held listed company directorships. This survey was completed between 5 November 2012 and 16 November 2012. The survey was completed by 199 directors. The survey sample included 21 Chairmen and nine Chief Executive Officers of ASX 200 companies. Of the respondents that answered the survey, 86 per cent had one or more current listed company directorships. This survey is referred to throughout this submission as the Member Survey.

2. General Comments

The Australian Institute of Company Directors is of the view that the Annual General Meeting (AGM) is one of the key events in the corporate calendar. As we have stated previously:

> "It is one of the primary mechanisms for shareholders to keep the board accountable for the performance of directors and the company, and for engendering transparency in corporate reporting. For members, the AGM provides an opportunity to see who the directors are, to engage with the individuals responsible for leading the company and to participate in certain key items of company business. For directors, and in particular the Chairman, the AGM imposes a range of obligations. For example, the company must discharge the items of business required by law and the company constitution. However, the AGM also offers directors the opportunity to exhibit their vision for the company,

> to explain the company's recent performance, and to hear from shareholders without the filter of intermediaries."[1]

Despite falling attendance by shareholders at AGMs in recent years and commentary expressing concerns about the relevance of the AGM, directors are of the view that the AGM remains an important forum. While we have suggested improvements in some areas, we are of the view that, to date, no superior alternative to the AGM has been put forward.

Legislation and the general law currently provide a base standard and set of protections in regard to the AGM. These laws have been refined over time to meet a myriad of circumstances that have arisen in practice. With these laws as a base, companies have the ability to amend their constitutions to provide for a more enhanced system if they choose to do so. The power to amend a company's constitution resides with its shareholders. Other than ensuring that the law is complied with, there is no restraint on a company (if the requisite majority of shareholders agree) from amending its constitution to implement an alternate system for conducting the AGM should it choose to do so. Accordingly, we are of the view that there is no market failure which warrants substantial regulatory intervention at this stage. As such, the Australian Institute of Company Directors does not recommend any major changes to the AGM as currently set out in law and in practice.

Before CAMAC makes any recommendations in relation to the AGM, we are of the view that the above mentioned regulatory settings should be kept in mind and that clear answers to the following two questions must be considered. First, what is the fundamental purpose of the AGM and second, what are the most important functions of the AGM? The answers to these questions should, in large part, guide responses to the issues raised by the CAMAC Discussion Paper.

Our Member Survey highlighted that the three most important functions of the AGM from a director perspective were:

- Board accountability to shareholders;
- Presenting information to shareholders; and
- Answering questions from shareholders.

The importance to directors of being able to engage with shareholders face-to-face and the need for the meeting to be contemporaneous with the end of the financial year emerged as important considerations for directors when considering changes to the AGM process.

We also received strong feedback from directors that the focus on remuneration at AGMs has been detrimental to the effectiveness of the meeting as a forum for discussion on a wide range of corporate activities. There was an overwhelming view that, in recent years, legislative amendments in relation to remuneration had shifted the focus of shareholder engagement, the AGM and corporate reporting away from a range of significant issues, including corporate performance and strategy, toward a discussion that focussed predominately on salary. Directors continued to observe in

[1] Australian Institute of Company Directors, *Annual General Meetings: A Guide for Directors* (Australian Institute of Company Directors (AICD), 2009) 7.

their feedback that remuneration, while important, is only *one* aspect of the company's affairs.

This same theme was noted by Mercer in the Australian Institute of Company Directors, Institutional Share Voting and Engagement Report which stated:

> "A strong theme emerged – on the part of company directors, managed funds, proxy advisory firms and engagement firms - that the "two strikes" legislation was not desirable… These views reflected a broader view (again widely shared across participant groups but not universal) that there had been too much focus on remuneration. The issue, while important, was thought to have diverted attention away from matters of more significance for share owner value, such as major transactions and the broader question of director capability."[2]

Further, there is reason to suggest that the "two strikes rule" in relation to remuneration is being misused.[3]

The views reflected in this submission on shareholder engagement and corporate reporting are that companies and boards should not be subject to further regulation in these areas. The basis for this view is that directors are already subject to a range of statutory and common law duties and obligations. In addition, the conduct of companies and their corporate disclosures are extensively regulated by the Corporations Act 2001 (Cth) and other legislation. Companies must comply with the accounting standards and have regard to the range of regulatory guidance that impacts upon their disclosures. Listed companies must also comply with the ASX Listing Rules and report under the ASX Corporate Governance Council's Principles and Recommendations. We are of the view that the current level and nature of regulation is generally operating effectively.

Institutional shareholders and proxy advisers play different but important roles in the engagement and voting process leading up to the AGM. They are not subject to the same extensive regulation as companies and their directors. This is despite the fact that institutional shareholders generally hold shares for the benefit of others and proxy advisory recommendations may be influential in determining how an institutional shareholder decides to vote. In the interests of good corporate governance, and to recognise the influence that institutional shareholders and proxy advisers have on voting outcomes at AGMs, we have in some instances, recommended that additional principles and guidance apply to these participants.

Our views on a range of issues specifically identified in the CAMAC Discussion Paper are set out below. We hope that our comments will make a valuable contribution to CAMAC's analysis and report.

[2] Australian Institute of Company Directors, 'Institutional Share Voting and Engagement: Exploring the Links Between Directors, Institutional Shareholders and Proxy Advisers' (Report, Australian Institute of Company Directors, 2011) 34.
[3] John Colvin 'Striking the Wrong Shareholder Chord' (2012) *Australian Financial Review* 47.

3. Shareholder Engagement

3.1 The role of the board in shareholder engagement

Should legislative or other initiatives (for instance, additional ASX Corporate Governance Council, or other, guidance) be adopted, and if so for what reasons, concerning:

- *the role of the board collectively as it relates to engagement with institutional/retail shareholders throughout the year, including leading up to the AGM.*
- *the role of particular board members, such as the board chair or the chairs of board committees, in relation to engagement with institutional/retail shareholders*

3.1.1 *The role of the board collectively*

We are in favour of a largely non-prescriptive approach in relation to the ways and extent to which companies engage with their shareholders.

Already there exists a robust framework for board engagement with shareholders. In particular, directors are legally obliged to act in the best interests of the company as a whole, meaning the shareholders as a general body.[4] Engaging with institutional/retail shareholders is an important part in determining what is in the best interests of the company. As the CAMAC Discussion Paper points out, there is also considerable guidance available in relation to shareholder engagement, including the ASX Corporate Governance Council Principles and Recommendations (in particular, Principle 6) and various industry standards.

Of the respondents to our November 2012 Member Survey, 61.9 per cent were of the view that *no* changes to the law are required to improve the shareholder engagement practices of boards in the year leading up to the AGM.[5] Further, 47.5 per cent of respondents were of the view that further guidance (eg ASX Corporate Governance Council Principles and Recommendations) is *not* needed to improve the shareholder engagement practices of boards.[6]

It also appears from our consultation processes that boards are cognisant of the importance of shareholder engagement. Further, the Institutional Share Voting and Engagement Report, shows that directors are actively turning their minds to how to effectively engage with institutional shareholders and proxy advisers.

Accordingly, we do not believe that new legislation or other mandatory requirements are needed concerning the role of the board collectively in relation to engagement with institutional/retail shareholders throughout the year. We believe that the existing guidance in relation to shareholder engagement is satisfactory. Principle 6 of the ASX Corporate Governance Council Principles and Recommendations provides, importantly, that companies should respect the rights of shareholders and facilitate the effective exercise of those rights. This may be achieved through effective

[4] *Greenhalgh v Arderne Cinemas Ltd* (1951) Ch 286,291; *Ngurli Ltd v McCann* (1953) 90 CLR 425, 438.
[5] Only 22.8 per cent of respondents considered that changes to the law were required, while 15.3 per cent of respondents did not know or were unsure.
[6] We note that 45.5 per cent of respondents considered that further guidance *is* needed to improve the shareholder engagement practices of boards, while 6.9 per cent of respondents did not know or were unsure.

communication, giving shareholders access to balanced and understandable information about the company and corporate proposals, and by making it easy for shareholders to participate in general meetings.

Nevertheless, we are not opposed to appropriate amendments to refine and develop Principle 6, bearing in mind recent developments in Australia and overseas. We have been working with the ASX Corporate Governance Council and other stakeholders to this end. For example, it may be helpful to include some further guidance around *how* to facilitate effective communication and engagement with shareholders. Naturally, any new guidance should be the subject of careful consideration and public consultation. Generally, any new guidance should be included as commentary rather than as recommendations.

3.1.2 *Role of particular board members*

As regards the role of particular board members in relation to engagement with investors, we note that the board (as a whole) has a collective responsibility to the shareholders as a general body. We believe that the division of shareholder engagement functions between board members is a matter for the board to determine, having regard to its modus operandi and the experience of individual board members. This is consistent with the findings of our Member Survey where 91 per cent of respondents said that the board should retain the ability to determine which directors and/or executives should attend meetings with investors/shareholders.

Genuine engagement may best be achieved through allowing the board and investors to decide whom is best to meet with whom, regarding what issues, and when. We also note that institutional investors will often specify who they want to meet with, depending on the issue they want to discuss. Where possible, these requests are generally agreed to by companies. It is usually the Chairman and the CEO who will attend key meetings with institutions, but it is also common for only the Chairman to attend such meetings, or for the Chairman and the Chairman of the Remuneration Committee to attend. The board may also wish to communicate a consistent message, and can achieve this by having the same director(s) engage with all shareholders.

Accordingly, we do not believe that new legislation or other initiatives are needed concerning the role of particular board members in relation to engagement with institutional/retail shareholders.

3.2 The role of institutional shareholders in engagement

Should legislative or other initiatives (for instance, additional ASX Corporate Governance Council, or other, guidance) be adopted, and if so for what reasons, concerning:

- *the role of institutional shareholders throughout the year, including leading up to the AGM. In this context:*
  - *is there a problem with having a peak AGM season and, if so, how might this matter be resolved*
  - *should at least some institutional shareholders be required or encouraged to report on the nature and level of their engagement with the companies in which they invest, in the manner provided for in the UK Stewardship Code or otherwise.*

3.2.1 *Peak AGM season*

A peak AGM season arises because of the requirement in section 250N(2) of the Corporations Act that public companies must hold an AGM within 5 months after the end of its financial year. Accordingly, approximately 80 per cent of listed companies hold their AGMs in October or November each year.[7]

We appreciate that a peak AGM season can be a problem for various reasons that include:

- the institutional share voting environment becomes characterised by high volume, decision-making in a compressed time, which impacts how institutional investors conduct share voting;[8]
- there is pressure on institutional investors to outsource parts of the share voting process (including research) to service providers for cost and efficiency reasons;[9] and
- shareholder engagement becomes difficult. In particular, access by companies to institutional investors and proxy advisory firms is limited, with communication restricted to exceptional matters.[10]

Notwithstanding such issues, we do not consider that any changes to the timing requirements in section 250N(2) of the Corporations Act are warranted. The current requirements facilitate the holding of AGMs relatively close to the end of the financial year, but prior to the announcement/discussion/analysis of the half-year results for the next financial year. The feedback we have obtained from our members suggests that directors generally would not support an extension to the statutory period for holding an AGM.[11]

Nevertheless, we believe that there are a number of ways to reduce some of the problems with having a peak AGM season. The Institutional Share Voting and Engagement Report suggests that communication between companies and institutional investors outside the peak proxy season could be helpful.[12] Early engagement could be encouraged through non-binding guidance on engagement practices. Additionally, as set out in section 3.4 below, we would support the introduction of principles and guidance requiring institutional investors/proxy advisers to devote more resources to the analysis of company resolutions. This may help to relieve some of the time pressures on these groups during the peak AGM season. A further possible solution to avoid a peak AGM season altogether may be to stagger the financial year-end of public companies. However, the workability and practicability of such a significant change would need to be carefully analysed.

3.2.2 *Institutional shareholder reporting on engagement*

We would support the introduction of principles and guidance (eg. industry-based initiatives and/or a code similar to the 2012 UK Stewardship Code released by the UK Financial Reporting Council) to promote reporting by institutional shareholders on the

[7] Finding 1 in Australian Institute of Company Directors, 'Institutional Share Voting and Engagement', above n 2, 3.
[8] Ibid.
[9] Ibid.
[10] Ibid 4, Finding 2.
[11] For example, only 20.9 per cent of respondents to our Member Survey considered that the statutory time frame for holding an AGM was an area of the AGM that could be improved. Australian Institute of Company Directors, Member Survey (November 2012).
[12] Australian Institute of Company Directors, 'Institutional Share Voting and Engagement', above n 2, 4, Finding 2.

nature and level of their engagement with the companies in which they invest. We believe that such principles and guidance should be consistent with and compliment (to the extent possible and practicable) the ASX Corporate Governance Principles and Recommendations for listed companies.

We note the following results of our Member Survey:

- 64 per cent of respondents said that institutional shareholders should be required to adhere to a code of conduct;
- 63.5 per cent of respondents said that institutional shareholders should be required to disclose their voting policy/guidelines on their websites; and
- 62.7 per cent of respondents said that institutional shareholders (and proxy advisers) should be required to inform companies of their intentions to vote or recommend against an AGM resolution prior to the voting cut-off date.

The Institutional Share Voting and Engagement Report also suggests that engagement by institutional investors with companies varies considerably, depending on the type of institutional investor. For example, the Report shows that superannuation funds engage with companies significantly less frequently than managed funds.[13] Principles and guidance could help to ensure greater uniformity in the frequency and nature of engagement between companies and institutional investors.

We also note that engagement between institutional investors and companies is only one aspect of the share voting process. Institutional investors should as well be encouraged to undertake proper analysis of company information in order to inform their voting and investment decisions.

Similar to the UK Stewardship Code (which operates on a "comply or explain" basis for institutional investors), principles and guidance for institutional investors should operate on an "if not, why not" basis and recognise that not all principles/guidance will be relevant to all institutional investors. For example, the UK Financial Reporting Council recognises that smaller institutions may judge that some of the principles and guidance in the UK Stewardship Code are disproportionate in their case and, in these circumstances, they should take advantage of the "comply or explain" approach and set out why this is the case.[14] Principles and guidance for institutional investors could, amongst other things:

- promote increased disclosures, including disclosure of their voting policy/guidelines, and of the nature and level of their engagement with the companies in which they invest;
- encourage a more detailed approach to reporting;
- recommend that institutional investors inform companies if they intend to vote against or abstain from voting on a particular resolution prior to the voting cut-off date;
- include principles / guidance for institutional investors using proxy advisers (see further our response in section 3.4.1 below); and
- include guidance in relation to who, within companies, institutional investors should engage with on significant issues.

[13] Ibid 20, Chart 5.
[14] Referred to in the CAMAC Discussion Paper, [3.2.3].

3.3 Corporate Briefings

Should legislative or other initiatives (for instance, additional ASX Corporate Governance Council, or other, guidance) be adopted, and if so for what reasons, concerning corporate briefings?

We believe that companies should have the flexibility to engage with investors and analysts in a way that meets the company's engagement strategy. We do not favour the adoption of new legislative or other initiatives concerning corporate briefings, bearing in mind that there are already significant rules and regulations that bear upon the content of corporate briefings.

For example, under the continuous disclosure framework, listed entities are required to immediately disclose to the ASX any information that could reasonably be expected to have a material effect on the price or value of the entity's securities.[15] Any such information should not be disclosed through a selective corporate briefing. In the event an officer becomes aware that material price sensitive information has been inadvertently disclosed to a particular audience it must immediately be made available to the ASX for the benefit of the entire market. Indeed, the continuous disclosure framework is founded on the principle that all investors should have equal and timely access to material information that is relevant to the taking of investment decisions.[16]

Companies should be encouraged to be innovative in terms of how they engage with investors. It is important that corporate briefings remain a useful and flexible form of shareholder engagement, and that companies do not become focused on form over substance.

3.4 The role of proxy advisers in engagement

Should legislative or other initiatives (for instance, additional ASX Corporate Governance Council, or other, guidance) be adopted, and if so for what reasons, concerning

- *the role of proxy advisers, including:*
- *standards for investors using proxy advisers, including the extent to which these investors should be entitled to rely on the advice of proxy advisers in making voting decisions, or, alternatively, whether those investors should have some obligation to bring an independent mind to bear on these matters.*
- *standards for proxy advisers*

3.4.1 *Standards for investors using proxy advisers*

Voting is an important part of corporate governance. Voting power should, to the extent possible and practicable, be commensurate with economic interest in a company. As such, it is important that shareholders turn their minds to voting decisions, and do not abrogate or outsource that important responsibility. That is not to say that shareholders should not obtain advice in relation to voting, but that they

[15] Australian Securities Exchange, *Listing Rules* r 3.1.
[16] Australian Securities Exchange, 'Continuous Disclosure: Listing Rule 3.1' (ASX Guidance Note No 8, Australian Securities Exchange, June 2005) 61.

should ultimately bring an independent mind to bear in relation to the issues raised and actively make the voting decisions.

The Institutional Share Voting and Engagement Report shows that some company directors believe:

- that proxy advisers are "improperly influential";[17]
- that too much has been outsourced by institutional investors, making proxy advisory firms "de facto decision-makers".[18]

Further, the Institutional Share Voting and Engagement Report showed that there was a consensus among company directors, managed funds and superannuation funds that the "proxy adviser as decision maker" model is undesirable.[19] Instead, there was agreement that institutional investors have a duty to make the voting decision themselves (even if they accept advice), and that to outsource decision-making to a third party is unacceptable.[20]

We note, however, that there is a difference of opinion in relation to what happens in practice. While institutional investors are strongly of the view that they retain the voting decision themselves and that the "proxy adviser as an input" model applies, a significant number of company directors believe that the "proxy adviser as decision maker" model applies.[21]

The Institutional Share Voting and Engagement Report also suggests that where institutional investors devote sufficient resources to considering company resolutions, proxy advice is more likely to be an input rather than the sole determinant.[22] Without appropriate resourcing, institutional investors will have limited analytical capabilities and may have no real option but to rely on proxy advisers.

Having regard to the above matters, we believe that "good practice" principles and guidance for investors using proxy advisers would be useful (see further our response in section 3.2.2 above). For example, increased disclosure would help beneficial owners to understand *how* investment and voting decisions are made. Beneficial owners would then have the opportunity to decide whether to invest in a fund that brings an independent mind to bear on voting decisions or, alternatively, whether they are prepared to invest in a fund that outsources this function. By way of example, increased disclosure of the following information would be beneficial:

- the voting policy/guidelines of institutional investors;
- whether or not institutional investors engage the services of proxy advisers;[23]
- to what extent the investor conducts its own analysis of resolutions before voting; and
- to what extent the investor follows/diverges from the recommendations of proxy advisers.[24]

[17] Australian Institute of Company Directors, 'Institutional Share Voting and Engagement', above n 2, 6, Finding 7.
[18] Ibid.
[19] Ibid 65.
[20] Ibid.
[21] Ibid 66.
[22] Ibid 65.
[23] See, eg, Financial Services Council, 'FSC Standard No 13: Proxy Voting Policy' (Draft Standard No 13, Financial Services Council, 28 August 2012) [6.2(a)(ii)], [8.4], [4(b)].

Additional principles and guidance for investors using proxy advisers would also be useful to help ensure that investors:

- devote sufficient time and resources to considering the issues involved in discharging their voting responsibilities;
- actively make voting decisions, rather than abrogating or outsourcing that responsibility; and
- have adequate internal review processes and resources to properly consider any proxy adviser recommendations.

3.4.2 *Standards for proxy advisers*

The Institutional Share Voting and Engagement Report found that 60 per cent of directors considered that proxy advisers had insufficient experience, expertise or knowledge, in terms of their understanding of what drives shareholder value in companies.[25] We also note the following significant findings from our recent Member Survey:

- 92.9 per cent of respondents said that proxy advisers should be required to disclose their qualifications and experience on their website;
- 91 per cent of respondents said that proxy advisers should be required to adhere to a code of conduct;
- 88.9 per cent of respondents said that proxy advisers should be required to disclose their voting policy/guidelines on their websites;
- 78 per cent of respondents said that proxy advisers should be required to disclose the resources allocated to their analysis of meeting resolutions on their websites; and
- 62.7 per cent of respondents said that institutional shareholders and proxy advisers should be required to inform companies of their intentions to vote or recommend against an AGM resolution prior to the voting cut-off date.

We believe that "good practice" principles and guidance for proxy advisers would be useful. By way of example, such principles and guidance could include:

- disclosure requirements, including as regards the qualifications and experience of proxy advisers, their voting policy/guidelines, the resources they allocate to analysis of meeting resolutions and outsourcing arrangements;
- a requirement that sufficient time and resources be allocated to considering the issues involved in voting decisions in order to make appropriate voting recommendations; and
- where a proxy advisory firm intends to issue a contrary voting recommendation, to discuss this with the company and share its report with the company before its

[24] For example, AMP Capital discloses in AMP Capital, *Corporate Governance: 2010 Full Year Report* (January 2011) AMP Capital, <www.ampcapital.com.au/about-us/corporate-responsibility/pdf/corporate-governance-report.pdf?DIRECT> the extent to which votes lodged by it match those of the proxy adviser. It is reported that a comparison between votes cast by AMP Capital and proxy advice shows: 61 per cent of AMP Capital's votes matched adviser recommendations, 21 per cent were voted 'more strongly' (either abstain or against, rather than 'for'), 18 per cent were voted 'more loosely' (e.g. in favour rather than against, and usually based on further discussions held with companies).

[25] Australian Institute of Company Directors, 'Institutional Share Voting and Engagement', above n 2, 7, Finding 7.

completion to ensure fairness and accuracy and enable the advisory firm to present a more fully considered view.[26]

We further note that the Canadian Securities Administrators (CSA) is currently reviewing the services provided by proxy advisory firms and their potential impact on Canadian capital markets. On 21 June 2012, the CSA released a Consultation Paper 25-401 titled "Potential Regulation of Proxy Advisory Firms", seeking feedback on various concerns that market participants, primary issuers and their advisers have raised about proxy advisory firms.[27] We draw your attention to a letter dated 20 August 2012 from the Canadian Institute of Corporate Directors (ICD) to the CSA in response to its Consultation Paper.[28] We generally agree with the "best practices" set out by the ICD in this letter.

3.5 Other aspects of shareholder engagement

Should legislative or other initiatives (for instance, additional ASX Corporate Governance, or other, guidance) be adopted for any other aspect of shareholder engagement?

We do not recommend legislative or other initiatives in addition to those suggested above.

3.6 Technology and shareholder engagement

Could greater use be made of technology to promote shareholder engagement outside the AGM and, if so, how? (page 49)

We consider that the extent to which a company uses technology to promote shareholder engagement should be a matter for the company. Companies should be free to choose which particular technological innovations to employ and be allowed the flexibility to innovate.

Companies use a wide variety of methods to communicate with shareholders. Our Member Survey shows that the most widely used methods are:

- analyst briefings (including via technology/webcast/teleconference) (68.4 per cent);
- institutional investor briefings (including via technology/ webcast/ teleconference) (65.1 per cent); and
- investor centre on listed company website (64.2 per cent).

We also note that technology is already being widely used in a way that promotes shareholder engagement. For example, under the continuous disclosure regime, disclosure of price-sensitive information is made to the ASX by sending the

[26] See, eg, comment letter submitted by the ICD to the CSA on potential regulation of proxy advisory firms, Stan Magidson, *Canadian Securities Administrators Consultation Paper 25-401 Regarding Potential Regulation of Proxy Advisory Firms Dated June 21, 2012* (20 August 2012) Institute of Corporate Directors, 4.6<www.icd.ca/Content/Files/News/2012/20120820_CSA_Comment_EN_Final.pdf>.
[27] Canadian Securities Administrators, *Consultation Paper 25-401: Potential Regulation of Proxy Advisory Firms* (21 June 2012) Ontario Securities Commission <www.osc.gov.on.ca/documents/en/Securities-Category2/csa_20120621_25-401_proxy-advisory-firms.pdf>.
[28] Magidson, above n 26.

information in a form suitable for release to the ASX market announcements platform by fax or electronic means. The full text of announcements is made available on the ASX website in real time. Our Member Survey also shows that companies are already making use of technology (or planning to do so) to promote shareholder engagement, including newer technologies such as:

- webcasting AGMs (34.4 per cent); and
- social media (16.5 per cent).

3.7 The 100 member rule

Should there be an amendment to the right of 100 members to call a general meeting of a company?

We believe that the right of 100 members to call a general meeting of a company (Corporations Act, s.249D(1)(b)) should be abolished. The need to encourage shareholder participation must be balanced against the need to manage the associated costs (both financial and time costs) to the company and, therefore, the body of shareholders as a whole. The right of 100 members to call a general meeting does not represent an appropriate balance.

We note our support for the right of members with at least 5 per cent of the votes that may be cast at a general meeting to call the general meeting. Requiring five per cent of total voting shares to requisition a general meeting is a reasonable balance of the rights of shareholders to have matters addressed with the importance of allowing directors to run the company effectively.

Importantly, by advocating for the repeal of the 100-member rule, we are not seeking to suppress the ability of shareholders to raise issues, which is an essential component of corporate governance. For example, we support the retention of the right of 100 members (Corporations Act, sections 249N(1)(b) and 249P(2)(b)) to raise issues of concern by putting a resolution on the agenda of an AGM and requesting the company to distribute statements to all its members. We consider that these provisions protect the rights of small groups of members to express their concerns. The debate generated by resolutions put forward through the 100-member rule has been central to shareholder engagement with companies, notwithstanding that most such resolutions have not been carried.

We are opposed to the vexatious use of the 100-member rule in section 249D(1)(b) of the Corporations Act to call a general meeting at a substantial cost to the company, and therefore its shareholders, when:

- the avenue remains open of raising the issue of concern by placing a resolution on the agenda of the AGM and having statements relating to that resolution distributed to members at the cost of the company through sections 249N(1)(b) and 249P(1)(b) of the Corporations Act; and
- it has been noted by those who have called a general meeting that it is not expected that the resolutions put forward at the general meeting will carry.

It is unreasonable to put corporations and their shareholders to the expense of the meeting, especially when the majority of those shareholders are not expected to support the resolutions put forward at the general meeting.

4. The Annual Report

4.1 Legislative changes to the annual report

Should legislative or other changes be adopted, and if so for what reasons, concerning any aspect of the annual report requirements?

Our Institutional Share Voting and Engagement Report found that a majority of institutional shareholders were of the view that companies produced valuable and sufficient information most of the time.[29] The information referred to in the Institutional Share Voting and Engagement Report was broader than the annual report and included information in continuous disclosure announcements, analysts' briefings and other corporate information issued by the company.

We are of the view that the current requirements with respect to the annual report of the entity as set out in section 295A of the Corporations Act are sufficient and do not require legislative change.

As set out in section 2 above, the Australian Institute of Company Directors is of the view that remuneration issues have shifted the focus of the AGM away from a range of significant issues, including corporate performance and strategy toward a discussion focussed on salary and the remuneration report.

With respect to the remuneration report, the Australian Institute of Company Directors believes that there is a need to reconsider section 300A of the Corporations Act. Currently, the remuneration report fails to provide the information to shareholders of the company as envisaged when first introduced and was recently described as "long and complex and often incomprehensible to lay and even expert readers".[30] This is supported by the responses received from our Member Survey. When asked which two disclosures *in practice* consume the most significant proportion of the boards time and focus in relation to disclosures, 70 per cent of respondents stated the Financial Statements and Directors Declaration, followed by the Remuneration Report (48.3 per cent of respondents). When asked which two disclosures respondents believed *should* consume the most significant amount of time and focus, 82 per cent stated the Operating and Financial Review, followed by the Financial Statements and Directors Declaration at 79.6 per cent. Only 9.7 per cent of respondents stated that the remuneration report should consume the majority of the board's time and focus. One respondent commented that "remuneration reports are often too long, poorly written, and incomprehensible. Simplicity and clarity seems to have been forgotten in the interests of better disclosure."[31] We are of the view that the reason for long and complicated disclosures in the remuneration report stems from the complexity of the legislative requirements and regulations.

[29] Australian Institute of Company Directors, 'Institutional Share Voting and Engagement', above n 2, 17, Chart 3.
[30] See Productivity Commission, *Executive Remuneration in Australia,* Discussion Draft (September 2009) 221.
[31] Australian Institute of Company Directors, Member Survey (November 2012), above n 11.

In 2010, The Australian Institute of Company Directors released a position paper, titled "Position Paper no.15: Remuneration Reports",[32] which sets out our proposals for reform with respect to the remuneration report. This position paper may be of assistance when considering the nature and extent of reforms required in section 300A of the Corporations Act. Recommendation 2 in our position paper states:

> "Section 300A should be re-drafted so that the provision contains a principles-based approach to the preparation of the remuneration report. The remuneration report (as a separate and clearly identified section of the Directors' Report) should contain information that members of the company would reasonably require to make an informed assessment of:
> a) the governance structures in place for determining the remuneration of key senior personnel;
> b) the company's remuneration philosophy and policies for key senior personnel;
> c) the remuneration outcomes for key senior personnel in the reporting period; and
> d) the current entitlements of key senior personnel to future remuneration as at the end of the reporting period."

We believe there is a significant amount of work that needs to be done to ensure that remuneration reports provide information that enables shareholders to make an informed assessment of remuneration while balancing the cost and preparation time to the company.

What the CAMAC Discussion Paper fails to address is the issue of why, when annual reports of listed entities are often more than 200 pages long, some users of these reports do not believe that they have the right information available to them to make decisions. There is a need to critically consider whether calls for increased disclosures in annual reports are warranted and whether the added information is used or tracked by shareholders.

4.2 Unnecessary information in annual reports

Do the current reporting requirements produce any unnecessary information ('clutter') in annual reports and, if so, how might this be reduced?

We believe that the current reporting requirements do produce unnecessary information in annual reports. In our Member Survey 72.7 per cent of respondents felt that the current annual reporting requirements produce unnecessary information for shareholders. One respondent to the Member Survey stated that "the content of annual reports has grown exponentially in recent years with arguably a decline in clarity. Main problem areas are remuneration reports, corporate governance statement, accounting notes and remuneration statements – which facilitate leap frogging behaviour between companies based on remuneration adviser 'benchmarking' analysis."[33]

[32] Australian Institute of Company Directors, *Position Paper No. 15: Remuneration Reports* (June 2010) Australian Institute of Company Directors <http://www.companydirectors.com.au/Director-Resource-Centre/Policy-on-director-issues/Policy-Papers/2010/~/media/Resources/Director%20Resource%20Centre/Policy%20on%20director%20issues/2010/Paper/Position%20Paper_No%2015%20Remuneration%20Reports_4%20June%202010_F.ashx>.
[33] Australian Institute of Company Directors, Member Survey (November 2012), above n 11.

Many of the comments received from participants in our Member Survey, focussed on the volume and extent of disclosures in the annual report, one respondent stated "annual reports are generally too voluminous and it would appear that most shareholders do not read the detail. Short form annual reports seem to deal with this problem, but more electronic access to shareholders would also help in dealing with shareholder questions ahead of the AGM."[34]

The CAMAC Discussion Paper considers various publications, both internationally and in Australia, that have highlighted the issues around corporate reporting, particularly focussing on the unnecessary and immaterial disclosures, as well as the use of boilerplate disclosures. However, there has been little work done on analysing the root cause of why companies feel compelled to follow a model of "if in doubt, disclose". Before implementing regulatory change to improve these issues, more research and consideration needs to be focussed on identifying the issues that underlie corporate reporting.

The Australian Institute of Company Directors believe that a significant contributing factor to the state of corporate reporting is the lack of a sound business judgment rule and safe harbours for forward looking information.

There is a need to encourage the International Accounting Standards Board to continue considering the level of disclosures required in the financial statements, in complying with the accounting standards. We also need to encourage the Australian government to provide adequate and appropriate protections to directors who are responsible for the financial statements.

4.3 Redesigning reporting requirements with overseas jurisdictions

Should the reporting requirements be redesigned in any respect, including along any of the lines adopted, or under consideration, in overseas jurisdictions, such as having a strategic report and an annual directors' statement?

We do not believe that reporting requirements should be redesigned in accordance with those in overseas jurisdictions. Section 299A of the Corporations Act, requires the directors of a company to prepare an operating and financial review that enables members of the company to make an informed assessment of the performance, financial position, business strategy and prospects of the company.

The challenge when looking at initiatives in other jurisdictions is that they have different regulatory frameworks under which those disclosures are prepared. The risk is then, when importing such solutions, that they do not fit within the regulatory environment in Australia and increase the regulatory and disclosure burden on companies.

The Strategic Report as proposed in the draft legislation released in October 2012 by the Department for Business Innovation and Skills in the United Kingdom sets out more detailed disclosure than the current requirements in Australia. The draft legislation also brings into the UK's Companies Act certain disclosures that form part of the ASX Corporate Governance Council's Principles and Recommendations. Before increasing the requirements within the Corporations Act by following international

[34] Ibid.

trends, we need to consider the relevance and legal imperative for making such changes.

4.4 Forward Looking Statements

What, if any, issues of liability might arise in the event of changes to the reporting requirements, particularly in relation to forward-looking statements, and how might this matter be dealt with?

The Australian Institute of Company Directors continues to have strong concerns about the potential liability risk for companies and directors in regard to forward looking statements.

The Corporations Act provides that any statements as to future matters made in takeover documents (eg bidder's statements, takeover offer documents, target statements, compulsory acquisition notices etc) or disclosure documents must have reasonable grounds otherwise they will be misleading.[35] Similarly, a person must have reasonable grounds for making a statement as to a future matter in an offer document otherwise the statement will be misleading. ASIC's Regulatory Guide 170 on prospective financial information is also set in the context of corporate control transactions and securities offers and provides that there must be reasonable grounds for any prospective financial information.

Disclosures made in the annual report (which includes the directors' report) and disclosures made in other announcements to the ASX, however, are subject to the general misleading and deceptive conduct provisions in the Corporations Act.

There are a range of places where directors will be required to provide some forward looking information in the annual report. For example, the general information in the directors' report must include: "details of any matter or circumstance that has arisen since the end of the year that has significantly affected, or may significantly affect:

(i) The entity's operations in future financial years; or
(ii) The results of those operations in future financial years; or
(iii) The entity's state of affairs in future financial years."[36]

In addition, listed entities must include an operating and financial review in their directors' report. The operating and financial review set out at section 299A of the Act provides that it must include information as to the entities "prospects for future financial years."[37]

Section 1041E of the Corporations Act contains a prohibition against false or misleading statements and section 1041H of the Corporations Act contains a prohibition against false or misleading conduct. The relevant inquiry in relation to section 1041H of the Corporations Act is whether the intended audience was misled by the statements. In the context of section 1041H allegations, the High Court has stated: "for the purposes of the misleading or deceptive claim the pleader must identify what it is alleged that the impugned statements conveyed to their intended audience".[38]

[35] See, eg, *Corporations Act 2001* (Cth) ss 670A, 728.
[36] Ibid s 299.
[37] Ibid s 299A(1)(c).
[38] See *Forrest v ASIC* (2012) 291 ALR 399, 407.

In addition, announcements made by listed entities to the ASX are also subject to the continuous disclosure requirements set out in ASX Listing Rule 3.1 and section 674 of the Corporations Act.

It is now common in Australia for shareholder class actions to be commenced alleging breaches by companies of section 1041H and section 674 of the Corporations Act for disclosures made to the market.[39] The majority of shareholder class actions commenced in Australia have been founded on statements made by companies that have contained forward looking information.

We note that in Australia there is no statutory safe harbour for directors or companies when providing forward looking statements in annual reports. In the United States, the judicially created *bespeaks caution* doctrine provides that where "forecasts, opinions, projects are accompanied by meaningful cautionary statements, the forward-looking statements will not form the basis for a securities fraud claim if those statements did not affect the 'total mix' of information. In other words, cautionary language, if sufficient, renders the alleged omissions or misrepresentations immaterial as a matter of law."[40] Further, the Securities Act 1933 and the Securities Exchange Act 1934 in the United States provide a statutory safe harbour which in summary applies to financial projections, underlying assumptions and statements of future economic performance.[41]

We are of the view that consideration should be given to the inclusion of a safe harbour for forward looking information in the Corporations Act, particularly where the statements are contained in the annual reports and in announcements made by listed entities to the ASX.

4.5 Technology & Accessibility of Annual Reports

How might technology best be employed to increase the accessibility of annual reports?

Annual reports are largely accessible in their current form, as members of entities are able to elect to receive them either electronically or as a hard copy.[42] When considering the usefulness of utilising information technology, there is a need to recognise that technology has its limits and as such there is a need to have a mechanism to enable the dissemination of the annual report to unsophisticated shareholders.

It should be up to the company to decide what investment in technology they are able and willing to make to further automate the process of delivery or presentation of the annual report. There are costs associated with developing a digital strategy of delivery of corporate reporting and we need to consider these costs in relation the benefits that may be obtained from making further changes.

The recent paper from the FRC in Australia, summarising the responses from their Discussion Paper, Managing Complexity in Financial Reporting, encourages

[39] See Grave, Watterson & Mould 'Causation, Loss and Damage: Challenges For The New Shareholder Class Action" (2009) 27 *C&SLJ* 483.
[40] See for example, *In re Donald J Trump Casino Securities Litigation,* 7 F.3d 357, 371 (3rd Cir, 1993).
[41] See *Securities Act 1933* s 27A(i)(1) and *Securities Exchange Act 1934 s* 21E(j)(1).
[42] As the annual report is usually sent with the notice of meeting, members may elect to receive the notice of meeting and meeting materials electronically. See *Corporations Act* s 249J.

companies to consider the benefits of utilising technology in the presentation of their annual report.

Internationally, there is also a lot of debate about moving items that include 'static' data, for example the accounting policy note in the financial statements to an electronic platform, such as a website. The company, in its annual reports, could make reference to these external links and make disclosures around any changes in the static data.

4.6 Future innovations in reporting

What, if any, initiatives might be introduced to cater for future innovations in reporting (for instance, would it be beneficial to establish the equivalent of a Financial Reporting Laboratory)?

Much of the discussion within the CAMAC Discussion Paper is focussed on discussing a vast array of issues that are symptoms of larger problems with respect to the disclosures within the annual report. For example, the FRC in Australia has considered strategies to better manage complexity in financial reporting, including ways to encourage companies to only include material information in their financial reports.[43] Further, ASIC has recently suggested that companies include more extensive forecasts or forward looking information in annual reports.[44] The real challenge is to investigate why, with all the guidance available, companies err on the side of including immaterial disclosures and may be reluctant to include forecasts or forward looking information.

The Australian Institute of Company Directors considers that disclosures in annual reports will continue to include immaterial items and not include extensive forecasts until the underlying issues, such as director liability, are adequately dealt with.

We also need to consider our legislative and regulatory environment when analysing initiatives from other jurisdictions. It is inappropriate to adopt a similar approach in Australia without regard to our own legal and corporate governance framework.

The development of a financial reporting laboratory may be of benefit in Australia; however it may be limited in the breadth of changes that may be achieved, given that the financial statements are prepared in accordance with the International Financial Reporting Standards. We need to consider which agency or institution may be best placed to drive such an initiative.

The success of the Financial Reporting Laboratory in the United Kingdom has been driven by involvement of companies, investors and the government in seeking real change with corporate reporting. The Financial Reporting Laboratory provides a safe environment where they are able to experiment with corporate reporting. For a similar initiative to be successful in Australia there is a need for Federal Treasury to be committed to exploring innovation and potential legislative changes to corporate reporting.

[43] FRC Australia, *Managing Complexity in Financial Reporting* (October 2012).
[44] ASIC, *Effective Disclosures in the Operating and Financial review*, Consultation Paper 187 (September 2012).

5. Conducting the Annual General Meeting

5.1 Statutory time frame for holding the AGM

Should there be any change to the statutory time frame for holding an AGM?

The Australian Institute of Company Directors is of the view that no changes should be made to the statutory time frame for holding an AGM. In this regard, we refer to our previous comments made in relation to the peak AGM season at paragraph 3.2.1 above.

The Corporations Act provides that the AGM must be held within 5 months from the end of the company's financial year.[45] During this period a range of activities related to the AGM will be undertaken by the company, directors, officers, auditors, registry staff and the company's shareholders.

While we recognise that the current statutory time frame and process leads to a peak season for AGMs and a compressed period for institutional shareholders to consider resolutions, it is important for the business of the AGM (including voting) to be conducted and concluded in a timely manner.

We are of the view that the AGM should remain as contemporaneous as possible with the company's financial year end and that the AGM process (from the preparation of the annual report, through to the holding of the meeting and the minutes) should be completed before the company is required to turn its attention to its half yearly results. At present the current statutory time frame achieves these objectives.

We note that suggestions have been made by some stakeholders as to compressing or extending the time frame for various components of the AGM process. While compressing or extending the time frames for aspects of the AGM process may alleviate the burden experienced by one group of participants, we are mindful that the same change could place a corresponding burden on others involved in the process.

It is likely that the fundamental issue is not the statutory time frame for holding the AGM and the statutory AGM process, but rather the fact that the bulk of ASX listed entities have a 30 June financial year end.[46] The reporting and AGM season will soon be further burdened by the passage of the Australian Charities and Not-for-Profit Commission Act 2012 (Cth), which now requires charities (unless they seek an exemption) to have a 30 June financial year end.[47] If charities do not apply for an exemption or their application for exemption is not allowed by the Commission, there may be an increase in the number of entities that have a 30 June financial year end. This would increase the workload for directors (who serve on boards of listed companies and charities) as well as for professional service providers who assist companies in the preparation of the financial statements, the annual report and the AGM.

Although we do not recommend any changes to the statutory time frame for holding an AGM, careful consideration could be given to the workability and practicability of staggering the financial year ends of listed companies and allowing charitable organisations to retain a 30 December financial year end without the need to seek an exemption.

[45] *Corporations Act* s 250N.
[46] Australian Institute of Company Directors, 'Institutional Share Voting and Engagement', above n 2, 3.
[47] *Australian Charities and Not-for-ProfitsCommission Act 2012* (Cth) s 60-85.

5.2 Notice of Meeting

In what respects, if any, might the requirements for information to be included in the notice of meeting for an AGM be supplemented or modified?

How might technology be used to make this notice more useful to shareholders?

Might any other documents usefully be sent with the notice of meeting, and, if so, what?

The Corporations Act sets out particular information that must be included in the notice of meeting for the AGM. The notice of meeting must at least specify:

- The place, date and time for the meeting (and if the meeting is to be held in 2 or more places the technology that will be used to facilitate this);[48]
- The general nature of the business of the meeting;[49]
- Any special resolutions to be proposed and the wording of the resolutions;[50]
- A statement setting out the member's right to appoint a proxy if the member is entitled to do so and the requirements for that proxy;[51]
- If the company is listed, a place and fax number for receiving proxy appointment authorities;[52] and
- If the company is listed, that a non-binding resolution on the remuneration report will be put at the AGM and that if at the previous AGM a strike (25 per cent of the votes cast on the remuneration report) was recorded, explain the circumstances in which section 250V (the board spill resolution) would apply.[53]

The current legislative requirements ensure that members have sufficient notice of the time and place of the meeting, understand the business to be conducted and can make an informed choice about whether or not to attend and how to vote.

We are of the view that the current requirements for the information to be included in the notice of meeting are appropriate as drafted and should not be supplemented or modified. We are also of the view that no additional documents (other than those currently circulated) need to be sent with the notice of meeting.[54]

As set out in the Institutional Share Voting and Engagement Report, survey participants (ASX 200 directors, managed funds and superannuation funds) were asked whether companies provided valuable and sufficient information so that institutional shareholders and proxy advisory firms can make informed share voting decisions (recommendations). All of the groups said that companies provided valuable and sufficient information most of the time. The research found that 79 per cent of managed funds (who were responsible for the majority of institutional share voting by

[48] *Corporations Act* s 249L(1)(a).
[49] Ibid s 249L(1)(b).
[50] Ibid s 249L(1)(c).
[51] Ibid s 249L(1)(d).
[52] Ibid s 250BA.
[53] Ibid s 249L(2).
[54] Companies will generally circulate the annual report and, if listed, a proxy form with the notice of meeting.

participants in the study), were of the view that companies provided valuable and sufficient information all or most of the time.[55]

We question whether imposing additional requirements as to the content of the notice of meeting and circulating additional documents with the notice will improve the quality and clarity of information that shareholders already receive.

As for the use of technology, we note that shareholders can already elect to receive meeting materials in an electronic format[56] and that once circulated the notice of meeting for listed entities will be released to the ASX announcements platform and generally posted on the company's website. For institutional shareholders, the meeting materials are usually sent electronically to the custodian as the registered shareholder. The custodian then forwards the materials to the relevant voting platform operator for electronic uploading to the relevant managed fund for consideration.[57] As technology is already used to some extent in the delivery of the notice of meeting and because we are of the view that the current requirements as to the content of the notice of meeting meet the objectives for which it was designed, we do not recommend any changes to the use of technology to make the notice of meeting more useful to shareholders.

5.3 Shareholders placing matters on the agenda

Should there be any change to the threshold tests for shareholders placing matters on the agenda of an AGM?

The Australian Institute of Company Directors has set out its objection to 100 members being able to requisition an extraordinary general meeting of a company pursuant to section 249D of the Corporations Act in paragraph 3.7 above.

Sections 249N and 249P of the Corporations Act provide that 100 members or members with five per cent of the votes eligible to be cast at a general meeting may give the company notice of a resolution they propose to move at a general meeting or request the company to distribute a statement to members.

The Australian Institute of Company Directors recognises that the ability of 100 members to place an item on the agenda for an AGM is not necessarily commensurate with the size of the economic interest held by the members proposing the resolution. We also note that most of the resolutions put forward on the AGM agenda pursuant to section 249N have not been carried.

Despite this, the Australian Institute of Company Directors has long held the position that while the 100 member rule in section 249D should be abolished due to the cost it accrues to the company (and ultimately its shareholders), we have no objection to the 100 member rule in sections 249N and 249P being retained.[58]

[55] Australian Institute of Company Directors, 'Institutional Share Voting and Engagement', above n 2, 17.
[56] *Corporations Act* s 249J.
[57] Australian Institute of Company Directors, 'Institutional Share Voting and Engagement', above n 2, 36.
[58] See, eg, Letter from AICD, CSA, FINSIA, ASA, IFSA, AIRA, BCA and AEOA to the Parliamentary Secretary to the Treasurer, 19 September 2006. Available at www.companydirectors.com.au.

5.4 Timing Requirements for calling an AGM

Should there be any change to the timing requirements for the calling of an AGM, including for shareholders to place matters on the agenda of an AGM, to seek the circulation of statements concerning any resolution, or nominate persons for the position of director?

In relation to the timing requirements for the calling of an AGM generally, see sections 3.2.1 and 5.1 above.

In our view, no changes are needed to the timing requirements for shareholders to place matters on the agenda of an AGM. We note that, theoretically, companies could reduce the opportunity for members to put resolutions on meeting agendas by calling meetings less than two months before the meeting date (directors of listed companies may call general meetings on a minimum 28 days' notice,[59] but shareholders must give at least two months' notice of a resolution to be considered at an AGM).[60] However, we are not aware of companies deliberately calling meetings less than two months before the meeting date to reduce the rights of members to propose resolutions. We do not believe that, in practice, this is an issue that needs to be addressed.

Companies should nevertheless be encouraged (e.g. through non-mandatory guidance) to announce the date of the AGM as early as possible (including, for example, on the company website). Since the timing of an AGM is generally organised well in advance, this would generally resolve the timing issues in relation to shareholder resolutions.

5.5 Pre-agenda notices

Should companies be required to publish a pre-agenda notice and, if so, what should be the contents and timing of that notice?

The CAMAC Discussion Paper states that "one policy option is to require that all public companies publicly give in excess of two months' notice of the date of the next AGM, indicating in the pre-agenda notice:

- The cut-off date for shareholders to place items on the agenda and to have any statements concerning that item circulated to shareholders; and
- The cut-off date for nominations for the position of the director.

To reduce costs, that notice could be published only on the company's website, provided it was given prominence."[61]

The Australian Institute of Company Directors does not support the introduction of a requirement that companies publish a pre-agenda notice. We are of the view that the notice of meeting requirements, currently set out in the Corporations Act, are sufficient to inform shareholders as to the date, time and place of the meeting.

[59] *Corporations Act* ss 249CA, 249HA.
[60] Ibid s 249O(1).
[61] CAMAC Discussion Paper, 78.

The information the law requires to be distributed to shareholders prior to the AGM is already substantial and subject to complex legal requirements. We are of the view that these requirements should not be added to. However, we are of the view as set out above, that it is good practice for a company to post on its website the date for the AGM as soon as it is practicable to do so and as far in advance of the AGM as is possible.

5.6 Excluding resolutions and material from statements

Does the current law concerning excluded material either create undue difficulties for shareholders who wish to criticise directors or, conversely, unduly restrict directors in vetting out information to be circulated to shareholders at the company's expense?

The Australian Institute of Company Directors is of the view that the current law which allows companies to exclude member resolutions from the notice of meeting or not to distribute statements proposed by shareholders in certain circumstances is appropriate. There are sound reasons for the way in which the common law has developed in this area and for the exclusions which are contained in the Corporations Act.

For example, it would be futile to require the company to allow a shareholder resolution to be included in a notice of meeting for an AGM where the resolution cannot be lawfully considered, or its object achieved, at the meeting. The basis for this exclusion is founded on fundamental principles of corporate law. Shareholders are not able to instruct the directors or management as to how they should exercise the powers vested in them by the company's constitution or by legislation.[62] Shareholders, however, may seek the removal of directors, vote to amend the company's constitution[63] or express their opinion on the remuneration report via a non-binding resolution.

In *NRMA v Parker* the New South Wales Supreme Court clearly stated: "it is no part of the function of the members of a company in general meeting by resolution, ie as a formal act of the company, to express an opinion as to how a power vested by the constitution of the company in some other body or person ought to be exercised by that body or person…the members of the [company] no doubt a have legitimate interest in how these powers are exercised, but in their organic capacity in general meeting they have no part to play in the actual exercise of the powers."[64]

For this reason, it is necessary that companies have the ability to exclude resolutions from the notice of meeting where the objects of the resolution cannot be lawfully achieved. In addition, if the resolution is so uncertain and unclear that it cannot be sensibly understood at the meeting or subsequently actioned, the company should be able to exclude it from the notice of meeting.

There are also good reasons for ensuring that resolutions and statements distributed to shareholders are not defamatory. Sections 249N and 249P were included in the Corporations Act to provide a mechanism for shareholders to raise legitimate concerns

[62] See Q Digby and L Watterson, 'Pursuing Profit, Productivity and Productivity, The Legal Obligations Facing Corporate Australia', *Keeping Good Companies,* June 2004, 267.
[63] Ibid.
[64] See *NRMA v Parker* (1986) 6 NSWLR 517, 522.

relating to the company's affairs. The provisions are not intended to be used as an avenue for damaging the reputation of directors, officers, shareholders or other persons. This is particularly important given that notices of meeting and statements are distributed widely to shareholders and, for listed companies, made available to the public by the ASX market announcements platform or on the company's website.

It is also sensible that the resolution or statement is not too long. Not only does the word limit contained in the Act ensure that the costs of distributing statements is minimised, it also assists those preparing the statement to succinctly state the key issues to be debated and addressed.

We remain of the view that for shareholders, the ability to propose resolutions and distribute statements is a useful tool. In large part, the exclusions referred to will be avoided when careful drafting is undertaken in respect of a resolution or statement.

5.7 Failure to present a resolution at an AGM

Should there be any rule regarding the failure to present a resolution at an AGM?

In our view, there is no basis for the introduction of a rule regarding the failure of a shareholder to present a resolution at an AGM. We note, in this regard, the findings in the CASAC Report[65] (referred to in the CAMAC Discussion Paper) that:

- there was no identified problem in this area in Australia; and
- the proposing of a resolution requires at least 100 shareholders (see sections 3.7 and 5.3 above), or shareholders representing five per cent of the issued voting share capital, all of whom would be prevented from putting forward any further resolution for the relevant period.

We further note that the shareholders proposing the resolution will have already provided the company with the wording of the proposed resolution (Corporations Act, section 249N(2)(b)), and possibly an explanatory statement (Corporations Act, section 249P(1)(a)). We see no reason why the members should also be required to attend the meeting to present the proposal.

5.8 Non-binding resolutions at AGMs

Should shareholders have greater scope for passing non-binding resolutions at AGMs?

We do not believe that shareholders should have greater scope for passing non-binding resolutions at AGMs. We note that a majority of the respondents to our Member Survey (66.7 per cent) did not support shareholders having greater scope to pass additional non-binding resolutions at AGMs (beyond remuneration).

Importantly, any increase in the scope of shareholders to pass non-binding resolutions may undermine the fundamental distinction between the role of the board and the role of shareholders. Strategic and managerial decisions in public companies should be left

[65] Companies and Securities Advisory Committee, *Shareholder Participation in the Modern Listed Public Company*, Report (June 2000).

to the board and management; as the Organisation for Economic Co-operation and Development has observed, a company cannot be run effectively through shareholder plebiscite or other forms of shareholder micro-management.[66] If shareholders are unhappy with the performance of a company they have the right to remove directors (directors of a public company can be removed at any time by ordinary resolution of shareholders),[67] and to divest their shareholding.

We also agree with the additional findings of CASAC that giving shareholders a general power to pass non-binding resolutions could:

- lead to a perceived obligation by boards to take non-binding resolutions into account, notwithstanding that the shareholders bear no legal responsibility for them;
- diminish director accountability by enabling directors to avoid responsibility for their decisions on the basis that a non-binding resolution authorised their actions; and
- put pressure on directors to disclose confidential commercial information to shareholders who propose such resolutions.

5.9 Seeking the views of shareholders

What, if any, additional legislative or best practice procedures should be adopted for companies to seek the views of shareholders on issues they would like discussed at the AGM, or to invite shareholders to submit questions prior to the AGM?

Shareholders who would like to raise an issue at the AGM can rely on the statutory provisions of Chapter 2G of the Corporations Act to do so. The company, when including resolutions in its notice of meeting for the AGM, should include resolutions proposed by members[68] provided that those members meet the minimum threshold of entitlement to exercise that right.[69] The company must give all its members notice of the resolution at the same time, or as soon as practicable afterwards, and in the same way as it gives notice of a meeting.[70] These statutory requirements were discussed at paragraph 5.3 above.

At the AGM itself, the chair must allow a reasonable opportunity for the members as a whole to ask the directors questions about, or make comments on the management of the company.[71] A reasonable opportunity must also be provided for members to ask questions of the auditor.[72] The chair must also observe the common law relating to the conduct of the meeting. This is discussed further at paragraph 5.12 below.

In addition to these statutory provisions and the common law, the AGM Guide noted that it is "becoming increasingly common for companies to send a questionnaire to members together with the notice of meeting to allow members to submit questions

[66] CAMAC Discussion Paper, question 3.56.
[67] *Corporations Act* s 203D.
[68] Ibid s 249N.
[69] Ibid; members with at least five per cent of the votes that may be cast on the resolution; or at least 100 members who are entitled to vote at a general meeting.
[70] *Corporations Act* s 249O(2).
[71] Ibid s 250S.
[72] Ibid s 250T.

before the AGM. This allows the chairman to deal with frequently asked questions at the AGM before opening questions from the floor."[73]

Our Member Survey found that 43.9 per cent of listed director respondents said that their companies already invited shareholders to submit questions prior to the AGM.[74] This percentage is likely to be higher given that another 15.4 per cent of respondents said that some of their companies invited shareholder questions prior to the AGM and others did not, depending on the company. As examples, companies that have adopted the practice of seeking questions from members prior to the AGM include the Commonwealth Bank, Caltex and Telstra.[75]

Receiving member questions in this way can assist the chair and other directors to prepare for the meeting by allowing time to check information and understand issues of concern to members.[76] In addition, this method of engagement ensures that issues of concern to members are responded to directly by the company to the member.

As described by the Parliamentary Joint Committee on Corporations and Financial Services report "Better shareholders - Better company, Shareholder engagement and participation in Australia"[77] companies often conduct informal briefings with investors, usually major institutional shareholders prior to the finalisation of the notice of meeting. "Company chairmen commonly engage in regular briefings with investment managers… [and] investment managers… [to] discuss proposed resolutions with chairmen in advance of AGMs"[78] These briefings often give institutional investors opportunities to question the board and management on more detailed matters, often financial, than might be raised at annual meetings, subject to ensuring that those briefings do not divulge exclusive information or price sensitive data.[79] The Member Survey found that 65.1 per cent of the respondents companies already use institutional investor briefings and 68.4 per cent use analyst briefings, by way of web technology and teleconferences, to communicate with their shareholders.[80]

Companies have also been known to adopt the practice of having information booths in the meeting foyer where shareholders can discuss their issues directly with company representatives.[81] This is a less appealing method of engagement for institutional shareholders since their concerns are unlikely to be associated with individual experiences such as service quality, queue lengths or other customer issues.

The Australian Institute of Company Directors does not recommend that any additional legislative or best practice procedures be adopted in relation to seeking the views of shareholders on issues they would like discussed at the AGM, or to invite shareholders to submit questions prior to the AGM. We are of the view that the various ways in which a company proposes to engage with its shareholders and to ascertain

[73] Australian Institute of Company Directors, *Annual General Meetings Guide*, above n 1, 24.
[74] Australian Institute of Company Directors, Member Survey (November 2012).
[75] See, eg, The Business Council of Australia, 'Company + Shareholder Dialogue: Fresh approaches to communication between companies and their shareholders' (Discussion Paper, The Business Council of Australia, 2004), 19. This practice was still undertaken by these companies in 2012.
[76] Australian Institute of Company Directors, *Annual General Meetings Guide*, above n 1, 24.
[77] June 2008.
[78] Jennifer Stafford, *Engaging with Shareholders* (Australian Institute of Company Directors, 2011) 26.
[79] Australian Institute of Company Directors, Submission to Parliamentary Joint Committee on Corporations and Financial Services *Inquiry into Shareholder Engagement and Participation,* 2008, 28. Available at www.companydirectors.com.au.
[80] Australian Institute of Company Directors, Member Survey (November 2012) above n 11.
[81] The Business Council of Australia, above n 75, 21.

issues to be discussed at the AGM, should be left to the existing requirements and the individual engagement practices of the particular company.

As set out in paragraph 3.1.1 above, our Member Survey found that 61.9 per cent of respondents did not believe that changes to the law were required to improve shareholder engagement by boards.[82]

Introducing further statutory provisions or mandating further ways in which the company must seek shareholder views is likely to stifle innovation and impede the company's ability to express its personality in how it seeks feedback from its shareholders.

5.10 Auditors at the AGM

Should there be some obligation on the auditor (or the representative of the auditor) to speak at the AGM?

What, if any, obligations should a company or a company auditor have to answer questions from shareholders?

We are of the view that there should not be an obligation for the auditor to "speak" at an AGM. The current requirements as set out in section 250PA and section 250RA of the Corporations Act are appropriate and sufficient. The role of the external auditor is to express an audit opinion on the annual financial report of the company and as such shareholder questions should be limited to this report. Section 250T of the Corporations Act also provides that the chair of the AGM must allow a reasonable opportunity to members at the meeting to ask questions of the auditor and allow the auditor to respond to the written questions received prior to the meeting.

The audit report, as prepared by the auditor, sets out the duties and responsibilities of the auditor and the directors in relation to the financial statements as well as their opinion on the annual financial report. Pursuant to section 250PA of the Corporations Act members of the company are able to submit a question on the content of the audit report or the conduct of the audit. Requiring auditors to provide comment beyond this, would extend beyond the scope of the audit and would not be appropriate.

The current obligations as set out in the Corporations Act are appropriate and sufficient to enable the auditor to effectively communicate with members of the entity with respect the member's questions concerning the content of the audit report and the conduct of the audit.

5.11 Business of the AGM

Should any matter be excluded from or, alternatively, added to the business of the AGM?

We recommend that no major changes be made to the business of an AGM. We note that only 38.7 per cent of respondents to our Member Survey considered that there was some part of the AGM that could be removed and addressed by alternative methods. In

[82] Australian Institute of Company Directors, Member Survey (November 2012), above n 11.

this regard we refer to our comments set out at paragraph 5.25 below on the functions of the AGM.

5.12 Functions and Duties of the Chair

What, if any, changes are needed to the current position concerning:
- *the general functions and duties of the chair*
- *the chair ensuring attendance of particular persons at the AGM*
- *the chair moving motions*
- *motions of dissent from a chair's rulings?*

Should a chair be obliged to provide shareholders with a reasonable opportunity to discuss a resolution before it is put to the vote?

Should a chair have the power to impose any time, or other, limits on an individual shareholder speaking at the AGM?

The powers, functions and duties of the chair of the AGM stem from the common law, the Corporations Act and any rules of meeting that may be set out in the company's constitution.

The chair is responsible for maintaining procedural control of the AGM.[83] It is the duty of the chair to: "preserve order, and to take care that the proceedings are conducted in a proper manner and that the sense of the meeting is properly ascertained with regard to any question properly before the meeting."[84]

The duties of the chair also include: to preside at the meeting, adjourn the meeting if necessary, control the voting process, declare the meeting closed and sign the minutes.[85] The chair must allow a reasonable opportunity for members as a whole at the AGM to ask questions or make comments about the management of the company, the audit of the annual financial report and the remuneration report.[86]

We are of the view that the current law as it relates to the functions and duties of the chair is appropriate. In particular, the duty of the chair to ascertain the sense of the meeting and to preserve order, gives the chair broad scope as to how to conduct the meeting. For example, the chair already has the ability to ask shareholders to resume their seats in circumstances where the points they raise are overly lengthy or not related to the issue being discussed.

The duties to preserve order and ascertain the sense of the meeting, also give the chair the flexibility to allow a range of shareholders to speak at the meeting and to prevent particular shareholders or special interest groups from dominating the AGM at the expense of the body of members present. The chair also has the power to request that a person withdraw from the meeting or order the removal of a person from the meeting if it is necessary to do so to preserve order.

[83] Australian Institute of Company Directors, *Annual General Meetings Guide*, above n 1.
[84] See Horsley's *Meetings, Procedure, Law & Practice* (Lexis Nexis, 6th Edition, 2010), 67 citing *National Dwelling Society v Sykes* [1894] 3 CH 159.
[85] See Eilis Magner, *Joske's Law and Procedure at Meetings in Australia* (Thomson Reuters, 11th ed, 2012).
[86] *Corporations Act* ss 250S, 250T, 250SA.

While shareholder grandstanding and disruption was raised by 47.1 per cent of respondents in our Member Survey as an area of the AGM that could be improved,[87] for the reasons set out above, we do not perceive that it is necessary to impose any statutory time limits on individual shareholders speaking at the AGM.

Further, as the chair already has a duty to ascertain the sense of the meeting (which will generally include allowing a sufficient time within which shareholders' views on a resolution will be heard), we do not consider it necessary to impose a specific statutory obligation on the chair to provide a reasonable opportunity to discuss a resolution before it is put to a vote.

We are of the view that the current law is operating effectively in relation to the functions and duties of the chair. The risk of attempting to prescribe what is effectively set out in the common law is that it could lead to inflexibility and could curtail the ability of the chair to deal with matters as they arise during the course of the meeting.

Finally, we do not believe that it is necessary for the chair to be required to arrange for the attendance of particular directors at the AGM. It is common practice for public companies to have the whole board in attendance at the AGM and the Australian Institute of Company Directors considers it good practice for all directors to be in attendance.[88] It is also common for the Chairman to call upon senior management or particular directors to answer questions when required. For these reasons, we are of the view that it is not necessary for the Corporations Act or guidance to prescribe or require the attendance of particular directors at AGMs.

5.13 Proxies

What changes, if any, should be made to the current requirements concerning:
- *informing shareholders of their right to appoint a proxy*
- *the proxy form*
- *pre-completed proxies*
- *notifying the company of the proxy appointment*
- *providing an audit trail for lodged proxy votes*
- *the record date and the proxy appointment date*
- *irrevocable proxies*
- *directed and undirected proxies*
- *renting shares*
- *proxy speaking and voting at the AGM, or*
- *any other aspect of proxy voting.*

5.13.1 *Appointment of a proxy and the proxy form*

As set out in the CAMAC Discussion Paper, the Corporations Act already requires that the notice of the meeting include a statement informing shareholders of:

- "their right to appoint a proxy;
- whether or not the proxy needs to be a member of the company; and

[87] Shareholder grandstanding and disruption was ranked third in the list of areas where directors thought the AGM could be improved. The top response was the use of technology to broadcast meetings (at 58.7 per cent) and the second ranked response was the remuneration report (at 51.1 per cent). Respondents were asked to select multiple issues of concern in responding to this question.
[88] See Australian Institute of Company Directors, *Annual General Meetings Guide*, above n 1, 38.

- the right, if entitled to cast two or more votes, to appoint two proxies and specify the proportion or number of votes each person is appointed to exercise."[89]

We are of the view that the current requirements are sufficient to inform shareholders of their right to appoint a proxy. We are also of the view that the Corporations Act and Listing Rules relating to the proxy form are appropriate and do not require amendment.

5.13.2 *Pre completed proxies*

The Australian Institute of Company Directors is of the view that it is not good corporate governance practice for companies to send pre-completed proxy forms to shareholders and we strongly discourage this practice. The right of shareholders to appoint a proxy and to direct their vote on resolutions if desired, is a fundamental right given to shareholders and should not be undermined by the pre-completion of proxy forms.

5.13.3 *Notifying the company of the proxy appointment*

The Australian Institute of Company Directors is of the view that is preferable, in order to ensure the integrity of the voting process, for proxies to be sent directly to the company or to another entity nominated by the company, such as the share registry. If shareholders send their proxies to a third party that is not nominated by the company, for lodgement, there is a risk that proxy forms could be altered or not forwarded to the company at all. This may negatively impact the integrity of the voting process.

The Australian Institute of Company Directors has no objection to the Corporations Act being amended to stipulate that proxies must be sent directly by any shareholder nominating a proxy, to the company or to another entity nominated by the company.

5.13.4 *Audit trail for lodged proxy votes*

The Institutional Share Voting and Engagement Report noted the following issues with the audit trail for lodged proxy votes:

> "There is significant disconnect between, on the one hand, the custodian and/or sub-custodian (including the voting platform) and, on the other, the registry company. Discussions with registry companies suggest that there is electronic lodgment by institutional investors of only around 10 per cent of total votes, and the rest are lodged by fax.[90] This means institutional share owners are not able to see the entire voting chain, and they cannot be certain that their votes have been voted as instructed."[91]

The Australian Institute of Company Directors is of the opinion that the following observations regarding errors in proxy voting, as reported by the Australian Council of Superannuation Investors (ACSI), should also be taken into consideration when discussing an audit trail for lodged proxy votes:

> "Of the 1895 resolutions examined at 370 separate meetings, the study found discrepancies between the data and the declared result in only nine instances, seven of which were the result of errors in the systems used by investors to lodge

[89] See CAMAC Discussion Paper, 93-94.
[90] Discussion (June 2011) with Computershare suggest that the voting breakdown is roughly as follows: 66 per cent fax (institutional share owners), 9 per cent online custodian voting and institutional share voting, 15 per cent online portal (retail), 10 per cent scanned (retail).
[91] Australian Institute of Company Directors, 'Institutional Share Voting and Engagement', above n 2, 83.

> their votes and two of which were the result of errors made by a company and its registrar. No instance affected the passage of a resolution."[92]

The majority of the voting errors discovered in ACSI's research were on the side of the voting platform operators engaged by institutional investors, not by the share registries engaged by companies.

These results may suggest that institutional shareholders who are directing proxy votes via a voting platform are "generally doing a good job within the time constraints and operational parameters of the current Australian proxy voting system."[93] However, the existence of nine reported errors (7 on the side of the voting platform operator) may demonstrate that the integrity of the share voting process in Australia is still not "sufficiently robust to ensure that voting is accurate and that share owner votes are fully counted."[94]

Given the importance of voting outcomes and the findings of the above mentioned research, consideration may need to be given to ensuring that the systems of voting platform operators support accurate voting outcomes. Further, the industry may need to give consideration to bridging the gap in the audit trail between the institutional shareholder's voting platform and the share registry.

5.13.5 *Record Date and Proxy Appointment Date*

The Australian Institute of Company Directors recognises that there is a sound basis for the record date and the cut-off date for the receipt of proxies being the same. Ensuring that only those with a current economic interest in the company are entitled to vote or appoint a proxy, is the key advantage of the Corporations Act position as presently drafted.

The Institutional Share Voting and Engagement Report, however, highlighted that having the record date and the cut-off date for proxies occurring at the same time may contribute to lost or miscounted votes. This is largely because institutional shareholders generally provide their voting instructions to the voting platform five days before the AGM.[95] Depending on share trading following the lodgement of voting instructions, the instructions may not match the number of shares held by the institutional shareholder at the record date. This, in turn puts pressure on the company's share registry. The share registry must reconcile the proxies received with the shares held, 48 hours before the meeting.

While directors are keen to ensure there is no marked separation between a shareholder's economic interest in a company and its voting rights at the AGM, directors are also keen to ensure that the voting process is as accurate as possible. For this reason, and while electronic voting remains an option, the Australian Institute of Company Directors would support consultation being conducted on whether a small separation between the record date and the proxy cut-off date is workable.

---

[92] The Australian Council of Superannuation Investors, 'Institutional Proxy Voting in Australia' (Research Paper, Australian Council of Superannuation Investors, October 2012) 7.
[93] Ibid, 40.
[94] Australian Institute of Company Directors, 'Institutional Share Voting and Engagement', above n 2, 82.
[95] Australian Institute of Company Directors, 'Institutional Share Voting and Engagement', above n 2, 74.

5.13.6 *Other Aspects of Proxy Voting*

Other than the areas we have referred to above, the Australian Institute of Company Directors does not recommend any other changes to the proxy voting process in Australia.

5.14 Direct Voting

Should direct voting before the meeting be provided for by legislative or other means, and if so what matters should be covered in any regulatory structure?

The Australian Institute of Company Directors supports direct voting being expressly recognised in the Corporations Act so long as this type of voting remains optional. We also support the recommendation in the CASAC Report that direct voting before a meeting should be permitted to the extent allowed by a company's constitution,[96] and provided that the company has appropriate infrastructure in place to ensure the accurate recording of these votes. We agree that this may assist shareholder participation in corporate decision-making.

We would not oppose the introduction of new guidance to further encourage the use of direct voting before a meeting, provided any such guidance is neither prescriptive nor mandated. Matters that might be covered by such guidance include:

- clarification of the circumstances in which direct voting is permitted (ie when the company constitution provides for it);
- possible methods of direct voting (ie by post, fax or electronically);
- mechanisms to ensure the accurate recording of votes through appropriate infrastructure;
- recommendations in relation to time limits for lodging votes (eg 48 hours before the meeting);
- mechanisms to deal with changes of voting intentions (eg the first direct vote received by the person collating votes on behalf of the company should be the valid vote, with any later received contrary direct vote to be disregarded); and
- amendments to resolutions (eg by the voting party acknowledging on the voting form that their vote will only be counted if any amendment is consistent with the substance of the original resolution).

[96] Companies and Securities Advisory Committee, above n 65, [4.118-4.143] (see CAMAC Discussion Paper, question 5.9.1).

5.15 Pre-meeting voting information

In what circumstances, if any, should access to pre-meeting voting information be permitted?

In what manner if any, should access to pre-meeting voting information be regulated before discussion on a proposed resolution?

In what manner, if any, should the current requirements concerning the disclosure of pre-meeting votes before voting on a resolution be amended?

In our view, the disclosure of pre-meeting votes (including proxy votes and direct votes lodged before the meeting) should be left to the discretion of the company. In particular, we do not believe that shareholders should have inspection rights in relation to pre-meeting votes, other than by court order, given the undesirable consequences that may follow. These consequences include, as set out in the CASAC Report,[97] increased administrative costs, privacy issues, and last minute voting. We also would not support the introduction of any mandatory requirement that particular external parties (eg the auditor) be given access to pre-meeting voting information. Again, whether or not this information is disclosed should be left to the company's discretion.

Similarly, we would not support the introduction of regulation regarding access to pre-meeting voting figures in advance of discussion on a particular resolution. It should continue to be a matter of discretion for the chair (subject to any pre-meeting disclosure and the company's constitution) whether to disclose the pre-meeting voting details prior to considering a resolution. We note, in this regard, that:

- the timing of any disclosure can have significant implications for the course of that discussion;
- there are differing views as to whether such disclosure is beneficial generally; ie, whether disclosure provides a realistic assessment of the voting intentions of the majority and assists in working through the meeting agenda or, conversely, stifles discussion and debate at the AGM; and
- whether or not disclosure is beneficial (and when) will be affected by the particular circumstances.

We also think that it should be a matter of discretion for the chair (subject to any previous disclosures and the company's constitution) whether to disclose pre-meeting votes before the vote is taken at the AGM.

For companies that use the replaceable rule and for the sake of consistency, we would not oppose an amendment to replaceable rule section 250J(1A) to provide that before a vote is taken on a resolution, the chair must inform the meeting whether any proxy votes and *direct votes* have been received and how the proxy votes and *direct votes* are to be cast.

[97] [4.50] (see Discussion Paper, question 5.10.1).

5.16 Online voting

Should there be legislative or other recognition of online voting during the course of an AGM and, if so, in what respects should this form of voting be regulated?

The Australian Institute of Company Directors' supports online voting during a meeting being expressly recognised in the Corporations Act as long as this type of voting remains optional and the company has appropriate infrastructure in place to ensure the accurate recording of these votes. We agree that online voting may assist shareholder participation in corporate decision-making. Any legislative recognition of online voting should not be prescriptive or mandated and should appropriately balance the risk of technological failure with the need for certainty in voting outcomes.

5.17 Voting Exclusions

Do any issues arise concerning voting exclusions on resolutions that must, or may, be considered at an AGM and, if so, how might those issues best be resolved?

In our experience, Australian listed companies and directors take their legal obligations seriously and work hard to ensure the integrity of their systems and processes relating to voting exclusions. We also note that in the case of voting exclusions on the remuneration report section 250R(7) of the Corporations Act imposes a strict liability criminal offence on key management personnel where a vote is cast by or on behalf of the person. The penalties for breaching the provision include fines of up to $22,000 or imprisonment for up to 5 years.

The Australian Institute of Company Directors is of the view that imposing this type of strict liability offence on directors is inappropriate. We are of the view that provisions of this type, the increased focus on remuneration and the remuneration report have moved the AGM away from for being a robust discussion on the company's strategic and operational matters to the detriment of the AGM.

We continue to have concerns about the proliferation of strict criminal and civil liability provisions being included in federal legislation (such as in relation to the voting exclusion on the remuneration report), and are of the view that these types of provisions should be reconsidered. Other than this issue, we do not recommend any amendments to the current law relating to voting exclusions.

5.18 Voting by show of hands

Should any changes be made to the current provisions regarding voting by show of hands?

A company's constitution may provide how a resolution is put to the vote but, in the absence of any provision to the contrary, voting on a resolution is conducted by a show

of hands[98] unless a poll is demanded.[99] This is a replaceable rule under section 135 of the Corporations Act.

With the exception of the chair, who may have an additional casting vote if required,[100] voting by a show of hands entitles the voter to one vote only, irrespective of the number of shares that they hold.[101] Depending on the constitution of a company, proxies may not be able to vote on a show of hands.[102] If joint holders both vote, the chair may only count the vote of the holder first named in the register.[103]

A poll can be demanded on any resolution[104] and can be called by the chair,[105] at least five members entitled to vote on a resolution[106] or by members with at least five per cent of the votes that may be cast on the resolution.[107]

At common law, the chair of the AGM is permitted to regulate the proceedings so that they can get a proper sense of the meeting.[108] Regardless of the method of voting employed, the chairman has a duty to obtain the sense of the meeting, which includes ensuring that the views of the majority of members are reflected in the vote. The chair must conduct the meeting so as to produce an expression of the true will of the participants, free from any distortion produced from the chair.[109] Even if a poll is not demanded, the chair still has the power to demand a poll if he or she is aware that a poll would probably produce a different outcome to a vote on a show of hands.[110]

The ACSI Research Paper of October 2012 regarding Institutional Proxy Voting in Australia observes that there is a "propensity for companies and their registries to pass resolutions by a show of hands from those present at the meeting (70 per cent of all cases) rather than call a poll to count the proxies submitted by all investors."[111] The Australian Institute of Company Directors is of the view that this high percentage is likely to arise because non-contentious resolutions will very often be passed by a show of hands at an AGM. The very nature of such resolutions means that, whether they are voted on by a show of hands or a poll, the outcome of the vote would be the same so the chair will conduct the vote on a show of hands.

Voting on routine or non-contentious issues will often be settled by a show of hands at the AGM and is often the most efficient method of voting. Further, retaining the show of hands method of voting allows companies to retain the flexibility to choose the voting process that meets their current needs and circumstances.[112] Finally, voting by a

[98] *Re Horbury Bridge Coal, Iron and Waggon Co* (1879) 11 Ch D 109.
[99] *Corporations Act* s 250J.
[100] Ibid s 250E(3) (replaceable rule)
[101] Ibid s 250E(1)(replaceable rule)
[102] Ibid s 249Y(2)
[103] Ibid s 250F(replaceable rule)
[104] Ibid s 250K. (Although the constitution may provide that a poll cannot be demanded on certain resolutions, see s 250K(2))
[105] *Corporations Act* s 250L(c).
[106] Ibid s 250L(a).
[107] Ibid s 250L(b).
[108] *National Dwellings Society v Sykes* [1894] 3 Ch 159, 162; (1894) 63 LJ Ch 906; 10 TLR 563 per Chitty J. See also *Corpique (No 20) Pty Ltd v Eastcourt Ltd* (1989) 15 ACLR 586; 7 ACLC 794, 801 per Cohen J, SC(NSW).
[109] 18 *Walker re One.Tel Ltd* (2009) 262 ALR 150; 74 ACSR 616; [2009] NSWSC 1172; BC200909821, [27] per Barrett J.
[110] *Second Consolidated Trust Ltd v Ceylon Amalgamated Tea & Rubber Estates Ltd* [1943] 2 All ER 567, 569; (1943) 169 LT 324 per Uthwatt J.
[111] Australian Council of Superannuation Investors, above n 92, 7.
[112] Australian Institute of Company Directors, Submission to Parliamentary Joint Committee on Corporations and Financial Services, above n 79, 16. Available at www.companydirectors.com.au.

show of hands helps to engage the interests and energy of the retail shareholder and invites a feeling of inclusion and democracy amongst voters at the AGM.

The Australian Institute of Company Directors does not recommend that any changes be made to current law regarding voting by a show of hands. Further, we do not support suggestions that voting by poll should become mandatory.

5.19 Voting by poll

What legislative, or other, verification initiatives, if any, should be introduced concerning voting by poll at an AGM?

Should one or more verification requirements apply in all instances or only if, say, a threshold number of shareholders require it?

5.19.1 *Legislative changes to voting by poll*

As set out above, votes at the AGM can be exercised either by voting on a show of hands or voting by poll. The constitution of the company may also allow direct voting.

Institutional shareholders will usually apply their vote to each resolution by way of a directed proxy or by direct voting if allowed by the company's constitution. There are two key reasons for doing so. First, and from a practical point of view, few institutional shareholders will actually attend the AGM to cast their vote and second, the proxy outcome will generally be known by the chair in ascertaining the sense of meeting.

If a poll is demanded at the AGM, the institutional shareholder that has directed their proxy vote ahead of the meeting will have ensured that their voting preference has been registered. Once a poll has been demanded or called, and unless the company's constitution provides otherwise, a poll vote will be taken when and in the manner directed by the chair.[113] If the poll demanded relates to the election of a chair or an adjournment, the poll must be taken immediately.[114]

The method by which the vote is taken at the AGM depends, in the large part on the chair's discretion, time factors and whether the resolution being voted on is contentious in nature. Some companies use polls for all but the procedural voting so as to include both proxy votes received prior to the meeting and the votes from the members in attendance at the AGM.[115] As set out above, some chairs may rely on differing voting methods throughout the course of the AGM, provided that the result of the vote on each resolution ascertains the sense of the meeting. Subject to a poll being demanded, the chair can therefore regulate the proceedings by determining which voting method to apply.

Subject to our comments below in relation to the verification of poll outcomes we do not recommend any changes to the current law relating to voting by poll at the AGM.

[113] *Corporations Act* s 250M(1).
[114] Ibid s 250M(2).
[115] Australian Institute of Company Directors, Submission to Parliamentary Joint Committee on Corporations and Financial Services, above n 79, 41.

5.19.2 *Verification Requirements*

The Institutional Share Voting and Engagement Report found that 51 per cent of ASX 200 directors surveyed said that their companies always, or most of the time, undertook verification or audit procedures to ensure proxies were voted as instructed.[116] For company directors this verification related to the verification of votes received and recorded by the registry company.

We note CAMAC's observation in its discussion paper that the *Companies Act 2006* (UK) gives authority to shareholders, representing not less than five per cent of the total voting rights of all shareholders or not less than 100 shareholders who satisfy certain voting prerequisites, to require directors to obtain an independent report on any poll taken at the AGM.

The Australian Institute of Company Directors does not support introducing such a requirement into Australian law. However, we would give consideration to a proposal that requires listed companies to ensure that an independent scrutineer was appointed to attend the AGM and verify voting outcomes.

In the Australian Institute of Company Directors' recent Member Survey, it was found that 52.3 per cent of persons surveyed supported the idea of a requirement for independent scrutineers to be appointed by the company to verify voting outcomes.[117]

Even though we do not support the approach taken in the United Kingdom on this issue, our research indicates that a majority of ASX 200 companies are already verifying voting outcomes[118] and that directors generally support the idea of the company appointing an independent scrutineer to verify voting results at AGMs.[119] As such, if a requirement for verification is to be considered in Australia, we are of the view that listed companies should be required to engage an independent scrutineer, in a way that is already occurring by a large number of listed companies.

5.20 Disclosure of voting results

Should any steps be taken to promote more consistency in the disclosure to the market of voting results?

Listed companies must already disclose to the ASX "the outcome in respect of each resolution to be put to a meeting of security holders", immediately after the meeting has been held.[120] We believe that the format of that disclosure should be left to the discretion of the company.

[116] Australian Institute of Company Directors, 'Institutional Share Voting and Engagement', above n 2, Chart 18.
[117] Australian Institute of Company Directors, Member Survey (November 2012), above n 11.
[118] Australian Institute of Company Directors, 'Institutional Share Voting and Engagement', above n 2, Chart 18.
[119] Australian Institute of Company Directors, Member Survey (November 2012), above n 11.
[120] Australian Securities Exchange, *Listing Rules* r 3.13.2.

5.21 Access to voting documents

Following the AGM, what, if any, rights of access should shareholders generally, or the person proposing a resolution, have to voting documents?

We do not believe that shareholders generally, or the person proposing a resolution, should have any rights of access to voting documents (other than by court order). We believe that the potential benefits of introducing any such rights are outweighed by potential costs, particularly the likelihood that interest groups would seek to access voting documents for an improper purpose. We note that an interested party who considers there has been some voting error is free to apply to the Court for an order for inspection of voting documents.[121]

5.22 Minutes

What, if any, changes should be made to the requirements concerning the recording of details of voting in the minutes of the AGM?

We do not believe that it is necessary to make any changes to the requirements concerning the recording of details of voting in the minutes of the AGM. However, for completeness, we would not object to an amendment to section 251AA of the Corporations Act to include a reference to direct votes before the meeting or online voting at the meeting.

5.23 Retention of voting records

Should there be a statutory minimum period for retention of records of voting on resolutions at an AGM and, if so, for what period?

The Australian Institute of Company Directors would not object to the proposal to introduce a statutory minimum period for retention of records of voting on resolutions at an AGM. We do note, however, that if records are retained for the purpose of enabling challenges to be made to the outcome of AGM resolutions, it may not be possible following the passage of time, for a Court to unwind the effect of a voting outcome. This is because the company's business and subsequent decision making would have relied on the outcome of the resolution at the AGM.

The CAMAC Discussion Paper refers to an obligation, under section 225(5) of the Corporations Act which states that all voting records regarding related party transactions must be retained for seven years. Other business documents, including financial records, should also be retained for seven years.[122] Other provisions in the Corporations Act relating to record retention, including preservation and disposal of financial records,[123] register of members,[124] access to company books,[125] retention of

[121] *Corporations Act* s 247A.
[122] Ibid s 286(2)
[123] Ibid s 1101C(2).
[124] Ibid s 169(7)(a).
[125] Ibid s 198F(2).

audit papers,[126] retention and access to Product Disclosure Statements[127] impose an obligation on the affected company to retain the mentioned documentation for seven years.

We therefore suggest that, if a statutory minimum period for retention of records of voting on resolutions at an AGM were to be imposed, seven years is an appropriate period of time. Any requirement should also allow voting records to be stored electronically.

5.24 Election of directors

Should there be any legislative initiatives in regard to the election of directors, including in

relation to:

- *the frequency with which directors should stand for re-election*
- *the right of shareholders to question candidates (and receive answers)*
- *the voting procedure?*

We do not support any changes to the frequency with which directors should stand for re-election. We note that only 17.8 per cent of respondents to our Member Survey were of the view that the election of directors is an area of the AGM that could be improved. In particular, we are not in favour of the introduction of mandatory annual director elections in Australia. The current rules ensure appropriate board continuity, stability and longer-term decision-making, while the performance of individual directors can be managed through other measures.

The CAMAC Discussion Paper points out that in the UK, all directors of FTSE 350 companies are expected to submit themselves for annual re-election.[128] It is interesting to note, however, that several large pension funds have raised concerns regarding annual director elections. In particular, in a letter to the chairmen of 700 companies, three large UK pension funds (Railpen, the University Superannuation Scheme and Hermes) warned that annual director elections could engender a short-term culture and undermine collective decision-making.[129]

Arguments in favour of mandatory annual director elections are generally driven by a sense that this is the practice preferred by shareholders. It is important to bear in mind, however, that unhappy shareholders already have a range of options available to them. In the first instance, shareholders can talk to directors about their concerns. If shareholders remain unsatisfied following these discussions, they can:

- make their views known at AGMs and cast their votes against the re-election of relevant directors;

[126] Ibid ss 307(B)(1)(c)(i), 307B(3)(b)(i).
[127] Ibid s 1015D(3).
[128] Financial Reporting Council, "The UK Corporate Governance Code", September 2012, provision B.7.1. As with all provisions of the Code, companies are free to explain the reasons for any non-compliance.
[129] Letter from Railpen, the University Superannuation Scheme and Hermes to the Chairmen of 700 companies. See Deloitte, *Governance in Brief: Your Summary of the Latest Corporate Governance Developments* (29 July 2010) Deloitte, 3 <www.deloitte.com/assets/Dcom-UnitedKingdom/Local%20Assets/Documents/Services/Audit/Corporate%20Governance/Governance%20in%20brief/UK_Audit_GovernancebriefAug2010.pdf>.

- remove directors from boards through an ordinary resolution of shareholders at a general meeting. A group of 100 shareholders, or shareholders with five per cent of the votes that may be cast on the resolution, may propose a resolution to remove a director;[130] and
- change the company's constitution by special resolution at a general meeting to provide for annual director elections.[131] Shareholders should not be obliged to elect directors annually if they do not believe that this is appropriate.

There are also various potential risks and disadvantages with annual director elections. We believe that these risks outweigh any potential advantages associated with annual director elections. In particular, annual director elections may:

- add to the short-term performance pressures on boards and management, and encourage short-term thinking on the part of investors, directors and management;
- be potentially disruptive and destabilising. If directors are turned over at a high rate then the company may lose continuity at board level, as well as experience, skills and corporate knowledge of directors;
- distract directors from performing their core oversight and supervisory functions;
- open the door to individual directors being targeted at AGMs. A separate vote on individual directors implies that the responsibility for specific decisions can be attributed to specific individuals. This is not the case, and would undermine the integrity of collective board decision-making;
- lead to activist, short-term or single-issue investors using the threat of a vote against one or more directors to drive forward their own agenda;
- cause directors to take populist decisions or to act with one eye on the next election rather than make difficult and unpopular decisions, which might be in the better interests of the company; and
- make it more difficult to put in place an effective board succession plan or recruit non-executive directors, who might be concerned about their security of tenure.

The Australian Institute of Company Directors also does not support any changes to the right of shareholders to question candidates. It should be up to the company and the chair of the meeting to determine whether other directors should address the AGM. We further note that listed companies already provide detailed information to shareholders about proposed candidates (including, biographical details, a statement by the board as to whether it supports the nomination, and details of certain relationships and directorships held etc).[132] We consider that this information is sufficient.

Finally, we do not support any changes to the voting procedures. Feedback from our members suggests that companies' voting procedures are working effectively, and that any new legislative initiatives are unnecessary. We believe that companies already take care to ensure that the procedure for the election of directors is fair, and that the potential fairness issues raised in the CAMAC Report are, largely, theoretical.

[130] *Corporations Act* ss 203D, 249N.
[131] Ibid s 136(2).
[132] ASX Corporate Governance Council Principles and Recommendations, Recommendation 2.4 – *Election of directors*.

5.25 Functions of the AGM and technology

For some or all public companies, should the functions of the AGM be changed in some, or the obligation to hold an AGM be abolished?

In this context, what technological developments might be taken into account in considering the possible functions of the AGM?

The Australian Institute of Company Directors is of the view that the AGM should be retained as important part of the corporate calendar. In our recent Member Survey, respondents were asked whether the AGM should be abolished in its current form, 53.2 per cent of respondents said "no", 33 per cent of respondents answered "yes" and 13.9 per cent of respondents were unsure. This data was considered in conjunction with qualitative feedback from our members which overwhelmingly supported the retention of the AGM, despite its faults.

When asked in our Member Survey "what were the most important functions of the AGM"[133] the top three responses according to respondents were as follows:

- board accountability to shareholders (64.1 per cent)
- presenting information to shareholders (53.2 per cent)
- answering questions from shareholders (52.3 per cent)

The next three responses were:

- shareholder voting on resolutions (34.1 per cent)
- to receive an indication of shareholder sentiment (27.3 per cent) and
- presenting on upcoming year (22.3 per cent).

Qualitative feedback from directors also strongly suggested that the rigour of preparation required by the board was, in and of itself, a valuable function of the AGM.

The CAMAC Discussion Paper refers to three options for changing the AGM being:

- Option 1: limit the AGM to the deliberative and decision-making functions
- Option 2: Separate out the decision-making function of the AGM
- Option 3: Some other adjustment to the current functions of the AGM
- Option 4: Abolish the requirement for an AGM.

The Australian Institute of Company Directors does not support limiting the AGM to only deliberative and decision-making functions. Directors consider the AGM to be an important forum to receive shareholder feedback and to answer questions from shareholders about the company, not just the matters for decision. We anticipate that the AGM will become less relevant to shareholders if the AGM were limited to only deliberative and decision-making functions.

The Australian Institute of Company Directors does not support separating out the decision-making function from the AGM. We agree with the CASAC Report which provided that "it is important that meetings achieve a final outcome without further

[133] Respondents were asked to select their top three responses from a list of 11 alternatives.

delay."[134] We are also of the view that the AGM should be as contemporaneous to the end of the financial year as possible. Allowing the voting to occur after the close of the meeting would move the AGM further away from the end of the financial year and delay outcomes. In regard to the timing of the AGM, we refer to our previous comments in paragraph 5.1 above.

The Australian Institute of Company Directors recognises that holding an AGM is a time consuming and costly exercise for companies, particularly public companies that are not listed and not-for-profit. We have always stated that good corporate governance is not a "one-size" fits all process. As such we would not object to consultation being undertaken as to whether some of the requirements for the AGM could be alleviated for smaller unlisted or not-for-profit companies. However, we would not like to see the rigour with which AGMs are currently conducted being undermined through such a process. As set out above, the majority of respondents to our Member Survey listed the most important function of the AGM as "board accountability to shareholders." The AGM is an important component of shareholder democracy and should be preserved.

As set out above the Australian Institute of Company Directors does not support the abolition of the AGM for public companies whether listed or unlisted.

We are of the view that so long as the company has appropriate technological infrastructure in place, flexibility should be given to companies as to how they decide to use technology at the AGM. We note that there is strong director sentiment in favour of preserving the physical meeting and directors being able to answer shareholder questions face to face. If technology is able to enhance this important function and other functions of the AGM, then the Australian Institute of Company Directors would have no objection to encouraging innovation in these areas.

5.26 Format of the AGM and technology

For some or all public companies, and if the AGM is retained in some manner, what legislative or other initiatives, if any, should there be in regard to the possible formats of the AGM?

In this context, what technological developments might be taken into account in considering possible formats for the AGM?

As we have set out in paragraph 5.25 above, we believe that the AGM should be retained. Meetings of company members, particularly AGMs, provide (amongst other things) board accountability to shareholders and an important forum for shareholder participation in the governance of companies. In our recent Member Survey, only 33 per cent of respondents were of the view that the AGM in its current form should be abolished.

Respondents to our Member Survey (58.7 per cent) identified the use of technology to broadcast meetings as the main area of the AGM that could be improved.

Having regard to feedback from our members, we do not believe that companies should be permitted to dispose altogether with a physical AGM and conduct an online-only or virtual AGM. Notwithstanding the cost benefits of these formats, many directors believe that non-physical meetings would be unsatisfactory, particularly given that a key component of the AGM is the ability for directors to interact with

[134] Referred to in CAMAC Discussion Paper, 125.

shareholders face-to-face. Further, Internet access is not ubiquitous, and nor is this technology well understood by older Australians, such that there would be real issues around shareholder participation rights.

However, we consider that hybrid physical/online meetings may help improve participation at AGMs. The webcasting of AGMs to shareholders is already being employed by many companies, and increasingly so. We do not consider that new legislation or other initiatives are necessary to further encourage the use of technology to broadcast meetings.

Bearing in mind that technological limitations and malfunctions are still commonplace, at this stage we have some concerns about online shareholder participation and especially real-time online voting. Ultimately, however, it should be a matter for companies to decide how best to employ technology (having regard to their technological capabilities) to improve shareholder participation. If there is some concern that online participation is not permitted under the current legislative provision, we would not object to an appropriate amendment to recognise its legitimacy, as a possible (but not mandatory) forum for shareholder participation in addition to the physical meeting.

Computershare Investor Services Pty Limited
ABN 48 078 279 277
Yarra Falls, 452 Johnston Street Abbotsford
Victoria 3067 Australia
GPO Box 2975 Melbourne
Victoria 3001 Australia
DX Box 30941
Telephone 61 3 9415 5000
Facsimile 61 3 9473 2500
www.computershare.com

Friday 21 December 2012

Mr John Kluver
Executive Director
Corporations and Markets Advisory Committee
GPO Box 3967
SYDNEY NSW 2001

Dear Mr Kluver,

RE: The AGM and shareholder engagement

Computershare welcomes the opportunity to respond to the Corporations and Markets Advisory Committee's (CAMAC) 14 September 2012 discussion paper *The AGM and shareholder engagement.*

Computershare is the global market leader in transfer agency and share registration, employee equity plans, proxy solicitation and stakeholder communications. Today, we service 100 million shareholder and employee accounts on behalf of 14,000 corporations. We manage around 480 Annual General Meetings in Australia on behalf of listed and unlisted companies, providing meeting services including proxy collection, shareholder registration and voting services for more than 60% of ASX200 companies.

Computershare has lobbied for and consulted on change in this area in other jurisdictions, including North America and the United Kingdom and has long taken an active interest in AGM reform in Australia. We believe that the depth and breadth of our experience and our insights into shareholder thinking and behaviours will help CAMAC formulate its recommendations to the Australian Government.

Our response addresses a number of questions for consideration and also puts forward one additional substantive policy recommendation that we believe is within the scope of CAMAC's review. We suggest that institutions and nominees should actively be encouraged to use designated accounts rather than pooled accounts, so as to facilitate direct communication and engagement between shareholders and companies, in particular institutional shareholders. This change would significantly improve the communications and voting process by removing one or more unnecessary layers of intermediation in the voting process.

We welcome the opportunity to participate in further discussions, including any round table discussions or papers, and look forward to working with CAMAC to promote positive change in our industry.

Sincerely,

Greg Dooley

Managing Director
Computershare Investor Services

Computershare

2.2 ISSUE 1: SHAREHOLDER ENGAGEMENT

2.2.3 Aspects of engagement – the role of institutional shareholders

Computershare believes that institutions and nominees should be encouraged to use designated accounts instead of pooled accounts and the Federal Government should consider the designated account as the default for institutional shareholders. We have been campaigning for some time now on what we believe is an obvious solution that will fix a number of the issues highlighted in the CAMAC discussion paper.

The difference between pooled and designated accounts

A pooled account is the combination of client assets held through an omnibus account in the name of the custodian or its nominee, rather than in individual accounts for each underlying client. For example, HSBC Custody Nominees (Australia) Limited or National Nominees Australia Limited.

A designated account is the segregation of underlying investors into individual accounts on the share register. For example, QIC Limited <c/- National Nominees Limited> or INVIA Custodians Pty Limited <Sample Superfund>.

Designated or segregated accounts can be established within CHESS and directly on the share register, facilitating direct communications and voting between companies and shareholders.

Issues surrounding pooled accounts

Any review of the AGM and shareholder engagement must include a review of the mechanics of the proxy system and, more importantly, the institutional proxy system in Australia. The current practice of custodians and nominees holding institutional investors in pooled account structures rather than in designated accounts named on the company register, in order to reduce their own internal operational costs, is causing market inefficiencies including:

- Over-voting
- Transparency issues
- Timeframe concerns

Over-voting

Over-voting occurs when more shares are instructed to be voted than the actual number of shares owned by a registered shareholder. It can occur when there is an imbalance between the perceived voting entitlements of individual investors whose shares are pooled with other investors and/or traders within a nominee and the actual (lesser) shares and voting entitlements held by the nominee on the share register.

In the 2012 season Computershare recorded in excess of 150 over-votes which had an impact on 79 meetings. This meant that votes were either disregarded in their entirety or that significant rework was required by all parties to ascertain the true voting position. The custodian/nominees generally represent the largest holders on a company's register (an average of 40-60% of the issued capital). The use of

pooled accounts (which lead to over-voting) is unintentionally disenfranchising beneficial holders and impacting on companies.

Transparency issues

Pooled accounts cause several issues relating to transparency:

- Pooled accounts do not facilitate a direct audit trail or confirmation process between the company and shareholder, whereas a designated account can facilitate certainty of the vote lodged and is readily traceable.
- Pooled accounts rely on offshore manual rekeying of meeting information (including meeting resolutions and vote exclusion details) which can introduce errors and misinterpretation.
- Companies do not automatically know who has the voting rights and who is making voting decisions under a pooled account structure. This is further compounded when stock is lent.

Computershare believes that these issues will become more prominent and more costly for companies and shareholders as institutional shareholders, superfunds and pension funds increasingly vote their shares and make their vote preferences public.

Concerns about timeframes

We note the current debate about increasing or changing the existing timeframes for voting entitlements and proxy close. Rather than making a wholesale change that has an impact on the entire industry, this issue can be resolved by the use of a designated account, as the cut-offs imposed by each link in the voting chain would no longer be required.

Recommendation: Institutions and nominees should be encouraged to use designated accounts and consideration should be given to making designated accounts the default for institutional shareholders. Rather than market participants such as custodians pushing for changes to the legislative environment to overcome the lack of transparency caused by the administrative approach they adopt, they should be asked to explain why they cannot use designated accounts to solve the identified issues.

2.4 ISSUE 3 – THE AGM

2.4.2 Current functions and format

Technical amendments to the Corporations Act

Computershare also proposes a number of technical amendments to the Corporations Act to allow for the more efficient conduct of meetings and to address some inconsistencies that presently exist within Part 2.G of the Corporations Act. These recommendations are:

- Addressing inconsistencies within Part 2.G of the Corporations Act
- Allowing the Corporations Act to adapt to technological changes

Addressing inconsistencies within Part 2.G of the Corporations Act

Computershare notes that certain provisions of the Corporations Act, relating to the conduct of meetings for companies in Part 2.G2, do not appear in the corresponding sections of the Act relating to registered schemes in Part 2.G4. Examples includes section 250BC (transfer of non-chair proxy to chair in certain circumstances) and section 250B (proxy documents). We are not aware of any policy reasons why a listed company and a listed management investment scheme should be treated differently, and these inconsistencies are particularly apparent for a listed entity that has issued a stapled security (which comprises a share in a company stapled to a unit in a scheme).

Recommendation: Address inconsistencies contained within Part 2.G of the Corporations Act.

2.4.3 – Future functions and format

Allowing the Corporations Act to adapt to technological changes

Computershare notes that the Corporations Act currently provides specific requirements regarding the authentication of electronic proxy appointments in section 250B. We believe that by prescribing detailed requirements as to the manner in which electronic authentication can occur, the law does not provide sufficient flexibility for companies to take advantage of technological advances as they occur. For that reason, we propose that amendments are made that allow companies to implement authentication processes in a manner that satisfies a general requirement to be of a high industry standard without prescribing exactly what that requirement must entail. This should also apply to any legislation that is proposed to allow for online voting during an AGM (see also our response to question 5.11 below).

Recommendation: Amendments should be made to the Corporations Act that allow companies to more easily adapt to technological changes.

RESPONSE TO QUESTIONS FOR CONSIDERATION

Computershare has elected to respond only to the questions for consideration where we believe we can provide insight into shareholder thinking and behaviours and/or where our experience in meeting management and proxy processing will be of benefit to CAMAC.

5.3 CONDUCTING THE AGM

5.3.1 Timing

Should there be any change to the statutory time frame for holding an AGM?

Computershare cautions against an extension of the statutory period for holding the AGM where an extension would result in the deadline for holding the AGM falling within the Christmas holiday period. This would hinder shareholder participation rather than encourage it.

In 2012, Computershare managed 112 meetings in the final week of November; this represents 24% of all meetings managed for the year. Rather than extending the deadline, consideration should be given to assisting companies by removing or streamlining some of the current requirements that prevent meetings from occurring earlier.

Recommendation: We don't believe there should be any change to the statutory timeframe. Efficiencies such as those outlined in 5.3.2 should be implemented to assist companies in minimising logistical requirements.

5.3.2 Notice of meeting

How might technology be used to make this notice more useful to shareholders?

Our data shows that shareholders are increasingly using electronic channels for shareholder-related activities. For example, 89% of our surveyed shareholders say they source information directly from company websites, and 50% pay to access online content from news or industry commentator sites. We have also observed that a growing number of shareholders choose to update their information and obtain information from the registry online. In 2011, 64% of the 1.2 million shareholder contacts that we received were carried out via the web.[1] Computershare has observed that in 2011 20.7% of voting shareholders opted to lodge their proxy vote online, when online voting was offered. Indications are that this number will increase to 23.4% in 2012.

Electronic dissemination of AGM documentation

The Simplified Regulatory Reporting Act of 2008 was changed to allow companies to require shareholders to opt in to receiving hard copy annual reports rather than the previous opt out requirements. This change had a positive environmental impact and significantly reduced costs for

[1] Computershare's Securityholder Contact Satisfaction Monitor, January – June 2012

companies without disenfranchising shareholders. Our data shows that 7% of shareholders opt to receive a hard copy annual report.

If there was regulatory change that mandated companies to disseminate meeting information to shareholders electronically, this could lead to more satisfied and engaged shareholders and would promote the use of technology in shareholder engagement.

While there have been some advances in the electronic delivery of information, including Notices of Meeting and Proxy Cards, shareholder communications have predominantly remained paper-based. Nearly 80% of the shareholders we surveyed said they would prefer to receive their AGM communications electronically (email, SMS or digital mail box). However, our data shows that the actual average number of shareholders who receive their Notice of Meeting via email is 18.5%.

Shareholders commented that companies are inconsistent when it comes to sending AGM documentation via electronic means.

Our research and experience shows an increased propensity to receive and source information electronically. This behaviour is consistent with all aspects of shareholder activity. We believe the current opt-out approach for paper-based Notices of Meeting and Proxy Forms should therefore be changed to an opt-in approach. In effect, physical paper mailpacks would only be sent to shareholders who had elected to receive meeting communications in this manner. The remaining shareholders would receive notification by email (currently 18.5%), via digital mail post (new) or by sourcing the information online. Using our annual report experience as a guide, we estimate that physical mail packs for Computershare clients would be reduced by six million per annum without negatively impacting shareholder engagement.

Companies could also consider making use of smartphone capabilities. For example, adding in features such as a 'save meeting in calendar' appointment and using Google or Apple Maps to direct shareholders to the meeting venue. In 2012, 13 of the companies that Computershare manages the register for offered mobile voting applications; 6.71% of holders who voted online lodged proxy votes via this channel.

Recommendation: Adopt regulatory change that allows companies to require shareholders to opt in to receive physical proxy material and the Notice of Meeting.

5.3.3 Notice to shareholders holding shares through nominees

Should there be provisions for companies to send information about an AGM directly to the beneficial owners of shares held by nominees and, if so, what type of information?

Computershare does not believe that there should be provisions for companies to send information about an AGM directly to beneficial owners. We do not believe that companies should incur further costs or the administrative burden of communicating with underlying shareholders.

Computershare strongly agrees with the point made in the CAMAC discussion paper about shareholders having the choice to be registered as shareholders directly and thereby receive information directly. Through our role in markets where companies are obliged to send communications directly to underlying shareholders, Computershare has proven experience of the additional cost and administration associated with it. In the UK, for example, under the 'Information Rights' provisions of the Companies Act 2006, at the election of their intermediary, shareholders who hold their shares via a nominee may be entered

onto a 'Register of Relevant Interests' for each UK company in which they hold shares, and thereafter those companies are required to send shareholder communications directly to that shareholder.

The UK Information Rights are currently managed by the intermediary and the take-up is remarkably low due to the high costs involved for all parties. The process does not warrant the expense in the UK, and we believe that the situation would be similar in Australia.

We also note that any material distributed to beneficial owners in relation to an AGM should not include forms for voting. The various nominees through which beneficial owners hold their shares have different timings and processes for receipt of shareholder voting instructions. The nominee should have an affirmative obligation to pass on to its client all AGM information sent by the company to its name-on-register shareholders, and to provide a mechanism for the beneficial owners to provide their voting instructions back to the nominee for lodgement with the Company's register, or otherwise provide the beneficial owner with proxy authority to vote. Where there are further intermediaries in the chain of ownership between the registered nominee and the beneficial owner of the shares, reasonable efforts should be undertaken for each intermediary to pass the information on in a timely manner such that it reaches the beneficial owner. In this regard, we would suggest that CAMAC consider the approach adopted in the Geneva Securities Convention.

Recommendation: Companies should not be required to send information about an AGM directly to the beneficial owners of shares held by nominees. CAMAC should consider the approach adopted by the Geneva Securities Convention in relation to the passing on of shareholder communications.

Should there be any provision for beneficial owners of shares in a company to participate in the AGM of that company and, if so, how?

To ensure the integrity of the shareholder voting process, all participants in the AGM that have the capacity to lodge a vote at the meeting must be capable of showing voting authority that is directly referable to a holding on the share register and capable of being appropriately audited. We therefore believe that a beneficial owner should only be capable of exercising voting authority where they act as a validly appointed proxy of the registered shareholder from whom they derive title, which is the current requirement in Australia.

Australian companies currently have a right to obtain disclosure of their beneficial owners via s. 672A of the Corporations Act. However, we do not believe that this disclosure can be used as a basis for beneficial owners to participate in any voting capacity at the AGM. Such disclosures are snapshots of ownership that are performed at varying times by the responding intermediaries. It would not be feasible – without a substantial investment in infrastructure between companies, intermediaries and institutions – to establish real-time disclosure of beneficial owners in a manner that could facilitate voting. We do not see that such an investment is warranted, particularly in the Australian market structure where shareholders can readily arrange to be directly registered via designated account structures and thus participate in the AGM as a registered shareholder.

It would be unreasonable to require companies to bear any additional cost in facilitating participation at the AGM by beneficial owners for those shareholders who have elected to maintain their shareholding in a pooled account.

We note that there has been discussion internationally on the issue of facilitating access and exercise of rights by beneficial owners. In the European Union, this issue is discussed within the proposed Securities Law Legislation, which has contemplated a right for beneficial owners to directly exercise voting rights.

For the reasons discussed above we have concerns about such an approach. We do, however, appreciate the importance of ensuring adequate arrangements are in place to facilitate the exercise of shareholder rights by beneficial owners.

Recommendation: We recommend that CAMAC look to the provisions of the Geneva Securities Convention with regard to an affirmative obligation on intermediaries that are responsible for administering beneficial owners securities to facilitate the exercise of shareholder rights, including voting. (Note: where a custodian nominee provides an institutional shareholder with a designated account and the shareholder's name is recorded on the CHESS sub-register or the company sub-register, the shareholder will receive their communications directly from the company).

5.8.10 Proxy Voting

What changes, if any, should be made to the current requirements concerning:

- ***the record date and the proxy appointment date***

It is worth noting that the Australian proxy voting processes are better than in any other developed jurisdiction.

In the United States the record date cannot be less than 10 days before the meeting and the record date is often 45 days before the meeting. In our experience this results in 'stale' voting, where the investors have sold out of the stock by the meeting date. In some European jurisdictions, if you want to vote at all, you have to 'block' your shares (deny yourself the right to sell them) for an even longer period before the meeting.

Recommendation: We do not recommend moving the record date as it will introduce concerns about people voting who are no longer shareholders at the time of the meeting.

- ***any other aspect of proxy voting***

Paperless proxy voting

Computershare supports companies having the right to elect to no longer permit receipt of proxies in paper form or by facsimile. Our research shows that 72.9% of surveyed shareholders responded positively to the adoption of paperless voting.

To ensure all shareholders have a readily accessible channel through which to vote, we would also propose that legislation expressly authorises telephone voting (see also our comment below).

Recommendation: Introduce legislation to permit companies to adopt paperless proxy voting.

Confirmation that telephone voting is an acceptable form of electronic voting

Computershare has a facility that allows for telephone voting in many of the jurisdictions where we currently operate and, particularly in North America, lodging a proxy using an IVR phone facility is a commonly used method of voting. Computershare understands that there are currently no legal impediments to lodging proxy votes using a similar facility in Australia, and we believe it would be of benefit if this was either expressly authorised under the Corporations Act or a general provision was

introduced that would allow for companies to accept proxies by whatever channel they choose, provided that there is a general obligation in place to ensure that the authentication processes around delivery of proxies through that channel are of a high standard (consistent with our comment above on electronic proxy appointments).

Recommendation: Expressly authorise telephone voting under the Corporations Act.

Vote confirmation

Through existing online proxy systems, registrars are able to provide name-on-register shareholders with confidence that their voting intention has been received in real time, removing any doubt of lost or late votes. This also provides an audit trail.

Institutional shareholders who are subject to various compliance requirements regarding their proxy voting activities have expressed interest in a confirmation process. In 2009, Computershare introduced vote receipt confirmation for participating custodians which has demonstrated significant efficiencies and transparency of votes lodged. It also gives confidence to their underlying shareholders that intentions have been passed along the voting chain. This process would be simplified if designated accounts were mandated in Australia.

Recommendation: Vote confirmation should be provided as part of electronic voting systems. Custodians and vote service providers remain responsible for confirming votes back to underlying beneficial holders.

5.9 DIRECT VOTING BEFORE THE MEETING

Should direct voting before the meeting be provided for by legislative or other means, and if so what matters should be covered in any regulatory structure?

Although there appears to be general industry acceptance that direct voting can be implemented under the current legislative framework, it has not been broadly adopted by listed companies. A reason for this may be that companies are concerned that direct voting is not expressly authorised by legislation. We would therefore support the introduction of legislation that removes those residual doubts. Our preference would be for the authorisation to be general, allowing companies to implement direct voting in a manner that works for them, with the exception that the cut off point for lodgement of a direct vote should align with the proxy cut off point.

Recommendation: Adopt legislation to expressly enable companies to introduce direct voting.

5.11 ONLINE VOTING DURING THE AGM

Should there be legislative or other recognition of online voting during the course of an AGM and, if so, in what respects should this form of voting be regulated?

Computershare welcomes the introduction of online voting during the AGM and sees no reason why online voting could not be regulated in the same way as in-person voting. Our shareholder surveys

support that this concept would promote retail shareholder engagement with 66% of shareholders surveyed saying that they would always or occasionally participate in an online environment.

Consideration will need to be given to the benefits for institutional shareholders who hold shares under a pooled account structure. These shareholders would still be required to vote in advance or nominate corporate representatives to revoke a proxy at the physical meeting. In the event that designated accounts are mandated in Australia, we could leverage off the advances of the E_GEM recently adopted in Turkey. This would only work where institutional shareholders hold their stock directly on the register. Where this is not the case, an underlying shareholder holding their shares through a nominee would not be able to vote online during the AGM unless significant changes were made to current voting processes. Therefore, the current process of institutional shareholders voting well in advance of the AGM would still prevail.

With the adoption of online voting, Computershare could readily provide a platform that allows shareholders to complete the following activities online during the course of an AGM:

- Register for the meeting
- View the live meeting
- Submit votes
- Ask and submit questions
- Share or post comments to social media sites
- Access vote confirmations

We believe that by retaining the current process of voting at the physical meeting and adding the option to vote online, we could provide shareholders with more choice, leading to greater shareholder engagement.

Recommendation: Allow online voting during the AGM.

5.12 EXCLUSIONS FROM VOTING

Do any issues arise concerning voting exclusions on resolutions that must, or may, be considered at an AGM and, if so, how might those issues best be resolved?

Issues with voting exclusions on resolutions arise largely as a result of pooled accounts because in those circumstances underlying shareholders who are subject to an exclusion hold their investments with other underlying shareholders who are not. Holding shares in designated accounts would allow for voting exclusions to be managed more easily and would give greater certainty to companies that the required exclusions have been properly imposed.

Recommendation: The use of designated accounts will minimise issues with managing vote exclusions.

5.14 INDEPENDENT VERIFICATION OF VOTES CAST ON A POLL

Should one or more verification requirements apply in all instances or only if, say, a threshold number of shareholders require it?

Computershare does not support a recommendation that independent verification requirements should apply to votes cast on a poll. The Corporations Act already provides a legal framework within which companies must operate their meetings including, for listed companies, disclosing poll results (and proxy results when resolutions are determined by show of hands) to the market and additional obligations regarding the accuracy of all disclosures to the market. A range of remedies are available to relevant persons for breaches of these obligations.

We therefore believe that to impose obligations (that would give a third-party access to sensitive shareholder information contained within proxy forms and voting records) is unwarranted and could lead to additional expense for companies as well as delays in the announcement of meeting results.

Recommendation: No additional verification requirements are required for voting by poll regardless of shareholder numbers.

5.15 DISCLOSURE OF VOTING AFTER THE AGM

Should any steps be taken to promote more consistency in the disclosure to the market of voting results?

While companies are required to lodge with the ASX the results of each resolution put to shareholders at a meeting, there is no requirement to communicate these results with shareholders within a particular timeframe or via a specific channel.

In a recent shareholder survey (see **Appendix A**), 75% of respondents indicated that they were interested in receiving voting results following an AGM. Nearly three quarters of respondents said that they would like the results to be communicated to them via a digital channel (email, digital mailbox or SMS).

Recommendation: Companies should allow shareholders to elect to receive a post-meeting communication that outlines the results of each resolution. To ensure cost effectiveness for companies, this communication should only be required to be made available to shareholders in electronic form.

5.17 DUAL LISTED COMPANIES

Are there any matters concerning dual-listing that should be taken into account in the regulation of AGMs?

Careful thought needs to be given to voting issues by dual-listed companies. Companies incorporated outside Australia (and dual listed on ASX) need to conform to their own domestic market laws as well as the practice and processes that are customary in the Australian market. Conversely, foreign markets, where Australian listed companies are dual-listed, may follow their own domestic practices (for example,

through the deployment of depositaries) that are different to the rules and procedures that are customary in Australia. Companies need to take care to ensure that their voting procedures can comply with relevant rules and practices so that companies, shareholders and intermediaries have certainty in the voting process. This may not be an issue for CAMAC but is something that needs to be understood and addressed by dual-listed companies to ensure, for example, that appropriate procedures are in place to make sure that the same holder cannot vote the same parcel of shares in each listed market.

5.18 GLOBALISATION

Are there any problems in the voting or other aspects of AGMs for overseas holders of shareholding interests in Australian regulated companies?

Many markets are considering ways to modernise shareholder communications and the proxy voting system. Because Australia has an advanced market structure and a transparent share ownership system the problems in Australia are not as acute as they are elsewhere, however, improvements could be made. Where overseas holders are direct registered shareholders they should have the ability to vote electronically via their registrar's platform (either by web or IVR depending on the services the company offers). Where overseas shareholders hold securities in a pooled account they have to rely on the nominee to "pass on" their rights. This is an internal matter between the nominee and the shareholder, subject to any further regulation in this area. Rules should be considered that require the nominee to advise the shareholder of the details of the meeting and to vote as instructed, as contemplated by the Geneva Securities Convention. We do not believe that companies should be required to develop or provide special services for beneficial owners given the choices shareholders have to hold their securities in designated accounts if desired.

Please also refer to our comments on question 5.17.

Recommendation: Companies should provide electronic voting facilities for registered shareholders. CAMAC should further consider requiring nominees to pass shareholder communications on to their clients, and to facilitate lodging the voting instructions passed back by beneficial owners.

6. FUTURE OF THE AGM

6.2.2 Options for change

For some or all public companies, should the functions of the AGM be changed in some manner, or the obligation to hold an AGM be abolished?

The physical AGM continues to be a valued forum for those who do choose to attend AGMs. For this reason Computershare is strongly against the abolition of the physical AGM. In its current state, the AGM plays a critical role by giving retail shareholders the opportunity to question the board and management in a public forum. Surveyed shareholders tell us that they value hearing fellow shareholders questioning the board at the AGM. In addition, the value that shareholders place on what they have described in our surveys as physically 'eyeballing directors' and making the board accountable is very real. Our survey revealed that of the shareholders who always or sometimes attend the AGM,

79% said that it enables them to directly assess a board's capacity to govern a company and gives shareholders the ability to ask questions in person.

As per our recommendation to question 5.11, we do support the introduction of online voting at the AGM, however, we caution against taking this to the extreme as they have done in the United States, where some states permit online-only meetings. Our experience in the United States with online-only meetings is that a degree of shareholder scepticism has emerged. For example, shareholders have expressed fears that their questions have been prioritised, rephrased and ignored or responses have been delayed to be answered outside the meeting, and are therefore not on public record. Concerns have also been expressed regarding the transparency of shareholder questions and management's answers, as well as whether or not shareholder questions asked online are visible to everyone at the meeting.

We therefore support the consideration of adopting hybrid meetings – that is, a combination of the physical and online AGM – for all companies on an annual basis as long as it is ultimately the company's choice as to whether they adopt this practice. To ensure the introduction of hybrid AGMs is successful in Australia the technology, systems and service providers need to have robust procedures in place.

Hybrid AGM benefits – for companies

Our experience in the United States indicates that offering virtual participation in AGMs leads to:

- Shareholder participation regardless of physical location – companies have the potential to reach out to more shareholders
- Interacting with more shareholders in real-time – with both online and physical Q&A and response time, companies are better able to gauge shareholder feedback and sentiment
- Improved corporate governance – there is less empty voting resulting in improved corporate governance

Hybrid AGM benefits – for shareholders

There are also benefits for shareholders including:

- The choice of whether to attend in person or to access it virtually
- Real-time access to the board and senior management, regardless of location
- The ability to interact with and hear questions from other shareholders without being in the room
- Provide institutional shareholders and foreign shareholders real-time access without the cost of attendance

Recommendation: Do not abolish the physical AGM, however, do introduce the option of a hybrid AGM at the company's election. There must be clear guidelines as to how hybrid AGMs are to be operated.

In this context, what technological developments might be taken into account in considering the possible functions of the AGM?

Please refer to our comments on 5.11.

Submission to the Corporations and Markets Advisory Committee Discussion Paper: The AGM and Shareholder Engagement

21 December 2012

Contents

Introduction

Corrs Chambers Westgarth (**Corrs**) is pleased to provide this submission (**Submission**) to the Corporations and Markets Advisory Committee (**CAMAC**) in respect of the CAMAC Discussion Paper: The AGM and Shareholder Engagement dated September 2012 (**Discussion Paper**).

This Submission focuses on certain aspects of shareholder engagement and the format and functions of the AGM. It also briefly deals with matters relating to the content of corporate annual reports. We have not commented on all issues raised in the Discussion Paper nor have we directly addressed each question set out in the Discussion Paper.

We welcome the efforts of CAMAC and others to foster public debate and contribution on these noteworthy regulatory matters.

You should be aware that this Submission does not necessarily reflect the views of any particular Corrs' client or stakeholder. Rather, this Submission is made by Corrs in the spirit of fostering public debate and informed discussion on issues that affect a large number of companies, investors and their advisers. Corrs' consents to the release of this Submission on the CAMAC website.

Corrs welcomes the opportunity to contribute to any further consultation process in respect of the Discussion Paper.

To discuss any aspects of this Submission or to facilitate further consultation, please contact:

Iain Laughland
Partner
+61 2 9210 6506
iain.laughland@corrs.com.au

Hedley Roost
Senior Associate
+61 8 9460 1665
hedley.roost@corrs.com.au

Overview of the AGM and shareholder engagement

1. The ASX Corporate Governance Council *Principles and Recommendations* describe the annual general meeting as the "*central forum by which companies can effectively communicate with shareholders, provide them with access to information about the company and corporate proposals, and enable their participation in decision-making".*
2. In reality, however, with improvements in technology and continuous real-time dissemination of company information, the AGM has become only one part of the overall shareholder engagement policy of public companies. For this reason it cannot be looked at in isolation. However, notwithstanding that the AGM may only forms part of an overall shareholder engagement strategy, it generally remains the pinnacle of the corporate calendar for retail investors and it remains a significant symbol of corporate governance. For a number of reasons there has been a steady decline in shareholders wanting to participate in the forum.
3. Accordingly, we welcome the efforts of CAMAC in seeking to assess the role of the AGM and to seek to improve this area of corporate governance and shareholder engagement more generally.

Future of the AGM

1. We do not support the proposal to dispense with the obligation on listed public companies to hold an AGM.
2. Accountability remains a fundamental component of good corporate governance. AGMs remain one of the few times when all shareholders, both retail and institutional, have an equal opportunity to interact directly with directors and executives. These individuals must remain accountable to the company's owners for the company's corporate strategy and operations. For this reason, it is our view that AGMs retain a significant role to play in good corporate governance.
3. We note that other jurisdictions, such as the US, Canada and the UK, still require public companies to hold AGMs.
4. We do however support efforts to modernise AGMs and streamline their functions. We have made further submissions in this regard below.

Future role and functions of the AGM

Option 1: limit the AGM to the deliberative and decision-making functions

1. We would support AGMs being limited to the deliberative and decision-making functions allocated to that meeting (option 1 in the Discussion Paper).
2. However, we agree with comments in the Discussion Paper that this may need to be counterbalanced with other forms of effective shareholder engagement in order to protect the rights of shareholders in continuing to have a meaningful voice. We would suggest that any company that elects to adopt this approach is required to put in place procedures that allow shareholders the opportunity to provide written questions to the directors and the management outside of the AGM. This could be achieved through questions and answers being published on the company's website and by companies

holding web-based briefings or question and answer sessions throughout the year. We note that some listed companies already do some, or all, of these things.

3. We would also suggest that companies that elect to adopt this approach should be required to offer shareholders the opportunity to submit questions to the directors and/or the auditor during a defined period in the lead up to the release of a company's half-year results, and full-year results. Companies would then be required to manage and filter the questions submitted by shareholders and respond to the more significant questions, including any questions that have a bearing on issues to be determined at the AGM. We suggest companies should post the selected questions and answers online for shareholders to consider, and where relevant make an informed vote at the AGM.. For example in the case of a resolution to propose the re-election of a director shareholders can ask that director direct questions, rather than having to take for granted a routine statement written by the relevant director in the Explanatory Statement for the AGM.
4. We support the suggestions in the Discussion Paper that the ability for shareholders to ask questions or make comments on an ongoing basis throughout the year may be more effective than the current rights of shareholders to do so at AGMs. We also believe that such an approach assists with making the deliberative and decision-making function of the AGM much more effective.

Option 2: separate out the decision-making function of the AGM

5. We do not support the separation of the decision-making function from the deliberative function of the AGM.
6. In this regard, it is important to consider that due to continuous disclosure requirements, and increased shareholder engagement activities by companies, shareholders are reasonably well informed about a company prior to an AGM. The AGM is no longer the only means by which investors receive important information about the company, and it is unlikely that any new information relating to a proposed resolution will be provided at the AGM that has not been previously announced publicly. Accordingly, shareholders should have sufficient information with which to make an informed decision on the resolutions at the AGM itself, and because of the notice requirements for an AGM have adequate time to vote by way of proxy before the meeting if they wish to do so. Accordingly, in our view there is no need to separate the decision-making function from the deliberative function.
7. Separating the decision-making function of the AGM is likely to increase uncertainty around AGMs, as well as introduce additional complexity and cost into the AGM process, removing finality from the meeting. In our view, this could have the effect of further disengaging shareholders from the AGM and reducing attendance. Such a change will also mean that there is a chance that shareholders will be particularly influenced by the media or minority special interest groups after the AGM.
8. If CAMAC were to seriously consider separating the decision-making function of the AGM, we would support further research being undertaken in relation to this issue, as there is currently very little evidence supporting the hypothesis that such a change will enhance shareholder engagement.

Option 3: some further adjustment to the current functions of the AGM

9. We would support further consideration being given to a flexible system around a company's requirement to hold an AGM, depending on such factors as shareholder numbers and the size of the company. While we agree that the AGM continues to have

a role to play in ensuring good corporate governance, we do not believe 'one size fits all'.

10. We note the separate work being undertaken by the Government and the ACNC with regard to governance requirements for not-for-profit entities, including the requirement to hold AGMs, and commend that project as an example of how a 'flexible' approach to the requirement to hold AGMs amongst all types of corporate entity should be strongly considered.
11. In the context of considering a 'flexible' approach to the requirement to hold an AGM, we would support CAMAC considering the criteria that should be applied. One example may be to consider providing unlisted public companies with less than 50 members the option to seek shareholder approval to remove the requirement to hold AGMs, with the requirement to renew any approval every three years. However, we consider that any such flexible approach should be counterbalanced with other methods of shareholder engagement such as increased disclosure and the ability to ask questions outside of the AGM, as discussed above.

Online voting at the AGM

1. We would support legislative amendment to expressly permit online shareholder participation and voting at a physical shareholder meeting, and the formulation a clear set of rules around this. In our view until this happens a number of companies that might use online voting will refrain from doing so because of a lack of clarity in the law around its use.
2. Online voting will allow shareholders to participate in meetings by remote communication whether they are in Australia or overseas. And a company should be able to adopt such a practice if it suits its needs and circumstances. With many Australian companies having shareholders located around the world, it is inevitable that companies are going to come under increased pressure to offer some sort of online participation for shareholders. We see online voting as a critical element in increasing shareholder engagement with regard to AGMs. As such, it is our view that CAMAC should seek to implement legislation and/or procedures of good practice in Australia that address some of the implementation issues and technological issues of online participation..
3. Prior to making legislative amendments, we would encourage CAMAC to look to the jurisdictions that allow for online shareholder participation, such as Delaware, and seek to build on their experiences and to review the legislation and guidelines that they have in place.
4. We do not support a move to allow for online meetings only or virtual meetings. In our view, AGMs are one of the main ways in which directors and management are held accountable to their shareholders and a move to online only or virtual meetings would significantly undermine their accountability.

Direct voting at the AGM

1. We support legislative recognition of direct voting prior to the AGM and agree that expanding the use of direct voting will likely help to rejuvenate the AGM and shareholder engagement. Direct voting would replace the necessity to appoint a proxy, and give shareholders direct ownership of their votes.

2. In 2011, only 11 of the ASX top 50 companies allowed direct voting.[1] We believe that more companies may be inclined to utilise direct voting if it was specifically provided for in the Corporations Act or the ASX Listing Rules.
3. We are concerned by the apparent lack of understanding by shareholders of the concepts of proxy voting and direct voting, and the difference between the two.
4. It is a common misconception that appointing a proxy is a direct vote. Shareholders do not tend to appreciate that appointing a proxy involves a temporary transfer of their rights to that proxy holder, in particular their right to vote.
5. It is apparent that many shareholders believe that their proxy will always be voted as directed, whereas in fact proxy holders are under no obligation to exercise the proxies they have, or vote in the manner directed.
6. The introduction of direct voting would likely reduce the occurrence of cherry picking, a concept described in the explanatory memorandum to the Corporations Amendment Bill (2006) as "a practice whereby a proxy holder, with directed proxies, chooses not to vote the directed proxies for a motion, but chooses to vote the proxies directed against a motion (or vice versa)". The proxy "deliberately withholds some votes that are contrary to their personal views, but lodges other proxies favourable to their views".
7. Direct voting introduces greater transparency, accuracy and integrity into the voting process, and is more aligned with shareholder expectations of AGM voting. Direct voting enables shareholders to ensure their vote is counted, unlike the outdated concept of proxy voting.
8. We further submit that legislative changes should mandate that clarification be provided by companies in the voting information section of notices of meeting, explaining the difference between direct voting and proxy voting and the reasons for each.
9. Currently, notices of meeting tend to include, if anything, a general statement that "a direct vote allows shareholders to vote on resolutions considered at the AGM by lodging their votes with the company prior to the AGM, without the need to attend the AGM or appoint a proxy".
10. We feel such statements are inadequate in informing shareholders of their rights, and would welcome a requirement for companies to explain to shareholders in their notices of meeting the difference between the two voting methods, and that appointing a proxy involves a temporary transfer of their rights, with a proxy being under no obligation to exercise the shareholder's vote.
11. Finally, we note that companies allowing direct voting should adopt direct voting regulations to govern and provide guidance on shareholder voting. Regulations should cover issues such as priority of votes, prescribing that where a member attempts to cast more than one vote on a particular resolution in respect of the same share, only the last document received is to be taken to have been cast, irrespective of whether the vote cast is by way of direct vote or proxy.

Statutory time frame for holding an AGM

1. We do not support an extension to the statutory time frame for holding an AGM.
2. We are of the view that extending this period by one month will not improve congestion of AGMs, and will instead lead to an accumulation of AGMs towards the beginning and middle of December rather than the middle and end of November.

[1] Johnson Winter & Slattery, *2011 AGM season survey results*, February 2012.

3. As the pre-Christmas period is already a busy time of year for most people, we believe that implementing this proposal will have an adverse affect on shareholder attendance and participation in AGMs. AGMs in December are likely to clash with pre-Christmas functions, both for attendees and venues, as well as holidays and compulsory office closures over the Christmas period.
4. We are of the opinion that it is the format and conduct of the AGM that is discouraging shareholder attendance rather than the time frame in which they are required to be held.

Election of directors

1. We support an increase in the frequency at which directors must stand for re-election.
2. This view is based on the right of shareholders to elect, as well as remove, directors to ensure corporate accountability.
3. The present requirement for directors to stand for re-election every three years does not allow for the prompt resolution of perceived director issues, or permit shareholders to raise concerns that they may have with corporate accountability.
4. The approach in comparable international jurisdictions such as the UK and Canada is to have directors standing for re-election annually. However, we note that there has been considerable opposition from within the listed company arena to such a proposal in Australia. In our view there is some merit in this view. For companies with larger boards, the AGM would become dominated every year by the re-election of directors, and in turn this may lead to increased shareholder dis-satisfaction with the AGM.
5. We would support considering reducing the period to two years on a rotational basis so that each year half of the board will be standing for re-election. By increasing the re-election of directors to a two year interval, important internal matters are more likely to be discussed and dealt with in an effective and timely manner. It should not add significantly to the cost of meetings, and is unlikely to stagnate the meeting with re-elections.

The role of proxy advisers

1. We note the widespread concern regarding proxy advisers' increasing role in dictating decisions to shareholders. We remain undecided on the issue of proposing regulation or restriction on the role of proxy advisers.
2. We note the strong support given to such a proposal in the AllensLinklaters Listed Client Survey (2012), with respondents being overwhelmingly in favour of regulating or restricting any possible undue influence or manipulation of shareholder voting by proxy advisers.
3. Given the attention that is currently being shown to this issue in a number of overseas jurisdictions, we are of the opinion that Australia should not immediately move to restrict or regulate proxy advisers but instead keep a watching brief on this subject, and revisit this issue once the AGM reforms have been completed and have been implemented for an AGM system. It may be at that time that CAMAC can consider imposing regulations based on the results of overseas regulations that may be in place.

Notice to shareholders holding shares through nominees

1. We support the view in the 2000 CASAC Report which concludes that it is unnecessary to implement legislative procedures for companies to send information about an AGM directly to the beneficial owners of shares held by nominees.
2. When a beneficial owner appoints a nominee, a relationship is established between the nominee and the beneficial owner. There should be an arrangement in place regarding information sharing.
3. On the issue of allowing beneficial owners the right to participate in the AGM, there is some merit in considering ways that this can be achieved without the beneficial owner entering their name directly on the register. One such way would be to permit the beneficial owner to notify the nominee that it wishes to attend the AGM, and to allow the nominee to give the company notice in advance of the AGM of the beneficial owners who have provided it with a notice that they intend to attend the AGM and the number of shares that they represent. Effectively a temporary share splitting would occur for the purposes of the meeting only. We do not consider that company share registries would have an excessive increase in administration around AGMs in relation to this proposal.

Right of 100 members to call a general meeting

1. We support the review of the right of 100 members to call a general meeting of a company.
2. In our view, the Corporations Act should provide that only shareholders who collectively have a certain percentage of a company's issued voting share capital may requisition a meeting of shareholders.
3. Accordingly, any shareholders numerical test should be removed.
4. In reaching this conclusion we have considered the following factors:
    a) the desire to maximise shareholder engagement and to allow shareholders to exercise their rights;
    b) the need to prevent the potential abuse of those rights (ie by share splitting);
    c) the cost to the company of holding extraordinary general meetings;
    d) the impact of unnecessary meetings on management's time; and
    e) that all comparable international jurisdictions use an issued capital test.
5. The example of Woolworths Limited and GetUp! this year is a timely reminder of the issues that can occur under the current legislative provisions, and the fact that a highly disproportionate number of shareholders can force a company to incur significant costs if they ‘club’ together to requisition resolutions that in all likelihood will never be passed. In Woolworths’ case, the 100 or so members who requisitioned the meeting represented only approximately 0.023% of the total 430,000 Woolworths’ shareholders.
6. We consider that the percentage for the issued share capital test should be retained at 5 percent.
7. This conclusion is based on the following considerations:

a) comparability to the tests adopted by international jurisdictions such as the UK, other European countries, New Zealand and Canada;

b) a 5 percent shareholding would represent a material economic interest in the company without creating undue burden on smaller shareholders to meet an unrealistic requirement; and

c) the requirement ensures that the cost of convening meetings is only incurred by a company when there is a legitimate concern by a substantial number of shareholders.

8. In our view, this threshold requirement achieves the necessary balance between the interests on minority and majority shareholders and the best use of management's time and costs to the company.

Stewardship Code

1. Institutional shareholders play an important role in corporate governance, and we support the aim of the UK Stewardship Code (**UK Code**) in promoting more active communication between shareholders and boards.
2. However, we do not support the introduction of a Stewardship Code in Australia.
3. While institutional shareholders should be encouraged to engage with the boards of companies in which they invest, this is not something that can be easily forced. If shareholders wish to engage, they will do so.
4. Further, without adequate enforceability, it is difficult to ensure compliance with any stewardship requirements. The UK Code is not mandatory, and while investors can sign up to the UK Code, they are under no obligation to actively comply with it.
5. Given the lack of measurable outcomes of the UK Code, and the absence of any ramifications for investors who fail to comply with the UK Code, we do not consider that it is necessary that it is followed in Australia at the current time.
6. We note that the UK Financial Reporting Council (**FRC**) has recently consulted on changes to the Code. Baroness Hogg, Chairman of FRC, has stated that while the UK Code got off to a reasonably good start, it has not yet inspired enough change or achieved its aim of active engagement between investors and companies. While investors may have signed up to the UK Code, they have not necessarily improved their engagement. Accordingly, the UK Code seems to have had only some limited initial success and our view is that Australia should wait to see its effectiveness before it considers something similar.

The annual report

1. Annual reports are becoming increasingly complex, with “clutter” obscuring relevant information and rendering the reports incomprehensible to many, particularly retail shareholders. While the purpose of annual reporting is to provide shareholders with the information necessary to assess a company’s performance and prospects, its effectiveness is being eroded as a result of the complexity of many annual reports.
2. Accordingly, we support suggestions for legislative change in relation to reformatting the annual report. We agree that the current reporting requirements produce unnecessary information, and would like to see annual reports become more user-friendly and accessible to shareholders.

3. In particular, we support the introduction of a Strategic Report, requiring the board to set out the strategy and direction of the company, and Annual Directors' Statement, to replace the current Directors' Report.
4. We note the extensive positive support in the UK for such a proposal, put forward by the UK Department for Business Innovation and Skills, as well as the strong calls in both Australia and overseas jurisdictions for legislative change in relation to the format and content of annual reports to make the relevant information more accessible to shareholders.
5. We also support the various suggestions aimed at reducing immaterial disclosures and complexity in annual reporting, as well as those embracing the employment of technological developments.
6. We consider it would be helpful if CAMAC could provide further guidance as to:
    a) how CAMAC envisages the implementation of proposed changes;
    b) whether proposed reforms would apply to all companies, whether listed or unlisted;
    c) how CAMAC hopes to achieve a reduction in the "clutter" contained in annual reports;
    d) the information to be included in a Strategic Report; and
    e) the proposed requirements for director sign off of the Strategic Report.

SYDNEY
Governor Phillip Tower
1 Farrer Place
Sydney NSW 2000
Tel 02 9210 6500
Fax 02 9210 6611

MELBOURNE
Bourke Place
600 Bourke Street
Melbourne VIC 3000
Tel 03 9672 3000
Fax 03 9672 3010

PERTH
Woodside Plaza
240 St Georges Terrace
Perth WA 6000
Tel 08 9460 1666
Fax 08 9460 1667

BRISBANE
Waterfront Place
1 Eagle Street
Brisbane QLD 4000
Tel 07 3228 9333
Fax 07 3228 9444

Australian Custodial Services Association
Level 24, 44 Market Street
Sydney NSW 2000
Tel: +61 2 8235 2530
Fax: +61 2 9299 3198
acsa@fsc.org.au
ACN 072 659 619

21 December 2012

Mr John Kluver
Corporations and Markets Advisory Committee
GPO Box 3967
Sydney NSW 2001

Dear John,

The AGM and shareholder engagement - Discussion Paper

About The Australian Custodial Services Association Limited ("ACSA")

ACSA is the peak industry body representing members of Australia's custodial and investment administration sector.

Our mission is to contribute to innovation within Australia's investment administration infrastructure, support the development of custody professionals, and to provide leadership in representing our members. By maintaining leadership and serving as a hub of quality and influential information, the Association enables members to confidently navigate change and growth. ACSA represents members holding securities in excess of $1.85 trillion in custody and under administration, and who employ more than 3000 staff.

Whilst the ACSA membership extends beyond custodians, this response to CAMAC only represents the views of the custodian community within ACSA. We understand that other non-custodian ACSA members such as share registries will be separately responding to the consultation paper.

ACSA has restricted its responses to those areas/questions that are relevant to the custodian community and we welcome further dialogue on these points.

Shareholder Engagement

3.4
Should legislative or other initiatives (for instance, additional ASX Corporate Governance Council, or other, guidance) be adopted, and if so for what reasons, concerning:
• the role of institutional shareholders throughout the year, including leading up to the AGM. In this context:
– is there a problem with having a peak AGM season and, if so, how might this matter be resolved

Response

The peak AGM season presents a challenge for Custodians due to the concentration of meetings and the number of proxy votes instructed by clients. However given the general predictability of the timing of the AGM season ACSA members are able to prepare for the increased volume accordingly and therefore manage the period appropriately.

While ACSA does not support changes to the timeframe for the holding of AGM we would like to see better use made of the entire period rather than a concentration of so many meetings during a few particular weeks. Initiatives to smooth out the number of meetings within the overall period would be supported by ACSA.

ACSA's overriding view in relation to many aspects of this paper is that we support a move to greater automation around the AGM notification, proxy voting and results notifications. If these systemic issues identified in our submission aren't addressed then with a continual increase in voting activity, the peak season will start to become problematic. Extending the timeframe or smoothing the concentration of meetings would ultimately only mask the inefficiencies with the end-to-end process.

The Annual Report

4.4
Should legislative or other changes be adopted, and if so for what reasons, concerning any aspect of the annual report requirements?
In this context:
• how might technology best be employed to increase the accessibility of annual reports

Response

ACSA supports the use of electronic communication methods for all documentation relating to the AGM's including annual reports. Additionally if any new reporting requirement was to be introduced then an appropriate electronic standard should be adopted.

The AGM

5.3.1
Should there be any change to the statutory time frame for holding an AGM?

Response

ACSA sees no need to change the statutory timeframe for holding an AGM but we would encourage a more even distribution of meetings within the current timeframe.

ACSA's belief is that the main issue lies in making the overall process more efficient – through automation, moving away from paper-based processes, and utilizing electronic voting – rather than just an extension or alteration of the time frame.

5.3.2
In what respects, if any, might the requirements for information to be included in the notice of meeting for an AGM be supplemented or modified?

Response

ACSA members experience a large number of issues when dealing with the voting exclusion clauses that are sometimes contained in meeting notices. The exclusions are general in nature and fail to adequately deal with the fact that custodians generally pool the shares of their various clients into one omnibus holding. Such statements often have the effect of excluding an entire omnibus holding from casting a vote even if there is only one underlying beneficiary to whom the exclusion actually applies – such a situation would unfairly exclude otherwise eligible beneficiaries from voting.

In order to deal with this scenario the company may seek a waiver from the exclusion.

However the obtaining of a waiver tends to be something of an afterthought that is often only received very close to the voting cut-off. In situations where the waiver is not obtained all the beneficial holders of a Custodian would lose their ability to vote on a resolution regardless of whether the voting exclusion would have otherwise applied to them.

ACSA acknowledges that specifying the excluded parties in the meeting notice is impractical, so we propose that the company must obtain the waiver before announcing the meeting and include it within the meeting notice.

Doing so would ensure that shareholders are not unfairly excluded from voting and reduce a large amount of urgent activity taking place very close to the voting deadlines. This would further enhance the other issues of efficiency that ACSA has identified as being needed in the proxy voting process.

5.3.2
How might technology be used to make this notice more useful to shareholders?

Response

One of ACSA's objectives is to promote and facilitate the development of efficient and innovative custodial and investment administration practices, and we feel that the lack of standardization and automation in the AGM/proxy voting process makes the overall framework inefficient. ACSA believes that meetings should be viewed in a similar light to other corporate actions in this respect and we therefore support the inclusion of meeting notices with proxy forms (as well as results notices) within the ASX's initiative to improve the process for lodging and disseminating announcements relating to corporate actions.

ACSA values the leadership that the ASX has shown in regards to this initiative and we believe that it will deliver lasting improvements as a result of increased automation and standardization.

ACSA would therefore like to see meeting notices, proxy voting forms and results notices delivered in a standardized and electronic format as part of the ASX initiative.

5.3.3
Should there be provisions for companies to send information about an AGM directly to the beneficial owners of shares held by nominees and, if so, what type of information?

Response

ACSA members believe that under the current conditions – whereby a custodian has an omnibus holding that represents the positions of beneficiaries at many underlying layers – that having companies directly engaging those beneficiaries would be impractical and costly. However ACSA also acknowledges that future developments may present the opportunity for improvements in the overall notification and voting framework.

ACSA believes that as this is a very complex issue with a large number of participants who hold differing views and concerns, and that a consultative approach should be applied towards any proposal to commence the direct engagement of beneficiaries. ACSA believes that having an informed and holistic understanding of these issues is essential before deciding on a course of action.

5.3.3
Should there be any provision for beneficial owners of shares in a company to participate in the AGM of that company and, if so, how?

Response

Given that beneficiaries have the ability to direct their custodian to appoint a proxy or corporate representative of their choosing (a right that they exercise often), ACSA believes that beneficial owners already have the ability to participate in the AGM.

There are however procedural aspects associated with these forms of participation that present administrative challenges and can sometimes limit the ability of custodians to comply with such requests.

A corporate representative may be appointed right up until the commencement of a meeting however it is also ACSA's understanding that a corporate representative is implicitly granted the ability to vote over the entire holding associated with their appointment. In other words custodians are unable to limit the number of shares that a corporate representative may vote over in respect of a given holding.

As a means to ensure that a corporate representative does not vote over shares belonging to other beneficiaries, custodians segregate the holding relating to that appointment into a new discrete registered holding. In doing so the corporate representative is only given the power to vote on the shares relating to their appointment.

However this means that the beneficiary must instruct the custodian of their desire to appoint a corporate representative before the voting record date. If a beneficiary wishes to appoint a

corporate representative after the record date there is no value in splitting out a holding and the appointment can only be made if that beneficiary holds 100% of the entitled to vote holding.

In order to remove the splitting out requirement and to allow corporate representative appointments right up until the start of the meeting, ACSA advocates a change in the rules that would allow custodians to limit the number of shares that a corporate representative may vote over.

The ability of a holder to appoint only two proxies presents additional challenges for custodians. If a custodian receives instructions to appoint more than two proxies then the ability to carry out those instructions is similarly limited. Some ACSA members have recently noted a steep increase in the number of times that this is happening. Given that custodians act on behalf of many underlying beneficiaries ACSA believes that custodians should not be limited to appointing only two proxies for any one registered holding.

Voting

5.8
What changes, if any, should be made to the current requirements concerning:
- *informing shareholders of their right to appoint a proxy*

Response

Please refer to ACSA's earlier responses in relation to the electronic dissemination of all aspects of meeting documentation (including the proxy form) and the problems associated with limiting custodians to the appointment of only two proxies per holding.

- *the proxy form*
- *notifying the company of the proxy appointment*

Response

In line with earlier responses ACSA believes that methods that allow for the proxy appointment to be validly lodged via electronic means should be made available for all shareholders for all meetings. This would provide shareholders with the opportunity to submit, amend and withdraw votes right up until the deadline date, improving the efficiency and efficacy of the proxy voting process.

- *the record date and the proxy appointment date*

Response

In conjunction with a move to electronic voting methods, ACSA members support the bringing forward of the record date so that it is two business days (ASX Settlement days) before the voting date.

Such a change would allow custodians and their clients time to understand their voting entitlements before the votes are submitted to the company. This sequence would give the custodian complete ability to ensure that over-voting by any of their clients did not take place.

ACSA views the ability to understand entitlements and then accurately execute shareholder instructions in accordance with the event's regulations as being fundamental to good practice in investment administration. Our belief is that in respect of proxy voting this can only be achieved by having a record date 2 business days before the voting date.

Via the use of electronic voting platforms this sequence of dates could also prevent over-voting at the registered holding level. The electronic voting system would be populated with the final voting entitlement and the shareholder would be restricted to voting on that many shares.

5.9
Should direct voting before the meeting be provided for by legislative or other means, and if so what matters should be covered in any regulatory structure?

Response

ACSA's view is that if direct voting is provided for, that the ability to vote electronically is made available to all meetings.

5.11
Should there be legislative or other recognition of online voting during the course of an AGM and, if so, in what respects should this form of voting be regulated?

Response

Should online voting during the course of an AGM be introduced ASCA agrees that appropriate rules would need to be in place to deal with situations where there was a technology failure.

5.12
Do any issues arise concerning voting exclusions on resolutions that must, or may, be considered at an AGM and, if so, how might those issues best be resolved?

Response

Please refer to ACSA's earlier responses in relation to voting exclusion clauses and companies being required to obtain waivers prior to the AGM notice going out.

5.13
Should any changes be made to the current provisions regarding voting by show of hands?

Response

ACSA does not support voting by a show of hands. ACSA believes that such a voting method disadvantages shareholders who are unable to attend meetings and that votes should be counted according to each shareholder's proportional interest in a company.

ACSA believes that voting by a show of hands should be removed in favour of voting on all matters by way of poll.

5.151
Should any steps be taken to promote more consistency in the disclosure to the market of voting results?

Response

ACSA believes that voting results should be standardized and made available in an electronic format. In line with our earlier response we believe that the dissemination of voting results should be within the scope of the ASX initiative surrounding the automation of corporate action announcements in order to bring greater efficiency to this space.

Globalisation
5.18
Are there any problems in the voting or other aspects of AGMs for overseas holders of shareholding interests in Australian regulated companies?

Response

Given the multiple layers of intermediaries between some beneficiaries and the end custodian, overseas based beneficiaries may be required to submit their voting instructions significantly earlier than Australian shareholders.

It is ACSA's belief that moving from paper-based voting methods towards an electronic standard would allow custodians to set a response deadline that was closer to the voting cut-off, allowing more time for international shareholders to vote.

If you have any questions in regards to this submission, please contact Stephen Hacker on (03) 9659 2361.

Yours sincerely

Andrew Bastow
ACSA Director

Australian Shareholders' Association
STANDING UP FOR SHAREHOLDERS

Level 7, North Tower
1-5 Railway Street
Chatswood NSW 2067
PO Box 519
Chatswood NSW 2057

ABN 40 000 625 669
Telephone 1300 368 448
or (02) 9411 1505
Fax (02) 9411 6663
Email share@asa.asn.au
Web www.asa.asn.au

Mr John Kluver
Executive director
Corporations & Markets Advisory Committee (CAMAC)

Friday, December 21, 2012

Email: john.kluver@camac.gov.au; camac@camac.gov.au

RE: Submission on 'The AGM and shareholder engagement' discussion paper

Dear Mr Kluver,

Thank you for the opportunity to comment on CAMAC's discussion paper, 'The AGM and shareholder engagement'. The Australian Shareholders' Association was founded in 1961 as a representative body for retail investors in Australia with a specific mission related to "standing up for shareholders".

We are the only organisation in Australia which systematically engages with companies, publishes voting intentions, aggregates proxy votes and then actively participates in debate and voting at AGMs.

Whilst there are a number of proxy advisory firms which provided private voting advice to institutional investors, we are the only Australian organisation servicing retail investors and do so in a much more public way, hence the importance of the AGM to our activities.

ASA strongly supports the retention of the physical AGM for listed companies as it often provides the only opportunity for retail investors to engage with company boards and management directly.

That said, we do recognize there are ways and means to improve the relevance and operation of the AGM.

Attracting more attendees to AGMs

ASA has traditionally advocated for AGMs to be held during business hours, a position which reflects the profile of our membership, many of whom are retired.

However, in light of falling attendance numbers in recent years, ASA is prepared to be more flexible and support evening AGMs if that is a change which facilitates greater participation.

Similarly, ASA notes that Adelaide has consistently proved itself to be the "shareholder attendance capital of Australia", drawing larger numbers to meetings than other cities. Maybe it is worth trying to understand why this is the case.

In hosting AGMs, companies need to be more focused on "putting on a show" which engages shareholders, rather than treating the gathering as a compliance event.

ASA has long observed that companies which go to the trouble of reasonable catering or providing "shareholder showbags" are usually rewarded with more vibrant and better attended AGMs.

Better managing AGM debate

ASA is well aware of criticism that AGMs can be hijacked by special interests or long-winded dissertations on irrelevant issues such as customer complaints.

Anyone who has sat through a 4 hour Telstra or BHP-Billiton AGM in recent years knows that it is not an enjoyable or constructive experience.

However, untidy public discussion is no reason to jeopardise the key function of AGMs which is an accountability mechanism for owners and their agents on the board.

In recent years, the bigger problem of AGMs has been a lack of debate – ASA representatives are often the only speakers at AGMs as occurred again in 2012 at major public companies such as Myer, Seek and Carsales.com.

AGMs would be a lot better if the brokers, fund managers and research analysts took the opportunity to ask well-researched questions in public. Instead, these professional players use other forums or direct engagement to access information.

This situation leaves ASA as the most important stakeholder and participant on this question around the future of the AGM.

We completely support the retention of the AGM but do acknowledge there are areas of improvement.

For instance, many chairs are too tolerant of long-winded speakers pursuing irrelevant issues.

ASA has no problem if a chair wishes to restrict shareholders to a set time frame or a limited number of questions, provided no shareholder is prevented from commenting on a specific item of business or that the overall debate is not needlessly curtailed.

The best run AGMs will commence with 20-30 minutes of formal presentations and then conclude after approximately 1 hour of debate featuring contributions from a range of speakers.

However, if a company has run into trouble, AGMs can still be thoroughly worthwhile after much lengthier debate as was the case with Fairfax Media's 2012 AGM which ran for 3 and a half hours.

The worst AGMs conclude after just a few minutes when board don't take the trouble to make detailed presentations and then shareholders decline to engage in debate.

Extending the AGM timeframe

ASA volunteers find the AGM season extremely taxing because so many meeting occurs in the peak months of October and November.

To help spread the load across a more workable time frame, ASA would support an extension of 1 month which would give companies a total of six months after their year-end to conduct the AGM.

Embracing new technology to extend debate

Larger listed companies are progressively moving to webcast their AGMs which is an important development that can be delivered in a cost-effective manner.

However, there is still no ability for shareholders to participate in AGMs remotely.

If analysts can ask questions on conference calls, it should be possible for retail investors to ask questions remotely during debate at AGMs. This concept is no different from the age old process of talk back radio, although priority should obviously be given to registered shareholders in the room.

Similarly, there is currently limited public record made of debate conducted at AGMs.

Chairs and CEOs routinely release their prepared statements and slides to the ASX – often before the AGM has even commenced – yet there is no record of answers given to questions.

If there is no archive of AGM webcasts, then companies should be encouraged to publish transcripts of AGM debates on their website.

Avoiding the "dead rubber" effect

If AGMs are to be energized, one possible reform would be to extend voting – both direct and through proxies – until after the AGM has concluded.

At the moment, the vast majority of votes are submitted before the proxy voting deadline 48 hours before the AGM.

This has the effect of turning the AGM into the Davis Cup equivalent of a "dead rubber" because the voting decisions have already been made. The political equivalent of this would be Julia Gillard and Tony Abbott having their televised leaders debate next year on the Monday after polling day.

Whilst some useful debate can occur at AGMs discussing the proxy votes – it might be preferable to have both an indication of voting trends at the meeting, plus a further opportunity for shareholders to vote after receiving information (via the media, or directly) about the AGM debate.

Boards will take AGMs more seriously if they don't go into them knowing the voting outcome and there is a possibility that their performance could influence the final voting outcome.

Polls versus a show of hands

ASA has traditionally defended the use of a show of hands at AGMs so that the views of those shareholders who have taken the trouble to attend the meeting can be reflected.

However, ASA recognises that only a tiny proportion of shareholders participate in the show of hands which also gives the same voting power to a holder with 10 shares versus someone who own 10 million shares.

Historically, the most important aspect of the show of hands has been the "deterrent effect" where the media might report that a company was "forced to take a poll" by shareholders attending the AGM. This extended the effective influence of retail investors who often took a harder line on remuneration issues than institutional investors.

The advent of the "two strikes" legislation has seen many more companies opt to take an automatic poll on all items, something which is normally spelt out in the notice of meeting.

ASA has not objected to this development as it also means we are able to vote undirected proxies in the poll.

The following data on the latest AGM season is relevant to our evolving position:

BHP-Billiton: only 481 shareholders attended the AGM in Sydney but ASA represented 3107 shareholders who owned 13.6m shares worth approximately $470 million.

National Australia Bank: only 315 shareholders attended the AGM in Perth but ASA represented 3048 shareholders who owned 11.77m shares worth approximately $315 million.

Woolworths: 490 shareholders attended the AGM in Adelaide but ASA represented 2304 shareholder who owned 6.83m shares worth approximately $200 million.

When you consider that more than 80% of ASA-held proxies are undirected, there are an increasingly large amount of retail proxy votes which are not being voted at AGMs where resolutions are passed on a show of hands.

It is for this reason that ASA is now prepared to support a voting system which mandates polls at AGMs because the current system has literally seen billions of dollars worth of undirected ASA proxies left un-voted in a show of hands.

Retention of the proxy voting system

ASA regards the aggregation and voting of proxies of undirected proxies on behalf of retail investors as one of its most important emerging functions.

Many thousands of Australian investors do not feel confident or informed enough to direct their votes on all resolutions conducted at the AGMs of ASA-listed companies. Instead, they prefer to give undirected proxies to the ASA which will then engage with companies, attend the AGM and vote in a considered way.

Given that participation in Australia remains disappointingly low at about 6% of all registered holders, ASA believes the following steps should be considered:

Companies should not be able to direct their share registry provider to exclude ASA in the drop down box for investors who choose to cast their proxy votes online.

Investors who wish to appoint ASA – or anyone else – as their permanent proxy through a standing proxy form should be able to do this through their broker for their entire portfolio, rather than having to fill in an individual form for each holding.

Whilst ASA recognizes that companies such as ASX Ltd and Cochlear are now offering direct voting as an alternative to proxy voting, the vast majority of votes are still cast using the proxy voting system.

ASA will strongly oppose any move to abandon the proxy voting system and move to a compulsory direct voting system because this will disenfranchise those retail investors who are increasingly choosing to out-source their voting function to ASA.

Indeed, one of the best ways to reduce the disappointing no-show by an average of 94% of all holders in a listed company is to facilitate the greater use of standing proxy appointment as outlined above.

AGMs, EGMs and the 100 signature rule

ASA has never called an EGM of shareholders and regards such a move as only warranted in extraordinary circumstances.

Therefore, we are open to discussion on the question of whether it is too easy for 100 small shareholders to call an EGM, given the cost involved.

However, we would only contemplate supporting change in this area if it was made easier for shareholders to propose resolutions for debate and vote at the AGM, given the costs will be incurred anyway.

ASA notes that in the US any shareholders who has continuously held more than $US2000 worth of shares for 12 months can propose a shareholder resolution for the annual meeting. To do this in Australia you need 100 signatures from shareholders or support from those who own more than 5% of the company.

ASA has gathered 100 signatures on a number of occasions for the distribution of S249P statements ahead of AGMs and we note that it requires a significant administrative effort to complete.

We also note that Australia has one of the lowest thresholds for external candidates wishing to contest a board election as the Corporations Law sets no limit and most company constitutions only require a single shareholder to nominate the candidate.

Putting it simply, a package of sensible reforms on these matters would make it easier for shareholder resolutions at AGMs and slightly harder to call an EGM.

And like the system in New Zealand, companies should be compelled to advise the ASX in advance of the deadlines for shareholder resolutions and board nominations.

Record date for AGMs

ASA supports reforms proposed by other bodies such as ACSI which would make the record date for voting at an AGM 5 business days before the meeting.

Annual elections for directors

ASA notes that the likes of BHP-Billiton, Rio Tinto and News Corporation have now all moved to annual elections of directors because of legislative provisions in the US and UK.

Whilst this does notionally increase the level of accountability on the full board, it also serves to reduce scrutiny on individual directors.

ASA has observed News Corp executive chairman Rupert Murdoch limit debate at AGMs held in the USA by only allowing one period of debate related to all items of business.

If a move to annual elections in Australia had the effect of allowing companies to deal with the election of directors as one item of business, ASA would be less likely to support it.

At the moment, we support a system which sees a typical AGM deal separately with between 1 and 4 directors seeking a 3 year term.

We always encourage directors facing election to address the meeting and, if necessary, answer questions, as this better enables shareholders in attendance to assess the candidate's credentials.

Managing board succession is a key issue for listed companies, many of which allow directors to stay for too long. The conclusion of 3 year term is often a good time to manage board succession issues and it is not clear that annual elections would necessarily facilitate more timely board renewal.

Stephen Mayne
ASA Policy and Engagement Co-ordinator

Ian Curry
ASA Chairman

CGI Glass Lewis
Suite 8.01, Level 8
261 George Street
Sydney NSW 2000
Australia

Tel: +61 2 9299 9266
Fax: +61 2 9299 1866

21 December 2012

Via email: john.kluver@camac.gov.au & camac@camac.gov.au

Mr. John Kluver
Executive Director
Corporations and Markets Advisory Committee
GPO Box 3967
Sydney NSW 2001

Discussion Paper – The AGM and Shareholder Engagement

Dear Mr. Kluver:

CGI Glass Lewis appreciates the opportunity to comment on the Discussion Paper ("DP") issued by the Corporations and Markets Advisory Committee ("CAMAC") regarding The AGM and Shareholder Engagement. The DP covers many important topics concerning shareholder engagement, annual report requirements and the annual general meeting ("AGM"). The comment period coinciding with the Australian proxy season resulted in time constraints which made it difficult to address all of the topics covered in the DP. As such, the focus of this response is limited to the role of the proxy advisor ("PA").

CGI Glass Lewis has been providing in-depth proxy research and analysis on ASX-listed companies from its Sydney headquarters since 1994, and is a subsidiary of Glass, Lewis & Co. ("Glass Lewis"), a leading independent governance services firm that provides proxy voting research and recommendations to a global client base of over 900 institutional investors that collectively manage more than US$15 trillion in assets.

Clients use Glass Lewis (and CGI Glass Lewis) research to assist them with their proxy voting decisions and to engage with companies before and after shareholder meetings. Glass Lewis' web-based vote management system, ViewPoint, provides clients with the ability to reconcile and vote ballots according to custom voting guidelines and to audit, report and disclose their proxy votes. Glass Lewis is an independent wholly-owned subsidiary of the Ontario Teachers' Pension Plan ("OTPP").

CGI Glass Lewis welcomes CAMAC's examination of shareholder engagement and the role of PAs in that process. Through its DP, CAMAC seeks feedback from market participants on whether legislative or other initiatives should be adopted to promote standards for PAs and investors using PAs. The rationale behind the perceived need for legislative support of these standards is specifically related to questions about the influence of proxy advice on investor voting behaviour; accuracy, independence and reliability of proxy advice; potential conflicts of interest; and advisor transparency with regard to issuer communications, voting policies and recommendations.

The following sections address the role of PAs, the questions driving the discussion of standards and a possible alternative to legislated standards. In each of these categories, CGI Glass Lewis' policies align with Glass Lewis' policies and the two entities can be identified interchangeably.

CGI GLASS LEWIS

CGI Glass Lewis
Suite 8.01, Level 8
261 George Street
Sydney NSW 2000
Australia

Tel: +61 2 9299 9266
Fax: +61 2 9299 1866

Role of Proxy Advisors

As described in the 2012 study by Tapestry Networks and the IRRC Institute, PA guidelines and recommendations are used by investors in different ways. While most respondents to the study employ custom policies and may use a PA's recommendations as "a point of reference", some investors have adopted a PA's policy as their own policy.

Contrary to some observers' comments, investors that elect to adopt a PA's policy are not abdicating their fiduciary responsibility. It is a decision that is made after significant analysis and consideration of the advisor's research methodologies, operations and controls. Issues typically covered by investors during their initial and annual due diligence reviews include: voting policies, models used in the analysis of remuneration, market-by-market regulatory reviews, research oversight, quality control, research personnel, conflict management and error management, among others. These reviews are conducted by people from various parts of the organisation, including investment management, compliance and/or risk management departments, as well as proxy committees and fund trustees, among other groups.

Exercising the rights of ownership with respect to voting is a monumental operational task, given the lack of global communication standards for the electronic distribution of proxies and the execution and confirmation of votes; the challenges investors and PAs face in sourcing proxy materials and other company disclosures; and the disconnect between the regulations governing disclosure deadlines and the vote cutoffs set by each link in the chain of intermediaries including custodian banks, ballot distribution agents and vote tabulators.

As it stands today, given the constraints and challenges inherent in the proxy voting system, PAs provide the data, research and tools that allow investors to focus on the most critical part of the engagement process. As such, any regulation that limits how investors use PAs for research or recommendations or prescribes how PAs must develop their research should take into consideration the regulatory and operational realities of being able to make informed voting decisions and execute votes in a timely fashion.

Influence of Proxy Advice on Investor Voting Behaviour

According to a recent study[1] on the use of PAs by US mutual funds:

> "Those who believe that asset managers blindly follow proxy adviser recommendations point to the correlation statistics as proof for their argument. These correlations are interesting, but correlations alone 'do not allow us to clearly map out the causal relationships.[2]' [Stephen] Choi, [Jill] Fisch, and [Marcel] Kahan noted that although they found significant correlation between

[1] Robyn Bew and Richard Fields, "Voting Decisions at US Mutual Funds: How Investors Really Use Proxy Advisers," a report commissioned by the IRRC Institute, (Tapestry Networks), June 2012.
[2] James Cotter, Alan Palmiter, and Randall Thomas, "ISS Recommendations and Mutual Fund Voting on Proxy Proposals," *Villanova Law Review* 55, no. 1 (2010), 3.

CGI GLASS LEWIS

CGI Glass Lewis
Suite 8.01, Level 8
261 George Street
Sydney NSW 2000
Australia

Tel: +61 2 9299 9266
Fax: +61 2 9299 1866

> proxy advisory recommendations and how asset managers voted, there was also 'a substantial correlation between proxy advisor recommendations and the factors that academics, policy makers, and the media have identified as important.[3]' According to this view, the proxy firms' positions essentially mirror the current consensus on good governance. If this is the case, then the proxy advisory firms' influence on voting outcomes is much smaller than correlation might indicate. … In their sample, Choi, Fisch, and Kahan found 'excessive deference to ISS recommendations appears less of a concern than excessive deference to management recommendations.[4]'"

Regarding the suggestion that "investors may not appropriately verify the recommendations they receive, which is seen by [European Securities and Markets Authority ("ESMA") survey] respondents as a 'box-ticking' approach," the mutual fund study provides a number of anecdotes that support the counter-arguments listed in this section:

> "The widespread use of proxy firms' automated voting platform services likely contributes to the perception that proxy advisers exert a high degree of influence in final voting decisions, but as one participant [in the Tapestry mutual fund study] said, "*The first [application of voting guidelines] is only the beginning.*" No voting policy, however customized or comprehensive, can cover every instance of every governance issue for every company, every year. It became clear from our conversations that voting decision-making is a complex and dynamic process that defies generalizations.[5]"

And, on 17 January 2012, Larry Fink, Chairman and CEO of BlackRock, said in a letter regarding its engagement strategy:

> "On behalf of our clients, BlackRock seeks to ensure that the companies in which we invest pursue corporate governance practices consistent with long-term business performance. To this end, as a fiduciary for our clients, we seek to engage in dialogue with the leadership of these companies to address issues that may be raised during the proxy season. … We think it is particularly important to have such discussions – with us and other investors – well in advance of the voting deadlines for your shareholder meeting, and prior to any engagement you may undertake with proxy advisory firms. … We reach our voting decisions independently of proxy advisory firms on the basis of guidelines that reflect our perspective as a fiduciary investor with responsibilities to protect the economic interests of our clients."

Furthermore, the recent study regarding the use of PAs by US mutual funds noted that:

---

[3] Stephen J. Choi, Jill Fisch, and Marcel Kahan, "Voting Through Agents: How Mutual Funds Vote on Director Elections," (University of Pennsylvania, Institute of Law and Economics Research Paper No. 11-28, NYU Law and Economics Research Paper No. 11-29), 17 August 17 2011, 9.

[4] Stephen J. Choi, Jill E. Fisch, Marcel Kahan, "The Power of Proxy Advisors: Myth or Reality?," Emory Law Journal 59 (2010), 20.

[5] Robyn Bew and Richard Fields, 19.

CGI GLASS LEWIS

CGI Glass Lewis
Suite 8.01, Level 8
261 George Street
Sydney NSW 2000
Australia

Tel: +61 2 9299 9266
Fax: +61 2 9299 1866

> "The wide variance in approaches to deliberation on voting matters shows that many different roads can lead to the same vote outcome. One asset manager observed, "So many people overstate the importance of ISS. Just because we reached the same conclusion, it doesn't mean we didn't do our own thinking." Another wondered where critics draw the line in their suspicion about investors' information sources: "Are we not supposed to read the Wall Street Journal and the New York Times either?" However, participants also recognize that given the lack of transparency in investors' voting decision making, it is easy for outside observers to conclude that asset managers are unduly influenced by external forces such as proxy firms.[6]"

In some cases, investors have developed a longstanding approach to certain issues. In Australia, and in many other similar markets, these include a general preference (in most cases) for a majority independent board and limitations on post-employment benefits for departing executives. On a global basis, such issues include views towards antitakeover devices like poison pills and separating the roles of chairman and CEO. These issues have been reviewed extensively for decades by most investors, who tend to treat certain proposals (such as those to dismantle or require shareholder approval of antitakeover devices or to appoint an independent chairman) as more routine since these proposals require very little additional evaluation. However, on issues such as mergers, investors take a very case-by-case approach and do not have standing policies applied uniformly without regard to each circumstance.

While there are many reasons investor votes and proxy advisor recommendations are aligned, the most prevalent is that the groups share the same investment philosophy and time horizon (i.e. making voting decisions and recommendations to foster sustainable, long-term performance) and, therefore, treat governance issues the same way. To be sure, proposals with a more direct financial impact that do not lend themselves to analysis based on specific voting guidelines, are reviewed more closely by investors than routine proposals. For these routine proposals, it is efficient and appropriate to develop a standard approach. However, this does not mean that investors feel the issue is necessarily less important; it reflects the view that the direct effect of such proposals on shareholder returns is lower and, therefore, does not warrant the same attention. As fiduciaries, investment managers necessarily focus their attention on issues that are more likely to have a direct financial effect on the company.

Accuracy, Independence and Reliability of Proxy Advice

Glass Lewis has an obligation to provide high quality, timely research to its institutional investor clients, based on the analysis of accurate information obtained from public disclosure.

Glass Lewis was founded on the principle that each company should be evaluated based on its own unique facts and circumstances, including performance, size, maturity, governance structure, responsiveness to shareholders and, last but not least, location. Therefore, Glass Lewis has policy approaches for each of the 100 countries where it provides research on public companies. These policies are based in large part on the regulatory and market practices of each country. Glass Lewis engages in discussions with clients, public companies and other relevant industry participants and observers in the

[6] Robyn Bew and Richard Fields, 25.

CGI GLASS LEWIS

CGI Glass Lewis
Suite 8.01, Level 8
261 George Street
Sydney NSW 2000
Australia

Tel: +61 2 9299 9266
Fax: +61 2 9299 1866

development and refinement of these proxy voting policies. Glass Lewis applies general principles, including promoting director accountability, fostering close alignment of remuneration and performance, and protecting shareholder rights across all of these policies, while also closely tailoring them to recognise national and supranational regulations, codes of practice and governance trends, size and development stage of companies, etc.

In developing individual reports, Glass Lewis relies only upon publicly-available information; it will not incorporate information into its research that is not available to clients and other shareholders. When Glass Lewis analysts require clarification on a particular issue, they will reach out to companies but otherwise generally refrain from meeting privately with companies during the solicitation period, which begins when the notice of meeting is released. Throughout the year, however, Glass Lewis hosts "Proxy Talk" conference calls to discuss a meeting, proposal or issue in depth; these calls are recorded and open to the public. Outside the solicitation and proxy season blackout periods, Glass Lewis is open to meeting with companies to discuss research policies and methodologies, as well as perspectives on both general topics and issues specific to the company. Indeed, Glass Lewis meets with hundreds of public companies each year in person or by phone.

Glass Lewis employs an experienced, highly-educated, multi-disciplinary team that leverages formal training and real-world experience in finance, accounting, law, business management, public policy and international relations. Many team members have advanced degrees and experience in subjects relevant to governance and finance. Regardless of education or experience, analysts must go through the Research Associate Training Program, which provides a comprehensive overview of the industry in general and the Glass Lewis research process. After completing the training program, all new hires are placed into relevant teams and practice areas based on their experience, education, language proficiency, profession and interest to enable further specialisation.

Throughout the year, analysts monitor regulatory and corporate governance practices in the markets for which they are responsible in order to ensure the research approach to each company under coverage is consistent with local-market codes, guidelines and best practice and is reflective of general principles applicable to all public companies, such as director accountability, protection of shareholder rights and promotion of a closer link between pay and performance.

Glass Lewis supplements its full-time analyst staff with research associates ("RAs"), who are responsible for gathering relevant information for the research reports, set up the framework of reports and provide an initial draft of some reports, depending on the size of the company and the nature of the issues up for vote, based on the appropriate voting guidelines. RAs undergo extensive classroom and hands-on training and are subject to close oversight by permanent analysts.

Multiple analysts collaborate in writing research reports based on the complexity and breadth of the issues presented to shareholders. Depending on the size of the company being analysed, and the complexity and nature of the issues, the report will be edited by at least two additional senior analysts up to and including a Director of Research, a Vice President of Research, the Managing Director of Mergers & Acquisition Analysis and/or the Chief Policy Officer.

CGI GLASS LEWIS

CGI Glass Lewis
Suite 8.01, Level 8
261 George Street
Sydney NSW 2000
Australia

Tel: +61 2 9299 9266
Fax: +61 2 9299 1866

Glass Lewis typically publishes its reports on AGMs approximately three weeks prior to the meeting date. Publishing times may vary depending on the timing of disclosure and the types of issues up for vote. Analysis on mergers and acquisitions and other financial transactions, for example, is generally published closer to meeting date. These publication targets provide clients with sufficient time to review reports, perform additional analysis and make final voting decisions in advance of the voting deadlines.

Potential Conflicts of Interest

Proxy research providers, like many companies, may face conflicts in conducting their business. In the case of PAs, potential conflicts generally fall into three categories: (i) business, such as consulting for issuers or selling research reports to asset manager divisions of public companies or issuers; (ii) personal, where an employee, an employee's relative or an external advisor to the PA serves on a public company board; or (iii) organisational, such as being a public company itself or being owned by an institutional investor.

Glass Lewis prides itself on avoiding conflicts of interest to the maximum extent possible. As a result, it does not enter into business relationships that conflict with its mission: To serve institutional investors in the capital markets with objective advice and services. However, Glass Lewis recognises it is not possible to be completely conflict-free. Where conflicts exist, it is absolutely critical for advisors to proactively and explicitly disclose those conflicts in a manner that is transparent and readily accessible for clients.

Four factors are key to Glass Lewis' management of potential conflicts: (i) Glass Lewis does not offer consulting services to public corporations or directors; (ii) Glass Lewis maintains its independence from OTPP by excluding OTPP from any involvement in the development of proxy voting policies and vote recommendations; (iii) Glass Lewis relies exclusively on publicly-available information for the purpose of developing its recommendations. Glass Lewis avoids off-the-record discussions with companies during the proxy solicitation period to ensure the independence of its research and advice – something that is highly valued by clients – and to avoid receiving information, including material non-public information, not otherwise available to shareholders; and (iv) Glass Lewis maintains strict policies, reviewed and revised annually, governing personal, business and organisational relationships that may present a conflict in independently evaluating companies. The policies, which all employees acknowledge receipt of at the beginning of each year, are disclosed on its public website.

As part of its continued commitment to customers, Glass Lewis has an independent Research Advisory Council ("Council"). The Council ensures that Glass Lewis' research consistently meets the quality standards, objectivity and independence criteria set by Glass Lewis' research team leaders. The Council, chaired by Charles A. Bowsher, former Comptroller General of the United States, and supported by Robert McCormick, Glass Lewis' Chief Policy Officer, includes the following experts in the fields of corporate governance, finance, law, management and accounting: Kevin J. Cameron, cofounder and former President of Glass, Lewis & Co.; Jesse Fried, Professor of Law at Harvard Law School; Bengt Hallqvist, Founder of the Brazilian Institute for Corporate Governance; Stephanie LaChance, Vice President, Responsible Investment and Corporate Secretary, PSP Investments; David Nierenberg, President of Nierenberg Investment Management Company; and Ned Regan, Professor, Baruch College.

CGI GLASS LEWIS

CGI Glass Lewis
Suite 8.01, Level 8
261 George Street
Sydney NSW 2000
Australia

Tel: +61 2 9299 9266
Fax: +61 2 9299 1866

Furthermore, Glass Lewis maintains additional conflict disclosure and avoidance safeguards to mitigate potential conflicts. These apply when: (i) a Glass Lewis employee, or relative of an employee of Glass Lewis, or any of its subsidiaries, a member of the Council, or a member of Glass Lewis' Strategic Committee serves as an executive or director of a public company; (ii) an investment manager customer is a public company or a division of a public company; (iii) an issuer purchases a copy of a published report in advance, to be received only after institutional customers receive it (iv) a Glass Lewis customer submits a shareholder proposal or is a dissident shareholder in a proxy contest; and (v) when Glass Lewis provides coverage on a company in which OTPP holds a stake significant enough to be subject to public disclosure rules regarding its ownership in accordance with the local market's regulatory requirements; or Glass Lewis becomes aware of OTPP's disclosure to the public of its ownership stake in such company, through OTPP's published annual report or any other publicly available information disclosed by OTPP.

In each of the instances described above, Glass Lewis makes full, specific and prominent disclosure to its customers on the cover of the relevant research report. Just as companies bear the burden to disclose potential conflicts, Glass Lewis recognises that the onus should be on the conflicted party to disclose any potential conflicts. In addition, where any employee or relative of an employee is an executive or director of a public company, that relationship is not only disclosed, but that employee plays no role in the analysis or voting recommendations of that company.

Advisor Transparency – Issuer Communications, Voting Policies and Recommendations

Since CGI's founding in 1994, the CGI Glass Lewis research team has actively engaged with hundreds of ASX-listed companies in meetings outside the solicitation period, Proxy Talks, forums and other industry events. The purpose of these meetings is to foster dialogue and understanding of CGI Glass Lewis' policies and business model, and to provide transparency of our processes, as well as to learn about specific company practices. Companies may also purchase a copy of our published report(s), but whether they purchase a report or not has no bearing on whether CGI Glass Lewis will meet with the company.

On an annual basis, all companies in the S&P/ASX 300 are contacted directly and provided with a fact sheet that outlines our operations, corporate engagement policy and contact details. The CGI Glass Lewis Fact Sheet and Corporate Engagement Policy for 2012 is a publicly available document and can be found at the conclusion of this CAMAC submission as an addendum.

Further, since the US Securities and Exchange Commission ("SEC") issued its Concept Release on the US proxy system in 2010, Glass Lewis has been actively engaging with all the stakeholders in the proxy voting process (i.e. investors, issuers and their advisors, regulators, and academics). Through these discussions, it became abundantly clear that Glass Lewis needed to provide easier access to information about its proxy voting policies, methodologies and models for analysing governance matters, policies and procedures for managing conflicts and information on how and when to contact Glass Lewis.

In early 2012, Glass Lewis launched its Issuer Engagement Portal, designed to enhance communication and understanding among issuers, investors and Glass Lewis. Through this portal, issuers have access to

CGI GLASS LEWIS

CGI Glass Lewis
Suite 8.01, Level 8
261 George Street
Sydney NSW 2000
Australia

Tel: +61 2 9299 9266
Fax: +61 2 9299 1866

information on Glass Lewis' approach to analysing proxy issues, including director elections, compensation, financial transactions and shareholder proposals on environmental, social and governance matters, among others. Issuers can also use the portal to request a meeting with Glass Lewis, propose a topic for a Proxy Talk conference call (a public forum that enables companies or dissident shareholders to discuss issues in an open dialogue, as described earlier in this submission) and to notify Glass Lewis of any updated company disclosures or potential data discrepancies.

As previously stated, Glass Lewis often engages in discussions with companies outside the proxy season, but generally does not engage in private discussions with companies during the proxy solicitation period.

In its opinion on ESMA's discussion paper regarding the proxy advisory industry, the Securities and Markets Stakeholder Group expressed strong views regarding the importance of relying exclusively on publicly-available information for the purpose of developing its recommendations:

> "The market abuse regime prohibits the selective disclosure of inside information. Thus, when contacting management of a publicly traded company or any other relevant party, the PA must take all reasonable steps to ensure that it does not receive inside information that may contravene the prohibition."[7]

Glass Lewis strongly believes its analysis, research and recommendations should be based on publicly available information. To that end, it encourages companies to clearly and comprehensively disclose information about relevant issues for consideration by shareholders.

In the event that CGI Glass Lewis' analysts require clarification on publicly disclosed information they will reach out to a company. In addition, CGI Glass Lewis will consider any additional public disclosures by the company during the solicitation period, but subsequent to the publishing of our report. If we believe this information is material and there is a reasonable amount of time prior to the meeting date, we will consider republishing our report with the new information and will always highlight whether or not any of our recommendations have changed as a result.

Glass Lewis' policy is formulated via a ground-up approach that involves a wide range of market participants, including clients, issuers, academics, corporate directors, subject matter experts, etc. It takes into consideration relevant corporate governance standards, company, local regulations and market trends. Glass Lewis' Chief Policy Officer oversees the development and implementation of the proxy voting policies, in consultation with the Research Advisory Council, an external group of prominent industry experts. The guidelines are tailored to each country's relevant regulations, practices and corporate governance codes. Glass Lewis revises and enhances the guidelines annually in response to regulatory developments, market practices and issuer trends. The guidelines are not applied in a 'one-size-fits-all' manner, but are implemented to reflect the unique characteristics of each company.

[77] Securities and Markets Stakeholder Group, "ESMA's Discussion Paper on Proxy Advisors – Opinion of the SMSG," VII Quality of the Advice, no. 21.

CGI GLASS LEWIS

CGI Glass Lewis
Suite 8.01, Level 8
261 George Street
Sydney NSW 2000
Australia

Tel: +61 2 9299 9266
Fax: +61 2 9299 1866

Alternative to Legislated Standards

Glass Lewis believes that no action should be taken to create legislative standards for PAs. Alternatively, the industry should develop a set of global standards, based on input from various stakeholders that would apply to proxy advisory practices in all markets to the benefit of all global investors.

The reasons for this view include:

- *Investors are fiduciaries that already hold advisors accountable. The market does work.*

Institutional investors have a fiduciary responsibility to vote proxies in a manner that is in the best interests of their beneficiaries. It has been Glass Lewis' experience, as a provider of governance services to over 900 institutional investors across the globe, that investors take this responsibility very seriously. Institutional investors hold PAs accountable for providing objective, high-quality research services that are developed and delivered in accordance with client instructions. In addition, PAs must meet the requirements set forth by their clients for managing and disclosing conflicts of interest. If an advisor fails to meet the standards and requirements set forth by the client, that client always has the option to select another provider.

As noted by the Productivity Commission report Executive Remuneration in Australia (December 2009):

> "Institutional investors have a fiduciary duty requiring them to vote in the best interest of their clients. In addition, while proxy advisers may have incentives to highlight poor corporate governance practice, they will need to be able to back up their recommendations, or risk losing credibility and clients.[8]"

- *Proxy advice is one component of a large voting chain, which includes issuers, ballot distributors, custodians, sub-custodians and registrars, among other participants. Research development by PAs is dependent on the activities of several members of this chain. It would be inappropriate and potentially harmful to investors if quasi-binding or binding instruments were mandated without mandating related instruments for other participants in the chain.*

For example, vote deadlines set by custodians and sub-custodians are a business decision and may vary for the same meeting. Furthermore, in Australia approximately 80% of AGMs for ASX-listed companies are held in the months of October and November, with the majority of those held in November.

Therefore, investors and their advisors are highly constrained, with meeting deadlines difficult for both PAs in meeting research delivery targets and institutions in meeting varying voting deadlines, and any roadblocks to timely access to information, ballot distribution, or communication between the various parties creates tremendous strain on the proxy voting system.

[8] Productivity Commission, "Executive Remuneration in Australia", December 2009, 314.

CGI GLASS LEWIS

CGI Glass Lewis
Suite 8.01, Level 8
261 George Street
Sydney NSW 2000
Australia

Tel: +61 2 9299 9266
Fax: +61 2 9299 1866

Separately, the Productivity Commission has previously considered mandating the nature of advice (i.e. preventing recommendations on resolutions) provided by proxy advisers and has rejected such proposals on the basis that:

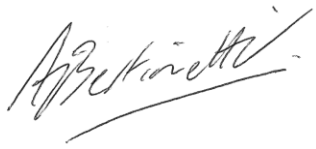
> "Since investors are not obliged to follow the guidance of proxy advisers, even if some have that as their default position, such a proposal seems excessive and could perversely result in a reduction in the availability of relevant market information.[9]"

- *A proliferation of differing regulatory instruments or industry-developed standards by various markets throughout the world would be potentially burdensome for both investors and PAs, impacting shareholder rights and creating barriers to entry into the proxy advisory industry.*

Glass Lewis welcomes the opportunity to work with members of the proxy advisory industry in developing a set of standards that could apply globally and work locally, governing policy and research development; conflict management and disclosure; and transparency.

Please do not hesitate to contact us if you would like to discuss any aspect of our submission in more detail.

Respectfully Submitted,



Aaron Bertinetti, Director, Research & Communications (CGI Glass Lewis)

Bridget Murphy, Director, Research Operations (CGI Glass Lewis)

John Wieck, COO (Glass Lewis)

[9] Productivity Commission, "Executive Remuneration in Australia", December 2009, 314.

CGI Glass Lewis
Suite 8.01, Level 8
261 George Street
Sydney NSW 2000
Australia

Tel: +61 2 9299 9266
Fax: +61 2 9299 1866

CGI Glass Lewis Fact Sheet

CGI Glass Lewis is a subsidiary of Glass, Lewis & Co., the leading independent governance analysis and proxy voting firm with a global client base of 850+ institutions that collectively manage more than $17 trillion in assets. With research focused on the long-term financial impact of investment and proxy vote decisions, Glass Lewis empowers institutional investors to make sound decisions by uncovering and assessing governance, business, legal, political and accounting risk at more than 20,000 companies in 100+ countries. Glass Lewis is an independent wholly-owned subsidiary of Ontario Teachers' Pension Plan ("OTPP") Board, one of the largest pension plan investors in the world.

Including its history prior to being acquired by Glass Lewis in 2006, CGI Glass Lewis has been providing in-depth proxy research and analysis on ASX-listed companies from its Sydney headquarters since 1994. CGI Glass Lewis is the parent company's largest operation outside of the United States and provides strategic support beyond research on Australian companies.

Key details regarding CGI Glass Lewis' staff and operations:

- CGI Glass Lewis' research team currently includes 8 permanent analysts based in Sydney. Within the global organisation this team is responsible for providing detailed reports for all ASX, NZX and JSE-listed companies. In 2012, this universe includes approximately 750 publicly-traded entities. In addition, this team includes specialised local-market support for the global mergers and acquisitions group.
- Outside of the proxy season, this Sydney-based research team also actively engages with institutional clients, ASX-listed company board members (see page 2) and other stakeholders/advisers in the corporate governance field.
- The Sydney office's client services and operations team provides local-market support for all Australian-based proxy voting clients, which currently manage over $350 billion in aggregate. This team also provides operational support to North American and UK-based proxy voting clients.
- In 2011, Australia became the first non-U.S. market in which Glass Lewis launched its "Pay-for-Performance" analysis. This quantitative analysis of companies' remuneration and performance represented the most significant enhancement to our "Proxy Paper" reports since CGI's acquisition by Glass Lewis, and now provides the consistent framework and historical context to enable our clients to more easily determine how well companies link remuneration with performance. This Pay-for-Performance analysis is included in CGI Glass Lewis' Proxy Papers for all S&P / ASX 300 companies.
- Launched in 2009, CGI Glass Lewis' "E&S Advisory Paper", produced in association with CAER, is designed specifically to address the evolving need for our clients to identify and manage E&S risks and opportunities within their portfolios, and to do so with the quality and readability that our Proxy Paper clients have come to expect.
- In March 2012, CGI Glass Lewis co-hosted its sixth annual Remuneration Forum. The Remuneration Forum is a half day of presentations and panel discussions providing an unique opportunity for institutional investors, corporate executives, and non-executive directors to have a frank and practical exchange on key governance issues in executive and non-executive remuneration.

CGI GLASS LEWIS

CGI Glass Lewis
Suite 8.01, Level 8
261 George Street
Sydney NSW 2000
Australia

Tel: +61 2 9299 9266
Fax: +61 2 9299 1866

Corporate Engagement Policy

Corporate meetings: Continuing a practice since CGI's founding, in 2011 the CGI Glass Lewis' research team met with well over 100 ASX-listed companies. The purpose of those meetings was to foster dialogue and understanding of CGI Glass Lewis' policies and business model, and to provide transparency to our processes, as well as to learn about company practices.

Publicly available information: CGI Glass Lewis' proxy research and recommendations are based solely on publicly available information; we rely only on public information that is also available to all shareholders.

Non-solicitation period: When our analysts require clarification on a particular issue they will reach out to companies, **but otherwise will not meet with companies during the solicitation period**, beginning from **the date a notice of meeting is released**, to discuss the details of their meeting or the merits of specific proposals.

Blackout periods: However, outside the solicitation period and our **proxy season blackout periods (April, May, September, October, November),** CGI Glass Lewis' analysts are open to meeting with any company to provide clarification as to our business model, operations, guidelines, and our perspective on general items within our area of expertise, as well as to learn about the specific aspects of that company.

Additional disclosures: Companies are also welcome to notify CGI Glass Lewis when additional disclosures have been made during the solicitation period, but subsequent to the publishing of our research report. If we believe the new information would be useful for our clients and there is a reasonable amount of time prior to the meeting date, we will consider republishing our report with the new information and will always highlight whether or not any of our recommendations have changed as a result.

"Proxy Talk": From time to time, CGI Glass Lewis will host "Proxy Talk" conference calls to discuss a meeting, proposal or issue in depth. CGI Glass Lewis' clients are able to listen to the call and submit questions to the speakers, with representatives from CGI Glass Lewis' research team serving as moderators. Proxy Talks are held prior to the publishing of our research in order to glean additional information that we (and our clients) consider as part of our analysis. Typically calls are held to provide the participants (e.g., company representatives, dissidents, shareholder proposal proponents) an open forum to provide further colour on specific issues. We believe this is an effective way for companies to reach our client base directly, empowering our clients and fostering improved disclosure of the relevant facts.

Corporate subscription: Companies may also purchase a copy of their proxy research report, but whether they purchase the report or not has no bearing on whether CGI Glass Lewis will meet with the company.

Like to know more? If your company would like to learn more about CGI Glass Lewis or schedule a call or meeting, you can do so by calling +61 (2) 9299 9266 [locally: (02) 9299 9266], or by sending an email to info@cgiglasslewis.com

HERBERT
SMITH
FREEHILLS

Mr John Kluver
Executive Director
Corporations and Markets Advisory
Committee

john.kluver@camac.gov.au

cc: camac@camac.gov.au

21 December 2012
By email

Dear John

Submission on CAMAC Discussion Paper — the AGM and Shareholder Engagement

The Head Office Advisory Team of Herbert Smith Freehills is pleased to provide this submission on the Discussion Paper issued by the Corporations and Markets Advisory Committee (**CAMAC**) on 14 September 2012 regarding, 'The AGM and Shareholder Engagement' (the **Discussion Paper**).

We have a few broad observations that we would like to share with CAMAC in relation to the matters raised in the Discussion Paper. Those observations are as follows:

1 CAMAC should be slow to recommend additional regulation

Over the last few years, public companies in Australia have had to grapple with a significantly increased regulatory burden, particularly in the area of executive remuneration and in other governance related requirements.

Against that background, CAMAC should be slow to recommend additional regulation of the issues raised in the Discussion Paper. Shareholder engagement, annual reports and the AGM are not matters of a nature that warrant major regulatory change. Change for the sake of change should be avoided.

2 AGMs should focus on the retail shareholder

In our view, there is little merit in abolishing the AGM. Such a move would deny retail shareholders one of their few opportunities to observe or participate in discussion about the company. AGM preparation does involve a significant investment of time and resources from both management and directors. However, that is rarely begrudged by those involved.

Any changes to the format of the AGM should take into account that:

- the typical listed company AGM is focused on engagement and interaction with retail shareholders;
- institutional shareholders already have, and make good use of, other mechanisms for engagement with the Company; and
- AGM participants as a whole would benefit from greater public recognition of the role of the Chair. The Chair can and should ensure that the AGM is not dominated by small activist interest groups, or 'serial AGM attendees', in a manner which prevents the majority of retail shareholders from engaging in meaningful discussion with the Board.

MLC Centre Martin Place Sydney NSW 2000 Australia
GPO Box 4227 Sydney NSW 2001 Australia
Telephone +61 2 9225 5000 Facsimile +61 2 9322 4000
www.herbertsmithfreehills.com DX 361 Sydney

HERBERT
SMITH
FREEHILLS

3 Current practices facilitate shareholder engagement

We consider that there is little merit in extending the scope of the AGM into an interactive process running for more than a few hours. Such a move would present a huge distraction for both management and Boards and would facilitate a relatively small increase in shareholder input. Institutional shareholders can, and will, look after themselves. Interested retail shareholders already have a meaningful opportunity to participate by asking questions in person or by sending written questions in advance of the meeting and observing via webcast.

4 The 100 member rule for requisitioning a meeting should be repealed

The Discussion Paper asks whether there should be any amendment to the rule allowing 100 members (irrespective of the size of their shareholding) to call a general meeting.

We submit that yes, the rule should be repealed. The rule in its current form was introduced without any real public consultation. The form of the rule is, as far as we are aware, unique to Australia and is open to abuse by special interest groups. The experience of Australian corporations has shown that the cost and distraction involved in holding an extraordinary general meeting (as opposed to adding a shareholder-requisitioned resolution to the business of a scheduled AGM) is so significant as to outweigh any theoretical regulatory benefit. Successive legislative attempts to correct the rule have been defeated due to a combination of political reasons and apathy. The rule remains a significant flaw in the *Corporations Act 2001* (Cth).

We look forward to hearing CAMAC's recommendations following the consultation process.

Yours sincerely

Quentin Digby
Partner
Herbert Smith Freehills

+61 2 9322 4470
+61 419 381 883
quentin.digby@hsf.com

Charmaine Roberts
Solicitor
Herbert Smith Freehills

+61 2 9225 5683
charmaine.roberts@hsf.com

Broadridge (Australia) Pty Ltd.
Level 13 (Suite 2)
50 Margaret Street
Sydney NSW 2000
P: +61 2 90341700
F: +61 2 90341701

December 21, 2012

Corporation and Markets Advisory Committee
GPO Box 3967
Sydney NSW 2001

Attention: john.kluver@camac.gov.au
cc: camac@camac.gov.au

RE: The AGM and Shareholder Engagement Discussion Paper September 2012

This letter represents the comments of Broadridge Financial Solutions, Ltd[1]. ("Broadridge") in response to the Corporations and Markets Advisory Committee ("CAMAC") discussion paper *"The AGM and Shareholder Engagement."* Broadridge previously submitted a letter to CAMAC regarding the future of AGMs and related shareholder communication systems on 01/08/12.

For more than 25 years, Broadridge has been an active participant in the dialogue on shareholder communication issues globally. We provide the benefits of our experience and expertise, as well as access to important quantitative data for regulators and other market participants. In addition, we value and invest heavily in continuous improvement, particularly in technological solutions that support the principles of efficient information access and delivery, high levels of investor engagement and participation, and improved transparency and governance in investor communications.

There is significant interest from market participants around the world to improve the way capital markets function. We're developing locally-tailored proxy and investor communication solutions to address the needs of both mature and emerging markets, within local regulatory frameworks. Broadridge supports CAMAC's objective of reviewing the effectiveness of the mechanisms that support retail and institutional shareholder engagement, in particular the AGM, and including:

- the future of the annual general meeting in Australia, including how documents and meeting forms should change to meet the needs of shareholders in the future
- the risks and opportunities presented by advancements in technology, in the context of maintaining the ongoing relevance and efficacy of the AGM
- the challenges posed to the structure of the AGM by globalisation, including potential increases in international share ownership and dual-listing

We believe the questions raised by CAMAC in all aspects of the interrelationship between a company and its shareholders are relevant and important. However, we have limited our comments to those questions where are our experience and expertise is particularly relevant, and where possible, included quantitative data to illustrate key points.

[1] Broadridge is a technology services company focused on global capital markets. Broadridge is the market leader enabling secure and accurate processing of information for communications and securities transactions among issuers, investors and financial intermediaries. Broadridge builds the infrastructure that underpins investor and proxy communications in 90 countries. For more information about Broadridge, please visit www.broadridge.com.

Introduction

Technology has enabled tremendous improvements in the shareholder communication processes in the past 25 years. It has delivered significant efficiencies, reduced costs and improved the speed and accuracy with which issuers communicate with both their retail and institutional investors. It has increased equity in investor communications, and continues to promote greater engagement of investors. Technology is making markets more transparent and ultimately improving investor confidence.

3. Shareholder Engagement

3.4 Questions for Consideration

Could greater use be made of technology to promote shareholder engagement outside the AGM, and if so, how?

Innovative new technologies are being successfully deployed to support shareholder engagement and voter participation, as well as reduce costs for participants. In addition, these solutions are providing greater transparency, accountability and improved corporate governance in shareholder communications.

Broadridge builds communications solutions that are deployed globally. These solutions support issuers, custodians, brokers and retail and institutional investors in markets where the regulatory framework exists, and could be deployed according to guidance set forth in an engagement plan as envisioned in the discussion paper and recommendations in the ASX *Corporate Governance Council Principles and Recommendations*.

One such solution is Shareholder Forum. Shareholder Forum has been designed to provide an online meeting place where corporate issuers can interact with both institutional and retail investors 365 days a year. Shareholders can voice their opinions directly to management and receive a response and view the opinions of other shareholders. Under U.S. law, issuers can use electronic forums to communicate with shareholders and others. Certain technologies enable participants to distinguish between comments made by shareholders and non-shareholders without compromising investors' rights to privacy. This platform may be particularly relevant in support of the communication and meeting protocols suggested by the discussion paper.

In Australia, the proposed Meeting Date (MD) -4 Record Date (RD) would improve the process for determining entitlements for applications like Shareholder Forum and Virtual Shareholder Meeting (discussed later in this response) though may need to be more rigorous than currently envisioned. Further improvements in the determination of entitlement would also improve proxy vote processing.

4. The Annual Report

The prevalence of the Internet provides a meaningful opportunity to make shareholder communications more cost effective for the corporate issuer. Even more significant, it represents a new model in shareowner communication – a model based on "investor choice". By providing shareholders with choice regarding how they receive materials, there is greater opportunity to engage them in the communication process.

4.4 Questions for Consideration

How might technology best be deployed to increase the accessibility of annual reports?

In the U.S. and Canada, new delivery mechanisms that leverage the ubiquity of the Internet are being deployed to provide retail and institutional shareholders with greater access to corporate information, including the annual report and proxy communications. Predicated on a model of investor choice, electronic delivery accommodates an array of choices, including material selection, delivery method, and method of access to information. Broadridge's preference management systems have been designed to allow investors self-select their preferences, improving their level of engagement while helping to reduce costs for issuers.

Electronic delivery of these materials is well established in these jurisdictions. In the 2012 proxy season, e-delivery was utilized to send materials to 35.4 million shareholders – a 13% increase over last year and an all-time high[2].

An alternative delivery method, known as Notice and Access, was introduced in the U.S. in 2007 and will be available in Canada in March 2013. Instead of automatically sending shareholders a complete set of proxy materials by mail (typically consisting of an annual report, proxy statement, and voting card), companies may choose instead to mail a "Notice of Internet Availability of Proxy Materials" (the "Notice"). Among other points of information, the Notice lists an Internet website address where shareholders may access proxy materials online.

Notice and Access offers many benefits to issuers and shareholders. Corporate issuers have the opportunity to reduce printing and postage expenses. There will also be an environmental benefit as less paper is likely to be recycled or go into landfills, and carbon emissions will be reduced as physical delivery of documents declines.

Another innovative delivery mechanism is Investor Mailbox. Investor Mailbox provides shareholders access to investor communications, including annual reports, through their broker's web site.

All of these delivery mechanisms are improving the accessibility of information for shareholders, and therefore improving opportunities to engage them in the ownership of the companies in which they've invested. As initiatives to provide access to broadband services for all Australians continue, the use of Internet-based delivery mechanisms becomes increasingly viable.

---

[2] Broadridge Financial Solutions, Inc., 2012 Proxy Season Statistics
http://www.broadridge.com

5. The Annual Meeting

5.8.10 Proxy speaking and voting at the AGM

What changes, if any, should be made to the current requirements concerning:
any other aspects of proxy voting?

Good corporate governance and the effectiveness of the proxy process depend on informed decision-making and active participation by all shareholders. Transparent, efficient communication is fundamental to good corporate governance and a strong capital markets globally. Broadridge supports proxy voting in 90 countries around the world, and participants in all those markets are successfully using technology-based solutions that will enable better communications between corporations and their investors.

In the 2012 proxy season in North America, ProxyVote.com, our Internet platform for retail investors, accounted for nearly twice as many shares voted as by paper voting forms. In addition, we are seeing significant adoption on our Mobile ProxyVote.com site in Canada and the U.S. There were over 445,000 votes cast this past season through Mobile Proxyvote.com, a nearly four-fold increase over last season. About 30% of mobile votes were previously non-voters[3]. Mobile ProxyVote.com allows an array of mobile devices to seamlessly integrate with ProxyVote.com through a sophisticated graphical interface.

Also in the 2012 proxy season, Broadridge launched a pilot program featuring Quick Response codes (QR codes) on forms of proxies for beneficial holders for six issuers sent to over 1.1 million shareholders. QR codes are incredibly data-rich, and by scanning them with a smart phone or tablet, investors are immediately directed to the voting site. Starting in 2013, all forms of proxy for beneficial holders for Canadian issuers will contain a QR code to encourage further investor participation and help reduce costs through the use of electronic communications. This innovative use of technology in proxy voting represents an investor engagement best practice in North America.

Virtual or hybrid AGM's allow online voting during the AGM, as well as, the opportunity for shareholders to submit questions during the meeting. We discuss our Virtual Shareholder Meeting solution in greater detail below.

5.15.1 Disclosure to the market

Should any steps be taken to promote more consistency in the disclosure to the market of voting results?

Australia is one of the few countries that currently require that listed companies immediately post meeting results after the meeting has been held. This is an excellent best practice that supports transparency.

[3] Ibid, Broadridge Financial Solutions, Inc., 2012 Proxy Season Statistics

An example of another best practice related to voting transparency for market participants is the University of Delaware working group's recommendations regarding end-to-end vote confirmation. This past season, four U.S. issuers worked together with Broadridge and made end-to-end vote confirmation available to over 1.5 million institutional and retail shareholders. In addition, we are seeing interest from institutional investors and issuers in Canada and other countries around the world to introduce an end-to-end vote confirmation process that would allow both retail and institutional investors to confirm positively that their shares have been voted and represented at an issuer's meeting.

Broadridge supports the goal of improving transparency in the proxy voting process in order to maintain market integrity and the health of the Australian economy and capital markets. We recently provided comment on amendments to the Financial Services Committee's (FSC) Standard No 13: Voting Policy, Voting Record and Disclosure. Producing records of voting audit and activity are straightforward with automated reporting and disclosure platforms, like Broadridge's ProxyDisclosure.

5.18 Globalisation

Are there any problems in the voting or other aspects of AGMs for overseas holders of shareholding interests in Australian regulated companies?

As identified in the discussion paper, the globalization of capital markets and subsequent growth in foreign ownership of Australian companies creates the need to ensure consistency in the method of proxy information delivery and in the method of voting, especially to investors whose shares are held in multiple accounts across multiple financial intermediaries around the world. ProxyEdge® is an important technology used by institutional investors, financial advisors and others for notification of proxy events and information, voting and filing compliance reports. It accounts for approximately 80% of all beneficial shares voted globally.

ProxyEdge simplifies the management of institutional proxies. Over 4,000 institutional investors use ProxyEdge to manage, track, reconcile and report proxy voting instructions through electronic delivery of ballots, online voting, and integrated reporting and record keeping. ProxyEdge provides proxy information through an automated electronic interface based on share positions provided directly to Broadridge by intermediaries. Institutional shareholders have the ability to reconcile their shares available for voting and votes cast using Broadridge's ProxyEdge institutional voting platform. The use of this efficient, integrated platform makes it easier to reconcile votes and allows votes to be cast closer to the meeting date.

Electronic voting channels have improved voting participation by domestic and foreign shareholders in Australia. Another approach to improve proxy voting is to examine the establishment of a record date.

6.3.2 Options for change

For some or all public companies, and if the AGM is retained in some manner, what legislative or other initiatives, if any, should there be in regard to the possible formats of the AGM?

In this context, what technological developments might be taken into account in considering possible formats for the AGM?

It is a generally accepted cornerstone of sound corporate governance that shareholder participation is a key component of a successful annual meeting of shareholders. From a governance perspective, the annual meeting often serves as an opportunity for management to update shareholders on company developments, for shareholders to ask questions of management and directors, to consider shareholder proposals and to review the company's performance. In recent years, there has been ongoing dialogue regarding best practices, or safeguards, to ensure that annual meetings are accessible, transparent, efficient, and meet the corporate governance needs of shareholders, boards and management.

Virtual Shareholder Meeting (VSM) provides a channel for active engagement with shareholders through increased and enhanced participation in the annual meeting process. The shareholder meeting is delivered via the Internet through a streamed audio and/or video content. Validated shareholders have the ability to watch the proceedings, post questions and tender their votes. Virtual Shareholder Meeting can be used in conjunction with the physical meeting (also known as a hybrid meeting) or as a stand-alone virtual meeting. Since its launch in 2010, over 100 meetings have offered this means of efficient, secure, and convenient online participation.

Online participation in shareholder meetings presents an opportunity, through the use of technology, to improve corporate governance by allowing shareholders to attend and participate in shareholder meetings, regardless of their location, and to increase communications among shareholders, management and directors. Online shareholder participation in a shareholder meeting allows a company to:

- Take advantage of emerging and social technologies
- Reach shareholders wherever they are located
- Give shareholders (including shareholders that might not be physically able to attend a shareholder meeting in person) the opportunity to access and participate in the annual meeting process
- Achieve potential cost savings for companies and shareholders alike
- Reduce the environmental impact of the annual meeting (i.e., lower the carbon footprint of annual meetings by reducing travel by management, the board and shareholders)
- Enhance retail participation in meetings by allowing such shareholders to vote directly online during the meeting[4]

[4] Guidelines for Protecting and Enhancing Online Shareholder Participation in Annual Meetings
The Best Practices Working Group for Online Shareholder Participation in Annual Meetings ~ June 2012
http://www.calstrs.com/CorporateGovernance/shareholder_participation_annual_meetings.pdf

In Closing

We appreciate the opportunity to comment on the CAMAC discussion paper. We would be pleased to discuss these opportunities further if it would be of assistance and look forward to working with CAMAC and other market participants to support best practice standards in proxy and shareholder communications in Australia.

Sincerely,

John Ryan
Head of Business Development Australasia
Broadridge
Investor Communication Solutions, Ltd.

Governance for Owners

December 2012

Submission to the Corporations and Markets Advisory Committee ("CAMAC")

In response to CAMAC's September 2012 Discussion Paper

The AGM and shareholder engagement

Lodged by/Contact
Sandy Easterbrook
Regional Advisor – Australia
Governance for Owners

mobile: +61 (0) 431 440 409
e-mail: s.easterbrook@g4owners.com

Contents

www.g4owners.com

Adding value through responsible activism

Authorized and regulated in the UK by the Financial Services Authority

Governance for Owners

26 Throgmorton Street, London EC2N 2AN

Tel: +44 (0) 20 7614 4759

Scope of this submission

The CAMAC Discussion Paper identifies for review three general areas affecting the ongoing interrelationship between a company and its shareholders:

1. shareholder engagement
2. the annual report
3. the AGM

and invites submissions from interested parties on all or any of those areas.

This submission deals with the area of shareholder engagement, on which the CAMAC Discussion Paper, in Section 3.4 on page 42 of the Paper, invites submissions "on a number of questions set out below, or on any other aspect of shareholder engagement".

The questions set out in Section 3.4 are:

> "**Should legislative or other initiatives (for instance, additional ASX Corporate Governance Council, or other, guidance) be adopted, and if so for what reasons, concerning**:
>
> • the role of the board collectively as it relates to engagement with institutional/retail shareholders throughout the year, including leading up to the AGM
>
> • **the role of particular board members, such as the board chair or the chairs of board committees, in relation to engagement with institutional/retail shareholders**
>
> • **the role of institutional shareholders throughout the year**, including leading up to the AGM. In this context:
>
> — **is there a problem with having a peak AGM season and, if so, how might this matter be resolved**
>
> — **should at least some institutional shareholders be required or encouraged to report on the nature and level of their engagement with the companies in which they invest, in the manner provided for in the UK Stewardship Code or otherwise**
>
> • corporate briefings
>
> • **the role of proxy advisers**, including:
>
> — **standards for investors using proxy advisers, including the extent to which these investors should be entitled to rely on the advice of proxy advisers in making voting decisions, or, alternatively, whether those investors should have some obligation to bring an independent mind to bear on these matters**.
>
> — **standards for proxy advisers**
>
> • **any other aspect of shareholder engagement**?
>
> Could greater use be made of technology to promote shareholder engagement outside the AGM and, if so, how?
>
> **Should there be an amendment to the right of 100 members to call a general meeting of a company?"**

In relation to shareholder engagement, this submission addresses:

— **the questions highlighted in the above list** in Section 3.4, **and**

www.g4owners.com
Adding value through responsible activism
Authorized and regulated in the UK by the Financial Services Authority

Governance for Owners
26 Throgmorton Street, London EC2N 2AN
Tel: +44 (0) 20 7614 4759

- the following additional issues:
    - **The importance of Australia introducing a stewardship code on a comply or explain basis**
    - **caveats on the introduction in Australia of a stewardship code**
    - **independent (i.e. outside the UK Stewardship Code) UK developments/initiatives to improve dialogue between listed entities and institutional investors, in which GO has played an active role**

Finally, this submission addresses the right of 100 members to call a general meeting of a company.

www.g4owners.com
Adding value through responsible activism
Authorized and regulated in the UK by the Financial Services Authority

Governance for Owners
26 Throgmorton Street, London EC2N 2AN
Tel: +44 (0) 20 7614 4759

Authors of this submission and their credentials

This submission is made by Governance for Owners ("GO").

GO is dedicated to adding long-term value to institutional investor clients' equity holdings by exercising owners' rights through relational investing and active share ownership.

Specifically:

- GO is an independent UK-based partnership between major institutional share owners, including CalPERS (US) and Railpen (UK), a long-term financial backer (IPGL, private investment vehicle of Michael Spencer, CEO of UK listed entity ICAP) and GO's senior executives.

- GO is a specialist organisation offering relational activist investment funds and environmental, social and governance ("ESG") services to its institutional investor clients.

- The provision of relational shareholder engagement services is GO's core competency and has been since GO's foundation in 2004. GO's founding partners, Peter Butler and Steve Brown, have been actively involved in shareholder engagement funds and the provision of ESG services since 1998 when they founded the Hermes Focus Funds, and subsequently the Hermes Equity Ownership Service, at the major UK fund manager, Hermes Pensions Management ("Hermes"). Hermes is a wholly-owned subsidiary of the British Telecom pension fund, one of the largest pension funds in the UK.

- GO has offices in London, New York and Tokyo, and a global team of over 50 people of 20 nationalities.

Since its inception, GO has contributed actively to the debate in the UK and internationally on the subject of corporate governance, with emphasis on shareholder engagement and stewardship.

Recent contributions include:

1. GO's April 2010 submission to the UK Financial Reporting Council on its *Consultation on a Stewardship Code for Institutional Investors*
2. GO's January 2011 submission to the UK Department of Business, Innovation and Skills on its *Consultation on a Long-term Focus for Corporate Britain*
3. GO's November 2011 submission to the *Kay Review of UK Equity Markets and Long-Term Decision Making*
4. GO's early 2012 membership of a Working Party examining how to improve the quality of investor stewardship in the UK, culminating in the issue of the Working Party's March 2012 *2020 Stewardship Report: Improving the Quality of Investor Stewardship*.
5. GO's April 2012 submission to the UK Department of Business, Innovation and Skills on its *Executive Pay: Shareholder Voting Rights Consultation*
6. GO's continuing membership of the above Working Party, which in October 2012 asked the UK Institute of Chartered Secretaries and Administrators (ICSA) to take forward two of the Working Party *Report*'s recommendations, by developing a good practice guide to improve the quality of engagement activity, and identifying more ways for companies and institutional investors to seek and provide feedback on the quality of engagement meetings. A Steering Group, including GO founding partner Peter Butler, established by ICSA to help carry out this work is seeking responses by 30 November 2012 to its consultation document *Improving Engagement Practices by Companies and Institutional Investors*.

www.g4owners.com
Adding value through responsible activism
Authorized and regulated in the UK by the Financial Services Authority

Governance for Owners
26 Throgmorton Street, London EC2N 2AN
Tel: +44 (0) 20 7614 4759

The primary authors of this submission to CAMAC are GO Partner Simon Wong and GO Regional Advisor – Australia Sandy Easterbrook. Both are recognised in their local and international markets for their knowledge and practical experience in the governance field.

Simon's background prior to his work with GO includes roles as Head of Corporate Governance in the London office of Barclays Global Investors (acquired by BlackRock in 2009) and a management consultant at McKinsey & Company. Simon started his professional career as a securities lawyer with Linklaters & Paines and Shearman & Sterling in London, and also served as Principal Administrator/Counsel at the OECD in Paris. His other current roles include Adjunct Professor of Law at Northwestern University School of Law, Chicago and Visiting Fellow at the London School of Economics. Simon also sits on the Shareholder Affairs Committee of the National Association of Pension Funds (UK) and Investment Committee of Eumedion (Netherlands). Previously, Simon chaired the Shareholder Responsibilities Committee of the International Corporate Governance Network [www.icgn.org].

Sandy was a corporate and commercial partner for many years of the major law firm now called King Wood Mallesons. He left in the mid-1990s to found Australia's first governance and proxy advisory firm, Corporate Governance International, now called CGI Glass Lewis and part of the international Glass Lewis group headquartered in San Francisco. He was a principal/director of CGI/CGI GL until December 2010, then a consultant until mid-2011 and in those roles became familiar with major institutional investors and entities listed on the Australian Securities [formerly Stock] Exchange ["ASX"] and many of their principals, directors and senior executives. Along with other GO principals, he has a long involvement with the ICGN, including past service on its board and nominating committee. He is now an independent advisor in the governance area.

Other significant contributors to this submission to CAMAC are GO founding partner Peter Butler, GO CEO and partner Stephen Cohen and GO partner Eric Tracey.

GO also submitted a preliminary draft of this submission to selected senior representatives of major Australian institutional investors, whom GO regarded as experienced leaders in the governance area.

www.g4owners.com
Adding value through responsible activism
Authorized and regulated in the UK by the Financial Services Authority

Governance for Owners
26 Throgmorton Street, London EC2N 2AN
Tel: +44 (0) 20 7614 4759

Responses to questions posed in the discussion paper

Schedule 1 of this submission sets out some fundamental observations relating to the state and structure of the ASX-listed entity and Australian investor scenes. Readers not intimately familiar with those scenes are encouraged to read Schedule 1 before proceeding further in this submission.

Most of those fundamental observations are also valid, mutatis mutandis, in other western-style markets, including the UK, where GO is based.

GO's recommendations in this submission are a logical and natural outcome from those observations – i.e. those observations are the reasons for the recommendations.

To the extent necessary or appropriate, additional reasons are included below.

Should legislative or other initiatives (for instance, additional ASX Corporate Governance Council, or other, guidance) be adopted, and if so for what reasons…

1. GO's General Recommendations

Timing

Effective investor stewardship, including effective shareholder engagement, is a leading edge development of corporate governance.

Best practice in just about the whole corporate governance area, and certainly effective investor stewardship, is a work in progress.

The rate of progress is a function of other developments, which, in turn, are often creatures of economic development. That is why progress cannot be achieved through legislation, per se, or by best practice guidance if that is sought to be applied too early – i.e. before the economic developments have occurred that can make the best practice practical.

A good example of this is the need for the growth of super funds to acquire adequate internal resources and skills before they can practice effective investor stewardship, including effective shareholder engagement (this is also a good example of the value of the collective role of industry bodies such as ACSI) and robust monitoring of their fund managers. By way of comparison, many smaller pension funds in both Australia and the UK struggle to appreciate fully the importance of investor stewardship and to hold their fund managers to account on their stewardship-related activities.

So, GO's first recommendation is to hasten slowly in legislative or other initiatives in this area and, in particular, ensure that the underlying economic conditions make the initiative practical.

GO does, however, recommend that Australia introduce its own Stewardship Code for institutional investors on a comply or explain basis, building on the experience gained in other countries such as the UK and South Africa and subject to the caveats outlined in this submission.

Targetting

Next, any such initiative needs to be carefully thought through and designed so that:

1. It will reliably achieve a particular intended beneficial outcome that is not otherwise being achieved,

www.g4owners.com
Adding value through responsible activism
Authorized and regulated in the UK by the Financial Services Authority

Governance for Owners
26 Throgmorton Street, London EC2N 2AN
Tel: +44 (0) 20 7614 4759

2. It is articulated as such in the initiative, and
3. It does not have unintended undesirable consequences.

A good example of such a beneficial outcome is the mandatory disclosure of proxy voting results[1], made necessary by the understandable interest of shareholders to know these voting statistics and the refusal at the time of some ASX-listed entities to provide that disclosure on a voluntary basis.

Legislative or other initiatives?

As indicated above, effective investor stewardship, including effective shareholder engagement, is a work in progress. So it is important that any legislative or other initiatives remain up to date with that progress.

Legislation, by its nature, tends to be frozen in its point of time and tends not to be updated regularly. Consequently, legislation's best application in the governance area is in the mandating of compliance with an already articulated aspect of best practice, which, despite that articulation, is being ignored by a significant element of the target group of that best practice. The mandating of disclosure of proxy voting results referred to under the previous heading is, again, a good example[2].

A good example of a different type is the mandating of a minimum 28 days' notice for the convening of an annual or other general meeting of shareholders of ASX-listed companies[3]. This minimum period has been instrumental in providing institutional investors with sufficient time in an often protracted notification and voting chain to:

1. receive notice of resolutions submitted by ASX-listed companies for shareholder vote,
2. research and obtain advice on often complex issues relevant to making fully informed and well-considered proxy voting decisions on those resolutions, and
3. have that proxy vote delivered to the company prior to the expiry of the proxy voting period.

Even best practice **guidance**, such as the ASX Corporate Governance Council's recommendations, can delay progress in leading edge best practice if updating of the guidance is dependent on the agreement of representatives of disparate interest groups.

Conservative bureaucratic control of best practice guidance can have a similar drag effect and this is discussed further below in relation to the UK Stewardship Code.

These practical considerations further support GO's recommendation to hasten slowly in, and, in particular, to think carefully through any potential cons, as well as the perceived pros, of legislative or other initiatives in the area of effective investor stewardship, including effective shareholder engagement.

At the same time, where a decision has been made to develop best practice guidance, we would urge high-quality, leading edge and specific standards from the start because, due to inertia and other forces at work, subsequent revisions are often much more incremental. In the UK, for example, although the Financial Reporting Council had acknowledged an array of deficiencies in the original 2010 Stewardship Code, it decided against making significant revisions when it amended the Code earlier this year.

---

[1] In one of six 1998 governance-based amendments to the Corporations Act requested by the Australian Investment Managers' Association (forerunner of the Financial Services Council ["FSC"] and CGI

[2] Generally, legislation in the governance area is best suited to, and most successful in, the mandating of disclosure, as, for example, in relation to remuneration

[3] Another of the six 1998 governance-based amendments to the Corporations Act requested by the Australian Investment Managers' Association [forerunner of the FSC] and CGI

www.g4owners.com
Adding value through responsible activism
Authorized and regulated in the UK by the Financial Services Authority

Governance for Owners
26 Throgmorton Street, London EC2N 2AN
Tel: +44 (0) 20 7614 4759

2. GO's Specific Recommendations

2.1 "Should legislative or other initiatives (for instance, additional ASX Corporate Governance Council, or other, guidance) be adopted, and if so for what reasons, concerning:

> ***▪ the role of particular board members, such as the board chair or the chairs of board committees, in relation to engagement with institutional/retail shareholders"***

Board and committee chairs

The main initiative and responsibility in the ASX-listed entity for engagement with shareholders lies with the chairman of the board and committee chairs, in the latter case in relation to their respective detailed governance responsibility areas of financial reporting (audit committee), remuneration (remuneration committee) and board composition, renewal and succession planning (nomination committee).

This is now accepted and practical best practice and GO does not believe additional legislative or other initiatives are needed on this basic point.

Other points

However, GO feels there are associated and important points that should be stated:

- The chairman of the board and committee chairs should preferably all have appropriate experience and expertise for those roles and a sufficient period of service on the board of the ASX-listed entity to be well familiar with the entity's business[es].

  All this should be achieved as part of an ongoing seamless board renewal and succession planning process that is meaningfully and transparently explained to shareholders in the governance section of the entity's website and in the annual report.

  Conditions can occur when it is necessary and in the interests of the entity and investors for an outsider to be brought onto a board as chairman or committee chair. But too often that is a consequence of inadequate renewal and succession planning. In any event, the need for the introduction of the outsider should be meaningfully and transparently explained to shareholders in the ASX notification of the appointment and in the next annual report.

- Newly appointed directors should be given early opportunities to meet with interested shareholders (via the chairman of the board offering meetings to, or accepting meeting requests from, investors).

GO does not believe that these points require to be mandated by legislation, certainly at this time; but we do see merit in their being incorporated in influential guidance on an "if not, why not" basis, such as in the ASXCGC recommendations.

If, after a period of their inclusion in influential guidance, they are being ignored by a significant number of ASX-listed entities, consideration could then be given to their being mandated by legislation.

www.g4owners.com
Adding value through responsible activism
Authorized and regulated in the UK by the Financial Services Authority

Governance for Owners
26 Throgmorton Street, London EC2N 2AN
Tel: +44 (0) 20 7614 4759

2.2 *"Should legislative or other initiatives (for instance, additional ASX Corporate Governance Council, or other, guidance) be adopted, and if so for what reasons, concerning:*

- *the role of institutional shareholders throughout the year, including leading up to the AGM. In this context:*
  - *is there a problem with having a peak AGM season and, if so, how might this matter be resolved*
  - *should at least some institutional shareholders be required or encouraged to report on the nature and level of their engagement with the companies in which they invest, in the manner provided for in the UK Stewardship Code or otherwise"*

The role of institutional shareholders throughout the year

Engagement is an on-going and increasingly important activity between shareholders and ASX-listed entities. There is an increasing practice in both Australia and the UK for as much engagement as possible, especially on conceptual, strategic or potentially controversial issues, to take place outside AGM season, when both parties are less rushed. We would also stress that *regularity* of interactions between companies and their largest shareholders is itself important (i.e., even in the absence of contentious issues) as a way to develop and sustain mutual trust and understanding. In Australia and the UK, many companies seek to meet their largest shareholders at least annually as a matter of routine to review strategy, governance and related matters.

But, whereas the accepted responsibility in the ASX-listed entity for engagement with shareholders lies with the chairman of the board and committee chairs, the counterpart in the case of institutional investors is often less clear. In particular, voting and engagement on governance-type issues may be handled by a different part of the institutional investor from the analysts or others who research the stock, monitor performance for investment purposes and deal on such issues with the ASX-listed entity.

This can lead to confused and unexpected outcomes for the ASX-listed entity, which may have thought that it had obtained the investor's support for proposals discussed with one part of the investor only to find that the voting decision on the proposals made by a different part of the investor did not support the proposals.

There is a need for better disclosure by many institutional investors on how they deal with those issues and, consequently, with whom in the investor and on what issues and when ASX-listed entities should deal.

This disclosure, and other improvements to the quality of engagement activity, could best be achieved by the development of a best practice guide, as is currently being worked on in the UK under the mantle of the Institute of Chartered Secretaries and Administrators ["ICSA"] – see further below.

Peak AGM season

There is no doubt that having a peak AGM season[4], during which most ASX-listed entities present all or most of their proposals each year for shareholder vote, compresses the period for shareholder decision-making on how to vote on such proposals and for due lodgement of those votes[5].

[4] In Australia during October and November each year for the bulk of ASX-listed entities – i.e. those with financial years ended June 30 or July 31

[5] There is also a mini (i.e. less intense) AGM season in Australia during April and May for the much smaller number of entities with financial years ended December 31; and even smaller numbers of entities have financial years ending March 31 or (for some major banks) September 30

www.g4owners.com
Adding value through responsible activism
Authorized and regulated in the UK by the Financial Services Authority

Governance for Owners
26 Throgmorton Street, London EC2N 2AN
Tel: +44 (0) 20 7614 4759

Theoretically, if this intense period of activity could be spread over a longer period, both ASX-listed entities and institutional and other investors would be less rushed and, arguably, would respectively have more time to do a better job.

There are, however, sound reasons for ASX-listed entities having similar balance dates. These include ease of comparison by analysts of the performance of entities, especially those in particular industries or otherwise appropriate peers for performance measurement, and safeguarding of taxation revenue (which is why Australian Tax Office approval is required for an entity to change its balance date).

In practice, the peak AGM season is a fact of life and it is more productive to explore ways to make it more efficient and manageable.

As indicated under the previous heading, one way to lighten the load, which is increasingly being practised, is to conduct as much engagement as possible, especially on conceptual, strategic or potentially controversial issues, outside the peak AGM season. Thereby, key issues can be mutually explored early and proposals for shareholder vote can thereby be tailored by the ASX-listed entity with maximum prospect of receiving shareholder support.

Reporting by institutional shareholders

Institutional investors, both fund managers and super funds, should report periodically on their voting, engagement and other stewardship-related activities.

We would stress that reporting by fund managers to their super fund clients should comprise both written reports and face-to-face meetings. Face-to-face meetings are an important complement to written reports because they give super funds opportunities to obtain a deeper understanding – fund managers, for instance, may legitimately be reluctant to include in written reports the details of specific engagements.

As to the content of reporting, fund managers should seek to provide their clients insights on the *quality* of voting and engagement activities, for example:

- Resources allocated to voting and engagement activities, including the experience and expertise of voting/engagement personnel and the involvement of fund managers and senior executives
- Key objectives and initiatives pursued during the period in question
- Significant developments and issues encountered during the preceding period, including successful and unsuccessful interventions and explanation of differences in outcomes
- The extent to which voting and engagement activities have been integrated into the investment process and have impacted investment decisions
- The extent to which the level of resources allocated and activities undertaken meet client expectations as specified in investment management agreements.

Super funds, which themselves carry out voting, engagement and other stewardship-related activities, should report periodically (along similar lines as above) to their members on those activities.

GO does not believe that these disclosures require to be mandated by legislation, certainly at this time; but we do see merit in their being incorporated, as part of other improvements to the quality of engagement activity, in a best practice guide to be developed as recommended above.

Whether such a guide should be contained in a stewardship code, which also covers other matters - see further below.

www.g4owners.com
Adding value through responsible activism
Authorized and regulated in the UK by the Financial Services Authority

Governance for Owners
26 Throgmorton Street, London EC2N 2AN
Tel: +44 (0) 20 7614 4759

2.3 ***"Should legislative or other initiatives (for instance, additional ASX Corporate Governance Council, or other, guidance) be adopted, and if so for what reasons, concerning:***

the role of proxy advisers, including:

- ***standards for investors using proxy advisers, including the extent to which these investors should be entitled to rely on the advice of proxy advisers in making voting decisions, or, alternatively, whether those investors should have some obligation to bring an independent mind to bear on these matters.***
- ***standards for proxy advisers"***

Use of proxy advisers

There is no legislative or other requirement for institutional investors to use proxy advisers.

Proxy advisers are a creature of the market and to exist, and continue to exist, they must satisfy the needs of their more or less sophisticated institutional investor client base. The services they provide have evolved, and continue to evolve, in response to that market demand, which is mainly to help the institutional investor client cope with the demands of the main proxy/AGM season.

Proxy advisers analyse, and make voting recommendations on, proposals submitted by listed entities for shareholder vote. Usually, the analysis and recommendation ("Proxy Advice") is based on the adviser's own governance and voting guidelines, which are reviewed at least annually prior to the main proxy/AGM season and are available to the institutional investor client.

How the client uses the Proxy Advice is a matter for the client and a one-size-fits-all guidance on how investors should use proxy advisers would be counter-productive (given their diversity in terms of assets under management, portfolio size, investment approach, availability of in-house analytical resources, etc).

A number of the larger institutional investors acquire Proxy Advice from more than one proxy adviser in order to obtain potentially – and, we understand, not infrequently - materially different Advice.

Also, Australian-based institutional investors with their own internal governance staff (i.e. these days most large to medium-sized institutions) maintain that the Advice is part (only) of the matters considered by the institution in making voting and other decisions.

On those bases, the institution does bring an independent mind to bear in making voting decisions and proxy voting results appear to support that contention (because those results can differ markedly from the Advice).

To enhance transparency and the understanding of investee companies and other interested parties, we believe institutional investors should disclose publicly – as is now required under the revised UK Stewardship Code – the extent to which they utilise proxy advice. In GO's opinion, this disclosure does not need to be mandated by legislation, certainly at this time; but we do see merit in its incorporation in best practice guidance.

If, after a period of inclusion in such guidance, such disclosure is not being provided by a significant number of institutional investors, consideration could then be given to it being mandated by legislation.

www.g4owners.com
Adding value through responsible activism
Authorized and regulated in the UK by the Financial Services Authority

Governance for Owners
26 Throgmorton Street, London EC2N 2AN
Tel: +44 (0) 20 7614 4759

Standards for proxy advisers

In GO's opinion, proxy advisers in the Australian market perform a useful role from often limited financial and human resources. In turn, those limited resources are due to the combination of competition between proxy advisers in a small market and the relatively small amounts that clients are able or willing to pay for Proxy Advice.

In these conditions, the imposition on proxy advisers of standards, which divert or further stretch those limited resources, could adversely affect the quality of the Proxy Advice.

Further, as indicated above, proxy advisers are a creature of the market and to exist, and continue to exist, must satisfy the needs of their more or less sophisticated institutional investor client base. In GO's opinion, that provides an adequate incentive for competent Proxy Advice.

There is, however, one standard, which should not impact the limited resources of proxy advisers but would, in GO's opinion, be beneficial to both ASX-listed entities and investors generally. That would be the requirement for proxy advisers to disclose on their websites their own governance and voting guidelines and, promptly, any changes to those guidelines.

Again, GO does not believe that this disclosure requires to be mandated by legislation, certainly at this time; but we do see merit in its being incorporated, as part of other improvements to the quality of engagement activity, in a best practice guide to be developed as recommended above.

2.4 "Should legislative or other initiatives (for instance, additional ASX Corporate Governance Council, or other, guidance) be adopted, and if so for what reasons, concerning:

▪ any other aspect of shareholder engagement?"

The importance of Australia introducing a stewardship code on a comply or explain basis

GO firmly believes that all listed entities benefit from having a critical mass of investors prepared to be good stewards.

In reality, however, not all investors can – or, indeed, should – have the same interest in their dialogue and engagement with the entity.

It is, therefore, important that those institutional investors that wish to be good stewards can sign up to a stewardship code (which, to cater for those that, for various reasons, do not or cannot have the same approach, should be on a comply or explain basis).

This will help to set standards of good stewardship and differentiate them from those not interested in or suited to stewardship.

We, therefore, recommend that Australia introduce its own stewardship code subject to the caveats listed below.

www.g4owners.com
Adding value through responsible activism
Authorized and regulated in the UK by the Financial Services Authority

Governance for Owners
26 Throgmorton Street, London EC2N 2AN
Tel: +44 (0) 20 7614 4759

Caveats on the introduction in Australia of a stewardship code

Drawing on the UK's experience with its Stewardship Code, we recommend that, if it is decided to develop a similar code for Australia, the code should:

- Be based on leading edge and specific (as opposed to generic or motherhood) best practices and with a commitment in the code for its review and update, say, annually to take account of further emerging leading edge and specific best practices. (In GO's opinion, the UK Code has been disappointing in these respects, limiting its practical incentive to improve dialogue between listed entities and institutional investors and facilitating a tick-a-box approach by investors)
- Be owned and controlled, including for the purpose of its review and update, and policed by a single owner[6] with a genuine commitment to and expertise in leading edge best practices in investor stewardship
- Recognize and accommodate legitimate differences in engagement styles of fund managers and super funds (as determined by portfolio size, investment strategy, availability of human and other resources, etc). Moreover, we believe that not all fund managers need, or should be required, to embrace and practise stewardship but those that do not do so should be required to make that clear and the reasons why to their clients and, where relevant, the public
- Emphasize the complementary but distinct roles of super funds and fund managers in fulfilling stewardship responsibilities. As many super funds will delegate voting and engagement with investee companies to their fund managers, it is essential that super funds are capable of meaningfully monitoring the activities of those managers. In addition, however, irrespective of the extent to which stewardship responsibilities have been delegated to their fund managers, we believe that super funds should remain ultimately responsible and accountable to their members for the performance of those responsibilities. In GO's opinion, super fund accountability in this area may need to be clarified (or specified) through legislative mechanisms.
- Require asset consultants to elaborate, and disclose to the market, how they assist their clients to follow through on stewardship responsibilities.
- Require institutional investors to take steps to *prevent* rather than solely to *manage* conflicts of interest. In GO's opinion, given the pervasive conflicts of interest among fund managers, it is highly disappointing that the UK Stewardship Code does not require them to take steps to *avoid* conflicts of interest situations[7]
- Address issues relating to the financial and other incentives and performance metrics for fund managers. Presently, the incentive structures in place for many fund managers reward short-term, relative performance and, as a result, create serious tensions between the financial forces at work and stewardship objectives. Accordingly, we strongly believe that any Australian stewardship code should seek to ensure alignment between the financial incentives of fund managers and the stewardship responsibilities expected of them.

---

[6] The single owner could have a number of stakeholders with legitimate (i.e. logical right to be represented in the determination of the code) disparate interests but the model should permit revision of the code by approval of a majority of stakeholders so that a single stakeholder or a minority of stakeholders cannot prevent or unduly delay revision of the code

[7] We note that the Institutional Shareholders' Committee Statement of Principles on the Responsibilities of Institutional Shareholders and Agents (from which the UK Stewardship Code was drawn) called for institutional investors to have a policy addressing how "situations where institutional shareholders and/or agents have a conflict of interest will be minimised or dealt with"

www.g4owners.com
Adding value through responsible activism
Authorized and regulated in the UK by the Financial Services Authority

Governance for Owners
26 Throgmorton Street, London EC2N 2AN
Tel: +44 (0) 20 7614 4759

- Support the introduction of measures, such as enhanced dividends or voting rights, to encourage and reward good investor stewardship
- Encourage the participation of foreign-based investors in upholding the code. Their support for the code and active involvement in voting and engagement will help ensure a critical mass of support for a flexible, shareholder-led governance system.
- Require institutional investors that proclaim their adherence to the code to provide supporting evidence of their stewardship activities, including through a standardised verification process[8].

Further independent UK developments/initiatives to improve dialogue between listed entities and institutional investors, in which GO has played an active role

A '*2020 Stewardship Report'* was developed by a Working Party of institutional investors (comprising Aviva Investors, BlackRock, Governance for Owners, Ram Trust, RPMI Railpen and Universities Superannuation Scheme) in the first quarter of this year to advance the debate on institutional investor stewardship in the UK and other markets.

This report summarises and synthesizes the interviews that members of the Working Party conducted with 17 company chairmen, CEOs, company secretaries and representatives of industry associations in the UK on the key elements of effective company-shareholder engagement and other dimensions of good investor stewardship.

Specifically, the report contained the following recommendations[9]:

1. The development of a Stewardship Framework for equity investors to identify the level of stewardship they intend to undertake
2. A series of good practice steps that would enable investors and companies to make better use of each other's time
3. A feedback mechanism between companies and investors so that the quality of stewardship can be further improved over time, and
4. Suggestions for companies to build up a critical mass of stewardship investors

Following the publication of this report, the Working Party asked the Institute of Chartered Secretaries and Administrators ["ICSA"] to take forward two of the report's recommendations by

- developing a good practice guide to improve the quality of engagement activity, and
- identifying more ways for companies and institutional investors to seek and provide feedback on the quality of meetings.

ICSA has established a Steering Group to help carry out this work, which seeks responses by 30 November, 2012 to an October 2012 consultation document *'Improving Engagement Practices by Companies and Institutional Investors'.*

Areas covered by this document include:

- Whether the nature of the discussion between a company and its investors needed to change, with more emphasis on a dialogue which built and encouraged a long-term relationship with, and commitment to, the company;
- What improvements can be made to the process of holding engagement meetings;

[8] In the UK, verification processes have focused on structures and procedures followed rather than outcomes of stewardship activities. In GO's view, both of these should be included in the verification process.

[9] The full *'2020 Stewardship Report'* is available at http://www.icsaglobal.com/assets/files/pdfs/Policy2/2020_Stewardship_Final_L.pdf

www.g4owners.com
Adding value through responsible activism
Authorized and regulated in the UK by the Financial Services Authority

Governance for Owners
26 Throgmorton Street, London EC2N 2AN
Tel: +44 (0) 20 7614 4759

- Whether companies and institutional investors should seek feedback on the quality of meetings, and how that might be most effectively done;
- A list of other practical measures submitted for comment and designed to make meetings more productive[10].

Subject to the outcome of the consultation process, the Steering Group intends to issue guidance in March 2013.

.

GO recommends that CAMAC consider the benefit of building on these recent UK developments/initiatives in its own deliberations.

2.5 "Should there be an amendment to the right of 100 members to call a general meeting of a company?"

In brief, in our view, No.

The above, and an associated similar right of 100 members to add an agenda item to a forthcoming general meeting, are important minority shareholder rights that have been part of Australian corporate law for very many years.

There have been complaints from time to time from some quarters that this right has been abused, or is open to abuse, for ulterior motives that are not compatible with the best interests of the company or its shareholders generally or that are otherwise unjustified.

Despite our long experience of reviewing the governance of ASX-listed entities, we do not recall any instance of such abuse in the ASX-listed sector.

There have been a few instances where this right has been exercised by minority shareholders of ASX-listed entities but, in our view, they had justifiable grounds for doing so, including failure of the company concerned to respond adequately or reasonably to reasonable requests previously made to the company by minority shareholders.

In recent years, the associated right of 100 members to add an agenda item to a forthcoming general meeting has been used[11] (rather than the right to convene a separate general meeting). This enables minority shareholders to have the matter addressed at a general meeting without causing the company and its shareholders the expense and inconvenience of holding a separate general meeting. This is further evidence that there is no abuse.

Nevertheless, we can envisage instances when the right to add an agenda item may not be adequate and the right to call a separate general meeting may be the more appropriate minority shareholder remedy.

Consequently, in our view, the claim of abuse is not substantiated by the facts and there is no need to amend the current right.

---

[10] The full ICSA consultation document is available at http://www.icsaglobal.com/assets/files/pdfs/Policy2/01-Improving-Engagement-Practices-between-Companies-and-Institutional-Investors-Consultation-Oct-2012.pdf

[11] By the Australian Shareholders Association, for example

www.g4owners.com
Adding value through responsible activism
Authorized and regulated in the UK by the Financial Services Authority

Governance for Owners
26 Throgmorton Street, London EC2N 2AN
Tel: +44 (0) 20 7614 4759

Schedule 1 - Fundamental Observations

This Schedule sets out some fundamental observations relating to the state and structure of the ASX-listed entity and Australian investor scenes.

Most of those observations are also valid, mutatis mutandis, in other western-style markets, including the UK, where GO is based.

ASX-listed entities

Most of the largest and/or most economically important businesses in Australia are listed on the ASX and many significant new or emerging businesses seek ASX listing sooner or later for capital raising, market liquidity and associated purposes – i.e. the ASX-listed sector comprises a major and important part of the Australian economy.

But ASX-listed entities are not a homogenous group; they are all at various stages of development at any one time and, individually, their development changes to a greater or less extent over time.

Membership of the ASX100, comprising the largest listed entities, is significantly different today from even only 10 years ago, with the disappearance of some entities and the appearance of new ones. Similar flux occurs below the ASX100.

This cycle, and especially the growth of smaller entities into bigger ones and the emergence of viable new industries and businesses, is crucial to the health of the economy and the living standards and welfare of its people.

The governance, and especially the resources available for governance activities, in ASX-listed entities similarly tends to differ greatly between the major and the smaller entities. This reflects the rapid tail off in capitalisation below, say, the ASX100, and also, within the ASX100, the very different size and scale between, say, members of the ASX20 and of the ASX50-100.

Conversely, the governance of otherwise comparable entities can vary significantly, usually reflecting the attitudes, behaviour and knowledge of those in leadership positions in the entities.

Legislative or other best practice initiatives intended to improve the governance of ASX-listed entities, including their engagement with their investors, need to be framed so that they are practical and workable in those different scenarios.

Investors in ASX-listed entities

The situation is roughly analogous in the case of investors in those entities but with some further important distinctive features.

It is difficult to obtain reliable data but it is probably not too far off the mark to divide these investors into approximately equal thirds (in terms of funds invested) – retail investors, local institutional investors (including Australian-based arms of foreign-headquartered institutions) and foreign-based institutional investors.

With some exceptions, retail investors and foreign-based institutional investors are not a significant force in shareholder engagement in the Australian market (and ASX-listed entities do not expect to engage much with them, except in the case of a significant shareholder or where an ASX-listed entity has a dual-listing abroad[12]) and it is the role mainly of local institutional investors to carry out that activity. There are realistic market and other reasons

[12] BHP Billiton, for example

Governance for Owners
26 Throgmorton Street, London EC2N 2AN
Tel: +44 (0) 20 7614 4759

for this, including the limited expertise, interest and market power of most individual retail investors and the relative insignificance of the Australian portfolio (in comparison with the overall portfolio) of foreign-based institutional investors. This probably will not change in the foreseeable future.

But, again, local institutional investors are not a homogenous group. First (and disregarding insurance companies, which are a significant different class of institutional investor), they are either:

- superannuation funds, which receive compulsory (superannuation guarantee charge ("SGC")) or other superannuation contributions from their members for investment on behalf of the member to fund the retirement in due course of the member, or
- fund managers, which receive mandates from their client super funds to invest the amount mandated in a particular manner or strategy specified in the mandate. (For example, a fund manager may be awarded a mandate by its client super fund for a specified period to invest the amount mandated in a more or less limited range of Australian equities (e.g. within the ASX100) and according to a particular strategy (e.g active, passive or quant)).

Often, an asset or other consultant retained by the super fund will be involved in the design of part or all of the mosaic of the overall funds invested by the super fund and in the award of individual mandates within that mosaic and the ongoing assessment of the performance of the mandate and the appointed fund manager.

Depending upon the particular mandate, the manager may have a shorter or longer horizon acting as an incentive on the manager's performance and any shareholder engagement by that manager will logically be directed to that objective.

In particular, depending upon its design, the mandate may not afford the fund manager the luxury of engagement with the investee ASX-listed entity to encourage the optimum performance of that entity over the longer term.

This may be seen as somewhat strange, given that super funds' liabilities to their members are to fund their retirement in the long term, but the perceived reality – and fierce competition for mandates between fund managers - in the investment market means that shorter term performance cannot be ignored and the mosaic structure is the accepted status quo.

Legislative or other best practice initiatives intended to improve shareholder engagement of ASX-listed entities by their investors need to be framed so that they are practical and workable in those different scenarios.

In addition:

The SGC has been in force in Australia for some 20 years with the result that, despite our relatively small population, Australia's pool of superannuation money has now reached $1.3 trillion, the fourth largest in the world.

One important consequence of this is that superannuation funds have tended to grow in size, in terms of funds invested. Some, also benefitting from the market-based trend to consolidation, are now very sizeable indeed in the Australian market and have grown their internal human and other resources and skill sets to be able to do a variety of things previously contracted out to others. This can include:

- managing internally all or part of the investment of their members' money, whether with or without the assistance of external asset or other consultants
- monitoring the governance and performance of their investee ASX-listed entities, including voting their stocks and shareholder engagement with selected entities [together called investor stewardship in this submission], and
- monitoring the performance of their fund managers, where they continue to use them, including monitoring their managers' voting of their stocks and shareholder engagement with entities in their portfolio [also part of investor stewardship].

www.g4owners.com
Adding value through responsible activism
Authorized and regulated in the UK by the Financial Services Authority

Governance for Owners
26 Throgmorton Street, London EC2N 2AN
Tel: +44 (0) 20 7614 4759

It is, therefore, no accident that these funds are an important element in the practice of investor stewardship and their efforts deserve encouragement.

The role and policies of the Australian Council of Superannuation Investors, which acts as a collective resource for its (mainly industry-based) super fund members in relation to the governance, including investor stewardship, of ASX-listed entities must also be acknowledged. The role and policies of the Financial Services Council for its fund manager and other members should also be mentioned, as should those of the Australian Shareholders' Association for its retail shareholder members,

Another important consequence of the burgeoning pool of Australian super money is that, because our domestic market of available ASX-listed stocks is relatively small/thin (under 2% of the global listed stock market), our super funds, especially the bigger ones, are increasingly investing in overseas stocks. And their offshore portfolios are expected to equal or exceed the value of the fund's Australian portfolio in the next few years[13].

In turn, that raises the question of the fund's investor stewardship of its offshore portfolio. Until recently, this tended to be dealt with by delegation of both the investment and the stewardship roles to the manager(s) of the offshore portfolio. Now, however, a number of the larger funds are beginning to review how they may be able to monitor their offshore portfolios and fund managers better[14].

Again, legislative or other best practice initiatives intended to improve shareholder engagement of ASX-listed entities by their investors need to be framed so that they are practical and nurturing in these developing scenarios.

[13] OECD, 'The Role of Institutional Investors in Promoting Good Corporate Governance', 2011, p. 76

[14] GO's Stewardship Service is designed to assist in such a case

www.g4owners.com
Adding value through responsible activism
Authorized and regulated in the UK by the Financial Services Authority

Governance for Owners
26 Throgmorton Street, London EC2N 2AN
Tel: +44 (0) 20 7614 4759

Hermes Equity Ownership Services

Hermes Equity
Ownership Services Limited
1 Portsoken Street
London E1 8HZ
United Kingdom

Tel: +44 (0)20 7702 0888
Fax: +44 (0)20 7702 9452

www.hermes.co.uk

Response to Corporate and Markets Advisory Committee discussion paper on The AGM and shareholder engagement

We welcome the fact that CAMAC is considering the issues relating to AGMs, Annual Reports and shareholder engagement. These are important issues and ripe for reconsideration, and we welcome the questions being opened for public debate.

By way of background, Hermes is a leading asset manager in the City of London. As part of our Equity Ownership Service (Hermes EOS), we also take part in public policy debates on behalf of many clients from around the world, including Canada's Public Sector Pension Investment Board, PNO Media Pensioenfonds of the Netherlands, and the BBC Pension Trust, British Coal Staff Superannuation Scheme, the BT Pension Scheme, the Lothian Pension Scheme and the Mineworkers Pension Plan of the UK (only those clients which have expressly given their support to this response are listed here). In all, EOS advises clients with regard to assets worth a total of some A$140 billion invested in companies across global markets. Our clients are significant investors in Australia and participate actively in Australian AGMs, largely through the exercise of proxy votes. Our clients take a particular interest in shareholder engagement, because they believe that this will help encourage directors and companies to act more fully in the long-term interests of shareholders.

We respond to CAMAC's questions below.

Section 3: Questions on Shareholder Engagement

Should legislative or other initiatives (for instance, additional ASX Corporate Governance Council, or other, guidance) be adopted, and if so for what reasons, concerning:

- ***the role of the board collectively as it relates to engagement with institutional/retail shareholders throughout the year, including leading up to the AGM***
- ***the role of particular board members, such as the board chair or the chairs of board committees, in relation to engagement with institutional/retail shareholders***
- ***the role of institutional shareholders throughout the year, including leading up to the AGM. In this context:***
  - ***is there a problem with having a peak AGM season and, if so, how might this matter be resolved***
  - ***should at least some institutional shareholders be required or encouraged to report on the nature and level of their engagement with the companies in which they invest, in the manner provided for in the UK Stewardship Code or otherwise***
- ***corporate briefings***
- ***the role of proxy advisers, including:***
  - ***standards for investors using proxy advisers, including the extent to which these investors should be entitled to rely on the advice of proxy advisers in making voting decisions, or, alternatively, whether those investors should have some obligation to bring an independent mind to bear on these matters.***
  - ***standards for proxy advisers***
- ***any other aspect of shareholder engagement?***

Could greater use be made of technology to promote shareholder engagement outside the AGM and, if so, how?

Should there be an amendment to the right of 100 members to call a general meeting of a company?

The role of the board collectively and **The role of particular board members**

We do not believe that this is an area where legislation is warranted nor would it be the best way to deliver change. Rather, as is generally the case with matters of corporate governance, we firmly support the development of best practice standards in this respect. We believe that it would be helpful for additional material to be added to the ASX Corporate Governance Council Principles to the effect that it is a crucial role of the board as a whole to maintain an active dialogue with the company's shareholders throughout the year. The current focus in the principles on (a) communication to shareholders rather than dialogue with them and (b) matters related to the General Meeting, mean that the principles do not seem effectively to reflect what the role of the board ought to be in this respect. We believe that the Principles should explicitly state the personal role of the chair, and of the board committee chairs as relevant, to enter into appropriate dialogue with shareholders on key matters of concern to them. Making these explicit changes to the Principles would simply reflect the existing best practice exercised by good boards and individual directors. Reflecting that best practice more clearly in the Principles would in our view be

a helpful step forwards in terms of clarifying the roles of shareholders and individual directors of investee companies, and how to make the dialogue between them most effective.

Peak AGM season

We do not believe that the peak AGM season is a problem in and of itself. Properly resourced institutional investors which consider material matters throughout the year, rather than focusing their attention solely at the point of the AGM, do not find that the intensity of the AGM season is a problem. In many ways, the problems of the peak AGM season arise because of the sense that – reinforced by the current drafting of the ASX Corporate Governance Council Principles – the AGM is the sole appropriate time for dialogue between companies and their shareholders, and that the focus of that dialogue ought to be the issues which go to a vote. Once it is more apparent that dialogue should occur throughout the year and should cross the broad range of areas which matter to long-term corporate performance and so to long-term shareholders we believe that the current nervousness with regard to the peak AGM season will dissipate.

Requiring reports on engagement

We believe that the UK Stewardship Code, and indeed the other stewardship standards that the CAMAC report references, including the Eumedion guidance, the CRISA and the EFAMA codes, have had a powerful impact on the emphasis on consistent and long-term engagement by institutional investors, and their willingness to enter into effective dialogue with investee companies. We believe that Australia would similarly benefit were it to introduce a stewardship code of its own. An important element of such codes is the transparency that they expect of institutional investors, which provides an important mechanism to incentivise the right behaviour and to ensure that institutions feel appropriately accountable to their beneficiaries and clients.

Again, as with corporate governance standards, we believe that a legislative approach is not the right way to go to create a stewardship code. As this is best developed as best practice guidance, with perhaps the same comply or explain-style underpinning as is employed for the UK Code, we would suggest that an Australian stewardship code could be developed by the ASX Corporate Governance Council (or some other similar body) and underpinned by an if-not-why-not disclosure standard applied by relevant investment industry regulators.

The role of proxy advisers

We note that disclosure of how an institutional investor makes use of proxy advisers is typically included among the standards in a stewardship code, and we would suggest that this would be a necessary and helpful element of any Australian code.

We note that generally international regulators have shied away from regulating the proxy advisory business, which at this stage on balance seems the right approach. We do, however, remain concerned that some advisory firms introduce conflicts by consulting with companies as well as providing advice on

how to vote at their General Meetings. We believe that this conflict is extremely unhelpful and should be constrained or avoided in some way.

100 shareholder rule

We do not favour a change to the 100-shareholder threshold, which we believe strikes an appropriate balance between enabling shareholders to call companies and their directors to account and limiting the scope for vexatious or otherwise inappropriate activities. While the 100 shareholder rule seems archaic and can be abused it nevertheless serves an important purpose, particularly at the largest companies where even institutional investors may struggle to muster the alternative requirement of a 5% holding. We would be willing to consider amending the 100 shareholder rule so that there was a minimum level of shareholding across this group and/or a minimum length for which those shares had been held (though this should not be more than 1 year), but we are firmly of the view that a form of this rule should be retained.

Section 4: Questions on Annual Reports

Should legislative or other changes be adopted, and if so for what reasons, concerning any aspect of the annual report requirements?
In this context:

- ***do the current reporting requirements produce any unnecessary information ('clutter') in annual reports and, if so, how might this be reduced***
- ***should the reporting requirements be redesigned in any respect, including along any of the lines adopted, or under consideration, in overseas jurisdictions, such as having a strategic report and an annual directors' statement***
- ***what, if any, issues of liability might arise in the event of changes to the reporting requirements, particularly in relation to forward looking statements, and how might this matter be dealt with***
- ***how might technology best be employed to increase the accessibility of annual reports***
- ***what, if any, initiatives might be introduced to cater for future innovations in reporting (for instance, would it be beneficial to establish the equivalent of a Financial Reporting Laboratory)?***

We strongly favour the model of having a strategic report which focuses on the business model, strategy and associated risks to the strategy such that there is a coherent flow through the document. Matters would be included which are material to the business model and strategy (and for the avoidance of doubt this would include relevant long-term risk factors which are sometimes classified under the headings of 'non-financial' or environmental and social), but not issues which are extraneous. The financial accounts would also be more streamlined to act as a deliberate and active communication rather than a compliance exercise.

In our view, the disclosures which are less focused, less relevant to this conception of the purpose of the annual report and are more about compliance

than about communication, would be relegated to the company's website (and in some cases should be relegated to the bin). This clear framing of the reporting in a single, focused document with extra material available through the use of hyperlinks would use modern technology more effectively and respond to the way in which most people already seek to access company information.

We think that the introduction of a Financial Reporting Lab in Australia would be a welcome step. We have found, even in the short life of the Lab in the UK, that it has proved a valuable, safe environment for discussions to occur and improvements to be developed. We have no doubt that the same would occur in the Australian market.

On the issue of liability, we – and we believe shareholders generally – would be content to see a limitation of liability for directors making forward-looking statements in their strategic reviews. We believe that this is necessary for directors to have the confidence that they need to make the statements encompassing the future which are necessary for strategic reports to be informative and useful documents. Just as directors need not to be fettered in the drafting of their strategic reports we also believe that they should not be limited by a detailed audit of them; rather the approach should involve the auditor reading the strategic report and confirming that nothing in it is inconsistent with what the auditor has learned through the course of the audit itself. While this approach does bear some risks for shareholders we believe it is the best way to help ensure that reporting is genuinely communicative rather than constrained in ways which risk instilling a compliance mentality.

Section 5: Questions on the AGM

5.3.1 Should there be any change to the statutory time frame for holding an AGM?

We would agree that it is worth considering extending the time frame from two to three months, to enable more time for more considered dialogue. But we would note the emphasis we have placed above on dialogue between shareholders and companies outside the routine issues arising in relation to AGMs. We would also note that we do not believe that this extension of the time period would have a marked impact on the peak of the AGM season as in our experience around the world companies work to the deadline so any such change would simply shift the existing peak back a month.

5.3.2 In what respects, if any, might the requirements for information to be included in the notice of meeting for an AGM be supplemented or modified? How might technology be used to make this notice more useful to shareholders? Might any other documents usefully be sent with the notice of meeting, and, if so, what?

The crucial document is not the notice of meeting but the annual report which should be the basis for shareholder decision-making in relation to all matters at the AGM. Having the annual report available at the time the meeting is announced – not necessarily sent with the notice of meeting but publicly available on the internet – should supply all the materials required.

5.3.3 Should there be provisions for companies to send information about an AGM directly to the beneficial owners of shares held by nominees and, if so, what type of information?
Should there be any provision for beneficial owners of shares in a company to participate in the AGM of that company and, if so, how?

We believe that as long as the annual report and notice of meeting are publicly available on the internet there should be no need for materials to be sent direct to beneficial owners. We do believe that the attendance of beneficial owners should be facilitated and that registrars and nominee account providers need to develop mechanisms to enable the underlying owners of companies to exercise their ownership rights, notwithstanding the fact that the complexities of investing often these days oblige people to invest through nominees.

5.4.2 Should there be any change to the threshold tests for shareholders placing matters on the agenda of an AGM?

We do not favour a change to the thresholds, which we believe strike an appropriate balance between enabling shareholders to call companies and their directors to account and limiting the scope for vexatious or otherwise inappropriate activities. While the 100 shareholder rule seems archaic and can be abused it nevertheless serves an important purpose, particularly at the largest companies where even institutional investors may struggle to muster the alternative requirement of a 5% holding. We would be willing to consider amending the 100 shareholder rule so that it also required a minimum level of shareholding across this group and/or a minimum length for which those shares had been held (though this should not be more than 1 year), but we do believe that the rule itself should be retained.

5.4.3 Should there be any change to the timing requirements for the calling of an AGM, including for shareholders to place matters on the agenda of an AGM, to seek the circulation of statements concerning any resolution, or to nominate persons for the position of director?
Should companies be required to publish a pre-agenda notice and, if so, what should be the contents and timing of that notice?

We would welcome some facilitation of shareholder resolutions in the ways which are highlighted in this section; a pre-agenda notice seems the best approach to this. At a minimum this would need to include the currently intended resolutions, including specifying which individual directors are to be proposed for election (which is often a crucial element in investor decision-making on whether to bring forward a shareholder resolution) as well as the intended timing and venue of the AGM.

5.4.4 Does the current law concerning excluded material either create undue difficulties for shareholders who wish to criticise directors or, conversely, unduly restrict directors in vetting out information to be circulated to shareholders at the company's expense?

We believe that the current law strikes the right balance between avoiding vexatious or inappropriate resolutions and enabling shareholders appropriately to express themselves to their peers. We note that it is relatively easy for shareholders to draft resolutions which meet the requirements and avoid tripping over the specific exclusions.

5.4.5 Should there be any rule regarding the failure to present a resolution at an AGM?

We share the view of CASAC that unless and until there is a demonstrated problem in this respect in Australia then there does not seem to be any need to introduce such a rule.

5.4.6 Should shareholders have greater scope for passing non binding resolutions at AGMs?

We are content that non-binding resolutions with regard to substantive matters should continue to be barred. We accept the argument put forward by directors that if they are to be asked by shareholders to do something which is contrary to their own view of what is best for the company this should be done as a formal requirement through the process of an amendment of the articles and so require 75% shareholder support. However, we make a distinction between resolutions which seek such substantive actions and resolutions which seek additional reporting from the company – whether on a one-off basis or on an ongoing annual basis. In other markets with a similar legal tradition to Australia this has become the usual mechanism to put forward a non-binding resolution: asking the board to develop and publish a report regarding the relevant issue. We believe that Australia would benefit from making similarly clear that such resolutions are appropriate to be brought before AGMs. We do not believe that such resolutions intrude across the lines of accountability drawn between the board and shareholders but they nevertheless enable a full discussion of the relevant issue and facilitate shareholders to express their views clearly to the directors in ways which may be influential. We would welcome a clear distinction being made, acknowledging that such resolutions may be brought at the same time as making clear that forms of non-binding resolution which seek substantive action beyond reporting are not permitted.

5.5 What, if any, additional legislative or best practice procedures should be adopted for companies to seek the views of shareholders on issues they would like discussed at the AGM, or to invite shareholders to submit questions prior to the AGM?

Should there be some obligation on the auditor (or the representative of the auditor) to speak at the AGM?

What, if any, obligations should a company or a company auditor have to answer questions from shareholders?

We believe that this is a key way in which modern technology can be usefully employed. The invitation to ask questions can be posted on the company's website, and indeed the answers to relevant questions can also be posted there. We believe that this mechanism can also be usefully employed for questions to the auditor, to which we also believe the auditor should be obliged to respond (to the extent that they are not repetitious or vexatious).

5.6 Should any matter be excluded from or, alternatively, added to the business of the AGM?

We note the statement that shareholders do not currently have the legislative right to ask questions with regard to individual items of business at the AGM. We believe that this anomaly should be addressed. Best practice is already that

shareholders are invited to debate and discuss each and every resolution but experience shows that those circumstances where such best practice is not followed are likely to be where the issues are most controversial and so the debate is most important. We believe therefore that the law should be changed in this respect such that there is an explicit right to discuss any matter brought before the AGM for consideration.

5.7 What, if any, changes are needed to the current position concerning:

- ***the general functions and duties of the chair***
- ***the chair ensuring attendance of particular persons at the AGM***
- ***the chair moving motions***
- ***motions of dissent from a chair's rulings?***

Should a chair be obliged to provide shareholders with a reasonable opportunity to discuss a resolution before it is put to the vote?
Should a chair have the power to impose any time, or other, limits on an individual shareholder speaking at the AGM?

We are generally content with the functions, duties and powers of the chair. We would strongly argue that there would be value in adding to the ASX Corporate Governance Council Principles a standard setting the expectation that the chairs of the major board committees attend the AGM such that they are accountable to shareholders for their decisions and available to answer questions.

As indicated above, we believe that there should be a legislative right for shareholders to debate and discuss each matter that is brought forward for consideration at the AGM.

The chair must chair the AGM. With the meeting's consent he or she must feel empowered to bring any one shareholder's contribution to a close. In our experience it is readily apparent when a chair is seeking to do so prematurely and we believe that in such circumstances the chair should permit the continuation of the shareholder's speech. A chair that fails to do so risks censure by the meeting.

5.8 What changes, if any, should be made to the current requirements concerning:

- ***informing shareholders of their right to appoint a proxy***
- ***the proxy form***
- ***pre completed proxies***
- ***notifying the company of the proxy appointment***
- ***providing an audit trail for lodged proxy votes***
- ***the record date and the proxy appointment date***
- ***irrevocable proxies***
- ***directed and undirected proxies***
- ***renting shares***
- ***proxy speaking and voting at the AGM, or***
- ***any other aspect of proxy voting.***

We believe that the laws in relation to proxy voting are largely appropriate and effective, however we do believe that there is need for a full audit trail of lodged proxy votes such that controversial decisions can be transparently seen to have been decided with the full consent of the shareholders, and individual investors

can carry out audits to check that their voting procedures function as they intend.

5.9 Should direct voting before the meeting be provided for by legislative or other means, and if so what matters should be covered in any regulatory structure?

We would welcome additional consideration being given to further facilitating direct voting. We believe that it would need to be enabled formally in legislation to be adopted with the full confidence of all participants.

5.10.1 In what circumstances, if any, should access to pre meeting voting information be permitted?

The concern for shareholders where directors have access to pre-meeting voting information but the shareholders do not is that this information may then be used by the directors to initiate a targeted campaign in relation to particular shareholders to encourage them to change their votes, or to encourage shareholders which have not yet lodged votes to do so. This will only occur when an issue is contentious, and in such circumstances shareholders dissenting from the board's position would always favour also being able to discuss relevant issues with other shareholders to encourage them to take a similar position. It is particularly frustrating for shareholders when they see their company's money expended for these purposes in a way which favours one side of a disputed situation. While it is certainly only appropriate that directors should be able to see the tally of votes at any given time, perhaps the simplest way to address this issue is to require that a board which uses this knowledge to begin to seek to influence shareholders must make the same information that it has access to available to all shareholders. This would ensure a level playing field in the most contentious circumstances.

5.10.2 In what manner if any, should access to pre meeting voting information be regulated before discussion on a proposed resolution?

5.10.3 In what manner, if any, should the current requirements concerning the disclosure of pre meeting votes before voting on a resolution be amended?

We regard it as bad practice for pre-meeting votes to be disclosed ahead of the AGM discussion of the issue. We believe that this would best be covered by guidance under the ASX Corporate Governance Council Principles. We also believe that votes taken on a show of hands should be discouraged and that all votes should be taken on a poll, with the votes cast at the meeting tallied with the pre-meeting votes and disclosed at that point. The technology to effect this is available and already used at a number of company meetings.

5.11 Should there be legislative or other recognition of online voting during the course of an AGM and, if so, in what respects should this form of voting be regulated?

We support the idea that the technological risk of online attendance breaking down should sit with the investor and we would welcome the facilitation to more companies adopting online voting that this greater certainty should bring.

5.12 Do any issues arise concerning voting exclusions on resolutions that must, or may, be considered at an AGM and, if so, how might those issues best be resolved?

We would favour much greater transparency on votes which have been excluded. This should be part of the general audit trail for the exercise of votes by shareholders to which we refer under 5.8.

5.13 Should any changes be made to the current provisions regarding voting by show of hands?

We believe that the approach of voting by show of hands should be abandoned. It is an historic anachronism which reflects the origins of AGMs in the 18th and 19th Centuries when the bulk of shareholders did attend the AGM in person. We believe that now, when the bulk of shareholders are absent, seeing resolutions approved solely by those in the room – which is what voting by show of hands implies – risks giving the impression that AGMs are unrepresentative, and particularly that they are unresponsive to the wishes of international shareholders. The measures indicated above, that proxy votes are not revealed until after the relevant debate on each resolution at the AGM, and that the votes by proxy and in the room are tallied before there is any disclosure of results, should avoid any risk that those present at the AGM feel in any way disenfranchised by the weight of the proxy votes which have already been cast.

5.14 What legislative, or other, verification initiatives, if any, should be introduced concerning voting by poll at an AGM?
Should one or more verification requirements apply in all instances or only if, say, a threshold number of shareholders require it?

We are comfortable for a flexible and permissive approach to the collation of votes given by poll to apply in general circumstances, but we do believe that there would be real value in adopting a formal right for shareholders to call for an audit of votes where they believe it would be appropriate. The discussion paper mentions the UK right to call for such an audit; this seems to us a good model for the Australian market to consider following.

5.15.1 Should any steps be taken to promote more consistency in the disclosure to the market of voting results?

We would welcome greater consistency being introduced with regard to the disclosure of voting results. This would facilitate the gathering of the outcomes of AGMs such that these can be reported to clients and beneficiaries, which in our experience are increasingly asking for such information. This would probably best be facilitated by the ASX developing a standard form for such reporting and the ASX Corporate Governance Council encouraging companies to report in that format.

5.15.2 Following the AGM, what, if any, rights of access should shareholders generally, or the person proposing a resolution, have to voting documents?

We would support the framework and approach proposed in the CASAC Report. We believe that this right to assess the documentation would reinforce the right to call for a vote audit – and that therefore the thresholds for each right should be set at the same level.

5.15.3 What, if any, changes should be made to the requirements concerning the recording of details of voting in the minutes of the AGM?

We see no need for significant change to these requirements.

5.15.4 Should there be a statutory minimum period for retention of records of voting on resolutions at an AGM and, if so, for what period?

We would favour a minimum retention period of two years (or until after the second subsequent AGM, whichever was the later). We believe that this period is not excessive but should suffice to satisfy any review requirements.

5.16 Should there be any legislative initiatives in regard to the election of directors, including in relation to:

- ***the frequency with which directors should stand for re election***
- ***the right of shareholders to question candidates (and receive answers)***
- ***the voting procedure?***

We are supportive of the current Australian approach to director elections – we see no need to move to annual elections as we believe that accountability every third year in the context of the wider shareholder rights enjoyed in the market is entirely appropriate. We do not think that cumulative voting is necessary, but we would welcome legislative clarity that majority voting is the route to director election, so that no individual can join or remain on a board who does not enjoy the support of the majority of shareholders expressing a view.

We would note that we would favour a requirement that the need to stand for election applies to all members of the board – ie including the managing director. We believe that this would reinforce the unitary nature of the board and the fact that the MD, like the non-executive directors, is fixed with fiduciary duties to the shareholders as a whole.

5.17 Are there any matters concerning dual listing that should be taken into account in the regulation of AGMs?

We are content with the structure and framework for AGMs developed by the dual-listed companies. We believe that these work effectively in practice and that the protections established in the companies' constitutions are appropriate and fair.

5.18 Are there any problems in the voting or other aspects of AGMs for overseas holders of shareholding interests in Australian regulated companies?

The bulk of our clients are overseas investors into Australia and we assist them to exercise their votes in the market. We are not aware of particular challenges in relation to voting in Australia, beyond those which are standard across the world arising from the length of the custodial chain. We are working through various channels to simplify the voting chain and hope that these attempts will be facilitated as necessary by local legislation.

Section 6: Future of the AGM

For some or all public companies, should the functions of the AGM be changed in some manner, or the obligation to hold an AGM be abolished?
In this context, what technological developments might be taken into account in considering the possible functions of the AGM?

For some or all public companies, and if the AGM is retained in some manner, what legislative or other initiatives, if any, should there be in regard to the possible formats of the AGM?
In this context, what technological developments might be taken into account in considering possible formats for the AGM?

We are strongly in favour of retaining the requirement to hold an AGM for all public companies. While we attend only a small fraction of the AGMs of companies in which our clients invest, we believe that the requirement to hold a full public meeting serves a real purpose in holding directors accountable, and that the AGM still effectively delivers a visceral sense of the board's accountability – the level of preparation put into the AGM by most boards, even in normal circumstances, is evidence enough of this. Those AGMs that we do attend, which are typically those where there is some controversy, deliver that accountability in still more obvious form. In practice, we believe that this degree of accountability can only be delivered by a meeting which combines the full range of reporting, questioning, deliberation and decision-making that the paper notes as its current role.

We are also clear that technology has not yet advanced to a stage that this visceral sense of accountability can be delivered in any form other than a face-to-face gathering (though we support attendance of that face-to-face gathering by means of relevant telecommunications). We therefore believe that the AGM must currently be retained in its current form.

BoardRoom
Smart Business Solutions

Boardroom Pty Limited
Level 7, 207 Kent Street
Sydney NSW 2000
Direct: +61 2 9290 9617
Mobile: +61 415 277 251
Fax: +61 2 9290 0664

www.boardroomlimited.com.au

21 December 2012

Mr John Kluver
Executive Director
Corporations & Markets Advisory Committee
GPO Box 3967
SYDNEY NSW 2001
John.kluver@camac.gov.au
cc. camac@camac.gov.au

CAMAC REVIEW OF THE AGM AND SHAREHOLDER ENGAGEMENT
BOARDROOM PTY LIMITED SUBMISSION

Dear John

Boardroom Pty Limited is pleased to provide this submission to the Corporations and Markets Advisory Committee ("CAMAC") in response to the Discussion Paper on *The AGM and shareholder engagement* ("Discussion Paper") first released in September 2012.

Boardroom Pty Limited ("Boardroom") is a leading Australian Share Registry Services provider managing over 280 ASX listed companies and 180 unlisted entities. Boardroom is a wholly owned subsidiary of SGX listed Boardroom Limited, one of the largest professional services providers in the Asia/Pacific region with offices in Australia, Singapore, China, Hong Kong and Malaysia. As a group, Boardroom services over 5,500 publically listed and unlisted companies.

The Parliamentary Secretary to the Treasurer has asked CAMAC to inform the Government on:

- The future of the annual general meeting in Australia, including how documents and meeting forms should change to meet the needs of shareholders in the future
- The risks and opportunities presented by advancements in technology, in the context of maintaining the ongoing relevance and efficacy of the AGM
- The challenges posed to the structure of the AGM by globalisation, including potential increases in international share ownership and dual-listing.

We provide a table with an overview of the areas we have addressed and our general comments in response to the associated question.

We trust the information and views provided in this submission are useful. We would be pleased to discusse any aspects of our submission in more detail at your convenience.

Kind regards,

Martin Jones
General Manager, Operation Risk and Compliance

BoardRoom
Smart Business Solutions

DISCUSSION PAPER REFERENCE	SUMMARY OF CONCLUSION
THE ANNUAL REPORT	
Questions for consideration *How might technology best be employed to increase the accessibility of annual reports?*	We understand that there is additional review and analysis being conducted and commented on by the Financial Reporting Council (FRC) and International Integrated Reporting Council (IIRC). With this in mind, we believe that the findings of those reviews will be interrelated to the way information is presented and the role technology has to play in making that information accessible.
CONDUCTING THE AGM	
Timing (5.3.1)	No change to the statutory time frame at present, but suggest further consideration upon review of the outcomes of the CAMAC report.
Notice of meeting (5.3.2)	We would support the introduction of legislative reform to make the default method of delivery of the NOM for meetings of companies, as electronic. We would also support legislative change to ensure the same provisions apply to managed investment schemes.
Notice to shareholders holding shares through nominees (5.3.3)	No change to current statutory requirements.
Timing requirements (5.4.3)	No change to current statutory requirements but we note that this may change depending on whether the business and format of the AGM is altered.
Non-binding shareholder resolutions (5.4.6)	No change to current statutory requirements.
Questions to the auditor (5.5.2)	No change to current statutory requirements.
General functions and duties (5.7.2)	No change; but we note that as the format of the AGM evolves, the manner in which the Chair receives questions from shareholders will change, potentially through the use of technology (see comments in the section Future of the AGM in this submission). If this changes, then the role of the Chair will need to be re-addressed.
Nature of this vote (5.9.1)	No change; but we note that companies, or organisations such as the Australian Shareholders Association, could engage in education programs to ensure shareholders understand how direct voting works.
Access to information on pre-meeting votes before the AGM (5.10.1)	No statutory change; companies should continue to have the flexibility to manage their investor relations in a manner most suited to their individual needs.
Disclosure of pre-meeting votes before discussion on a resolution (5.10.2)	No statutory change.
Disclosure of pre-meeting votes after discussion but before voting on a resolution (5.10.3)	No statutory change.
Demanding a poll (5.13.2) Changing approach (5.13.3)	No change; but we note that as the nature of shareholdings change, that there may be requirement for this to be legislated in the future.
FUTURE OF THE AGM	
Format of the AGM *What technological developments might be taken into account in considering the possible formats for the AGM?*	We support further review and comment on prescribing other technological formats in statute. We note that there is scope for further analysis on the risks involved and the way the technology is interpreted in statute.

BoardRoom
Smart Business Solutions

1. THE ANNUAL REPORT

1.1. QUESTIONS FOR CONSIDERATION

How might technology best be employed to increase the accessibility of annual reports?

We understand that there is additional review and analysis being conducted and commented on by the Financial Reporting Council (FRC) and International Integrated Reporting Council (IIRC). With this in mind, we believe that the findings of those reviews will be interrelated to the way information is presented and the role technology has to play in making that information accessible.

While we await the development of Integrated Reporting and how this will be formally structured, we note the following based on our observations of our clients and industry experience:

- Budgets are being shifted from print to online. Companies are moving away from the expense and use of resources to produce "glossy" financial year-end reports. In the same way that industries (such as publishing) are having to adopt and change their production model to accommodate online formats, so too are companies.
- Companies are spending their money on web and graphic designers to produce marketing and sales material that can be replicated in several formats, including for use in investor and market strategy meetings.
- This trend has led to re-evaluation of what information has traditionally been included in the annual report and whether a greater focus can be spent on shifting other information into other formats such as strategy/analyst/market briefings.
- A shift in focus from the current reporting format has given concern that if strategy information was separated from the current format of the annual report, this could potentially lead to less rigor around the information presented. There is also the risk around verifying forward looking statements and not presenting deceptive and misleading information. Legislation would need to reflect any changes to format to ensure correct rigor and application is adhered to

2. CONDUCTING THE AGM

2.1. CALLING THE AGM

Timing (5.3.1)

We note that the Discussion Paper quotes that:

> *"AGMs in the past have provided a forum for, amongst other things, the reporting of significant company information (such as the annual results), the passage of significant shareholder resolutions, and the scrutiny of company directors"*[1].

Therefore we believe that the timing of the AGM depends largely on the future of the AGM and consequently, the outcomes of CAMAC's review. If the purpose, format or business of the AGM differs from its current form, then the current timing issues may no longer be relevant or the scope for changing the timing requirements .

While, as pointed out in the Discussion Paper, there are current issues associated with the legislative timeframes imposed on the holding of an AGM, we believe at present:

- Any reduction in the timeframe would impose unnecessary burden on the company, and
- Any increase in the timeframe would render the financial even more historical than already prescribed.

[1] The AGM and shareholder engagement – discussion paper page 1

Conclusion
No change to the statutory time frame at present, but suggest further consideration upon review of the outcomes of the CAMAC report.

Notice of meeting (5.3.2)

We consider technology can be used more constructively with regard to the Notice of Meeting ("NOM"). We considered whether the legislative requirement for NOMs could be specified in the same manner as financial year reports and that the default for sending out NOMs be electronic. On that basis shareholders would have to "opt-in" to receive hard copies. However, we note that there is there has been concern expressed that if shareholders had to "opt-in" for hardcopy NOMs, small retail shareholders could be at a disadvantage.

There are steps that a company can take ahead of any legislative change in order to encourage greater use of electronic delivery of NOMs. For example, companies could monitor shareholder data usage and note those that tended to use technology. This would need to form part of the company's communication strategy and allow targeted communication with these shareholders.

However, we believe that, as was required with the change to the default method of delivery of financial year reports, any significant change will only occur with legislative amendment to make electronic delivery of the NOM the default.

As a general comment, any change to the legislative requirements for delivery of the NOM for companies, should also be reflected in the provisions that apply to meetings for managed investment schemes. In the past, changes made in relation to meetings of companies have not been reflected in the provisions that apply to managed investment schemes. This has lead to instances for example where listed managed investment schemes have shorter meeting notification requirements than listed companies. Similarly, legislative changes made in relation to receipt by companies of proxies by electronic means have not been reflected in the provisions dealing with proxies for meetings of managed investment schemes.

Conclusion
We would support the introduction of legislative reform to make the default method of delivery of the NOM for meetings of companies, as electronic. We would also support legislative change to ensure the same provisions apply to managed investment schemes

Notice to shareholders holding shares through nominees (5.3.3)

There are complications in current reporting structures to determine the actual beneficial holder of shares held through a nominee. There can be many layers of custodial ownership beneath the initial registered nominee holding.

To introduce a legislative requirement or recommendation for a company to communicate directly with a beneficial shareholder would create an administrative burden with no clear benefit.

Conclusion
No change to current statutory requirements.

Timing requirements (5.4.3)

It was raised whether the NOM should be sent out further in advance to give shareholders more time to analyse the resolutions and formulate questions for the directors.

We note that for smaller companies that don't have the same lead times as larger, more structured companies, a longer lead time may cause issues with enabling of any last minute changes of timing. Smaller companies don't necessarily have the same access to resources and forward planning tools as larger companies. We believe a longer lead time will hinder rather than help these smaller companies and impose an unnecessary burden on the company that doesn't result in any direct benefit to the shareholders.

Additionally, even if there were a "pre-agenda" notice posted only on the Company's website, this is potentially excluding retail shareholders who don't necessarily monitor electronic communication sources and rely on hardcopy notice as it is. Therefore, the stakeholders that are the ones who would actually make changes or put forward resolutions/nominations are generally already aware of the rules and regulations and options available to them to influence the business of the AGM and therefore don't need further legislation to enable them to express their views.

We note that even with a longer lead time, changes to the meeting can still occur on the day, for example in the case of a hostile takeover.

Further, the release of earlier NOMs wouldn't necessarily result in greater attendance. Part of the issue with shareholders not being able to attend meetings is the fact that there is a huge congestion of meetings in a short timeframe due to legislative timeframes.

Conclusion
No change to current statutory requirements but we note that this may change depending on whether the business and format of the AGM is altered.

Questions to the auditor (5.5.2)

We considered whether there be further need to enforce interaction with the auditors at the AGM. We believe additional legislation would create another administrative burden for companies with no clear benefit. The Auditors express their view through the audit opinion. If shareholders have questions, they are given opportunity, as prescribed in legislation, to voice them at the AGM.

Conclusion
No change to current statutory requirements.

Non-binding shareholder resolutions (5.4.6)

We considered the introduction of additional non-binding resolutions at the AGM. We agree with the conclusions of the CASAC report and add that while non-binding resolutions could prove useful, they would also place extra burden on the resources of the company.

Conclusion
No change to current statutory requirements.

2.2. CHAIRING THE MEETING

General functions and duties (5.7.2)

Provide an opportunity for shareholders to ask questions or comment

We considered how questions were received by the Chairman and the way the Chairman facilitated the answering of those questions at the AGM:

- We observed that some companies send out a request for shareholder questions with the Notice of AGM.
- Moderation of questions received before the meeting, if it occurred, is most likely done through a nominated relationship manager, not the Chairman. Questions are then bundled into general questions/categories, or general themes. Some companies that have used this approach have noted that generally shareholders appreciate if their individual questions are acknowledged, even if they were under the umbrella of a general question covering their issue. We observed that filtering of questions only occurred where there were too many questions to address.

Conclusion
No change; but we note that as the format of the AGM evolves, the manner in which the Chair receives questions from shareholders will change, potentially through the use of technology (see

comments in the section Future of the AGM in this submission). If this changes, then the role of the Chair will need to be re-addressed.

2.3. DIRECT VOTING BEFORE THE MEETING

Nature of this vote (5.9.1)

Our research based on discussions with companies which have provided direct voting as an option has shown that companies that have allowed for direct voting have found it caused extra administrative burden with minimal to no real benefit. We note that even when given the opportunity to vote directly, shareholders still tend to utilise the proxy based method of voting.

We believe that ahead of implementing any legislative change more education is needed to inform shareholders of the process for it to be determined whether direct voting is of any real benefit to either the shareholder or the company.

Conclusion
No change; but we note that companies, or organisations such as the Australian Shareholders Association, could engage in education programs to ensure shareholders understand how direct voting works.

2.4. DISCLOSURE OF PRE-MEETING VOTING

Access to information on pre-meeting votes before the AGM (5.10.1)

Monitoring proxy lodgements provides good feedback on how a resolution is trending, including who is voting and which shareholders may need to be engaged with more closely. If proxies are not given to directors until the day of the meeting, this makes it difficult to direct investor relationship management.

We note that our clients appreciate having a third party involved in proxy management for reasons of independence and time management.

Conclusion
No statutory change; companies should continue to have the flexibility to manage their investor relations in a manner most suited to their individual needs.

Disclosure of pre-meeting votes before discussion on a resolution (5.10.2)

We note that often the proxy figures are often included in the Chairman's report (which has to be released to the ASX for listed companies prior to the AGM).

We have found that most Boards feel that shareholders are still able to exercise independent judgment and not be influenced by seeing the proxy votes before voting.

Conclusion
No statutory change.

Disclosure of pre-meeting votes after discussion but before voting on a resolution (5.10.3)

We have found that most companies show the proxy votes at the meeting prior to the vote. We note that some directors may not like the disclosure of proxy votes if it involves their personal re-election, but have observed that the votes are shown regardless.

Conclusion
No statutory change.

2.5. VOTING BY SHOW OF HANDS

Demanding a poll (5.13.2)

We considered whether companies should call a poll on every resolution, i.e. disabling the mechanism to vote via a show of hands. Based on our experience, we observe the following:

- For the companies that we attended AGMs for in 2012[2], 26% went to a poll on at least one resolution.
- For the companies that we attended AGMs for in 2012[3], 9% went to a poll on all resolutions.
- For the companies that we attended AGMs for in 2011[4], 18% went to a poll on at least one resolution.
- For the companies that we attended AGMs for in 2011[5], 7% went to a poll on all resolutions.

We note that the use of a poll provides a good audit trail for potentially contentious resolutions (such as the vote on the remuneration report). An independently conducted poll in this instance provides a good and defensible audit trail.

Further, we agree with the conclusion of the listed company quoted in the Discussion Paper that by calling a poll, all proxy votes are then accounted for which gives a fairer indication of the vote taking into account shareholding percentages which we believe is good governance.

Changing approach (5.13.3)

We considered the development and use of electronic voting devices. In using these devices we note the following:

- General start up cost is high. This includes a set-up fee and then individual fees for the number of handsets used. Like any technology, the handsets are likely go out of date quite quickly and result in further costs being passed onto the companies.
- This process creates another layer of risk to be considered by the company, as well as the inherent risk involved with any technological device. For example, the risk of having the devices fail.
- For companies that didn't use them, cost was seen as the major downside for the devices. Companies weren't sure how to justify the expense to shareholders.
- If, for example, only 50 shareholders attend the AGM and they represent only 0.04% of the eligible vote, will the speed and convenience of obtaining the voting result outweigh (in the minds of shareholders) the cost of use. Such devices may only really be worthwhile for large meetings.
- The advantages of handheld voting included that the Board received instant results on voting items. The handsets can also be used to enable shareholders to conveniently communicate questions to the Board.

Conclusion
No change; but we note that as the nature of shareholdings change, that there may be requirement for this to be legislated in the future.

3. FUTURE OF THE AGM

In considering the future of the AGM we note the following:

[2] Boardroom Pty Limited attended 88 AGMs in the calendar year 2012
[3] Boardroom Pty Limited attended 88 AGMs in the calendar year 2012
[4] Boardroom Pty Limited attended 83 AGMs in the calendar year 2011
[5] Boardroom Pty Limited attended 83 AGMs in the calendar year 2011

- The purpose of the AGM is to vote on resolutions and engage in discussion on the company's performance and future direction.
- An advantage of the AGM in its current form is that it is highly regulated and allows a formal opportunity for the company's management to engage with the shareholders.
- Some companies and shareholders find the ceremony and ritual of the AGM appealing. On the other-hand, the formality of the AGM and its structure can be considered intimidating, costly and timely.
- The legislative compliance of the AGM can cause an unwelcome burden that distracts from the day to day business of the company.

3.1. FORMAT OF THE AGM

What technological developments might be taken into account in considering the possible formats for the AGM?

Our below comments are based on our experience as well as specific feedback we have received from clients when we discussed the future of the AGM.

Current observations

- We note the platform for online engagement is constantly changing and as technology progresses, legislation and company Boards often fall behind in adopting the technology. However, before legislation can change, a full opportunity needs to be given to assess the new technology and the risks involved.
- We acknowledge that there are modes of technology that have not yet been developed. One example that we have encountered was the idea of a virtual AGM being telecast over a specific AGM channel. We also note that there is further potential for companies to use online formats such as Facebook or Blogs as a means of shareholder communication leading up to and during the AGM.
- Some companies currently use technology and online sites (such as Hot Copper) for communication, especially for foreign investors who may not have ready access to company reports if their shares are held through a third party such as a broker. Sites such as Hot Copper enable companies to test shareholder and market feedback on a real time basis.
- With the development of electronic hand held devices, we note the ability for shareholders to type questions rather than stand up in a public forum. This can have an effect on the meeting dynamics. Generally it is perceived that the anonymity that comes with typing a question sometimes led to less thoughtful and convincing questions. We also note that a feed of direct questions from shareholders has an impact on the Chairman's ability to control the meeting.

Virtual meetings

- Advantages of a fully virtual meeting would avoid the situation of planning for attendance of 350 and only 40 turn up. Greater engagement would be possible as it is likely that more shareholders would have access to the online format rather than physically having to attend.
- There will always be a small group of shareholders (most likely retail) that don't have access to online formats.
- Disadvantages include the disappearance of the "tea and biscuit" forum after an AGM. This is an informal chance for shareholders to engage with the directors of the company and engage with them face to face.
- Virtual meetings may enable cost and time efficiencies. We note that the use of a virtual AGM opens up possibilities for dual listed companies rather than hosting dual AGMs which can present a logistical nightmare (or instead of holding AGMs using teleconference). Can cover many

different national geographical locations, rather than perhaps a rotating AGM, or "roadshow" AGM.

- We note that verification of online participants will become an issue. The identity of shareholders that are present online (either for engagement or for an actual online AGM format) will need to be accurately verified (i.e. how do you verify that the person logged on is actually the shareholder).
- We also note that a method will need to be determined to gage how a shareholder/member being "present" is interpreted in statute.
- The Corporations Act doesn't currently specify the validity of a virtual meeting. There is scope for interpretation but nothing specific. Some companies may be willing to provide for the format in their constitution but until it is prescribed through legislation, some companies may feel it's too risky.

Conclusion
We support further review and comment on prescribing other technological formats in statute. We note that there is scope for further analysis on the risks involved and the way the technology is interpreted in statute.

CAMAC
Level 16, Metcentre
60 Margaret Street
Sydney NSW 2000
Australia

Email submission: john.kluver@camac.gov.au, camac@camac.gov.au
Sydney, 21 December 2012

Subject: CAMAC Discussion Paper, The AGM and Shareholder Engagement

Dear Sir/Madam,

ISS is a leading provider of corporate governance solutions to the global financial community, including corporate governance analysis and voting recommendations for institutional investors. More than 1700 clients rely on ISS' expertise to help them make more informed voting decisions.

ISS has over 25 years of experience in this field and our team of more than 500 research, technology and client service professionals are located in financial centres worldwide, including Sydney, Australia, through its wholly owned subsidiary RiskMetrics (Australia) Pty Ltd.. We welcome the opportunity to respond to the CAMAC discussion paper on the AGM and shareholder engagement.

In responding to this submission, we note the primary purpose of the inquiry – to explore the evolving forum for shareholder participation in an increasingly global marketplace. While there are many aspects to shareholder participation and many forums in which to engage, our role in providing proxy voting advisory services to our clients focuses on:

- Providing our clients with relevant, accurate, and timely information on which to make informed voting decisions;
- Implementing client voting decisions through platforms and technology that enable global voting of their shares.

The dialogue between global shareholders and the companies in which they invest provides an opportunity for sharing common ground on key areas of interest, and we facilitate that dialogue in our role as advisers. In that regard, our submission focuses on those inquiries related to shareholder engagement and the role of proxy advisers.

We hope that you will find our response useful, and we are available if you would like to discuss anything in further detail.

Best regards,

Daniel J Smith
Head of Research, Australia/New Zealand, ISS
daniel.smith@issgovernance.com

Martha Carter
Head of Global Research, ISS
martha.carter@issgovernance.com

ISS Responses to CAMAC's Discussion Paper
The AGM and Shareholder Engagement

3.4 Shareholder Engagement

Should legislative or other initiatives (for instance, additional ASX Corporate Governance Council, or other, guidance) be adopted, and if so for what reasons, concerning:

- the role of the board collectively as it relates to engagement with institutional/retail shareholders throughout the year, including leading up to the AGM
- the role of particular board members, such as the board chair or the chairs of board committees, in relation to engagement with institutional/retail shareholders
- the role of institutional shareholders throughout the year, including leading up to the AGM. In this context:
  - is there a problem with having a peak AGM season and, if so, how might this matter be resolved
  - should at least some institutional shareholders be required or encouraged to report on the nature and level of their engagement with the companies in which they invest, in the manner provided for in the UK Stewardship Code or otherwise
- corporate briefings
- the role of proxy advisers, including:
  - standards for investors using proxy advisers, including the extent to which these investors should be entitled to rely on the advice of proxy advisers in making voting decisions, or, alternatively, whether those investors should have some obligation to bring an independent mind to bear on these matters.
  - standards for proxy advisers
- any other aspect of shareholder engagement?

Could greater use be made of technology to promote shareholder engagement outside the AGM and, if so, how?

Should there be an amendment to the right of 100 members to call a general meeting of a company?

Shareholder engagement

ISS does not believe that additional legislation is a necessary condition to increasing or directing shareholder engagement. ISS observed that company management, directors, and their shareholders are increasingly taking the opportunity to engage in constructive dialogue. Whether motivated by relatively recent codes, such as UK Stewardship or UNPRI, or relying on individual needs for dialogue, we see engagement between boards and shareholders throughout the year, not just during proxy season. ISS believes that

boards as a whole, particular board members, shareholders, and proxy advisers play important roles in the engagement process. Irrespective of any additional legislation, it is likely that the trend toward increased engagement will continue. As advisor to a worldwide group of asset managers and asset owners, we observe that our clients have not only an interest, but an economic incentive to ensure that their companies are governed in a way that minimizes their risks and increases shareholder value over the long term.

ISS is committed to dialogue with issuers as part of our research to gain the greatest possible insight for our clients. We also publish our approach to such dialogue.[i] ISS' engagement with companies takes place throughout the year, so that our final research report for each meeting we cover contains accurate information that is most relevant to our clients. We strive for constructive and informative dialogue with companies to better inform our research.

Pursuant to our research policies, we include substantive public information provided by companies and parties to our engagement in our reports. We believe that our longstanding approach to engagement enhances the quality of our research.

The role of proxy advisers

ISS believes the use of proxy advisers positively assists institutional investors in carrying out their fiduciary obligations and stewardship responsibilities to vote in an informed and consistent manner across their portfolios.

CAMAC questions whether, in the course of making voting decisions, investors using proxy advisers have an obligation to bring an independent mind to these voting matters. It is our experience that investors are not of a single mind with respect to corporate governance issues. Many clients who subscribe to our benchmark policy recommendations review and analyse our research, but ultimately decide to vote differently from our recommendations – instead voting in line with their own investment and governance philosophies and company engagement activities. In addition, large, global asset managers vote on behalf of their clients, whose money they manage. As such, they have an obligation to vote according to their clients' wishes. Therefore, the decision making and voting process is multi-faceted, not singularly focused on a proxy adviser's recommendations.

ISS' clients use our proxy research and vote recommendations in a variety of ways. ISS' research and vote recommendations are just one of many resources that clients use in arriving at their voting decisions. Many institutional investors have internal research teams that conduct proprietary research and use ISS research to supplement their own work. Some clients use ISS research as a screening tool to identify non-routine meetings or proposals. A number of our clients use the services of two or more proxy advisory firms as inputs to their voting decision analysis.

In developing our benchmark policy, we utilise a transparent and consistent methodology[ii] to evaluate company corporate governance practices. We also provide support and expertise for global investors who may be voting outside of familiar home markets. As such, we provide an important research component to enable our clients to vote globally. The following are key aspects of our role as a global adviser:

- ISS closely follows key reforms in company law and corporate governance in over 100 developed and emerging markets worldwide. Our presence on the ground in many local markets, including in Australia, helps us keep our clients up-to-date with the latest corporate governance developments.

- While ISS' research is based on widely accepted standards in international corporate governance, local market practices are highlighted and taken into account, and our clients therefore receive informed analysis and recommendations encompassing local as well as global governance principles.

- To serve the needs of our clients, we have a dedicated team of global procurement professionals and governance analysts with experience in the process of acquiring, processing and analysing meeting information in over 100 developed and emerging markets worldwide.

ISS, along with most proxy advisers in Australia, holds an Australian Financial Services (AFS) license, issued by ASIC. As an AFS licensee, ISS is subject to ASIC's regulations with respect to the provision of financial products. ISS is held to very high standards, not just by regulators, but by our global clients. Our research process is highly transparent and involves extensive time devoted to proactive engagement with issuers, both in policy development and with respect to specific governance issues at individual companies. Ultimately, the research process conducted by ISS is designed to deliver analysis and recommendations to our clients based on sound governance principles and policies, enriched by robust engagement with all constituents in the governance community.

[i] See the following: http://www.issgovernance.com/policy/EngagingWithISS for our global engagement policy and more information on our engagement practices.
[ii] See http://www.issgovernance.com/policy

31 December 2012

Mr John Kluver
Executive Director
Corporations and Markets Advisory Committee
Level 16, Metcentre
60 Margaret Street
SYDNEY

Dear Mr Kluver

FSC SUBMISSION – FUTURE OF THE AGM

Thank you for the opportunity to provide a submission on this discussion paper.

The Financial Services Council (FSC) represents Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks, trustee companies and public trustees. The FSC has over 130 members who are responsible for investing $1.8 trillion on behalf of more than 11 million Australians.

The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange and is the fourth largest pool of managed funds in the world. The FSC promotes best practice for the financial services industry by setting mandatory Standards for its members and providing Guidance Notes to assist in operational efficiency.

Our recommendations can be found throughout the document.

Please find our submission enclosed. We look forward to discussing the contents with you. I can be contacted on 02 9299 3022.

Yours sincerely

ANDREW BRAGG
SENIOR POLICY MANAGER

FSC SUBMISSION CONTENTS

1. AGMs: Timing

In normal circumstances companies are required to hold their AGM within 5 months of the end of their financial year. This in itself appears to be a reasonable stipulation, allowing sufficient time to complete and audit accounts and send the appropriate disclosures to shareholders. In practice, it takes most companies up to two months to prepare reports and circulate the relevant information. They will then usually announce the AGM date but it is not until about two weeks before the cut off point before the AGM that the detailed voting information is circulated to investors.

The issue for investors is that with the majority of companies' fiscal year ending on either 30 June or 31 December, many AGMs will be bunched between mid-October to late November or between early April to May. With the information on resolutions which will be voted on at the AGM from companies coming to investors via registries and custodians, albeit electronically, the timeframe in which investors should decide whether to vote in favour or oppose resolutions is limited to little more than two weeks. Where items are "routine" and can be voted through with confidence this is not an issue. Where it becomes an issue is where investors question or disagree with a proposal which a company has made. In this case they may simply vote against the proposal or abstain but most will seek to engage with the company in order to achieve further clarification or an alternative outcome.

It is in the cases where the fund manager decides to engage with management over a contentious issue that the tight deadline restricts a dialogue. Investors need to put a well reasoned case to the company and the company needs to consider carefully its response. If the company is prepared to modify its position this will also require time. Where many companies are reporting within a brief period the fund manager will not have sufficient time to do its research and raise issues with the company so more of the responsibility for this analysis is devolved to the proxy advisers. This group has become increasingly influential as a result, albeit they are not shareholders in the company.

Recommendation: To alleviate "AGM season", the period between the notification of the company's resolutions for the AGM and the deadline for votes to be received should be extended.

It would be preferable for this to be achieved within the current 5 month timeframe which means that the company should be encouraged to publish the relevant information sooner. The alternative, of pushing back the AGM would also create a better window for dialogue with the company but would run the risk of leading into the subsequent reporting season when elements of the dialogue might be overtaken or become redundant.

Another possibility might be for companies to loosely agree to hold their AGM within certain timeframes, e.g., early, mid or late in the reporting season so that all those within a broad sector report in close proximity to each other but overall the AGM season is extended. The mechanics of such a change would need to be explored in detail before a proposal could be framed.

We believe that companies should be encouraged to engage sooner rather than later in the reporting period. This provides investors with necessary time to consider the company's performance and forward approach.

2. Proxy voting

For many years, the FSC and a number of our members have advocated reform of the proxy voting process in Australia. As noted in the issues paper, the current arrangements give rise to inefficiency and integrity concerns which could be obviated.

In our submission to the 2008 PJC inquiry "Better Shareholders, Better Companies" we argued a number of necessary regulatory changes. We made recommendations following substantive engagement with the proxy voting, custodian and share registry industries (as well as our own members).

Although the PJC adopted our recommendations, there has not been an opportunity for reform via adoption of the PJC findings potentially until they were captured in this CAMAC issues paper. During the course of this particular inquiry, a number of our members worked with the Australian Council of Superannuation Investors (ACSI) and Ownership Matters to undertake the most comprehensive assessment of the proxy voting system to date.

Their report "Institutional Proxy Voting in Australia" found again that there are deficiencies in the current system and recommended change. The FSC broadly endorses the 6 recommendations for regulatory reform outlined in the / ACSI Ownership Matters report.

The proxy voting process represents a key element of our corporate governance framework. Ensuring that the process operates effectively and with a high degree of integrity is of vital importance to maintaining confidence in the mechanisms that allow shareholders to exercise their voting rights.

FSC believes the system needs to be improved and that key flaws with the present system need to be addressed. We set out a series of recommendations which, if adopted, will result in a significantly improved proxy voting system.

Recommendation: FSC's view is that electronic voting with increased integrity provisions including an audit trail should be facilitated. This will require cooperation of issuers, sub custodians, owners, managers and the Government broadly.

These recommendations are outlined below under the subheadings required of each party in the chain of the proxy voting process.

<u>Superannuation trustees and investment managers</u>

Superannuation trustees and investment managers should immediately commence requesting issuers in which they hold shares to receive proxy instructions by electronic means as a matter of course at all members' meetings.

<u>Issuers</u>

All S&P/ASX 300 companies should put appropriate electronic proxy voting arrangements in place as soon as possible.

Issuers should develop an electronic proxy voting capability that will provide a meaningful audit trail from issuers & their registrars to shareholders so that superannuation funds, investment managers and other appointed proxies are able to confidently declare how they voted in any instance.

The audit capability should allow for acknowledgement within 24 hours of the record cut-off date for any proxy instruction submitted electronically. The industry is prepared to discuss mechanisms to allow issuers and share registry service providers to recoup any development costs by charging a fee (based on cost-recovery) for using such a system.

Should, as soon as practicable, make publicly available on the corporate governance part of their websites a clear policy surrounding how they will deal with unclear proxy forms and cases where the votes lodged do not reconcile at the proxy appointment cut-off date with the shares actually held by that registered shareholder at the record cut-off date.

The policy should also provide that in cases where there is a discrepancy in the shareholding, the company will direct its share registry service provider to conduct a reconciliation process so that the correct entitlement is voted as opposed to disregarding the entire number of votes.

Financial Market operators

In consultation with issuers and institutional and retail shareholders, FSC will continue to work with the financial market operators towards the development of a template to facilitate standardised disclosure of proxy voting results.

The template could include details of the number of votes lodged against each resolution including as a proportion of issued capital. We believe there would be significant benefit in having a template in which issuers could report the outcome of voting on resolutions. This would reduce inconsistency and improve readability and potentially future engagement. The ASX Corporate Governance Council may be in a position to assist in template development.

We seek the support of CAMAC in this area.

Government (Treasury/ASIC)

Regulation 7.11.37(3) of the *Corporations Regulations 2001* should be amended to extend the record cut-off date to "5 business days before the meeting". The ASX Listing Rule definition of "business day" should be adopted for this purpose.

Additionally, FSC suggests that ASIC issue a Policy Statement or 'no action' position letter clarifying that any issuer that accepts electronic proxies without a relevant company constitution change will not be taken to have breached the relevant sections of the Corporations Act.

Alternatively, in the event that such a statement is unable to be provided by ASIC, FSC recommends that companies seek to amend their constitutions at the next meeting of members to explicitly provide for electronic lodgement if this is not already included in their constitution.

Companies should also be required to report to the market the total number of proxy votes exercisable by all parties and declare the final result tallies.

Further, we also endorse the recommendations for regulatory reform in the ACSI / Ownership Matters report submitted to this review.

3. Shareholder resolutions / engagement

The FSC supports the expansion of the ability of shareholders to submit to companies for inclusion on the AGM agenda non-binding resolutions. Over the last 12 months we have seen instances in relation to both climate change disclosure (Woodside Petroleum) and electronic gaming machines (Woolworths), where resolutions which might otherwise had been put to shareholders as non-binding resolutions instead had to be put as constitutional amendments. Aside from requiring a greater portion of shareholders to pass (75% as opposed to a simple majority) constitutional amendments are not the most appropriate medium for achieving change in areas like these.

The FSC does not accept the arguments put forward by CAMAC report that allowing non-binding resolutions could blur the distinction between the role of the board and that of the general meeting, diminish director accountability, or be equivalent to the company being run through 'shareholder plebiscite' because these concerns have not been realised in the introduction of non-binding resolutions related to executive pay.

To the contrary non-binding resolutions in relation to executive pay have proved a valuable tool for shareholders to express concerns over remuneration practices without causing broader unintended consequences for the company (as per a constitutional amendment) and importantly has increased the level and quality of director engagement with shareholders on remuneration practices.

Coupled with changes to threshold tests, particularly in relation to minimum holding periods, broadening the scope for non-binding shareholder resolutions has the potential to provide a new and important tool for shareholder engagement with companies on issues of interest to long term shareholders, particularly as they relate to the long term sustainability of the company. The coupling of these mechanisms could (as part of a broader package of reforms) prevent some of the negative impacts of short-termism identified by the Kay Review in the UK in relation to the in UK equity markets.

Recommendation: Expand the ability of shareholders to submit to companies for inclusion on the AGM agenda non-binding resolutions. Where a company rejects the request to include a non-binding resolution, an independent arbiter determines which proposals are placed on the agenda.

Section 5.4 looks at the legal requirements and practical mechanisms by which shareholders can place a matter on the agenda of a company's AGM. Currently shareholders are only able to place very specific items on AGM agendas with little scope for non-binding resolutions being put and significant scope for companies to refuse resolutions.
In considering this issue, the FSC takes the broad view that shareholders should:

- Not be impeded by misaligned or inefficient processes from placing matters on the notice of meeting; and
- Be able to place non-binding resolutions on the agendas of companies' general meetings so long as safeguards are in place to prevent vexatious or unjustified resolutions.

The review asks a number of questions regarding these issues which all warrant responses, but should be taken together with regard to the principle stated above.

Questions

Should there be any change to the timing requirements for the calling of an AGM, including for shareholders to place matters on the agenda of an AGM, to seek the circulation of statements concerning any resolution, or to nominate persons for the position of director?

Should companies be required to publish a pre-agenda notice and, if so, what should be the contents and timing of that notice?

The FSC supports the timing changes suggested by the review, whereby companies should provide three months' notice of the date of the AGM and provide shareholders one month to submit any resolutions or director nominations. The current system requiring the notice of annual general meeting to be lodged with the ASX 28 days prior to the AGM should be increased to 42 days. Further, the current requirement for the annual report to be lodged with the ASX 21 days before the AGM should also be lengthened to 42 days. To fit it with the notification of the date of the AGM (3 months prior to the meeting) and the lodgement of the notice of meeting with the ASX (42 days prior to the AGM) shareholders who want to submit a proposal on the AGM agenda should do so within one month of the notification of the AGM date.

Longer periods will permit increased scrutiny but also more informed engagement and deeper consideration of the issues at hand.

Question

Does the current law concerning excluded material either create undue difficulties for shareholders who wish to criticise directors or, conversely, unduly restrict directors in vetting out information to be circulated to shareholders at the company's expense?

The FSC supports a framework where defamatory resolutions against individual directors can be excluded as there are other forums, in particular director elections and the ability for shareholders to obtain the shareholder register, where shareholders who are critical of directors can express their views. However, this should not extend to the board or company as whole, where resolutions critical of a course of action or decisions should still be permissible in non-binding form proposed below. *What about an independent arbiter such as in the US – the SEC determines which proposals make it onto the agenda*

Question

Should there be any rule regarding the failure to present a resolution at an AGM?

The FSC agrees with the CAMAC Report and does not support penalties for not presenting a resolution at the AGM.

4. Reporting content

Issue: CAMAC, as part of the terms of reference on the future of the annual general meeting, is required to review whether documents in relation to the AGM - in this case specifically the annual report - should be changed to better meet the needs of shareholders in the future. This will require an examination of such matters as: reduction of unnecessary information ('clutter') in annual reports; integrated reporting (a more forward looking strategic approach to communication); any issues of liability in relation to proposed changes, and technology to improve communication.

The FSC shares the view that annual reports are limited in usefulness due to a combination of complexity, detail and 'clutter', and lack of a consistent strategic focus by most reporting entities to explain the creation of long term value. The introduction of s 299A was intended to address some of these issues by providing for what is in effect a new operating and financial review (intended to address the limitations of audited accounts in providing a transparent assessment of the financial progress of companies). The FSC welcomes the forthcoming guidance by ASIC (CP 187 - Effective disclosure in an operating and financial review).

Nonetheless, it is clear that the current requirements for the annual report remain suboptimal and, further, there are competing views on how to most effectively address these problems. The FSC's view is that the most promising work in this field is being undertaken by the International Integrated Reporting Council (IIRC). The IIRC is currently piloting a draft integrated reporting framework with organisations, including some Australian companies.[1]

The IIRC will publish a complete draft framework by the end of 2013 (with interim reports on technical matters to be published throughout 2012 and 2013). The FSC notes that the Financial Reporting Council has established an Integrated Reporting Taskforce specifically to monitor IIRC developments and outputs.

Recommendations:

- CAMAC should acknowledge and reference the work of IIRC and consider recommendations for amendments to annual report requirements as the work of the IIRC evolves.
- There should be focal points for consideration of the IIRC integrated reporting framework, as well as for those technical issues that arise in the lead-up to publication of the completed integrated reported framework in 2013. The FSC is of the view that the logical place for that focus point in the short term is with the ASX Corporate Governance Principles and the longer term, the Financial Reporting Council.
- The FSC is of the view that changing reporting requirements to provide for a strategic report and an annual directors' statement, as outlined in the CAMAC discussion paper at 4.2.6, would be beneficial. However, that proposed change should be considered in the context of the review referred to above and should not be undertaken in isolation.

5. Stewards code

Corporate governance in Australia has benefitted from a series of self-regulatory and legal requirements which govern the way in which institutional shareholders conduct their affairs as fiduciaries.

The FSC has maintained a number of self regulatory tools to assist asset managers, asset owners and companies in meeting high standards of corporate governance. Other bodies such as the ASX Corporate Governance Council are well-established institutions which play an important role in achieving high standards of corporate governance in Australia.

[1] "Integrated Reporting brings together material information about an organization's strategy, governance, performance and prospects in a way that reflects the commercial, social and environmental context within which it operates. It provides a clear and concise representation of how an organisation demonstrates stewardship and how it creates and sustains value. An integrated Report should be an organization's primary reporting vehicle" (IIRC, May 2012).

For example the FSC has maintained the Blue Book – a corporate governance guide for fund managers and companies for over a decade in addition toa mandatory standard on proxy voting disclosure on all Australian company resolutions.

In superannuation (asset ownership), the FSC has developed a mandatory governance standard which requires our superannuation company members to have a majority of independent directors, independent chair, conflicts provisions and member disclosures of proxy voting and ESG risk reporting. Other bodies such as ACSI have undertaken significant bodies of work in guiding super trustees on meeting contemporary governance standards expected of asset owners.

In 2011, in conjunction with ACSI, the FSC published a reporting guide for Australian companies on disclosing their ESG risks to investors.

We strongly believe in the value of high standards in corporate governance which recognises the stewardship and fiduciary nature of investment management and trusteeship in superannuation. A number of the elements in the UK Stewards Code have been developed comprehensively by the FSC and other bodies in Australia – therefore we would prefer that there not be duplication.

This is particularly salient given self regulation in Australia has been effective. For example, investors in a pool managed investment scheme can view the manager's proxy voting record and the ASX Corporate Governance Principles (which drive company disclosure) have consistently been updated to ensure they remain fit for purpose.

Accordingly we would not support a "hard" regulatory approach whilst self-regulation is maintaining its effectiveness. The UK Stewardship Code has seven principles, some of which are presently covered by legal or self-regulatory obligations in Australia. The FSC is prepared to review the viability of creating further standards for asset managers in addition to Standard 13: Proxy Voting.

Further, the FSC is prepared to work with other stakeholders to develop a consolidated set of "codes" which could continue to apply through self-regulation.

6. The 100 member rule

3.84 Section 249D(1) of the Corporations Act stipulates that:
(1) The directors of a company must call and arrange to hold a general meeting on the request of:

(a) members with at least 5% of the votes that may be cast at the general meeting; or
(b) at least 100 members who are entitled to vote at the general meeting.

Our view is that the rule may be open to abuse This is a widely shared view, for instance, in the recent PJC inquiry, Treasury stated that the ability of relatively small groups of shareholders to impose the cost of an extraordinary general meeting (EGM) on companies gave them 'significant and undue leverage when negotiating with large companies'.

As noted in the PJC paper, the Exposure Draft of the Corporations Amendment (No. 2) Bill 2006 proposed to abolish the 100 member rule and leave the five per cent requirement, which would have brought Australia's law into line with comparable jurisdictions. It is further noted that the states may need to agree with the Commonwealth on executing this change.

We believe this warrants further consideration, accordingly we propose a variation of recommendation 7 of the PJC report: "The government should continue to negotiate with the states to have the 100 member rule abolished." Our variation is designed to continue permitting minority shareholders access to calling meetings providing they meet criteria which demonstrates their commitment as investors.

Recommendation: retain the 5% threshold.

Amend the 100 member threshold to require that each of the 100 members have a:
(1) A minimum holding period of 12 months; and
(2) A $1,000 minimum holding value.

In order to bolster the proxy voting recommendations above, we believe that shareholders should be permitted (where they comprise more than 5 per cent of a company) to appoint an independent reviewer / scrutineer of a poll.

SUBMISSION OF THE HONOURABLE PETER R. GRAHAM Q.C.

ON CAMAC'S DISCUSSION PAPER ENTITLED

"THE AGM AND SHAREHOLDER ENGAGEMENT"

PREFACE

As an active participant in the consideration of business at Annual General and other company meetings for about 50 years and as a director of the Australian Shareholders' Association (NSW Branch) from about 1970 to 1976, I would hope that the following observations may be of some assistance to CAMAC in its formulation of information, as requested by the Parliamentary Secretary to the Treasurer in his letter to the Convenor of 5 December 2011.

My earliest recollection of such a meeting dates back to my time as a student of Company Law, under the guidance of the renowned Professor, the late Ross Parsons, at the University of Sydney, when the Macquarie Auditorium, from which radio station 2GB broadcast its live Quiz shows, stood in Phillip Street, Sydney in close proximity to the Law School.

At a meeting in the Macquarie Auditorium, Blue Metal Industries Limited proposed that the Company's Superannuation Scheme be extended to include non-executive directors. Whilst the proposal was approved, it was not without some heated debate as to the propriety of encouraging longevity in office even though a director's use-by date may well have come and gone.

Another significant meeting took place at the then Regent hotel in Sydney when Australia and New Zealand Banking Group Limited put forward a contentious proposal to raise capital in about 1991 through an issue of, as I recall it, non-redeemable, non-cumulative, converting preference shares.

Then came the historic Annual General Meeting of Westpac Banking Corporation at the Sydney Convention Centre at Darling Harblour in January 1992 at which the Chairman sought to restrict the right of members to speak by imposing a 5 minute time limit on their contributions to the business of the meeting. A protracted debate ensued in relation to the 5 minute time limit, which the Chairman ultimately had the good sense not to enforce. Somewhat curiously, the meeting was called for the afternoon, rather than the traditional mid-morning starting time. In his "Report", the then Chairman, Sir Eric Neal, declared that "(t)here are signs that the worst of the bad debt experience is behind us". One did not need to be Einstein to realise that this statement was bunkum. It was the subject of strident criticism by members who rose to speak. Not surprisingly, about 6 weeks later the Bank wrote off another $3 billion and shortly thereafter the Chairman left the board, his office being assumed by his distinguished successor, John Uhrig.

Other notable Annual General Meetings which I have attended have included the Arnotts Limited meeting at the Menzies Hotel in Sydney when the then Chairman, Mr Stan Small, was

castigated for the removal from office of the Company's Managing-Director, and the Coles Myer Limited meeting in the Sydney Town Hall at which the business dealings between companies associated with Mr Solomon Lew and Coles Myer itself came under considerable scrutiny.

SUBMISSION

Annual General Meetings are to companies what elections are to democracy. They are of critical importance.

As I said in my email to Mr Kluver of 17 September 2012, "One must never overlook, in respect of companies, the three fundamental considerations: ownership, stewardship and accountability. Sadly, ownership is often treated with inappropriate disdain."

At Annual General Meetings (see s. 250N(2)), shareholders (the owners) have no right to direct the Board as to the manner in which the Board should discharge its functions (see McLelland J's judgment in NRMA v Parker (1986) 11ACLR 1; 4 ACLC 609). However, they do have the right to speak to the motions that are properly before the meeting, including motions for the election of directors (see s.250R).. In addition, they have the right to bring before such meetings motions for the removal of directors (see s.203D) and they may requisition the inclusion in the business of such meetings, of other business, such as proposed amendments to a Company's Constitution (see s.249N).

Sadly, under the Corporations Act, motions for the "adoption" of the annual accounts, the directors' report and the auditor's report, no longer constitute the ;primary business of an AGM. In part this has come about because shareholders have been perplexed when told that they had no right to ask questions about those matters, their right being to speak for or against the adoption motion. This lead to the inclusion in the Act of a statutory right "to ask questions" and the introduction of s. 250R(1), providing that the business of an AGM may include "(a) the consideration of the annual financial report, directors' report and auditor's report" whether referred to in the Notice of Meeting or not (see also, inter alia, ss.292(1), 295, 297, 298, 299, 307 and 308).

The questions sections are now ss.250S, 250SA, and 250T. Unfortunately, many, perhaps most, listed public companies do not understand their obligations in respect of these matters. They seem to focus on conferring a right to ask questions, seemingly without limitation, as if that exhausted the role of shareholders at AGMs. Nothing could be further from the truth.

Apart from other considerations, s.250S(1) provides both a statutory right to ask questions and a separate right to "make comments on the management of the company".

One might argue that chairmen (whether male or female) allow too much latitude in relation to questions and comments. One might argue that "consideration of the annual financial report, directors' report and auditor's report" is somewhat free-ranging, but undoubtedly distinct from "the management of the company", about which questions may be asked under s.250S(1) and in respect of which comments may be made under that sub-section. To determine how far-reaching "consideration" of the reports may be, one needs to carefully analyse and

understand what the reporting requirements are. Perhaps most chairmen don't have a clear enough grip on those requirements.

The AGM has immense value. It provides the forum for the relevant reports to be brought by the directors to the owners on an annual basis. It allows the owners to "eye-ball" the directors and form judgments as to their competence. It allows the owners to bring their stewards back into line if their performance and account of it is unacceptable.

Most importantly, the AGM provides the forum for members to share their thoughts and concerns with their fellow members. Whilst the "penny may not drop" instantaneously, press reporting of an AGM will serve to alert co-owners of problems that may lie ahead and warrant remedial action.

The possible ways in which shareholders may legitimately use AGMs demands that they be preserved, whether that only results in action being taken once in a blue moon. For an illustration of my thinking on the use of AGMs may I invite the Committee's attention to Bryan Frith's articles concerning Beswick Pty Limited and Panary Pty Limited qua BHP published in The Australian newspaper on 13 August 1997 ("BHP crisis puts spotlight on role of Beswick block") and 2 December 2003 ("Right to clip board powers"). I would also urge the Committee to ponder ASC Memo #1/1994, re-issued as #131 in 1996 on "Chairperson's Conduct of Meetings and Members' Right to Speak at Meetings"

ANNUAL REPORTS

It should be mandatory for listed public companies to send hard copies of Annual reports to ALL shareholders Boards may be proud of their achievements or ashamed of them, but should never seek to hide the results of their stewardship from the companies' owners.

The obligation of boards to include remuneration reports should be curtailed. Basic information should be included in the annual financial report, but obfuscation should not be permitted.

Directors should be educated as to their responsibilities in respect of their Statutory Reports and, in particular under s.299(1) of the Act.

Perhaps, the inclusion of "pretty pictures" and other irrelevant material in Annual reports should be proscribed. If the only information from the directors was that required by the Act, shareholders would be better informed.

CAMAC Paper on The AGM & Shareholder Engagement

This response is prepared by John Campbell and Tony McAuliffe, two volunteer company monitors who are members of the Australian Shareholders Association, Inc, and resident in WA. Our views do not necessarily represent the views of all monitors or the Association. Our comments are set out below in blue font under the questions posed by CAMAC. The comment 'no response given' indicates that we do not wish to comment because in our opinion the question is not relevant to monitoring and/or the interests of retail shareholders represented by the Association.

Chapter 3 Shareholder involvement – questions for consideration:

1. Should legislative or other initiatives (for instance, additional ASX Corporate Governance Council, or other, guidance) be adopted, and if so for what reasons, concerning:
   - the role of the board collectively as it relates to engagement with institutional/retail shareholders throughout the year, including leading up to the AGM
     Generally, we think current informal arrangements work reasonably well and we do not think that we become privy to market-sensitive information.
   - the role of particular board members, such as the board chair or the chairs of board committees, in relation to engagement with institutional/retail shareholders
     As above
   - the role of institutional shareholders throughout the year, including leading up to the AGM. In this context:

     – is there a problem with having a peak AGM season and, if so, how might this matter be resolved
     There is definitely a problem caused by the having a peak AGM system but it is not caused by the provisions in the Corporations Act – it is caused by the ATO insisting that companies which wish to adopt a balance date other than 30 June make a pre-payment of a year's tax, instead of allowing a proportionate payment for the period from one balance date to the non-30 June balance date. This makes it very difficult for companies to change from a 30-June year-end. If anything, the time for holding the AGM needs to be brought closer to balance date rather than extended away from it as the currency of financial information is very important to users. The ATO should be encouraged to change its tax imposition and then companies would be free to move away from 30 June without financial penalty. They would be encouraged to do so by having lower professional fees for non-peak audits, tax returns, share registry services etc, and lower meeting costs.

     – should at least some institutional shareholders be required or encouraged to report on the nature and level of their engagement with the companies in which they invest, in the manner provided for in the UK Stewardship Code or otherwise
     Ideally, we would like to see the retail shareholders who are investing in managed funds etc given the right to influence the direction of institutional voting, but recognise the problems in seeking this goal. There is a clear conflict of interest as regards voting on remuneration because the executives of institutions who determine such voting are themselves on incentive remuneration arrangements mirroring those in listed companies and relying on the listed companies as the benchmark by which their pay is determined. Disclosure of voting intentions by institutional shareholders within one month after the AGM is highly desirable but seems to be an issue of considerable magnitude depending upon how many listed

companies they hold. Unit holders however are entitled to expect their shares to be voted and to be told the reasons for voting as they did.

corporate briefings
We want to encourage webinars where interested shareholders of whatever status can listen in on corporate briefings.

- the role of proxy advisers, including:

  – standards for investors using proxy advisers, including the extent to which these investors should be entitled to rely on the advice of proxy advisers in making voting decisions, or, alternatively, whether those investors should have some obligation to bring an independent mind to bear on these matters.
  No response given as we are talking about retail investors who have access to our proxy advice and we do not anticipate that CAMAC is proposing to impose such standards on retail investors.

  – standards for proxy advisers
  We declare an interest here – we are not sure if CAMAC sees the role provided by the ASA's volunteer monitors as proxy advisers, but want to be clear that there are differences between proxy advisers seeking a fee for their advice, and our voluntary work. The purchasers of paid advice reasonably expect a standard of competence and due care, but the recipients of a voluntary service such as ours have no right to expect this. Our monitors come from a huge variety of educational and professional backgrounds, and some are quite senior in years – we have airline pilots, medical doctors, engineers and accountants. Imposition of any standard of knowledge and quality would be very difficult for us.

- any other aspect of shareholder engagement?
  No response given
- Could greater use be made of technology to promote shareholder engagement outside the AGM and, if so, how?
  Webinars as above

2. Should there be an amendment to the right of 100 members to call a general meeting of a company?
   We do not think any change is needed to this legislation, which seems to work as intended though rarely used.

Chapter 4 – The Annual Report – questions for consideration:

1. Should legislative or other changes be adopted, and if so for what reasons, concerning any aspect of the annual report requirements?
   No response given – see individual questions below
2. In this context:
   - do the current reporting requirements produce any unnecessary information ('clutter') in annual reports and, if so, how might this be reduced
     There is clutter – eg in accounting methods disclosure and particularly as regards the impact of newly proclaimed standards etc. Certain accounting methods should be disclosed – eg goodwill etc, but all the rest could be included in a website file. Similarly, long lists of mining tenements, and similar clutter could be reduced. Financial risk management disclosure is also an area where rationalisation should be introduced. Remuneration reports are not always written in plain English. Their

complexity is a function of compliance and is probably impossible to avoid. That said, the difficulty is the explanation of share-based payments and their valuation etc. There is no doubt that most retail shareholders would not have the desire or endurance to struggle through a remuneration report and it would be a lot simpler if legislation was introduced to prohibit share-based payments altogether. Disclosure of investment risk in a company similar to that found in a prospectus would not be necessary if such information was required to be maintained on a website by all listed companies. It would be an improvement all directors to sign off on the report thereby imposing ownership and a more direct message about their duty of care, and their need to attend to the company at important times to discharge their duties.

- should the reporting requirements be redesigned in any respect, including along any of the lines adopted, or under consideration, in overseas jurisdictions, such as having a strategic report and an annual directors' statement
  The US adopts a different style of narrative financial report to shareholders combining directors report and financial statements in a flowing document, whilst the detailed financial statements of interest to analysts and monitors are filed with the regulator and made available to the people who need them.
- what, if any, issues of liability might arise in the event of changes to the reporting requirements, particularly in relation to forward-looking statements, and how might this matter be dealt with
  We would be concerned if profit forecasts became more expansive and less regulated.
- how might technology best be employed to increase the accessibility of annual reports
  No response given. We find that it is much better to review annual reports in hard copy than on screen because one needs to be able to cross-reference information from one page to another regularly and easily, and this is hard on screen. It is also much easier to compare the annual reports of two different companies (or prior year to current year) in hard copy rather than on screen.
- what, if any, initiatives might be introduced to cater for future innovations in reporting (for instance, would it be beneficial to establish the equivalent of a Financial Reporting Laboratory)?
  A Five or Ten Year Performance Summary recommended by ASA is not always present but when present is very useful. Taxpayers should not be asked to pay for accounting laboratories.

Chapter 5 – Conducting the AGM – questions for consideration:

1. Should there be any change to the statutory time frame for holding an AGM?
   No -it is already too long after balance date in terms of the financial information under review being out of date.
2. In what respects, if any, might the requirements for information to be included in the notice of meeting for an AGM be supplemented or modified?
   No response given
3. How might technology be used to make this notice more useful to shareholders?
   No response given

4. Might any other documents usefully be sent with the notice of meeting, and, if so, what?
   No response given
5. Should there be provisions for companies to send information about an AGM directly to the beneficial owners of shares held by nominees and, if so, what type of information?
   No response given
6. Should there be any provision for beneficial owners of shares in a company to participate in the AGM of that company and, if so, how?
   No response given
7. Should there be any change to the threshold tests for shareholders placing matters on the agenda of an AGM?
   The threshold tests could be modified where in the case of the 100 shareholders test each shareholder should be required to hold shares of a meaningful economic value (say $1000) prior to giving the company notice of resolution
8. Should there be any change to the timing requirements for the calling of an AGM, including for shareholders to place matters on the agenda of an AGM, to seek the circulation of statements concerning any resolution, or to nominate persons for the position of director?
   As above
9. Should companies be required to publish a pre-agenda notice and, if so, what should be the contents and timing of that notice?
   No response given
10. Does the current law concerning excluded material either create undue difficulties for shareholders who wish to criticise directors or, conversely, unduly restrict directors in vetting out information to be circulated to shareholders at the company's expense?
    No response given however CAMAC should consider whether defamation laws are creating difficulties for shareholders seeking to remove or criticise directors.
11. Should there be any rule regarding the failure to present a resolution at an AGM?
    No response given
12. Should shareholders have greater scope for passing non-binding resolutions at AGMs?
    Consideration should be given to making a non-binding resolution to receive the annual financial report. Our observation is that institutions and retail shareholders are using the vote on the remuneration report to express disapproval of the results for year and other aspects of directors' performance which are unrelated to remuneration. If there was to be a non-binding resolution to approve the financial report, it would concentrate any negative feelings into that resolution, leaving the remuneration voting to be on its merits. We are not otherwise in favour of non-binding resolutions which could encourage directors to act irresponsibly.
13. What, if any, additional legislative or best practice procedures should be adopted for companies to seek the views of shareholders on issues they would like discussed at the AGM, or to invite shareholders to submit questions prior to the AGM?
    The submission of questions to be answered at the AGM appears to be working satisfactorily
14. Should there be some obligation on the auditor (or the representative of the auditor) to speak at the AGM?
    It would be a waste of time for the auditor to be required to read his report or another document relating to the audit. In practice, few questions are directed to the auditor unless there appears to be an error in the financial statements. Directors should be able

to answer any questions about the accounts and most shareholders are not well-equipped to ask technical questions relating to the conduct of the audit, or to gain any meaningful information from the responses given.

15. What, if any, obligations should a company or a company auditor have to answer questions from shareholders?
    Companies or company auditors appear to be answering appropriate questions at AGMs. The situation where confidentiality precludes an answer could arise but all seems well in our experience.
16. Should any matter be excluded from or, alternatively, added to the business of the AGM?
    There may be matters properly excluded from the AGM on confidentiality grounds. Chairs seem to be very accommodating with respect to the range of other matters raised in either general business or in a discussion segment at the AGM conclusion.
17. What, if any, changes are needed to the current position concerning:
    - the general functions and duties of the chair
    - the chair ensuring attendance of particular persons at the AGM
    - the chair moving motions
    - motions of dissent from a chair's rulings?
      The prospect of legislating in respect of motions of dissent from a chair's rulings seems like opening a can of worms and might be better left alone.
18. Should a chair be obliged to provide shareholders with a reasonable opportunity to discuss a resolution before it is put to the vote?
    A chair should provide reasonable opportunity for shareholders to discuss a resolution prior to putting it to the vote. If this right can be abused perhaps it should be enshrined in legislation.
19. Should a chair have the power to impose any time, or other, limits on an individual shareholder speaking at the AGM?
    A chair must have the right to impose a time limit on an individual shareholder speaking at an AGM, and to deny a questioner the right to continue a particular line of questioning after a reasonable opportunity to put a point of view and a response from the board. It would be interesting to hear the alternate view
20. What changes, if any, should be made to the current requirements concerning:
    - informing shareholders of their right to appoint a proxy
    - the proxy form
    - pre-completed proxies
    - notifying the company of the proxy appointment
    - the record date and the proxy appointment date
    - irrevocable proxies
    - directed and undirected proxies
    - renting shares
    - proxy speaking and voting at the AGM, or
    - any other aspect of proxy voting.

      The proxy appointment form must be simplified as it appears to be creating enormous confusion particularly where proxies may revert to the chair in certain circumstances. In some instances, particularly where electronic voting is in use, shareholders are told on registration that their proxy is invalidated by the presence at the meeting and that if they attend as shareholders, they must submit votes in person rather than relying on their proxy. This situation is of significant concern to

the ASA as we are losing our voting power. Direct voting is also confusing retail shareholders, particularly when the direct voting form is a panel within the proxy form and may result in shareholders inadvertently voting direct when they intended to provide a proxy.

21. Should direct voting before the meeting be provided for by legislative or other means, and if so what matters should be covered in any regulatory structure?
    Direct voting should be allowed and covered by legislation but a separate form should be prescribed that sets out clearly the irrevocable nature of direct voting and the difference between it and proxy voting.
22. In what circumstances, if any, should access to pre-meeting voting information be permitted?
    It should be a requirement that companies display proxy counts prior to the matter being put to a vote, but the number of votes held by shareholders present at the meeting should also be displayed to provide balance as to whether the proxy verdict can be overturned by those voting on the floor.
23. In what manner if any, should access to pre-meeting voting information be regulated before discussion on a proposed resolution?
    See answer to #22 above
24. In what manner, if any, should the current requirements concerning the disclosure of pre-meeting votes before voting on a resolution be amended?
    No response given
25. Should there be legislative or other recognition of online voting during the course of an AGM and, if so, in what respects should this form of voting be regulated?
    There should be regulation of what type of voting is acceptable and what is required to document a valid vote. It is essential that all voting be capable of proper scrutineering and this should apply to direct votes, proxy votes and ordinary votes. A scrutineer should be able to see the shareholder's signature against his vote
26. Do any issues arise concerning voting exclusions on resolutions that must, or may, be considered at an AGM and, if so, how might those issues best be resolved?
    No response given
27. Should any changes be made to the current provisions regarding voting by show of hands?
    Voting on a show of hands is fundamentally undemocratic. All voting should be subject to poll. Technology now provides for proxy votes and electronic votes cast at AGMs to be counted in tandem. Legislation required!
28. What legislative, or other, verification initiatives, if any, should be introduced concerning voting by poll at an AGM?
    The law should set out what record is to be maintained of each shareholder's vote so as to make scrutineering of votes practicable in all methods of voting.
29. Should one or more verification requirements apply in all instances or only if, say, a threshold number of shareholders require it?
    The law should require a substantial number of votes be behind any request at an AGM for scrutineers or similar; the 100 shareholder rule would seem appropriate. In that case the request must be granted .Legislation required
30. Should any steps be taken to promote more consistency in the disclosure to the market of voting results?
    We would prefer to see a standard form used with percentages and method of calculation (with or without abstentions in the denominator) prescribed.

31. Following the AGM, what, if any, rights of access should shareholders generally, or the person proposing a resolution, have to voting documents?
    Rights of access to voting documents by a shareholder after the AGM should be subject to a constraint to prevent shareholders using the step as a means of delaying or frustrating the business of the company but should be available in genuine cases of concern.
32. What, if any, changes should be made to the requirements concerning the recording of details of voting in the minutes of the AGM?
    No response given
33. Should there be a statutory minimum period for retention of records of voting on resolutions at an AGM and, if so, for what period?
    We see no reason why these records should not be subject to the same retention requirements as other company records.
34. Should there be any legislative initiatives in regard to the election of directors, including in relation to:
    - the frequency with which directors should stand for re-election
    - the right of shareholders to question candidates (and receive answers)
    - the voting procedure?

    The length of directors' terms of office between re- elections, right to question and the voting procedure should be covered in the listing rules to facilitate prompt amendment according to need.
35. Are there any matters concerning dual-listing that should be taken into account in the regulation of AGMs?
    There are companies registered in the Bahamas listed on the ASX that hold no AGMs and produce financial statements in compliance with minimal Bahamian requirements. We think that any entity listed on the ASX (and this includes REITs) should be required to prepare financial reports in accordance with the Corporations Law and to hold AGMs.
36. Are there any problems in the voting or other aspects of AGMs for overseas holders of shareholding interests in Australian regulated companies?
    We are not aware of any problems on any aspect of AGMs arising from overseas shareholders in Australian listed companies

Chapter 6 – Future of the AGM – questions for consideration:

1. For some or all public companies, should the functions of the AGM be changed in some manner, or the obligation to hold an AGM be abolished?
   The AGM should not be abolished as it brings boards out into the open where they are on display. There is no doubt that most directors consider the AGM as a venue where shareholders can and will express support or anger dependent upon their perception of the board's conduct of the company's affairs, whereas on a webinar or similar they are in a comfort zone and not so personally exposed. Equally, retail shareholders like to meet directors and other shareholders so as to form their own conclusions. Perhaps it is a Perth-differentiation from other parts of Australia, but AGMs of even relatively small companies at the lower end of the ASX200 are well attended by about 50 shareholders and they are often quite vigorous in questioning the board. On other occasions though, the ASA may be the sole questioner usually on remuneration issues.
2. In this context, what technological developments might be taken into account in considering the possible functions of the AGM?

We would not encourage allowing shareholders (and others) to direct questions to the chair through the internet at an AGM.

3. For some or all public companies, and if the AGM is retained in some manner, what legislative or other initiatives, if any, should there be in regard to the possible formats of the AGM?
   We are happy with the present format.
4. In this context, what technological developments might be taken into account in considering possible formats for the AGM?
   We are happy with the present format.

BHP Billiton
BHP Billiton Centre 180 Lonsdale Street
Melbourne Victoria 3000 Australia
GPO Box 86
Melbourne Victoria 3001 Australia
Tel: +61 3 9609 2654
bhpbilliton.com

31 December 2012

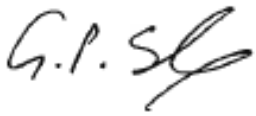
John Kluver
Executive Director
Corporations and Markets Advisory Committee
GPO Box 3967
Sydney NSW 2001

Dear Mr Kluver,

I am pleased to enclose a submission from BHP Billiton in relation to CAMAC's discussion paper *The AGM and Shareholder Engagement*.

I trust you find this submission to be a useful addition to the debate. If you have any questions, please do not hesitate to contact Megan Esson, Manager Company Secretariat on megan.esson@bhpbilliton.com.

Yours sincerely,



Geof Stapledon
Vice President Governance

BHP BILLITON SUBMISSION TO CAMAC IN RELATION TO THE DISCUSSION PAPER ON THE AGM AND SHAREHOLDER ENGAGEMENT

Submission Highlights

We welcome the opportunity to respond to the CAMAC Discussion Paper on the AGM and shareholder engagement. BHP Billiton has a Dual Listed Company (DLC) structure, combining an Australian company (BHP Billiton Limited) with a UK company (BHP Billiton Plc). We are therefore subject to the regulatory regimes of both Australia and the UK, and are able to comment on the CAMAC Discussion Paper from this perspective.

There are a number of general points which we would like to make on each of the three areas covered in the paper: shareholder engagement, the annual report and the Annual General Meeting (AGM). Together with the continuous disclosure regime, these three elements are important building blocks of effective communication with shareholders. Our general comments are followed by responses to some of the questions set out in the Discussion Paper.

Issue 1: Shareholder Engagement

As your paper states, shareholder engagement by listed companies is an ongoing process and is important to support more informed involvement by shareholders in corporate governance. Over the past 10 years since the merger of BHP and Billiton we have sought to build and maintain open and transparent relationships with our investors around the world to ensure the Board represents their views in governing the business. We have a proactive plan for regular engagement with:

- institutional shareholders and investor representative organisations in Australia, South Africa, the United Kingdom and the United States; and
- retail investor organisations such as the Australian and UK Shareholders' Associations as well as retail investors directly through channels such as our website, direct correspondence with the Chairman and Computershare.

Our approach has developed over time as have the requirements of shareholders. For example, over 10 years ago contact with BHP Billiton was principally with management and investor relations representatives. Over the last several years it has broadened – and today, in addition to the CEO, CFO, senior management and Investor Relations – there is regular engagement between shareholders and the Chairman, Senior Independent Director, Remuneration and Audit Committee Chairmen and management representatives from Human Resources as well as Health, Safety, Environment and Community, and Company Secretariat.

At the same time it has become critical to have a robust structure in place for feedback from shareholders to be regularly reported to the Board. We believe that this is at the heart of effective engagement. At BHP Billiton, shareholder and analyst feedback is shared with the Board through the Chairman, the Chairman of the Remuneration Committee (also the Senior Independent Director), other Directors, the CEO and the CFO. In addition, Investor Relations provides regular reports to the Board on shareholder feedback and analysis. This approach provides a robust mechanism on an ongoing basis to ensure Directors are aware of issues raised and understand shareholder views.

As the Discussion Paper notes, engagement may not necessarily result in a convergence of interests or perspective between a company and its various shareholders, or even between shareholders. We believe that, while it is critical that shareholders have confidence in the board and management of a company, engagement is not necessarily about reaching a unanimous conclusion on business or governance issues. Instead we believe the aim is for the board to understand the various views of shareholders to ensure it has given them full consideration when balancing these different perspectives in reaching its own conclusions – and ultimately, putting matters before shareholders at an Annual or Extraordinary General Meeting.

We do not believe that additional regulation to mandate a form of shareholder engagement is required. Our view is that the current framework strikes a sensible balance between providing guidance to companies (and their shareholders) and allowing a sufficient degree of flexibility for companies of different sizes operating across different industries with a variety of shareholders. We submit that any change, if recommended by CAMAC, should adopt the 'comply or explain' approach (consistent with the ASX Corporate Governance Council's Principles and Recommendations) to allow companies to adopt practices appropriate to their particular situation.

Issue 2: The Annual Report

We understand the concerns that have been raised in some quarters about the level of complexity of annual reports. This has triggered the call for rationalisation to ensure that reports contain the type of information that investors desire, in a form accessible and comprehensible to retail as well as institutional shareholders. Clearly, part of the complexity of annual reports is driven by this very requirement. Different annual report users will require different information and different levels of detail, which can be difficult to assimilate within one single document of record.

Another driver of complexity is the increasingly common need for multi-national companies to reconcile the wide range – and sometimes conflicting – demands in relation to disclosure and reporting requirements of different jurisdictions. Given our DLC structure, with an additional listing in New York and secondary listing in South Africa, our governance framework reflects the regulatory requirements of Australia, the United Kingdom and the United States. Beyond regulatory requirements, we continue to aim to adopt what we consider to be the highest of governance standards in these jurisdictions.

These various demands are particularly evident in the areas of risk reporting (US and UK), and remuneration reporting (UK and Australia).

We consider that the issues relating to remuneration reporting are the most pressing.

As the Discussion Paper sets out, the UK Department for Business, Innovation and Skills is currently seeking to address the 'simplification' of the reporting regime for remuneration. We are supportive of the proposals, and were pleased to have the opportunity to work with the UK Financial Reporting Lab project to determine how the new single total annual remuneration figure should be calculated and disclosed. However, there is a real risk that while the UK regime looks to make reporting simpler, conflicting requirements from Australian legislators are likely to mean that retail and institutional investors see no simplification, and indeed, increased complexity and confusion, in our Annual Report as we attempt to assimilate two sets of rule changes in one remuneration report.

In particular, we note the recently released draft amendments to the Corporations Act which propose to introduce the requirement to disclose past, present and future remuneration paid in the reporting period. This new requirement, which supplements rather than replaces the existing accounting standard-based remuneration disclosures, would add a further layer of complexity and confusion without achieving the objective of helping shareholders to better understand executive remuneration outcomes in respect of a given reporting year.

In contrast, the UK's new 'single figure' executive pay disclosure rules will *replace* the UK's current pay disclosure requirements, such that UK companies will not need to disclose two different pay numbers for each executive director. UK investors have been heavily involved in the formulation of the new UK rules and are supportive of this approach of replacing, rather than adding to, existing rules.

In addition, we note that the draft amendments to the Australian Corporations Act differ markedly from the UK's 'single figure' executive pay disclosure rules in terms of how the remuneration amounts are required to be calculated. In an increasingly global environment where investors make informed investment decisions in different jurisdictions using remuneration disclosures as one criterion, it is critical that regulators enable the comparison of remuneration practices through the

alignment of reported outcomes. While this is of course of keen interest to DLCs such as ourselves – to avoid increased complexity and confusion for our shareholders and other users of our Annual Report – it is also fundamental for any shareholder for their investment decision-making.

We understand that different responses by Governments to policy imperatives will mean differences in regulatory frameworks. However in some instances different requirements can result in the unintended consequence of less effective overall disclosure to stakeholders. This is clearly something all of us wish to avoid as transparency is critical to accountability. While our Securities and Exchange Commission Form 20-F filings differ in a number of respects to our Annual Report, we work hard to keep the differences to a minimum. We have no wish to produce varying documents for each jurisdiction for each reporting year.

We believe that the appropriate approach to any change to the Annual Reporting framework in Australia should involve a coordinated review of all the relevant legal and other requirements (including Corporations Act, Listing Rules, ASX Corporate Governance Council Principles and Recommendations, and Accounting Standards) with the aim of producing a cohesive set of requirements, drawing upon examples from the United Kingdom and United States as appropriate. This is a particularly pressing issue for remuneration reporting.

Issue 3: The AGM

Communications between companies, shareholders and Non-Governmental Organisations have improved dramatically over the past decade. There are increasing levels of transparency and individuals have access to much wider sources of information, as well as greater ability to share their views. These are constructive developments. However at the same time, the usefulness of the key annual face-to-face opportunity for shareholders and their directors to engage is under question from several quarters. In this context, as the CAMAC paper states, it is opportune to consider whether the AGM in its current, or any other, form performs a useful role.

Despite some of the challenges in balancing the requirements of different attendees at AGMs, we consider the AGM continues to be a vital component in the suite of channels for communication between the company and its shareholders. The presence of the Board and senior management team at the AGM provides us with a direct interface to communicate with and learn the views of retail shareholders and other important stakeholders. These might be about the Group in general, aspects of strategy, uses of capital, Health Safety Environment or Community issues, or about the performance of individual assets across our operations. It is important for the Board and our senior management team to receive this perspective first-hand.

Each year, hundreds of our shareholders attend our AGMs and many of them take the opportunity to ask questions. While this number is far fewer than the total number of holders on our register, we believe that the views of all our shareholders should be given our attention and treated with respect.

We support having an open forum each year for all shareholders to attend and for them to share their views with our Directors and senior executives. The current AGM process provides the company and shareholders with that forum. While some might suggest that this could be achieved by having 'town hall' sessions at various locations each year, our experience is that our shareholders value having a forum where they can raise general comments in relation to the company, as well as any questions they may have on the resolutions put to a vote. The one-share, one-vote principle is an important element of shareholder rights in Australia. It is therefore essential that shareholders be given a reasonable opportunity to ask questions of the Board and management of the companies in which they choose to invest. In addition, under our DLC structure, we are required to hold an AGM under UK legislation. As we strive to ensure a consistent approach for our UK and Australian-based shareholders, the current AGM process ensures that there is a parallel forum in Australia so that all of our shareholders are given an opportunity to engage with BHP Billiton in a similar manner.

As contemplated above, for some companies, the AGM attracts few shareholders. However, for others, although the proportion of shareholders as a whole that attend the AGM is small, interest in the AGM remains. Accordingly, we believe that any change should take this into account and allow for flexibility so that the most appropriate approach can be selected.

DETAILED RESPONSE TO CAMAC QUESTIONS:

3.4 Shareholder engagement

Should legislative or other initiatives (for instance, additional ASX Corporate Governance Council, or other, guidance) be adopted, and if so for what reasons, concerning the role of institutional shareholders throughout the year, including leading up to the AGM. In this context:

Should at least some institutional shareholders be required or encouraged to report on the nature and level of their engagement with the companies in which they invest, in the manner provided for in the UK Stewardship Code or otherwise?

Based on our experience in the UK, the Stewardship Code has been a positive initiative which has been embraced by the institutional investor community. It is therefore worthy of further consideration in Australia. A suggested issue for consideration is discussing with the UK Financial Reporting Council whether the existing UK Stewardship Code could be adopted as an international code. This would be preferable to the adoption of slightly different codes in separate jurisdictions around the world, recognising that the alignment of underlying policy objectives among several jurisdictions (including Australia and the UK) and the international presence of many institutional investors should make a single code feasible.

We note that the UK Stewardship Code is structured as guidance rather than mandatory legislative requirements. This approach has been endorsed strongly in the UK, as there is no clear evidence that legislation is warranted. Accordingly, our view is that any change should take the form of guidance.

The role of proxy advisers, including:

Standards for investors using proxy advisers, including the extent to which these investors should be entitled to rely on the advice of proxy advisers in making voting decisions, or, alternatively, whether those investors should have some obligation to bring an independent mind to bear on these matters?

Standards for proxy advisers?

Over the past decade there has been an increase in the exercise of voting rights by institutional investors who have come under increasing pressure to exercise their stewardship responsibilities through active engagement. The proxy advisory industry has grown as a consequence.

In our experience most domestic institutional investors use proxy advice as an input to their voting decisions. They do not blindly follow the adviser's voting recommendations.

We appreciate the difficulties that the proxy advisers face in meeting with companies during October and November due to the clustering of AGMs in those months for 30 June year-end companies. We therefore engage with proxy advisers throughout the year as part of our pro-active approach to shareholder engagement.

Should there be an amendment to the right of 100 members to call a general meeting of a company?

We believe that the provision enabling shareholders to request an extraordinary general meeting should be amended such that the 5 per cent of voting rights threshold is the sole threshold. The alternative 100 shareholder limb should be repealed for the reasons set out in the CASAC Report (quoted in the CAMAC discussion paper at page 27).

4.4 Annual Report

Should legislative or other changes be adopted, and if so for what reasons, concerning any aspect of the annual report requirements?

Do the current reporting requirements produce any unnecessary information ('clutter') in annual reports and, if so, how might this be reduced?

The discussion paper outlines the current UK focus on removing clutter from annual reports. One excellent example of this in practice is the proposed new UK regulations on disclosure of executive pay. Rather than layering the new pay disclosures (including the 'single figure' – which is the 'actual' or 'realised' pay for the year) on top of the existing reporting obligations, the UK is going to repeal the existing pay disclosure rules. The result will be one set of pay figures for each director in the annual report.

This approach is instructive for Australia where, following an earlier CAMAC report, the Government has decided to mandate the reporting of past, present and future pay in respect of each financial year. While the Australian approach is similar in some respects to the UK approach, as discussed earlier there are key differences. First, the new UK disclosure rules will replace the existing UK rules, ensuring that shareholders are not faced with two different pay numbers derived from different methodology. In Australia, however, the new pay disclosures are to be imposed *in addition to* the existing section 300A disclosures (which drive the current statutory / accounting pay table). Under the Australian approach shareholders will be faced with two sets of pay numbers for each executive. This will be confusing and unhelpful for many investors. Secondly, the draft Australian provisions differ markedly from the UK's 'single figure' executive pay disclosure rules in terms of how the remuneration amounts are required to be calculated. In an increasingly global environment where investors make informed investment decisions in different jurisdictions using remuneration disclosures as one criterion, misaligned reported remuneration outcomes will create increased complexity and confusion for all investors.

Should the reporting requirements be redesigned in any respect, including along any of the lines adopted, or under consideration, in overseas jurisdictions, such as having a strategic report and an annual directors' statement?

We note that the UK has now moved away from the initial proposal for an Annual Directors' Statement, but is moving forward with the Strategic Report.

The Strategic Report is worthy of consideration in Australia for the reasons that led to its conception in the UK: it will provide a relatively short section in the annual report (and, if a company wishes, as a stand-alone document) to which shareholders can turn for key strategic information about the company. However, we also believe that any change to the reporting framework should be considered holistically in the context of all the relevant existing requirements, with the aim of reducing complexity and overlap while maintaining transparency. For example, we note that there is already proposed ASIC guidance regarding operating and financial reviews. In this context, we suggest that any changes to the reporting requirements review all existing regulation and guidance to assess whether change is required to the framework in its entirety.

What, if any, issues of liability might arise in the event of changes to the reporting requirements, particularly in relation to forward looking statements, and how might this matter be dealt with?

To the extent that reporting requirements are introduced requiring forward-looking statements, a due diligence defence would be appropriate.

How might technology best be employed to increase the accessibility of annual reports?

Technology could be used to make the document more useful to shareholders in a number of ways. There could be a version produced which is easy to download on the iPad; or it could even be made interactive which is already something that BHP Billiton has pursued in an attempt to make finding specific areas of the report online easier and therefore more accessible.

However, while these options might be allowable, they should not be mandated. Each company will have a different view on the time and resources it wishes to spend on technical innovation.

What, if any, initiatives might be introduced to cater for future innovations in reporting (for instance, would it be beneficial to establish the equivalent of a Financial Reporting Laboratory)?

We have been involved in the UK Financial Reporting Lab, together with other companies and institutional investors. It has been a useful way for the UK Government to better understand complex areas, the implications for and views of companies, investors and other stakeholders, and the structures and practices that will be subject to new regulations, before those regulations are put in place. It has proven particularly useful, for example, in supporting the drafting of the UK's new executive pay regulations, in achieving a largely aligned position amongst all interested parties.

We think it would be useful to introduce a similar initiative to the UK Financial Reporting Lab in Australia, with its first piece of work being the proposed reforms to remuneration disclosures.A key aim should be removing the issues of jurisdictional duplication and global inconsistency we outlined above.

5.0 The AGM

5.3.1 – Timing - Should there be any change to the statutory time frame for holding an AGM?

We note that there has been some discussion about extending the statutory time frame for holding an AGM to 6 months post-balance date. We consider that it would be undesirable to have AGMs continuing in the month before Christmas (for 30 June year-end companies), as this is typically a busy time of year for many shareholders.

Given that one of the key issues associated with the AGM season is the demand on institutional investors, we believe that the more appropriate response is for companies to engage with institutional investors throughout the course of the year, rather than just in the lead-up to the AGM.

5.3.2 – Notice of meeting - In what respects, if any, might the requirements for information to be included in the notice of meeting for an AGM be supplemented or modified?

We do not believe it is necessary to supplement or modify the existing requirements for information to be included in the notice of meeting. They are already relatively extensive which results in long notices.

The most meaningful guidance, which is embedded in the existing requirements, is to provide all information which is material to a shareholder's decision how to vote on each item of business.

How might technology be used to make this notice more useful to shareholders?

Technology could be used to make the document more useful to shareholders in a number of ways. There could be a version produced which is easy to download on the iPad; it could be made

interactive like the Annual Report; or could even potentially have a sound recording of the Chairman's invitation for those who receive the notice electronically.

However, while these options might be allowable, they should not be mandated. Each company will have a different view on the time and resources it wishes to spend on technical innovation.

5.4.2 – Threshold for placing matters on the AGM agenda - Should there be any change to the threshold tests for shareholders placing matters on the agenda of an AGM?

We comment below (5.17) on the issue that, in Australia, unlike in the UK and other jurisdictions, there is effectively no threshold for a shareholder to place one type of matter on the AGM agenda: nominating someone as a director candidate. It is not clear why this is the case given that all other types of shareholder resolutions require the support of 100 shareholders or 5 per cent of the voting rights to be circulated at the company's expense.

As we highlight at 5.17, achieving a valuable mix of skills and experience on a board is a function of a rigorous nomination committee process. In turn, a candidate who has not been through that process is, under the UK approach, required to demonstrate a reasonable level of shareholder backing before being eligible to run for the board using the company's notice of meeting and proxy form.

5.4.3 – Timing requirements - Should companies be required to publish a pre-agenda notice and, if so, what should be the contents and timing of that notice?

We consider that one notice is sufficient.

The requirement to publish a pre-agenda notice would not appear to achieve any material gain for shareholders, would represent a significantly increased burden on companies, and would create unnecessary additional cost.

5.4.6 – Non-binding shareholder resolutions - Should shareholders have greater scope for passing non-binding resolutions at AGMs?

We do not consider there to be additional benefit to increasing the number of non-binding resolutions at AGMs. We agree with the points made in the CASAC Report as summarised in the discussion paper.

5.5 – Questions from shareholders prior to the AGM - What, if any, additional legislative or best practice procedures should be adopted for companies to seek the views of shareholders on issues they would like discussed at the AGM, or to invite shareholders to submit questions prior to the AGM?

We do not consider that any additional legislative procedures are necessary for companies to seek the views of shareholders in this area. It is an area where companies can differentiate and innovate.

However, if change is considered desirable, our view is that guidance, rather than legislation, is the best vehicle for achieving this.

BHP Billiton currently invites shareholders to ask questions in advance of the meeting. Questions asked by shareholders in this manner are shared with the Board through the Chairman, consistent with our approach to the feedback we receive from shareholders more broadly through our shareholder engagement program. In addition, the most frequently asked questions, together with the answers, are made available online. We consider that this process assists us in understanding

the issues of importance to our shareholders, as well as ensuring those issues are appropriately addressed at the AGM.

Should there be some obligation on the auditor (or the representative of the auditor) to speak at the AGM?

We do not believe this is necessary. There is already scope for the auditor to be asked questions at the meeting.

Furthermore, questions asked in advance will be responded to by the auditor and hard copies of questions and answers are available at the AGM. It is arguable that mandating that the auditor speak at the AGM will encourage standard or 'boilerplate' reporting, which reduces relevance, rather than promoting engagement.

What, if any, obligations should a company or a company auditor have to answer questions from shareholders?

We do not believe that there should be an obligation that the auditor should speak at the AGM.

We believe that the current protection provided to shareholders whereby a reasonable opportunity is provided for shareholders to ask questions of the auditor is appropriate and allows relevant issues to be raised.

5.7 – Should a chair have the power to impose any time, or other, limits on an individual shareholder speaking at the AGM?

The chairman of an AGM must already allow a reasonable opportunity for the members as a whole to ask questions or make comments. It is well recognised that at the AGM, the chairman acts as chairman of the meeting (rather than of the board), owes duties to the meeting and must act impartially.

The current practice, where the chair strikes a balance between providing opportunity to ask questions and maintaining order, is appropriate. In this context, provided a reasonable opportunity is given to shareholders as a whole (and subject, of course, to a company's constitution) arguably the chairman already has the power to limit an individual speaking at the AGM.

5.9 – Direct voting before the meeting - Should direct voting before the meeting be provided for by legislative or other means, and if so what matters should be covered in any regulatory structure?

We believe that legislative recognition of direct voting would be positive to remove any concerns about the validity of votes cast by direct voting.

5.11 – Online voting during the AGM - Should there be legislative or other recognition of online voting during the course of an AGM and, if so, in what respects should this form of voting be regulated?

We believe that there should be legislative recognition of online voting during the course of an AGM – enabling companies to offer this method of voting if they believe it to be appropriate in the context of their shareholder base.

5.16 – Election of directors - Should there be any legislative initiatives in regard to the election of directors, including in relation to:

- ***the frequency with which directors should stand for re-election?***

The Board of BHP Billiton has adopted a policy consistent with the UK Corporate Governance Code, under which all Directors seek re-election by shareholders annually if they wish to remain on the Board. This policy took effect at the 2011 AGMs. It replaced the previous system, which is set out in the Constitution of BHP Billiton Limited and the Articles of Association of BHP Billiton Plc, under which Directors are required to submit themselves to shareholders for re-election at least every three years.

The adoption of annual re-election reflects the Board's long-standing commitment that where governance principles vary across jurisdictions, the Board will adopt what it considers the higher of the prevailing standards.

Our Board believes that annual re-election promotes and supports accountability of the directors to shareholders. Annual re-election might therefore be considered for inclusion in the ASX Corporate Governance Council Principles and Recommendations along the lines of the UK Code (where it is recommended for FTSE350 companies).

5.17 – Dual listed companies - Are there any matters concerning dual listing that should be taken into account in the regulation of AGMs?

We noted above the sometimes conflicting demands that our DLC structure imposes on our reporting and communications. The structure can also present issues for shareholder meetings and the items for voting at those meetings. One example of this is the practice for director nominations. The Australian approach typically allows any shareholder of a publicly listed company to nominate a person for election to the board subject only to nominations deadlines and the candidate's consent. There is no threshold requirement to gain any significant shareholder support in order to nominate for election.

This contrasts with the approach in many other countries. In the United Kingdom (the other jurisdiction in our DLC structure), for example, someone wishing to run for election to a company's board needs to garner the support of 5 per cent of the voting rights. The UK approach is consistent with the greater focus being placed – particularly since the start of the global financial crisis – on the balance of skills and experience on boards. Achieving a valuable mix of skills and experience is a function of a rigorous nomination committee process and, in turn, a candidate who has not been through that process is, under the UK approach, required to demonstrate a reasonable level of shareholder backing before being eligible to run for the board using the company's notice of meeting and proxy form.

6.2 – Functions of the AGM - For some or all public companies, should the functions of the AGM be changed in some manner, or the obligation to hold an AGM be abolished?

As noted above, we consider that the AGM plays an important role in the communication between companies and shareholders. We therefore consider that the requirement to hold an AGM should continue. Feedback from our shareholders indicates that many think too much time is spent on Q&A before the business of the meeting. While Option 2 (separate out the decision-making function of the AGM) may address this perceived imbalance, the necessity to get to the formal part of the meeting under the current approach brings some discipline of time to the process of the AGM. On balance, we do not see a compelling case for a formal (mandated) change to the structure of the AGM.

In the event that change is contemplated, recommendations should allow for flexibility (as contemplated in Option 3) so that the most appropriate approach can be selected, taking into account the size of the company, its shareholder base and whether it is listed. Our view is that if flexibility is provided, and an appropriate minimum standard is developed, external regulation would be unnecessary, however, guidance in applying the new requirements may be helpful.

Aberdeen Asset Management submission

Aberdeen Asset Management Ltd is a long-term investor in Australia, and we welcome the opportunity to respond to the aforementioned discussion paper. We endorse the submission of the Financial Services Council (see attached), of which Aberdeen Asset Management is a member, which reflects our views on the issues discussed within.

In addition to endorsing the response of the FSC, we would highlight two further issues:

Involving beneficial shareholders in the AGM (as discussed in 5.3.3) would, in our view, present significant challenges. Whilst the proposal is not without merit, the challenges of identifying beneficial shareholders, for example, would likely impede the identification of all beneficial shareholders given the multiple ownership / fiduciary layers involved in the investment process. We note that the ability of beneficial shareholders to monitor their investments (either directly or indirectly), and access corporate annual reports along with the voting records of investment managers they appoint, are useful tools in this respect.

We note that section 6.2.2 on the future of the AGM includes "Option 4: abolish the requirement for an AGM". Whilst we are open to discussions on the future form and direction of AGMs, we would strongly counsel against abolishing the requirement to hold an AGM. For both retail and institutional shareholders, the AGM presents a tangible opportunity to meet, question, and communicate views to directors of the companies in which we invest (in some cases in relation to the items that are being voted on). The AGM serves not only as a meeting for taking votes on governance issues but also as a forum for discussion and communication. Removing the requirement to hold an AGM would not, therefore, be in the interests of shareholders.

21 December 2012

Mr John Kluver
Executive Director
Corporations and Markets Advisory Committee
By email: john.kluver@camac.gov.au
Cc: camac@camac.gov.au

Dear Mr Kluver

Submission to Corporations and Markets Advisory Committee: The AGM and shareholder engagement

Thank you for the opportunity to submit our views on the AGM and shareholder engagement to the Corporations and Markets Advisory Committee.

Regnan is owned by and run for institutional investors with significant shareholdings in Australian listed markets, as well as other asset classes. Our submission reflects our experience in researching and engaging with Australian listed companies on behalf of these investors. We respond only to those parts of the discussion paper for which we are in a position to have formed a view.

Guidance for companies about shareholder engagement

Regnan has observed an increase in the quantity and quality of shareholder engagement by many S&P/ASX200 companies over the decade in which we have been undertaking such engagement.

However while we do not favour additional prescription, we recognise that smaller companies and those with less well established investor relations /shareholder engagement programs may derive benefit from descriptive guidance in this area.

Regnan Governance Research
& Engagement Pty Ltd
ABN 93 125 320 041
AFSL 316351

Level 9, 387 George Street
Sydney NSW 2000
Australia

Phone +61 2 9299 6999
Fax +61 2 9299 6799
www.regnan.com

Particularly helpful for this audience would be descriptive guidance that addressed common misperceptions, by:

- Emphasising the benefits to the company of engagement that involves two-way dialogue exchange rather than a one-way flow of information from the company to its shareholders;
- Forestalling any misapprehension that shareholders necessarily desire *more* reporting, or *more polished* presentation of information*;*
- Explaining the varying objectives of distinct classes of institutional investors (asset owner versus asset manager, long term versus short term, active versus passive etc);
- And in light of the above points, communicating the value of having the relevant (generally non-executive) directors participate directly in engagement activity.

We note examples of such guidance that is readily available[1] and note also that consideration of further developments will be the subject of a separate review by the ASX Corporate Governance Council for its 2013 review.

Should at least some institutional investors be encouraged or required to report on the nature and level of engagement with the companies in which they invest, in the manner provided for in the UK Stewardship Code or otherwise?

Regnan believes it is beneficial for institutional investors to demonstrate accountability for their engagement with companies, and we note a number of existing frameworks that encourage both stewardship activity, (including engagement) and reporting on this activity.[2]

More detailed analysis is required ahead of determining whether more is needed. This should include mapping to establish whether any legitimate groups are under-served by the content or coverage of these frameworks, and analysis of formal participation and (separately) *de facto* compliance with the content by market participants.

Could greater use be made of technology to promote shareholder engagement outside the AGM and, if so, how?

Institutions, their representatives and advisers (eg asset owners, larger fund managers, proxy advisers, investor groups such as Regnan and ACSI) tend to be better served by corporate engagement programs than those representing smaller parcels of shares. In practice, this means that engagement between a company and such shareholders is characterised primarily

[1] Eg Stafford, J. (2011) *Engaging with Shareholders.* Australian Institute of Company Directors
[2] Eg UN Principles for Responsible Investment, Financial Services Council "Blue Book" Guidelines.

by one-way rather than two-way communication. Even those shareholders able to attend the AGM in person may not have the opportunity during proceedings to put their questions or views from the floor. Some companies solicit questions in advance of AGMs however there is currently limited formal accountability for whether these are prioritised.

Regnan views these circumstances as a lost opportunity for demonstrating accountability, furthering shareholder engagement and promoting a more informed market. This is particularly unfortunate given the availability of technology-based alternatives that would demonstrate more systematic engagement with shareholder questions and concerns – including at times other than the AGM. Examples could include web-based forums for shareholders to submit, review and vote on others' questions to the company – with companies responding to a limited number of those most highly prioritised by the shareholders as a group.

Should there be additional scope for non-binding votes?

Regnan is in favour of additional scope for shareholder resolutions and notes the effectiveness of the non-binding vote on remuneration in promoting dialogue between companies and their investors on issues of interest and concern. We also note that extraordinary general meetings have been called by shareholders in recent years to circumvent (or pre-empt) companies' refusal of ordinary shareholder resolutions. Such EGMs can be costly to the company and its wider shareholders and a distraction for all parties. Regnan believes that the availability of ordinary resolutions would have reduced the instances in which the 100 member rule was used to requisition EGMs.

However Regnan is also mindful of limits on the proper role of shareholders in decision-making for investee businesses. Additional scope for shareholder resolutions and voting should be framed in a manner that does not promote proliferation of resolutions on business management or operational matters.

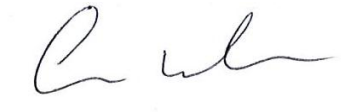
It may be that additional scope should encompass both binding and non-binding votes to facilitate clarity about director responsibilities. For example, shareholder resolutions in other jurisdictions commonly seek a report from the board on matters of interest to the proposing shareholders. Where directors do not believe it is in the interests of the company to provide these disclosures and would consequently be conflicted if not bound to do so by the vote, it may be preferable that the vote be binding (a situation similar to the obligation on Australian-domiciled companies to report on remuneration). On the other hand, any subsequent vote on the requisitioned report might necessarily be limited to a non-binding vote (again, paralleling the non-binding vote on the remuneration report).

We see it as necessary to consult further on the mechanisms by which to a sensible balance could be achieved within Australian business context.

The Annual Report

Regnan has provided detailed comment on Annual Reporting in its recent submission to ASIC's consultation: *Effective Disclosure in an Operating and Financial Review.* This is attached as an appendix in the following pages.

Yours sincerely,



Amanda Wilson
Managing Director

APPENDIX: Regnan submission on Consulation Paper 187: Effective Disclosure in an Operating and Financial Review

22 November 2012

Ms Crystal Kwan
Executive Assistant, Financial Reporting & Audit
Australian Securities and Investments Commission
By email: policy.submission@asic.gov.au

Dear Ms Kwan

Regnan Submission on Consultation Paper 187: Effective Disclosure in an Operating and Financial Review

Regnan – Governance Engagement & Research Pty Ltd was established to investigate and address environmental, social, and corporate governance (ESG) related sources of risk and value for long term shareholders in Australian companies.

Its research is used by institutional investors making investment decisions, and also used in directing the company engagement and advocacy it undertakes on behalf of long term investors with $43 billion invested in S&P/ASX200 companies (at June 2012).

Regnan was launched in 2007 having operated previously as the BT Governance Advisory Service. It is owned by eight institutional investors: Commonwealth Superannuation Corporation (formerly ARIA); BT Investment Management; Hermes (UK); HESTA Super Fund; Local Government Super; Vanguard Australia; VicSuper; and the Victorian Funds Management Corporation.

Summary of Regnan's Response

Corporate disclosures, including the Operating and Financial Review (OFR), are critical inputs to the decisions investors make in allocating capital. We agree that there is a need to improve the quality of corporate disclosure and its relevance for investor decision-making and commend ASIC for addressing this important topic. We note that there is currently a wide gap between the best and worst disclosers, even among the large listed companies that are the focus of our work. We consider the draft guide could play an important role in closing that gap, to the benefit of investors, financial market efficiency, and the reporting entities themselves.

Overall, we consider the draft regulatory guide well adapted to this end. We consider the positions taken to be uncontroversial and the guidance and examples consistent with the current practices of companies we consider leading disclosers.

Material Environmental and Social Matters

We agree that a high-quality OFR is important in meeting the information needs of current and prospective investors, that it should be tailored to the circumstances of each entity, and provide insightful information and analysis. We also agree that this includes explaining underlying drivers of an entity's performance more generally.

In our view, the proposed guidance could be enhanced by explicitly stating that environmental and social matters should be addressed in the OFR where these are material to the company's operations, financial position, business strategies and prospects for future financial years.

We consider there is a need for explicit guidance on this point because material environmental and social matters are too often overlooked or inadequately explained in communication to investors. For example, it is accepted that over recent years skills shortages have been an important exposure for the resources sector, with implications for production costs and project timetables. Yet it remains common for resources companies to fail to address human capital management and skills in the annual review to the extent relevant for investors.

Even among companies that disclose significant amounts on environment and social matters, this disclosure is generally not adequately focussed on the aspects most material to business value, nor is the link to corporate strategy and value creation sufficiently clear to meet investor needs.

Communication Between Companies and Investors

Further, the guidance could be enhanced by recognising the role of direct communication between companies and investors and their intermediaries (analysts and managers) to better understand their information needs.

Integrated Reporting

Regnan is strongly supportive of, and actively engaged in, the development of guidance for integrated reporting.

We consider that the concerns with current disclosure practices underlying the push for integrated reporting are well understood and that there is no reason that companies should not be attempting to address these concerns and adopt the principles of integrated reporting now, even before the framework is fully detailed.

We see the proposals contained within this consultation paper as consistent with integrated reporting and likely to help companies in moving toward integrated reporting.

Nonetheless, we agree that it would be premature for ASIC to explicitly include guidance on integrated reporting at this stage.

Future Orientation and Director Liability

We note that the requirement for the OFR to address prospects for future financial years (plural) is specified under the current legislation (as mentioned in the consultation paper). We consider concerns about increased director liability associated with this requirement to be excessive.

In our view, much meaningful information could be provided without going as far as providing forecasts, including (as proposed):

- disclosure of the main risks that could adversely affect the successful fulfilment of the business strategies of the entity; and
- identification of key factors relevant to an entity's prospects, but outside management's control.

We do not consider the guidance set out would often entail presenting forecasts; but information relevant to sensitivity analysis, such as ranges for key factors over which the company's view remains valid should be included, e.g., the price for the company's product over which its expansion strategy remains viable.

We do not view such disclosure as likely to increase director liability. On the contrary, fuller disclosures, including of key risks to successful fulfilment of strategy, would assist directors in fulfilling their obligations to shareholders, managing investor expectations, and thereby safeguarding against potential liability.

Compliance Costs

We do not consider the proposals will add materially to compliance costs. In our view, the proposals do not create additional obligations, but rather clarify existing ones. This clarity should reduce compliance burden.

Further, significant resources are expended by corporations in communicating with investors. Better targeting these communications to investor information needs should reduce the resources required to be expended.

Effect on Competition

We foresee that individual reporting entities and their representatives may express concerns about the potential detriment associated with making commercial information visible to competitors.

We question the basis for such concerns, given the wide-reaching applicability of the proposed guidance – it will likely apply equally to competitors. Further, we observe that the guidance is consistent with existing good practice, indicating companies that adopt higher quality disclosure have not experienced significant negative impacts from doing so. We suggest more effective communication may, in fact, be a source of competitive advantage, including for access to capital.

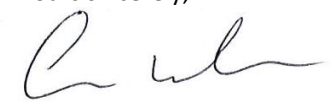
Moreover at the market-wide level, the availability and quality of information is a key determinant of the efficiency of a market. By reducing the cost of acquiring quality information and by ensuring it is readily available to all investors, the proposed enhancements to the OFR would support market efficiency.

Other Impacts, Costs and Benefits

We consider other benefits may also arise including for the disclosing entities reduced stock-price volatility associated with a closer match between investor expectations and company performance under a range of conditions – a relationship we have observed in practice for leading disclosers.
Our full response to each of the consultation questions is set out in Appendix 1.

Should you have any queries in relation to this submission, please contact Alison George, in the first instance, on 03 9982 6404.

Yours sincerely,



Amanda Wilson
Managing Director

Appendix 1: Regnan Response to Specific Consultation Questions

Feedback Question		Regnan Response
B1Q1	Do you agree with our view of what an OFR is, and broadly what it should contain? If not, please explain why not.	We agree with the view expressed and that an OFR should: (a) contain an analysis and narrative that explains an entity's business; and (b) provide investors with useful and meaningful information about the entity, together with its annual financial report and other market disclosures, such as continuous disclosure.
B1Q2	Do you agree with our view that an OFR should be a major source of information about an entity's business to meet the information needs of investors? If not, please explain why not.	We agree. While presentations and other market disclosures are an important part of communications by companies to investors, the OFR should remain a key source where developments disclosed continuously are brought together periodically, reviewed, and contextualised. This is also important for the many investors who do not have access to the briefings and other market disclosures more readily accessed by institutions. The proposed enhancements to the OFR reduce the cost to acquire quality information and reduce information asymmetries supporting market efficiency.

Regnan Governance Research
& Engagement Pty Ltd
ABN 93 125 320 041
AFSL 316351

Level 9, 387 George Street
Sydney NSW 2000
Australia

Phone +61 2 9299 6999
Fax +61 2 9299 6799
www.regnan.com

Feedback Question		Regnan Response
B2Q1	See draft RG 000.21–RG 000.26. Is there other additional guidance that would be useful about the relationship between disclosures in other documents and the disclosures made in the OFR?	The guidance could be enhanced by recognising the role of direct communication between companies and investors and their intermediaries (analysts and managers) to better understand their information needs.
B3Q1	Do you agree with our view on the level of disclosure required? If not, please explain why not and suggest alternatives.	We agree that the full depth and detail of a prospectus would rarely be required in the OFR. However, in our view, there is scope for companies to restate key information included in a prospectus and maintain its currency with little additional effort or expense. For example, the discussion of risks included within a prospectus is typically highly valuable to investors and rarely available from other disclosures. This information could be summarised in the OFR (consistent with the example set out in the draft regulatory guide) and a full version appended to the risk policy on the company's website and reviewed and updated along with the policy.
C1Q1	Do you consider that the proposed guidelines on the specified contents of an OFR (as set out in the draft regulatory guide) are appropriate? If not, please explain why not and suggest alternatives.	We consider the guidance (in sections C and D) to be appropriate.

Feedback Question		Regnan Response
C1Q2	Do you agree with the examples of disclosure set out in Tables 1 and 2 of the draft guide? If not, please explain why not. If you think that there is a preferable way of illustrating our guidance, please suggest alternatives.	We agree the examples are appropriate.
C1Q3	Do you think that there is any other key information that should be included in an OFR that has not been referred to in our draft guidance?	In our view, the proposed guidance could be enhanced by explicitly stating that environmental and social matters should be addressed in the OFR where these are material to the company's operations, financial position, or business strategies and prospects for future financial years. We consider there is a need for explicit guidance on this point because material environmental and social matters are too often overlooked or inadequately explained in communication to investors. For example, it is accepted that over recent years skills shortages have been an important exposure for the resources sector, with implications for production costs and project timetables. Yet it remains common for resources companies to fail to address human capital management and skills in the annual review to the extent relevant for investors. Even among companies that disclose significant amounts on environment and social matters, this disclosure is generally not adequately focussed on the aspects most material to business value, nor is the link to corporate strategy and value creation sufficiently clear to meet investor needs.

Feedback Question		Regnan Response
C2Q1	Do you consider that our proposed guidance on disclosure about an entity's operations (as set out in the draft regulatory guide) is appropriate? If not, please explain why not and suggest alternatives. See draft RG 000.41–RG 000.42.	We agree the OFR should disclose the underlying drivers of an entity's performance that are relevant to understanding its performance and the factors underlying its results; and that this may include significant factors affecting: (a) the total income and income for major operating segments; and (b) the significant components of overall expenses and expenses for major operating segments. We consider the proposed guidance appropriate.
C3Q1	Do you agree that the reference to RG 228 in relation to business models is useful? See RG 000.43–RG 000.45. If not, please explain why not and suggest alternatives.	We agree that the reference is useful. We consider business model to be a critical matter that should be central to investor communications. Further, once initially produced, whether for a prospectus or otherwise, there is scope to restate and maintain the currency of this information with little additional effort or expense. A summary in the OFR with additional information online can assist where length is a concern.

Feedback Question		Regnan Response
C4Q1	Do you consider that our proposed guidance on disclosure about an entity's financial position (as set out in the draft regulatory guide) is appropriate? If not, please explain why not and suggest alternatives. See draft RG 000.46–RG 000.47.	We strongly agree that relevant information to understanding an entity's financial position includes: • disclosing the underlying drivers of the financial position of the entity; • disclosing exposures that are not reflected in the financial report (e.g. off-balance sheet arrangements); and • explaining the accounting information and other detail contained in the financial report (rather than simply repeating it).
C5Q1	Do you consider that our proposed guidance on disclosure about an entity's business strategies and prospects (as set out in the draft regulatory guide) is appropriate? If not, please explain why not and suggest alternatives.	We consider the guidance is appropriate. We approve the proposal that the OFR include: • an outline of the entity's key business strategies, and its plans that are a significant part of those strategies; and • disclosure of the main risks that could adversely affect the successful fulfilment of the business strategies of the entity. This information is reasonably required by investors and their agents to understand an entity's financial position and prospects. We agree that it would assist investors 'if key factors relevant to an entity's prospects outside management's control were appropriately identified'. We do not consider the guidance set out would often entail presenting forecasts; but information relevant to sensitivity analysis, such as ranges for key factors over which the company's view remains valid should be included, e.g., the price for the company's product over which its expansion strategy remains viable.

Feedback Question		Regnan Response
		We do not view such disclosure as likely to increase director liability. On the contrary, fuller disclosures, including of key risks to successful fulfilment of strategy, would assist directors in fulfilling their obligations to shareholders, managing investor expectations, and thereby safeguarding against potential liability.
C7Q1	Do you agree with our interpretation of the exemption requirement? If not, please explain why not.	We agree with this interpretation.
C7Q2	Do you agree that, when information has been omitted in reliance on the exemption, a summary of the type of information omitted and the reasons for the omission should be disclosed, where possible? If not, please explain why not.	We agree that this information is necessary for investors and that this should generally be possible.
C7Q3	Do you agree with the final example of disclosure (relating to the use of the unreasonable prejudice exemption), which is set out in Table 2 of the draft regulatory guide? If not, please explain why not.	We agree the final example is appropriate.

Feedback Question		Regnan Response
C7Q4	Are there other matters of practical guidance that should be included? If so, please describe these matters and explain why you think they should be included.	The guidance could be enhanced by giving greater emphasis to the need (when determining whether any prejudice is unreasonable) to judge potential detriment to the disclosing entity against the value of withheld information to investors, particularly when this relates to risk. We see this greater emphasis as necessary in order to communicate more assertively about investors' entitlement to relevant information, particularly given the lack of clarity about this exemption reported within the consultation paper and also to counteract the reticence entities may feel in the early stages of providing fuller disclosures.
C7Q5	Do you agree with our suggestion for internal record keeping? If not, please explain why not.	We agree that directors should ensure adequate internal records are maintained including information 'which: (i) identifies the information that has not been disclosed; and (ii) explains how disclosure of the excluded information would be likely to result in unreasonable prejudice'. In our view, this is consistent with well-established obligations on company directors.

Feedback Question		Regnan Response
C8Q1	Do you consider that the proposed good disclosure practices in Table 3 of the draft regulatory guide are appropriate? If not, please explain why not and suggest alternatives.	We agree the good disclosure practices are appropriate. We note the guidance that 'there is no provision that allows the OFR to incorporate information by reference to other documents that do not form part of the annual report, such as briefings to analysts.' We agree this guidance is appropriate but should not prevent companies from providing links to ***additional*** information (supplementary to the OFR) by reference. We strongly agree that disclosure can and should be concise and that excessive length may impede the effective communication of key, material information. We consider management and directors are well positioned to strike a balance between disclosing all material information and excessive length.

Feedback Question		Regnan Response
C9Q1	Do you agree that it is not appropriate to include guidance on integrated reporting at this stage? If you think guidance should be included, please explain why.	Regnan is strongly supportive of, and actively engaged in, the development of guidance for integrated reporting. We consider that the concerns with current disclosure practices underlying the push for integrated reporting are well understood and that there is no reason that companies should not be attempting to address these concerns and adopt the principles of integrated reporting now, even before the framework is fully detailed. We see the proposals contained within this consultation paper as consistent with integrated reporting and likely to help companies in moving toward integrated reporting. Nonetheless, we agree that it would be premature for ASIC to explicitly include guidance on integrated reporting at this stage.

Law Council
OF AUSTRALIA

Mr Martyn Hagan
Acting Secretary-General

9 January 2013

Mr John Kluver
Executive Director
CAMAC
GPO Box 3967
Sydney NSW 2001

Dear Mr Kluver,

CAMAC Discussion Paper: The AGM and Shareholder Engagement

I enclose a submission in response to CAMAC's Discussion Paper "The AGM and Shareholder Engagement" which has been prepared by the Corporations Committee of the Business Law Section of the Law Council of Australia.

The Committee has extracted the questions raised in the Discussion Paper and prepared its submission as responses to each of these questions.

The submission has been endorsed by the Business Law Section. This submission is lodged by the authority delegated by the Directors to the Acting Secretary-General, but does not necessarily reflect the personal views of each Director of the Law Council of Australia.

Should you have any questions, in the first instance please contact the Committee's Deputy Chair, Andrew Lumsden, on 02-9210 6385 or via email: Andrew.Lumsden@corrs.com.au

Yours sincerely,

Mr Martyn Hagan
Acting Secretary-General

Enc

GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone +61 2 6246 3788
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

Law Council
OF AUSTRALIA

Mr Martyn Hagan
Acting Secretary-General

Submission - Business Law Section

The AGM and Shareholder Engagement Discussion Paper

CAMAC September 2012

Question	Ref	BLS Comment
Should legislative or other initiatives (for instance, additional ASX Corporate Governance Council, or other, guidance) be adopted, and if so for what reasons, concerning: • the role of the board collectively as it relates to engagement with institutional/retail shareholders throughout the year, including leading up to the AGM • the role of particular board members, such as the board chair or the chairs of board committees, in relation to engagement with institutional/retail shareholders • the role of institutional shareholders throughout the year, including leading up to the AGM. In this context: – is there a problem with having a peak AGM season and, if so, how might this matter be resolved – should at least some institutional shareholders be required or encouraged to report on the nature and level of their engagement with the companies in which they invest, in the manner provided for in the UK	3.4	1 The Committee does not support additional legislation or other initiatives to further govern the way that the board of directors of modern ASX listed entities engages with their security holders. 2 Although the Committee supports strong engagement between a company's board and its shareholders, the current regulatory framework appropriately accommodates the need for establishing a minimum level of shareholder engagement while leaving boards to determine the most appropriate form of engagement having regard to the wide variety of listed entities and their varying needs. 3 The Committee understands that it is already common practice for a company's chairman and board committee(s) chairman to informally meet with significant shareholders. Maintaining the informal nature of these meetings allows directors to determine how best to utilise the meeting in either seeking to explain and advocate their company's governance and strategy or take a more passive role in seeking

GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

Question	Ref	BLS Comment
Stewardship Code or otherwise • corporate briefings • the role of proxy advisers, including: – standards for investors using proxy advisers, including the extent to which these investors should be entitled to rely on the advice of proxy advisers in making voting decisions, or, alternatively, whether those investors should have some obligation to bring an independent mind to bear on these matters. – standards for proxy advisers • any other aspect of shareholder engagement?		additional viewpoints about these issues. 4 The Committee considers that mandating that directors participate in more frequent structured briefings may involve directors unnecessarily having to advocate management's execution of the strategy on an ongoing basis. This could have the effect of lessening directors' objectivity. 5 Conversely, failing to advocate company performance risks division between management and the board. By not mandating additional formal board engagement, greater scope is provided to directors to use those discussions as simply a forum to obtain different views without needing to proactively comment on the company's performance. 6 Not formalising additional engagement also enables directors to determine how best to meet shareholder expectations. Where investors have particular concerns in relation to remuneration, financial oversight or risk management, companies will often offer consultation with the chairman of the relevant board committee. This more targeted approach ensures that shareholders are appropriately provided access to the director(s) who is best skilled to address shareholder questions. 7 Finally, following the 2011 *Centro* decision[1], additional focus has been placed on directors taking a proactive role in managing workload. For large companies, a director's workload is already significant with non-executive directors often attending 25-35 board and board committee meetings per

[1] *Australian Securities and Investments Commission v Healey* [2011] FCA 717

Question	Ref	BLS Comment
		year with substantial pre-reading required for each meeting. In addition, directors are required to undertake ongoing education while also participating in existing engagements such as the AGM. 8 The Committee submits that adding to this workload by mandating additional formal engagements (which would trigger additional preparation of each meeting) is inconsistent with recent trends relating to the management of director workload. **Avoiding the AGM peak season** 9 See our comments below in relation to the potential extension of the statutory time period for holding an AGM (5.3.1). **The role of proxy advisers** *Standards for investors using proxy advisers* 10 The Committee sees no reason to alter the existing use of proxy advisers by Australian investors. The Committee supports efforts to ensure that institutional investors actively make voting decisions and devote sufficient time and resources to think about the issues involved. 11 The Committee notes concerns from various parties about the level of influence a proxy adviser recommendation may have on institutional investors voting behaviour. Even if this influence is not real, it is perceived, and is therefore potentially damaging to the efficiency of our financial market. The level of influence is likely to be significant where: • the institutional investor lacks the internal resources to consider and

Question	Ref	BLS Comment
		analyse recommendations within the short timeframe required, resulting in proxy advisers becoming de facto decision makers. • there are structural incentives within the voting organisation to agree (and not to disagree) with a proxy adviser's recommendation (for example, disagreement with a recommendation may require the matter to be elevated, creating extra paperwork and time pressures for the officer involved). 12 The Committee's concerns echo the comments of those organisations such as the Australian Institute of Company Directors (AICD) set out in 3.1.5 of the Discussion Paper. *Standards for proxy advisers* 13 As a matter of policy, the Committee believes that all proxy advisers should be required to hold an Australian Financial Services Licence (AFSL) and supports establishing an appropriate licensing regime, including providing information on how conflicts of interest are managed. 14 Section 3.1.5 of the CAMAC report suggests that the major proxy advisers in Australia hold an AFSL. 15 The Committee notes with interest the recommendations from France (Autorite des Marches Financiers (AMF)) and the current discussion paper in Canada (Canadian Securities Administrators), summarised in section 3.3.2 of the CAMAC report. 16 The Committee thinks it is important that proxy advisers be required to engage with a company when their proposed voting recommendation differs to the voting recommendation provided by a company's board. In

Question	Ref	BLS Comment
		some circumstances engagement can be critically important. For example, resolutions on a remuneration report where a 'no' vote emerges could have serious consequences for the board and the company having regard to the "two-strikes" and "board spill" legislation.
	17	Where a proxy adviser's voting recommendation differs to the voting recommendation of the company's board then, like the AMF, the Committee believes there is strong merit in requiring proxy advisers to: • distribute a copy of their draft report to the company (free of charge); • include in their final report any comments provided by the company; and • correct any substantive errors in the report identified by the company.
	18	Companies should be afforded a reasonable time to respond to a draft report.
	19	Implementing, reporting and auditing compliance with these requirements could form part of the AFSL license conditions.
	20	The Committee agrees that there should be no requirement for proxy advisers to publicly disclose their reports.
	21	The Committee believes there would be merit in obtaining better empirical data from institutional investors and proxy advisers to determine the extent of actual, as distinct from perceived, influence that proxy advisers exert. If market participants had a clear sense that proxy adviser recommendations were being used to inform, rather than substitute,

Question	Ref	BLS Comment	
			investors' voting decisions, this would, in its view, promote market efficiency.
		22	The Committee also supports the proposal to decouple the discussion function of an AGM from its decision making function (see below). If this occurs, institutional shareholders should be encouraged to attend the discussion function of the AGM and, if proxy advisers propose to provide a recommendation on any resolution to be put to the AGM, they should be required to attend the discussion function of the AGM as a condition of their licensing regime. The Committee has already recommended that proxy advisers be required to provide a copy of their report to the company if they proposed to recommend against any resolution at the meeting. This draft report should be required to be provided to the company prior to the date of the AGM discussion function.
Could greater use be made of technology to promote shareholder engagement outside the AGM and, if so, how?	3.4	23	The Committee agrees with the recommendations put forward in the Discussion Paper and further recommends that companies make active use of social media in their shareholder engagement.
		24	The CAMAC Discussion Paper notes various recommendations for the use of technology to promote shareholder engagement. For example: • the ASX Corporate Governance Council, Commentary on Recommendation 6.1, proposes that significant group briefings (including, but not limited to, results announcements) should be made widely accessible, including through the use of webcasting or teleconferencing or posting a transcript or summary of the transcript on their websites; • the Canadian Coalition for Good

Question	Ref	BLS Comment	
			Governance Report 2012 advocates that the limitations of communication with shareholders by in-person meetings may be reduced by companies using innovative approaches like websites and social media to reach a broader audience (giving the example of a Canadian company establishing a dedicated investor relations twitter account that is updated regularly).
		25	The Committee generally agrees with these recommendations, although strategies are needed to accommodate the interactive nature of some social media. However (consistently with the PJC Report, paragraph 2.1), the Committee recommends a non-regulatory approach to increasing the use of available technology for shareholder engagement purposes. This is because there is no need for legislative intervention here; market forces and best practice are likely to move listed entities towards the use of emerging technologies; and conversely regulation is likely to find it difficult to keep up with technological developments.
		26	The Committees does not see any impediment to broadcasting briefings in these ways. However, listed entities should give careful thought to the nature and sophistication of the likely audience, and to whether appropriate warnings should be included in the broadcast information to avoid misleading conduct (especially where the primary audience is likely to be more sophisticated than those who acquire the information through the website).
Should there be an amendment to the right of 100 members to call a general	3.4	27	The Committee continues to support the abolition of the 100 member rule.

Question	Ref	BLS Comment	
meeting of a company?		28	It is a legal anomaly that 100 shareholders may compel a general meeting, regardless of whether the company has 500 shareholders, or 500,000 shareholders.
		29	The 100 member rule does not make sense in today's context of large listed companies and the rule heavily contradicts the rationale for the 5% member threshold that currently operates separately to the 100 member rule.
		30	Australian listed companies are vulnerable to EGMs being used as a weapon against them by groups who disapprove of their operations. The recent Woolworths EGM in July 2012 called under the 100 member rule in relation to the proposed ban of gambling operations highlights the need to deal with this issue.
		31	In 2003, the Wilderness Society used the provision as part of its attack against Gunns. The society successfully requisitioned an extraordinary general meeting to put a resolution to ban old-growth logging. When the meeting went ahead, the resolution was defeated. In 2002, the Australian Manufacturing Workers Union rallied shareholders to requisition an EGM of the NRMA, which the motoring services company claimed would have cost it $3.75 million to stage. The meeting did not go ahead as the dispute was resolved. Other companies to face EGMs spearheaded by activist groups include Boral (from The Workers Union in 2003) and National Australia Bank (from the Wilderness Society in 2002).
		32	In the recent years, the 100-member rule has not often been used by

Question	Ref	BLS Comment	
			activist groups to tactically impede a company's operations as it was a far more common tactic 10 years ago. However, considering that other jurisdictions such as UK and France are only using the 5% threshold for EGMs, the 100-member rule in Australia is anomalous, outdated and should be abolished.
Should legislative or other changes be adopted, and if so for what reasons, concerning any aspect of the annual report requirements? In this context: • do the current reporting requirements produce any unnecessary information ('clutter') in annual reports and, if so, how might this be reduced • should the reporting requirements be redesigned in any respect, including along any of the lines adopted, or under consideration, in overseas jurisdictions, such as having a strategic report and an annual directors' statement • what, if any, issues of liability might arise in the event of changes to the reporting requirements, particularly in relation to forward-looking statements, and how might this matter be dealt with • how might technology best be employed to increase the accessibility of annual reports • what, if any, initiatives might be introduced to cater for future innovations in reporting (for instance, would it be beneficial to establish the equivalent of a Financial Reporting Laboratory)?	4.4	33	The Committee supports the development of enhanced narrative reporting as a way of better enabling investors and others to determine the value of a company. However before changing the rules the Committee believes there should be appropriate safe harbours for directors because of the need to make statements about the future (for example on risk) which, necessarily, have an element of uncertainty.
		34	Current legislation (requiring compliance with accounting standards) ensures that a minimum level of content is included in a company's annual report.
		35	Section 299 of the Corporations Act prescribes the type of information required to be provided by a company or disclosing entity in an annual report.
		36	Section 299A imposes additional requirements on a company or disclosing entity that is a listed public company to include an 'operating and financial review' (OFR) in the directors' report. The OFR must contain information that members of the entity would reasonably require to make an informed assessment of the entity's operations and financial position, as well as business strategies and the entity's prospects for future financial years (unless

Question	Ref	BLS Comment
		disclosure would be likely to result in unreasonable prejudice). OFR is sometimes to referred to as "management commentary".
	37	ASIC has proposed a set of guidance for section 299A obligations in Consultation Paper 187 and the draft Regulatory Guide annexed to that Consultation Paper. In the draft Regulatory Guide, ASIC stated that information on business strategies and prospects for future financial years should: • focus on matters that may have a significant impact on the future financial performance and position of the entity; • discuss strategies and prospects in the short term as well as the long term, and not be limited to just the next financial year; and • contain balanced discussion about prospects, for example, by outlining the main risks which could adversely affect the entity's achievement of its outcomes.
	38	In addressing prospects, ASIC stated that a narrative discussion will be sufficient, but if financial forecasts are included, the guidance in *Regulatory Guide 170 Prospective financial information* should be considered.
	39	The draft Regulatory Guide further provides useful examples of disclosure about business strategies and prospects, in particular the level of detail that ASIC considers being appropriate for these types of disclosures.
	40	As a general principle, the Committee supports the draft Regulatory Guide, provided that the same time regulators provide a safe harbour for those preparing the forward looking

Question	Ref	BLS Comment
		statements.
	41	While financial reports generally provide reasonable insight into past performance, the Committee agrees that many companies are reluctant to provide forward-looking commentary relating to future company performance.
	42	Where the directors' report is required to "refer to the likely developments in the entity's operations in future financial years and expected results of those operations"[2] many companies are cautious in addressing this requirement, being concerned about the inherent risk associated with any form of a subjective forward-looking statement.
	43	There is indeed benefit in companies providing forward-looking commentary, but the Committee notes that this benefit needs to be balanced against the common desire of companies to not provide any form of earnings guidance or disclose commercially sensitive information.
	44	In balancing the competing goals of keeping certain information confidential against encouraging disclosure to shareholders about the likely future performance of the company, the Committee notes the approach taken in other jurisdictions, most notably the United States[3] in providing a safe harbour for forward-looking disclosure made in good faith.
	45	While the operation of those off-shore approaches could be simplified, the Committee supports the inclusion of similar safe harbour.
	46	Other than as indicated above the

[2] s299(1)(e)
[3] s21E of the Securities Exchange Act 1934

Question	Ref	BLS Comment	
			Committee does not support additional regulation governing the content or presentation of the annual report.
		47	The Committee believes that investor expectations already drive companies to draft a report as streamlined and efficient as regulation allows.
		48	The Committee believes additional detailed regulation risks leading to undue complexity, with no better example than the Directors' Remuneration Report.
		49	The additive requirements of the Corporations Act, accounting standards and information desired by shareholders often leaves these reports poorly drafted, lengthy and containing information not used by stakeholders.
		50	The Committee supports reviewing the mandatory contents of this report to better reflect information useful to shareholders.
Should there be any change to the statutory time frame for holding an AGM?	5.3.1	51	The Committee supports the statutory time period for holding an AGM being extended by one month to three months subject to more fully understanding the position of ASX listed entities on the issue.
		52	Under current law, a listed public company must hold its AGM within five months after the end of its financial year: s250N(2). The company must lodge its annual report with ASIC within three months after the end of the financial year: s319(3). The company must provide the report to shareholders by the earlier of 21 days before the AGM, or four months after the end of the financial year: s315(1).
		53	Effectively this means there is a

Question	Ref	BLS Comment
		window of two months for the interaction of shareholders with directors between completion of the annual report and the holding of the AGM.
	54	Extending the statutory time period could remedy the obvious difficulty of having approximately 1,500 AGMs held by the end of November each year.
	55	The Committee agrees that that the continuous disclosure regime in Australia has lessened the need for the annual report and AGM date to be in any way contemporaneous.
	56	Providing an extended time period would also facilitate greater engagement not only by retail shareholders, but also by institutional shareholders who would be less likely to experience clashes. The high number of AGMs in such a short space of time places enormous pressure on institutional investors who as a result, are compelled to delegate a great part of the voting process to proxy advisory firms. An extension of the time for holding an AGM will provide institutional shareholders with more time to engage with companies in relation to proxy advisers recommendations and more time for proxy advisers to engage with companies in relation to their recommendations
	57	This extension will become particularly favourable if the focus of the AGM shifts from reporting to a discussion. This is because attendance and involvement in the deliberation will become more relevant while the urgency of reporting to ensure the currency of information will become irrelevant.

Question	Ref	BLS Comment	
		58	The CSA/Blake Dawson discussion paper, Rethinking the AGM (2008), proposed extending the statutory period for holding the AGM by one month, on the grounds that this would prevent the bunching of AGMs in November and consequently allow institutional investors more time to consider the agendas for those meetings; and also the window for interaction of shareholders with directors would be extended from 2 to 3 months.
		59	However in the Allens Listed Client Survey (2012), the majority of respondents opposed this proposal, although the authors of the Allens Report suggested (in the passage quoted in the CAMAC Discussion Paper) that there were good reasons for supporting the proposal notwithstanding the reviews of the survey respondents.
		60	The Committee's view is that the case for change has not yet been made out. First, the result of the Allens survey is significant. For whatever reason, a substantial majority of respondents opposed the proposal.
		61	On a practical issue such as this, change should only be made if it is desired by those affected. Second, extending the timeframe to 6 months might simply produce a bunching up of AGMs in December rather than November, a worse outcome because the tidying up process after an AGM would need to be carried out in the traditional Australian holiday period. Clearly there is scope to more fully understand the issue before advocating change.
In what respects, if any, might the requirements for information to be	5.3.2	62	The CAMAC Discussion Paper, paragraph 5.3.2, sets out the legal

Question	Ref	BLS Comment	
included in the notice of meeting for an AGM be supplemented or modified?			requirements and guidelines for the contents of notice of the AGM, and notes that the Australian law is in accordance with the recommendations in the OECD Principles of Corporate Governance (2004). No criticism of the Australian law is offered.
		63	In these circumstances, the Committee does not propose any change to the legal requirements for content of the notice of meeting. Obviously these remarks do not extend to the contents of the annual report.
How might technology be used to make this notice more useful to shareholders?	5.3.2	64	The Committee recommends that section 249L be amended to accommodate the Canadian 'notice and access' approach.
		65	The Canadian 'notice and access' approach essentially involves despatch of a short notice to shareholders by mail or electronically, advising shareholders that information regarding the meeting has been posted on the company's website and explaining how to access the material. That is an attractive means of streamlining the process, and reducing the cost, of giving notice of an AGM.
		66	Current Australian law would not permit the Canadian approach to be taken here, because Australian law requires that a notice containing the information prescribed by section 249L must be sent to all shareholders in the manner prescribed by section 249J. It would be appropriate to amend section 249L to allow an abbreviated notice of meeting, incorporating by reference material displayed on the website. The amendment should make provision to

Question	Ref	BLS Comment	
			accommodate updating of the website up to a reasonable time before the meeting.
Might any other documents usefully be sent with the notice of meeting, and, if so, what?	5.3.2	67	No, except to the extent required by the directors' general law obligation to make full and fair disclosure to shareholders.
Should there be provisions for companies to send information about an AGM directly to the beneficial owners of shares held by nominees and, if so, what type of information?	5.3.3	68	The Committee supports steps being taken to facilitate direct communication between listed companies and the beneficial owners of their shares.
		69	The Committee empathises with the comments from the CASAC Report raised in the Discussion Paper. The task of identifying every beneficial share owner to directly engage with is incredibly burdensome from the company's point of view, and there is a strong argument that beneficial share owners have chosen to hold their shares through a "nominee" and many sophisticated investors still have procedures and process that may remove legal and beneficial ownership.
		70	Legislators and regulators need to consider ways to streamline the process of directly notifying beneficial owners or compelling the nominees to notify the beneficial owners about an AGM and giving them an adequate opportunity to consider the proposed matters and direct their voting.
Should there be any provision for beneficial owners of shares in a company to participate in the AGM of that company and, if so, how?	5.3.3	71	Yes, see the Committee's comments above.
Should there be any change to the threshold tests for shareholders placing matters on the agenda of an AGM?	5.4.2	72	No.
Should there be any change to the timing requirements for the calling of an AGM,	5.4.3	73	The Committee supports the approach proposed in the Discussion

Question	Ref	BLS Comment
including for shareholders to place matters on the agenda of an AGM, to seek the circulation of statements concerning any resolution, or to nominate persons for the position of director?		Paper as to the extended notice requirements.
	74	In particular, the Committee considers it prudent for public companies to give more notice to shareholders, consistent with its earlier recommendation in relation to the extended statutory period to call AGMs.
	75	The Committee further recommends, as an overarching policy, that CAMAC consider the benefits of separating the discussion function of the AGM from its decision making function.
	76	There is a common feeling amongst shareholders that because of proxies, decisions are made before and without the benefit of deliberation at the AGM. Decoupling the discussion and decision-making functions of the AGM might enable shareholders to have the opportunity to reflect on the questions posed at the AGM, the directors' responses to those questions and any other issues that were raised on the day, prior to voting.
	77	Institutional shareholders should be encouraged to attend the discussion function of the AGM and if proxy advisers propose to provide a recommendation on any resolution to be put to the AGM, they should be required to attend the discussion function of the AGM as a condition of their licensing regime. The Committee has already recommended that proxy advisers be required to provide a copy of their report to the company if they proposed to recommend against any resolution at the meeting. This draft report should be required to be provided to the company prior to the

<table>
<tr><th>Question</th><th>Ref</th><th colspan="2">BLS Comment</th></tr>
<tr><td></td><td></td><td></td><td>date of the AGM discussion function.

78 In order to decouple the discussion, information exchange and questioning from the formal voting process, it might be possible to provide that voting should open at the commencement of a general meeting and stay open for a further set period.

79 Subject to further consultation on any limitations with the electronic voting system, a possible meeting timetable is set out below. An extended period has been provided from the date of the meeting to voting to allow sufficient time for proxy advisers to finalise their recommendations and for institutional shareholders to properly consider the recommendations, engage with the company in relation to the vote and complete any internal escalation procedures.
<table>
<tr><th>Date</th><th>Event</th></tr>
<tr><td>Day 1</td><td>Dispatch of NoM</td></tr>
<tr><td>Day 20</td><td>Meeting date – discussion only</td></tr>
<tr><td>Day 27</td><td>Time for determining voting entitlements</td></tr>
<tr><td>Day 28</td><td>Last day for receipt of votes on meeting (other than direct voting)</td></tr>
<tr><td>Day 30</td><td>Last day for receipt of direct voting on meeting</td></tr>
<tr><td>Day 31</td><td>Publication of results of voting</td></tr>
</table></td></tr>
<tr><td>Should companies be required to publish a pre-agenda notice and, if so, what should be the contents and timing of that notice?</td><td>5.4.3</td><td>80</td><td>No.</td></tr>
<tr><td>Does the current law concerning excluded material either create undue difficulties for</td><td>5.4.4</td><td>81</td><td>No.</td></tr>
</table>

Question	Ref	BLS Comment	
shareholders who wish to criticise directors or, conversely, unduly restrict directors in vetting out information to be circulated to shareholders at the company's expense?			
Should there be any rule regarding the failure to present a resolution at an AGM?	5.4.5	82	No.
Should shareholders have greater scope for passing non-binding resolutions at AGMs?	5.4.6	83	No.
What, if any, additional legislative or best practice procedures should be adopted for companies to seek the views of shareholders on issues they would like discussed at the AGM, or to invite shareholders to submit questions prior to the AGM?	5.5.3	84	There is no need for additional regulation for companies to seek the views of shareholders on issues they would like discussed at the AGM.
		85	The Committee believes there is already an efficient informal practice of seeking shareholder opinions before an AGM. The Committee supports this practice as a general principle but takes the view that there is no need for prescriptive rules.
Should there be some obligation on the auditor (or the representative of the auditor) to speak at the AGM?	5.5.3	86	No.
What, if any, obligations should a company or a company auditor have to answer questions from shareholders?	5.5.3	87	None in addition to the current requirements at common law and contained in the Corporations Act.
Should any matter be excluded from or, alternatively, added to the business of the AGM?	5.6	88	No.
What, if any, changes are needed to the current position concerning: • the general functions and duties of the chair • the chair ensuring attendance of particular persons at the AGM • the chair moving motions • motions of dissent from a chair's rulings?	5.7.5	89	The obligations of the chair at common law are clear and adequate and the Committee sees no need to codify them.
Should a chair be obliged to provide shareholders with a reasonable opportunity to discuss a resolution before	5.7.5	90	This is the position at common law and the Committee sees no need to codify this.

Question	Ref	BLS Comment	
it is put to the vote?			
Should a chair have the power to impose any time, or other, limits on an individual shareholder speaking at the AGM?	5.7.5	91	There is no need for any further prescriptive rules in connection with the conduct of the AGM..
		92	Companies should be afforded sufficient flexibility to mange the flow of the AGM as appropriate. The chairman should be free to oversee and directs the course of an AGM as he or she sees fit.
What changes, if any, should be made to the current requirements concerning: • informing shareholders of their right to appoint a proxy • the proxy form • pre-completed proxies • notifying the company of the proxy appointment • the record date and the proxy appointment date • irrevocable proxies • directed and undirected proxies • renting shares • proxy speaking and voting at the AGM, or • any other aspect of proxy voting.	5.8.10	93	The Committee considers that there should not be any change to the current requirements around proxy voting other than those discussed earlier in this submission at 3.4.
		94	However, the Committee notes findings of the Australian Committee of Superannuation Investors (ACSI) in their report entitled Institutional Proxy Voting in Australia which found evidence of a number of operational weaknesses in the systems used to cast votes.
		95	The issues identified include unrealistic deadlines for sub-custodian messages, lack of reconciliation of holdings data with votes lodged and the extensive use of faxes to submit proxies.
		96	One particular issue raised is that the coincidence of the time for the determination of vote entitlements (not more than 48 hours prior to a meeting) and the deadline for the submission of proxies (normally two calendar days before a meeting) has led to unrealistic time pressures and reconciliation difficulties.
		97	AICD's report recognized similar problems. Share registries have expressed difficulties reconciling the votes received with the correct number of shares held by the share

Question	Ref	BLS Comment
		owner within the 48 hours between the receipt of proxy forms and the company meeting. 98 To assist your review, the Committee has repeated the recommended regulatory reforms in the ACSI Report as below: • separate the coincidence of the time for the determination of voting entitlements (suggested 5 business days before a meeting) with the deadline for proxy lodgements (retain at 2 calendar days before a meeting); • standardise the application of vote exclusions on capital raising resolutions to protect the rights of investors whose votes may be excluded if their holdings are combined (through sub-custodians) with other investors who are ineligible to vote; • require companies to report to the market the total number of proxy votes exercisable by all proxies validly appointed but excluded; • empower shareholders representing more than 5 percent of a company (the same threshold at which a meeting can be called) to appoint an independent assessor to oversee or review a poll; • require companies (in electronic form only) to acknowledge that the votes of shareholders have been processed (or discarded) and to confirm what proportion of the final results their votes represented; and • make poll voting mandatory for listed companies so that the votes of all investors are counted on resolutions and not just those present at the meeting. 99 In addition, ACSI has recommended the following market reforms: • all custodians, sub-custodians

Question	Ref	BLS Comment
		and voting agents (both institutional and custodial) should make use of the SWIFT proxy voting messages to enable the automated processing of proxy messages on the investor's side; • registries should ensure that online systems for the lodgement of proxies enable 'split' voting, file exchanges and are capable of releasing vote confirmations in a format compatible with the SWIFT proxy voting messages; and • online proxy voting platforms should enable users to identify if they have participated in placements so that they can comply with the terms of vote exclusion statements on capital raising resolutions.
Should direct voting before the meeting be provided for by legislative or other means, and if so what matters should be covered in any regulatory structure?	5.9.2	100 Direct voting should be provided for by legislative means. 101 Direct voting is a simple method by which the shareholder completes a binding voting form instead of completing a proxy form. In this sense, direct voting improves the exercise of voting rights because it removes the intermediary between the shareholder and the company. 102 The Australian Company Secretary Service summarised the benefits of direct voting in a memo as: • giving shareholders full control over their votes – by using direct voting instead of appointing a proxy, shareholders will have certainty over their voting intentions; • shareholders are able to promptly and securely vote either by mail, fax or electronically without needing to attend the meeting – therefore, no matter where the shareholder is located, they are able to simply and conveniently cast their vote; and • direct voting encourages more

Question	Ref	BLS Comment
		shareholders to vote at meetings – the convenience of direct voting ensures greater participation, enabling more effective engagement with shareholders. 103 The Committee notes several additional compelling reasons to legislate for direct voting: • many companies have already implemented direct voting via amendment of their constitution. Amending the Corporations Act would provide greater certainty to these companies, especially regarding the validity of votes and provide shareholder confidence; • legislative backing will encourage more companies to use direct voting; • noting that there has been a dismal percentage of shareholder attendance in recent years at most AGMs, direct voting can assist in revitalising the AGM process and re-establishing engagement with shareholders; and • direct voting is more desirable than proxy voting, which is a complex area of the law. 104 The law needs to catch up with technological advances and the widespread use of the internet. It is only a matter of time before direct voting (particularly online) is the preferred method for voting. 105 5.9.2 of the Discussion Paper raised the following two issues: **Should votes be final?** 106 The Committee suggests: • votes should be counted on the basis that the last vote received and registered during the voting window will be effective; and • time of receipt should be 48 hours before AGM for non-electronic or

Question	Ref	BLS Comment
		up to close of AGM for electronic methods **How should amendments to resolution/s be dealt with?** 107 The Committee suggests: • a similar system to that used by proxies should be adopted for non-electronic votes as suggested by the Discussion Paper; • electronic voting during the AGM can overcome this issue 108 Due to the use of postal and facsimile votes (non-electronic votes) there must be provisions in the Act addressing such logistical issues. However, electronic voting does not suffer from the same inadequacies due to its instantaneous and automated process. It is therefore proposed that separate rules should govern electronic votes and non-electronic votes. 109 Other considerations for regulators include document requirements for direct voting (similar to the s250B, s250BA requirements for proxies) such as: • manner of receipt (for example. electronic, postal, facsimile); • manner of electronic signatures (validation/authentication process as determined by the company); and • AGM notice requirements.
In what circumstances, if any, should access to pre-meeting voting information be permitted?	5.10.1	110 Access to pre-meeting voting information at the company's discretion should be permitted as a general principle, but should not be regulated
In what manner if any, should access to pre-meeting voting information be regulated before discussion on a proposed	5.10.2	111 See the Committee's comments above. This area should not be regulated.

Question	Ref	BLS Comment	
resolution?			
In what manner, if any, should the current requirements concerning the disclosure of pre-meeting votes before voting on a resolution be amended?	5.10.3	112	No amendments are recommended.
Should there be legislative or other recognition of online voting during the course of an AGM and, if so, in what respects should this form of voting be regulated?	5.11	113	See our earlier comments on direct voting (5.9.2).
		114	The Committee supports the legislative recognition of online voting, with the caveat that any legislative reform in this respect should make it abundantly clear that technology risk rests with the shareholders who wish to take on the online voting option.
		115	It would be desirable, in the interests of enhanced shareholder participation in AGMs, to take whatever legal steps are necessary to permit online voting to take place, both on a 'show of hands' and on a poll, if the directors of the company determine that adequate technological facilities are available to permit such voting to take place.
		116	The Minter Ellison paper on online participation in shareholder meetings, to which the CAMAC Discussion Paper refers, suggests that although legislative amendment may not be needed (because of s 33B of the Acts Interpretation Act), a specific legislative amendment to permit online voting would put the matter beyond doubt. As the CAMAC Discussion Paper notes, an amendment would provide some encouragement for listed companies to offer that facility.
		117	The Committee agrees with CAMAC that legislative reform should make it clear that the technology risk would rest with the shareholders seeking to vote by online voting, so that inability to vote online during the course of an AGM because of technological failure

Question	Ref	BLS Comment	
			would be analogous to the shareholder failing to attend because of, say, a transportation breakdown.
		118	The Committee's comments in response to paragraph 5.11 of the Discussion Paper are confined to online voting. Online participation, as opposed to online voting, is considered in our response to paragraph 6.3.2 below. A shareholder who votes online without participating in the meeting should not be regarded as present for quorum purposes or any other purposes. Online voting would take effect when received by the company, and at that point the vote would be irrevocable.
		119	The interrelationship between online voting and voting by a proxyholder representing the same shareholder would be governed by analogy with the case where a shareholder appoints a proxy and then attends in person; the online vote would constitute revocation of the proxy, and so the proxyholder's vote would be ineffective. These matters should be clarified in the amending legislation.
		120	Listed companies should be encouraged to supplement the statutory reform with constitutional provisions addressing the issues identified in the Minter Ellison paper.
Do any issues arise concerning voting exclusions on resolutions that must, or may, be considered at an AGM and, if so, how might those issues best be resolved?	5.12	121	No issues.
Should any changes be made to the current provisions regarding voting by show of hands?	5.13.3	122	No.
What legislative, or other, verification initiatives, if any, should be introduced concerning voting by poll at an AGM?	5.14	123	None.

Question	Ref	BLS Comment	
Should one or more verification requirements apply in all instances or only if, say, a threshold number of shareholders require it?	5.14	124	None.
Should any steps be taken to promote more consistency in the disclosure to the market of voting results?	5.15.1	125	No need.
Following the AGM, what, if any, rights of access should shareholders generally, or the person proposing a resolution, have to voting documents?	5.15.2	126	No additional access is necessary.
What, if any, changes should be made to the requirements concerning the recording of details of voting in the minutes of the AGM?	5.13.3	127	No need for change.
Should there be a statutory minimum period for retention of records of voting on resolutions at an AGM and, if so, for what period?	5.15.4	128	No.
Should there be any legislative initiatives in regard to the election of directors, including in relation to: • the frequency with which directors should stand for re-election • the right of shareholders to question candidates (and receive answers) • the voting procedure?	5.16.3	129	No.
Are there any matters concerning dual-listing that should be taken into account in the regulation of AGMs?	5.17	130	No.
Are there any problems in the voting or other aspects of AGMs for overseas holders of shareholding interests in Australian regulated companies?	5.18	131	See the Committee's comments on beneficial share owners (5.3.3).
For some or all public companies, should the functions of the AGM be changed in some manner, or the obligation to hold an AGM be abolished?	6.2.2	132	The Committee does not advocate the abolition of the AGM as a meeting at which the company's senior officers orally report to shareholders, and then shareholder deliberation and decisions take place. However, the Committee supports CAMAC's Option 1: Limit the AGM to the deliberative

Question	Ref	BLS Comment
		and decision-making functions.
	133	In the Committee's view, much time is wasted at AGMs during the course of consideration by shareholders of the annual financial report, directors' report and auditor's report as required by section 250(1)(a). The law does not require a vote to be taken on this item, and nowadays the usual practice is that the reports are considered without any decision or vote. This item of business tends to be dominated by a small number of retail shareholders, whose comments and questions do not always demonstrate a basic understanding of the reports, and by other retail shareholders who have a particular axe to grind, sometimes in their capacity as customers or debtors of the company rather than as shareholders. By the time the meeting moves on to deliberation of matters for decision, there is an exhaustion factor that limits the quality of the discussion.
	134	This problem can be avoided by removing the requirement to consider the annual report (other than the remuneration report, upon which shareholders make a decision by advisory vote) at the AGM, and substituting a requirement for the notice of meeting to stipulate an electronic address, accessible to all shareholders, at which members could post their comments and questions up to a specified time before the meeting. The company would be required to respond to all questions, individually or by categories, at the AGM or on the website prior to the AGM, but without any follow-up questions at the meeting.

Question	Ref	BLS Comment	
In this context, what technological developments might be taken into account in considering the possible functions of the AGM?	6.2.2	135	As noted, shareholders should be permitted to make comments and ask questions on the annual reports by posting them at an electronic address which would be accessible to all shareholders. The company would be empowered to remove scurrilous or defamatory material, though it should be given general protection from liability for material published by shareholders.
For some or all public companies, and if the AGM is retained in some manner, what legislative or other initiatives, if any, should there be in regard to the possible formats of the AGM? In this context, what technological developments might be taken into account in considering possible formats for the AGM?	6.3.2	136	The Committee supports CAMAC's Option 1 in the discussion paper.
		137	The Committee does not advocate CAMAC's Option 2: Online-only meeting, for the reasons given by CAMAC in the Discussion Paper.
		138	First, if (as advocated above) the AGM is retained for deliberation and decision-making by shareholders, including on the remuneration report, a physical meeting offers face-to-face accountability for management that cannot be replicated online.
		139	Second, the law should not assume that all shareholders will have, or be able to use, online access to the meeting. A fortiori, the Committee does not advocate Option 3: Virtual meeting.
		140	However, the Committee submits that there is sufficient potential advantage in Option 1: Hybrid physical-online meeting to warrant further study of overseas implementations with a view to developing a detailed proposal for implementation in this country. In that regard, the Turkish initiative noted by CAMAC seems particularly promising.
		141	Under Option 1, shareholders would be able to observe the proceedings at the physical location of the AGM (or the principal physical location)

Question	Ref	BLS Comment
		through live streaming, and they would be given the opportunity to participate by electronically transmitting their comments and arguments on the motion, as well as by voting.
	142	As noted in its response to 5.11, the Committee agrees with the suggestion by Minter Ellison that it would be undesirable to rely on section 33B of the Acts Interpretation Act, and instead there should be specific legislative authorisation for hybrid physical-online meetings. On balance, the Committee considers that shareholders who participate online should not be taken to satisfy a quorum requirement and should not be treated as present for other purposes. Consequently a shareholder could participate online after having appointed a proxy to attend a physical meeting, although (as noted at 5.11) if the shareholder casts an online vote, doing so should be taken to have extinguished the proxyholder's authority to vote.
	143	As noted at 5.11, listed companies should be encouraged to supplement the statutory reform that would permit online participation, by appropriate constitutional provisions addressing the kinds of issues identified in the Minter Ellison paper.

Working Group members

Andrew Lumsden
Hon Dr Robert Austin
Stephanie Daveson
Glenn Vassallo
Amanda Harkness
Guy Alexander
Chelsey Drake

Global Proxy Solicitation Pty Limited
Level 2, 220 George St, Sydney NSW 2000
PO Box R698, Royal Exchange NSW 1225
T: 61 (2) 8022 7900 F: 61 (2) 8022 7950
www.gps-proxy.com
ABN 90 122 943 131

Mr John Kluver
Executive Director
Corporations and Markets Advisory Committee
Level 16, 60 Margaret Street
SYDNEY NSW 2000

Via email: john.kluver@camac.gov.au
Cc: camac@camac.gov.au

Dear Mr Kluver,

The AGM and Shareholder Engagement

GPS is a specialist shareholder engagement firm which has acted on behalf of many ASX listed companies in relation to a diverse range of corporate actions.

These include annual general meetings, shareholder requisitioned meetings (s249D & others), schemes of arrangement, capital raisings, takeover bids and takeover defences. GPS specifically provides advice on proxy strategies and corporate governance, institutional and retail investor solicitation and shareholder research. GPS also co-publishes the GPS-Melbourne Institute Shareholder Confidence Index, a leading indicator of Australian retail shareholder behaviour and intentions.

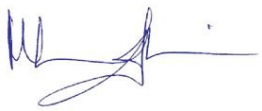
Based on our experience and observations over many years, we do not hold the view that legislative requirements are needed to improve the quality of shareholder engagement between Australian companies and their owners. What is required is a better understanding by boards and executive management of the needs of their owners and the benefits that will flow from more effective engagement and an alignment of interests with them.

In our brief submission to Camac, we focus on several key areas of shareholder engagement and comment where we believe improvements can be achieved.

We thank you for the opportunity to lodge this late submission and invite you to contact the writer should the Committee require any further explanations or clarifications.

Yours sincerely

GPS



Maria Leftakis

Managing Director

Introduction

In our experience, the fundamental issues of shareholder engagement come down to three key factors:-

- the identity of beneficial owners being known to the Board
- knowledge and understanding of the voting policies of each institutional shareholder - whether they be an investment manager or asset owner (superannuation funds and public investment authorities)
- timing of engagement throughout the year.

Boards and executive management who understand these fundamentals are found to enjoy higher quality relations with their investors including greater support for policy proposals such as remuneration, operational initiatives and capital raising; and also experience lower dissident activity.

We have found also that boards and executive management usually have a substantial knowledge gap about the identity of beneficial owners and knowing the most appropriate time throughout the year when a Company should engage with them. However, this usually depends on the size of the company with larger capitalised companies generally being better resourced to manage an active engagement schedule.

Under the Corporations Act (s672a & s672b), a listed Company is able to send a tracing notice to custodians and nominees (and receive a response within 48 hours of the request) which provides detailed information about the identity of each beneficial owner and the number of shares it holds in the Company.

Custodial tracing notice responses clearly set out the identity of all beneficial owners and also provide a breakdown of what proportion of an asset owners holding is being managed by a fund manager or managers. This level of details is not always known or properly understood by companies.

This is often because the task of managing and reporting the tracing notice process is usually outsourced by Companies and the reports provided to them (Share Register Analysis Reports) in most cases only reveals the identity of fund managers and not the 'underlying' asset owners (although these are clearly detailed in the tracing notice response).

Companies therefore accept the Share Register Analysis Report as the definitive list of beneficial owners without realising that there are potentially a large number of additional beneficial owners (usually asset owners) who in many cases retain the right to control their vote, are happy to engage with Companies, abide by their own governance and proxy voting guidelines and vote independently from their investment manager.

This has led for example, to situations where a Company engages with a fund manager, responds to its questions, addresses concerns and receives feedback that the fund manager is supportive and will vote in favour of proposed resolutions, only to later discover that the support only related to part of the holding and that dissenting votes have been lodged by the fund's underlying beneficial owners.

In our experience, this occurrence is largely avoidable where a Company has a clear understanding of all its beneficial owners and actively engages with its fund manager and asset owner shareholders. At the very least, a Company should be aware of the multiple layers of beneficial shareholders and what proportion a fund manager can actually vote (voting mandate) as opposed to manage (investment mandate).

Our recommendation. GPS believes that additional legislation is not warranted to assist remedying this occurrence. However there may be scope for additional guidance, that fund managers provide improved clarity about the breakdown of their investment mandate; what proportion of a Company's shares for which they control the vote; and better explanation of how/if they manage vote lodgement across their shareholding and underlying asset owner clients.

Governance and Proxy Voting Policies of Institutional Shareholders

It is imperative that engagement with institutional shareholders is undertaken on an informed basis about their governance and proxy voting policies.

In our experience, the overwhelming number of fund managers and asset owners has a published set of proxy voting policies which outlines their position on governance related matters. These policies provide insights and valuable information about how the shareholder may vote when presented with specific resolutions – this could relate to the election or re-election of a Board member, remuneration related and capital raising matters amongst others. These policies may also provide information about which proxy advisors shareholders subscribe to and whether they follow a proxy advisors recommendation. If the proxy voting policy does not contain this information then most shareholders are happy to provide this information to the Company if requested.

The investment management community is also guided by the Financial Services Council governance standards (known as the 'Blue Book').

In our experience, most institutional shareholders although informed by paid for research reports do not necessarily have a policy of blindly voting in line with proxy advisers. However, we have found that the case for this is higher with some offshore institutional shareholders that do not have the resources to do otherwise; although most of these are prepared to have a dialogue with the Company and could change their position if a Company's rationale is clearly articulated and accepted.

It is important to note that Australian asset owners usually also subscribe to an industry association which has its own proxy voting guidelines. For example, the Australian Council of Superannuation Investors representing 38 industry superannuation funds publishes its own governance guidelines for its member funds.

Most major proxy adviser firms and industry associations which publish research reports are usually prepared to supply these to the Company free of charge, on request.

Therefore, in addition to active shareholder engagement, there is a substantial amount of information available to Companies about what factors may influence the vote its shareholders cast and whether any proposed resolutions run the risk of generating a high dissenting vote.

We note that proxy adviser research is usually only published for the ASX300 and institutional shareholders usually rely on their internal or industry governance guidelines in relation to voting matters outside the ASX300.

Engagement with Institutional Shareholders and Proxy Advisers

In the peak of the AGM season from the period of lodgement of a Company's AGM Notice of Meeting (NOM) to the proxy voting deadline, it is not uncommon for GPS to receive feedback from institutional shareholders and proxy advisers that this time is not ideal to be actively engaging for the first time with the Company and its Board.

We find that if Companies are actively engaging with institutional shareholders and proxy advisers throughout the year then the time pressure to engage during the AGM peak season is substantially minimised.

Engagement - Proxy Advisers

In our experience, all proxy advisers and industry associations are prepared and happy to engage with companies for which they produce research, although at least one has specific rules of non-engagement during certain months of the year or whilst a company is defined as being in its solicitation period.

Based on feedback we have received, most proxy advisers would like the opportunity to engage with a Company before its remuneration report is finalised and published to enable constructive dialogue that may lead the Company to refine/clarify aspects of remuneration to improve readability or even potentially make amendments to the structure of remuneration.

This is not to say that proxy advisers consult or provide advice on how to structure remuneration, but rather that via constructive dialogue about the governance policies that define the way a proxy adviser assesses remuneration reports, a Company will have a much clearer idea of how its remuneration report and structure may be analysed by it and if any aspects of its remuneration run the risk of a negative recommendation.

Usually as far as a proxy adviser is concerned, once a Company's remuneration report is published then its engagement (excluding one proxy adviser which does not engage at this time) focus shifts to clarifying any confusing aspects and enquiring about rationale for structure – not engaging with the view of persuading a proxy adviser to change a negative recommendation – this will not happen.

Proxy advisers are prepared to update the content of their research reports only where there are errors of fact.

Once a Company's AGM NOM is published a proxy adviser does not see the need to engage with a Company unless it is specifically seeking to clarify information, or it is considering making a negative recommendation and wishes to communicate the reasons for this to the Company.

It is important to note that the publication of proxy adviser research ranges from 14-18 days before a Company's meeting date. It is important for a Company and preferable that it obtains a copy of the research (especially if it is negative) so it is aware of the reasons for the negative recommendation and to enable it to effectively respond to any questions from its shareholders who may subscribe to the research.

These research reports also usually flag governance issues that may provide a Company with useful information in preparation of its next AGM.

Our recommendation. In our view, companies should engage with proxy advisers twice a year although this will be higher if a company is conducting other non-AGM or special meetings or is subject to an acquisition proposal via a Scheme of Arrangement.

We do not believe there is any need for regulation of proxy advisers in addition to the statutory obligations they already hold in their work as holders of an Australian financial services licence.

Institutional shareholders should be entitled to buy independent research in relation to governance related matters without restriction just as they can in relation to broker and other research on a Company's performance or trading recommendations.

Engagement - Institutional Shareholders

Engagement with institutional shareholders depends on a range of factors, including size, whether actively managed, whether dealing with the fund manager or asset owner, and the shareholder's engagement policy amongst others.

Asset owners in particular will either be happy to engage directly with a Company in relation to governance related matters or have a policy of only dealing via their fund manager or preferring engagement and advocacy via an industry association such as ACSI.

The challenge in relation to institutional shareholder engagement ahead of a Company meeting is dealing with all the relevant stakeholders. For example, the overwhelming majority of large funds have at least 2 departments that a Company needs to engage with – the fund manager managing the actual investment and the governance department (back office) managing all voting related aspects.

In some cases, the governance/proxy voting department wields outright control or significant influence over voting. We have seen this give rise to the situation where dissenting votes are lodged even though the fund manager may be satisfied with the performance of the investment but where the governance departments has substantial corporate governance related concerns which may cause it to either vote against Board members and/or against the remuneration report.

It is therefore essential that a Company clearly understands which individuals/departments it needs to engage with, who the institutional shareholder would like to engage with (e.g. do they need to speak to a board chair; the Chairman etc) and at what time throughout the year.

We have often heard from Companies that there is little point engaging with institutional shareholders early in the AGM cycles as they leave voting until the 'last minute'. Many companies assume that institutions are lodging votes 72-48 hours before the meeting date because that is the time when custodians are lodging vote with a Company's share registrar.

However, in our experience that is not the case. Institutional shareholder voting at AGMs could take place as early as 12 days before the meeting date and usually at least 4 days before the meeting date.

Shareholder engagement after this time is simply too late and does not enable a Company to address any issues in time for them to meet an institutional shareholder's proxy voting cut-off that may be imposed by voting agents, sub-custodians or its internal business rules.

A Company should also be aware that its institutional shareholders may engage in stock lending and that it is usually possible to obtain details from the custodians about the identity and number of shares loaned by institutional shareholders.

The issue of stock lending impacts the number of shares that can be voted by an institutional shareholder at a Company meeting but, if excessive, may also potentially flag the building of a shareholding position for takeover or dissident activity.

Our recommendation. The investment management community should provide additional guidance on proxy voting related matters particularly where the voting mandate is not controlled by the fund manager. This may provide a general framework outlining the layers of beneficial owners and intermediaries and what engagement options are available to a Company. This will provide much needed assistance to help improve shareholder engagement.

In Summary

There is substantial opportunity and scope for Company Boards and executive management and institutional shareholders to engage throughout the year based on industry guidelines; documented institutional shareholder engagement guidelines; proxy adviser guidelines and other guidelines.

Further, we have found that both Boards and individual Board members are very happy to engage if they are aware of the identity, needs and requirements of their institutional shareholders.

As access to this information should be easily available to every listed Company we see no need for additional legislation prescribing how a Board or institutional shareholder engages with a Company.

However, we believe that Companies would benefit from a much better understanding of the layers of beneficial shareholders which own their stock, all the stakeholders they need to engage with and a well-structured annual program timing shareholder and proxy adviser engagement. This will ensure the opportunity for constructive dialogue that will assist a Company to propose resolutions on an informed basis of what potential issues they are likely to face and relatively accurately forecast the level of support they can expect.

We therefore suggest that additional guidance is provided by institutional shareholders to assist Companies to have a much clearer understanding of the potential breadth of shareholder engagement and the specific engagement needs of institutional shareholders so that a Company's engagement efforts are effective.

Ends

CLAYTON UTZ

Submission to the Corporations and Markets Advisory Committee The AGM and Shareholder Engagement Discussion Paper

21 December 2012

---

1. **Introduction**

1.1 Clayton Utz is pleased to provide this submission to the Corporations and Markets Advisory Committee (**CAMAC**) in response to CAMAC's Discussion Paper of September 2012 titled *The AGM and Shareholder Engagement* (**Discussion Paper**).

1.2 Our submission focuses on the issues we believe are most pertinent to listed companies achieving substantial improvement in the conduct of their Annual General Meeting (**AGM**) and engagement with their shareholders in that context.

2. **Current status of the AGM**

Low institutional investor attendance

2.1 From our experience, AGMs conducted by listed companies are dominated by discussion between retail shareholders and the company's board of directors and executives. Whilst one would assume the company's AGM, the one forum whereby directors and management report to all shareholders in person and at the one location, would be of great importance to the company's major shareholders, more often than not institutional investors are not present. This is primarily due to the reality that;

(a) no new information is disclosed at the AGM as all material information provided to shareholders at the AGM has been previously provided or is concurrently available on the company's website and through the ASX public announcements; and

(b) institutional investors have previously had the opportunity to be briefed by and question management with respect to the company's results for the relevant period and its strategic objectives.

2.2 Following the release of the company's preliminary results (i.e. the lodgement of a company's Appendix 4E with ASX), which occurs well before the AGM, a company will conduct briefings with institutional shareholders, financial analysts and media, the content of such discussion being dissected by financial analysts, summarised in slide packs and public announcements, lodged with ASX for disclosure to the market and reported in the media.

2.3 A company's annual report is released also well before the AGM, and this provides shareholders with comprehensive detail regarding the company's financial performance and ongoing activities. Finally, and perhaps most relevantly, the text of the Chairman and CEO's AGM addresses are made available on a company's website and/or the ASX contemporaneously with the AGM. These addresses contain information about the company's activities, financial performance for the previous

period, current trading and future outlook, much of this information having already been previously covered within the release of the company's preliminary results and annual report. Accordingly, if the CEO or Chairman's addresses at the AGM provide any new information, it will be contained in the text of the addresses released to the market contemporaneously with the actual address being delivered. As such it is rare for the Chairman and CEO to diverge from the text during their addresses.

2.4 Additionally, institutional investors have greater access to senior management than retail investors and accordingly hold discussions with management and directors at predetermined times throughout the year. Whilst in these private discussions they are not permitted to receive information which retail shareholders would also be entitled to receive, they are able to interact directly with management with regards to the company and any concerns that they hold. Finally any new information which might have arisen which is price sensitive and relevant to a decision whether or not to buy or sell securities of the company will of course have been released to the market pursuant to ASX Listing Rule 3.1, unless protected by the carve out in Listing Rule 3.1A.

2.5 Accordingly, the availability of all information relevant to shareholders prior to, or concurrently with, the AGM, and the access institutional investors have to management and directors at predetermined times, is a disincentive for institutional investors to physically attend and participate in a company's AGM.

Discussion skewed towards retail shareholder issues

2.6 A lack of institutional investor attendance at AGMs naturally results in the attendees at the AGM primarily consisting of a company's retail shareholders. The issues retail shareholders want addressed at an AGM are generally relatively inconsequential or are 'single-issue' concerns that are important to the interests of specific group of shareholders, rather than being relevant to the company as a whole.

2.7 The recent Woolworths Limited AGM is one such example, where a group of retail shareholders were able to propose a resolution to require the majority-owned ALH Group to limit maximum bets on poker machines to $1 per spin, cap machine revenues at $120 per hour and restrict venue opening times to 18 hours a day.

2.8 Accordingly, discussion at the AGM is skewed towards retail shareholder concerns. This has the effect of reducing the quality of discussion at the AGM and further deters institutional investors from attending AGMs. This is a self-perpetuating issue whereby fewer institutional investors attending company AGMs results in AGMs being dominated by retail shareholders and discussion of issues pertinent to them, which in turn discourages greater numbers of institutional investors from attending.

2.9 Furthermore where issues arise with respect to a resolution to be submitted to the meeting for example with respect to the election of directors or the consideration of the remuneration report, the institutional shareholders will have generally expressed their views prior to the lodgement of proxy's for the meeting and discussion at the meeting will be limited to comments and observations by or on behalf of retail shareholders.

3. Should holding an AGM remain compulsory?

Fundamental to the relationship of between shareholders and directors/management

3.1 Despite the issues discussed above in respect of the current status of the AGM, we nevertheless believe it should remain compulsory for listed companies to hold an

AGM. It is important for there to exist an annual forum for management and directors to report to the company's shareholders and answer any questions and address any issues shareholders wish to be discussed. Accordingly the principle items of business to be conducted at the AGM include a consideration of the company's financial and directors reports for the previous period, the election of directors and any other matters which for policy reasons it is considered appropriate to submit to shareholders. At the moment a consideration of the remuneration report is a matter which present policy requires be submitted to shareholders, however it is by no means clear that that is the matter which relates to the conduct of a company's affairs during the previous period which is most likely to impact shareholder value positively or negatively.

3.2 As owners of the company, shareholders have the right to collectively comment on the company's financial performance and strategic direction. This is a vital tenet to the relationship between those who run the company and those who own the company, and removing this forum runs the risk of reducing the accountability of management and directors to the owners. This principle of director accountability is best achieved through an AGM. Unfortunately, the AGM process is not as effective and efficient as it could or should be, much to the frustration of directors, management and institutional investors.

Rise of shareholder activism

3.3 We have seen shareholder activism become a regular feature of corporate life in recent years. Institutional investors are often the leaders of this activism, whereby through their large shareholding in the company, they seek to influence the company's policies and strategies, such as the financial performance, remuneration of key management and directors, and investments and acquisitions. This is perhaps most evident through the use of the "Two Strikes Rule" or ability for shareholders to call an Extraordinary General Meeting (**EGM**) or put a resolution in the notice paper for an AGM. Although these measures have unfortunately been used for other purposes for which they were intended (for example the "Two Strikes Rule" has been used to influence the Boards approach to matters in no way related to remuneration), the availability of these measures has awakened institutional investors to the potential they have to influence decision making by a company's board.

3.4 Such activism is often motivated by short-term pressures on the institutional investors, such as fund managers, to achieve short term returns on their investment in the company in order to satisfy the demands of their investors. This often results in institutional investors making decisions that result in their short-term objectives being achieved, even if it is sometimes not in the best interests of the company in the longer-term.

3.5 The involvement of Allan Gray, an institutional investor with an 8% share in Spotless Group Limited (**Spotless**), in the takeover of Spotless by Pacific Equity Partners (**PEP**) is one of the most recent examples of shareholder activism, in which shareholders of Spotless (led by Allan Gray) threatened to call an EGM to spill the Spotless board if the Spotless board did not actively engage with PEP.

3.6 This rise in shareholder activism and the increased involvement of shareholders, as owners of a company, seek to have in the running and direction of a company is evidence that the AGM, as an annual forum, remains relevant.

Important forum for retail shareholders

3.7 Additionally, retail shareholders may be less inclined to invest in listed companies if they believe they are being denied the right to confront management and directors with their concerns. As retail shareholders are critical to providing liquidity for listed companies, it is important to retain the AGM to ensure retail shareholders are encouraged to invest in Australian listed companies.

4. The future of the AGM

4.1 Whilst we believe the AGM should be retained for the above reasons, its current format is dated and places too much emphasis on the physical nature of the meeting. Listed companies could take advantage of advances in technology to make it more attractive and convenient for its shareholders, in particular institutional investors, to attend and participate in the AGM.

Technology

4.2 Present-day technology has the potential to overhaul the way in which listed companies conduct their AGMs. The emphasis on a physical meeting could become less relevant as companies now have the capability to stream their meetings online through webcast technology and allow shareholders to participate in the meeting and ask questions in real time from anywhere in the world where they have access to the internet or a telephone.

4.3 The physical meeting and attendance of directors and management should remain compulsory, however shareholders could be provided the choice of either attending in person or attending remotely (or not attending at all). Providing shareholders with such easy access to participation at the AGM should encourage involvement and increase the levels of general shareholder engagement. Recent technological advances have also meant that direct voting by shareholders is now available, as discussed below.

Direct voting before and at the meeting

4.4 An appropriate framework is required to enable shareholders to directly vote on AGM resolutions. We believe that shareholders should be able to vote directly on their own behalf, regardless of whether they intend on attending the AGM, by forwarding their vote to the company prior to a specific cut-off time before the AGM.

4.5 We note that whilst CAMAC supports the implementation of direct voting, it has left open the question as to whether the availability of direct voting should be compulsory for all companies or voluntary by its constitution. Currently the Corporations Act and the ASX Listing Rules are silent on direct voting prior to the meeting and the possibility of direct voting in real time during the course of a meeting.

4.6 As mentioned above, technologically it should be possible to allow shareholders to vote online in real-time during an AGM either through a dedicated website with personal login details or via a phone call to a dedicated number. This should be possible given that one is now able to bet in real time during sporting events, if so minded. If companies provided this functionality, shareholders who were unable to attend the AGM in person, but were able to view the AGM via webcast, would be able to vote in real-time rather than vote before the meeting (if this process was implemented), or via proxy (an option which is currently available to shareholders).

4.7 There are, however, potential issues with direct voting at a meeting. Firstly the shares held by institutional shareholders are almost invariably held by custodians. These custodians are likely to hold shares on behalf of a number of investors. Voting at an

AGM, or any other shareholder meeting, must be undertaken by the registered shareholders that is the custodian. Voting through custodians is a cumbersome process which requires the custodian to have regard to the directions received from all of the institutional investors on whose behalf shares in the relevant company are held and to lodge a vote to reflect the voting intentions of those investors. Inevitably this leads to an aggregation of votes into a "Yes", "No" or abstain and the lodgement of proxies. Furthermore we understand that the administrative steps which are required to ensure voting through a custodian, time consuming and highly process driven. The requirement for institutional investors to vote in this way would almost certainly preclude direct voting during the course of a meeting where the shares are held through a custodian.

4.8 The companies will invariably approach shareholders particularly institutional shareholders who seek their views in relation to specific resolutions to be considered at the AGM and in doing so will solicit support for those resolutions which have been proposed by the company. This will obviously include encouraging the shareholders to lodge proxies in advance of the meeting so as to reflect the institutional shareholders views in relation to the relevant resolutions. It is likely that this process will continue.

4.9 Accordingly, we believe that a move away from lodging proxy votes or direct votes in advance of the meeting, is not going to occur in the near future.

5. Election of Board of Directors

5.1 The election of a company's board of directors should be the primary function of the AGM. Currently there is no uniform process for the election of a single director or an entire board where the election is contested and the number of candidates exceeds the number of vacancies. Other than outlawing the ability for directors to run for the board as a ticket (unless unanimous consent is given), the Corporations Act is silent on the procedure for electing directors at the AGM.

5.2 It is frustrating that this fundamental issue with respect to the process of electing directors has been known for some time, and yet has not been addressed in recent law reform, whilst other AGM reforms, such as the introduction of the "Two Strikes Rule" and the "No Vacancy Rule", have been implemented. We believe a prescribed method for electing directors is necessary to ensure procedural uniformity and fairness across all companies. This is consistent with the policy objectives underlying the "Two Strikes Rule" which is clearly intended to promote the prospects of contested elections of directors.

5.3 Voting procedures used by some companies whereby shareholders are asked to elect directors under a sequential voting system on the order of candidates as chosen by the board, is palpably unacceptable as it allows the possibility of the election being completed before candidates sitting lower in the order have been voted for.

5.4 CAMAC identified two principles which it believes are relevant in this context. Firstly the "equal opportunity principle" and secondly the "majority vote" principle. These are discussed below, we support both of these principles.

5.5 CAMAC's "equal opportunity principle" provides that (in summary) shareholders have the opportunity to vote for all candidates for a seat on the board. For example, if there are five vacancies on the board but six candidates, the election process will not end even if the first five candidates were to receive a majority of "for" votes, as there remains a sixth candidate who the meeting has yet to vote on. This sixth candidate will be voted on by the shareholders, and if they receive a greater majority of "for"

votes than any of the five previous candidates, they will win a seat on the board, assuming that there are sufficient available vacant positions for election to the Board.

5.6 Equally, CAMAC's "majority vote principle" should also be implemented, namely that the candidate in any election to the Board, whether or not there are more candidates than vacancies, should only be elected if that person receives more votes for than against his or her election.

5.7 The Discussion Paper, in paragraph 5.16.3, raises the possibility of implementing a vote by poll on each of the candidates with shareholders having the opportunity to vote for or against a candidate, or otherwise abstain. All candidates with more "for" votes than "against" votes would be eligible for a placement on the board (an "eligible candidate") and if there were more available positions than eligible candidates, all eligible candidates would be elected to the board. If there were more eligible candidates than positions on the board, they will be decided by the most "for" votes in order from highest to lowest, until all positions are filled. This is a proposal which we support.

5.8 In the United Kingdom, the Financial Reporting Council's Corporate Governance Code requires each director of a FTSE 350 company stand for re-election every year. We do not recommend that this practice be implemented in Australia as we believe consistency and succession of board composition leads to efficient and successful management and a requirement for all directors stand for election every year raises the risk that a company's board may continually turnover. A company's directors must have the security of knowing they will have a reasonable length of tenure on a board, otherwise, we believe, they are less likely to enact farsighted and ambitious policies and strategies for the organisation. We believe the current regulation of director tenure set out in ASX Listing Rule 14.4 is effective and should remain unchanged.

6. Shareholder Engagement

6.1 The Discussion Paper raises the need for greater shareholder engagement. We believe that improving the conduct of AGMs, as discussed above, will contribute to the improvement of shareholder engagement. However, we are also aware that companies have the ability to, and should, engage with their shareholders year round, not just at the AGM.

Regular shareholder meetings

6.2 The Discussion Paper raises the possibility of companies holding regular meetings, referred to as "town-hall meetings", with shareholders throughout the year in addition to the AGM. The holding of such meetings will allow retail shareholders to have more opportunities to question the company's directors and management, compared to the status quo, where they really only have the AGM to formally raise any issues they have.

6.3 Implementing town-hall meetings may result in an increase in the quality of discourse at AGMs, as shareholders will have previously had the opportunity to confront the directors and management, and accordingly it is less likely that discussion at an AGM will be predominantly based on retail shareholder concerns. This may have the result of encouraging institutional investors to increase their participation at the AGM, whether it be in person or via webcast.

6.4 We note that conducting town-hall meetings, or any other form of increased shareholder engagement for that matter, may have the undesirable effect of

increasing listed companies' disclosure levels, as any new price sensitive information revealed at these meetings would need to be disclosed to the market as a whole. However practically, it is unlikely that companies will provide any information or make any statements at these meetings that have not already been released to the market if that is required.

6.5 Telstra is a prime example of the effectiveness of town-hall meetings, with the Australian Financial Review reporting that the company reduced its 2012 AGM to 90 minutes after holding town hall-style shareholder information meetings around Australia in the lead up to its AGM. The presentations made by the CEO and CFO at these meetings were lodged on the ASX and a webcast of one of the meetings was provided to all shareholders.

6.6 We endorse the practice of holding these town-hall meetings throughout the year in order to increase a company's engagement with its shareholders and potentially improve the conduct of the AGMs. From a practical perspective only the Chairman, CEO, CFO and Chairman of any significant committee should be required to attend these meetings, with attendance seen as optional for all other directors and senior CFO management. This would have the effect of minimising the costs and time commitment involved in holding such meetings.

7. Conclusion

7.1 Therefore we submit that

(a) the AGM should be maintained as the annual forum for management and directors to report to the company's owners, namely its shareholders;

(b) where possible advantage should be taken of technological advances which will facilitate and encourage participation in AGM's;

(c) that whilst companies may elect to make direct voting available in real time in a meeting, practical issues relating to voting by institutional shareholders are unlikely to change the current system of voting by proxy prior to the meeting;

(d) that the Corporations Act should be amended so as to reflect CAMAC's "equal opportunity principle" and "majority vote principle" and specifically the proposals in paragraph 5.16.3 of the Discussion Paper with respect to the election of directors; and

(e) companies, particularly those with large retail share registers should be encouraged to undertake "town-hall meetings" to provide an additional forum for their shareholders to engage with the Board and management.

8. Contact Details

8.1 Please contact any of the following if you would like to discuss our submission:

(a) Rod Halstead
9353 4126
rhalstead@claytonutz.com

(b) Geoff Hoffman
9353 4617
ghoffman@claytonutz.com

(c) David Landy
9353 4175
dlandy@claytonutz.com

(d) Karen Evans-Cullen
9353 4838
kevans-cullen@claytonutz.com

Business Council of Australia

Submission to the Corporations and Markets Advisory Committee AGM and Shareholder Engagement Discussion Paper

FEBRUARY 2013

Contents

About the BCA

The Business Council of Australia (BCA) brings together the chief executives of 100 of Australia's leading companies.

For almost 30 years, the BCA has provided a unique forum for some of Australia's most experienced corporate leaders to contribute to public policy reform that affects business and the community as a whole.

Our vision is for Australia to be the best place in the world in which to live, learn, work and do business.

Introduction

This submission responds to the Corporations and Markets Advisory Committee (CAMAC) discussion paper released in September 2012 regarding the AGM and shareholder engagement.

The Business Council of Australia supports effective shareholder engagement and participates in a range of initiatives and forums that promote good corporate governance and shareholder engagement such as the ASX Corporate Governance Council. We have also previously developed publications promoting best practice including *Fresh Approaches to Communication Between Companies and Their Shareholders* (2004) in conjunction with the Australian Institute of Company Directors (AICD) and Chartered Secretaries Australia (CSA) and *General Meetings – Code of Conduct*.

Our submission is organised in three parts:

1. a summary of our general views on the regulatory approach that should be adopted in relation to shareholder engagement and AGMs
2. a summary of our main positions in relation to the questions outlined in the discussion paper
3. a detailed response to the questions outlined in the discussion paper.

Regulatory approach to shareholder engagement and AGMs

We note that the starting point for many of the discussion questions in the discussion paper is the possible need for legislative intervention in a range of areas involving shareholder engagement, annual reporting and the AGM. The paper also outlines legislative initiatives being undertaken in overseas jurisdictions.

The BCA is of the view that CAMAC should be cognisant of a number of factors in the corporate regulatory environment before recommending legislative approaches to address some of the issues identified in the discussion paper. These factors are outlined in turn below.

Australia's corporate governance environment is already highly regulated

While the BCA recognises that improvements can be made in shareholder engagement within the existing environment, regulations imposing new corporate governance requirements or obligations on companies are not warranted. The issues raised in the discussion paper do not present systemic risks to effective corporate governance.

There has been substantial change to corporate governance regulation over recent years and now is the time for consolidation. More effort should be made to review and streamline existing regulation to reduce the regulatory burden and improve the ability for companies to engage with shareholders.

Effective non-regulatory mechanisms

There are a range of very effective mechanisms and incentives to drive effective shareholder engagement, outside of the legislative environment.

For example, there are formal mechanisms such as the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations*, best practice guidance and codes of conduct developed by groups such as the BCA, AICD and CSA.

Companies and their directors also have a very strong interest in upholding their professionalism and reputation. Scrutiny and analysis of company practices to inform community and shareholder views is more intense than ever before with the advent of social media, along with greater financial analysis and commentary.

Australia is a high performer in corporate governance

The BCA considers that Australia has a high-performing corporate governance environment. This is evident in the World Economic Forum rankings[1] for the strength of these institutions, which placed Australia:

- fourth on the efficacy of corporate boards
- eighth on the strength of auditing and reporting standards
- eleventh on the ethical behaviour of firms.

With this in mind, we believe that Australian policymakers must be discerning when it comes to considering regulatory developments in other jurisdictions and their suitability in the Australian corporate governance environment.

Their focus must be on those regulatory initiatives adopted overseas that are well targeted and would lift both the efficiency and effectiveness of the AGM, shareholder engagement and annual reporting. In this regard, it is important to exercise caution in relation to regulatory proposals addressing perceived failures of corporate governance emanating from the global financial crisis in the United Kingdom and the United States, which in some cases may have limited relevance to Australia.

One size does not fit all

The BCA has consistently argued that in the area of corporate governance and shareholder communication, 'one size does not fit all'. What may work well for one company and its shareholders may not be suitable for another. Ultimately, each company and its shareholders need to agree the best approach to communication for their circumstances.

For publicly listed companies, the ASX Listing Rules provide corporate governance and shareholder communication obligations enforceable under the Corporations Act. Within these broad obligations, the company constitution then provides a platform for companies and their shareholders to tailor their approach as necessary to areas like the AGM .

Poorly targeted regulation can distort the focus of corporate governance

Strongly legislating a specific issue or requiring new processes and procedures in one area of corporate governance can place a disproportionate focus on this area, to the detriment of the broad focus that good corporate governance requires. It can also have unintended consequences.

Recent changes to regulation of executive remuneration are illustrative of this. While improving levels of shareholder engagement on remuneration issues, in some instances the laws have resulted in an over-emphasis on remuneration issues and have detracted focus from a range of other issues critical to shareholder value. The laws have also provided a vehicle for some groups to protest against a company on social and environmental issues unrelated to remuneration.

1. World Economic Forum, *The Global Competitiveness Report 2012–13*, p. 95.

Summary of BCA position

Like many sectors of the economy, shareholder engagement and AGMs are being impacted by the rapid development of technology and the changing preferences of shareholders and companies. Digital technologies are providing enhanced information and access to analysis, providing critical channels for shareholder engagement. Most institutional shareholders are engaging on a regular basis outside of the AGM.

In these circumstances, the AGM has become a less utilised channel, but it remains an important channel for many shareholders and it promotes the accountability of the board to shareholders, including through the board presenting to shareholders and addressing their questions face to face, with public scrutiny.

In the absence of an alternative to the AGM that is compelling to companies, their boards and shareholders, the BCA does not see a case for abolishing the AGM at this time. However, in line with our comments above regarding the notion that 'one size does not fit all', we acknowledge that there may be a case for streamlining the obligations surrounding the AGM for small companies and not-for-profits.

The BCA believes that the AGM is evolving and will continue to evolve in response to technological developments and the changing needs of companies and their shareholders. The BCA does not believe that prescriptive regulatory approaches or mandating of particular processes and procedures will assist in responding to changing needs.

The regulatory environment must afford companies the flexibility to adapt their methods of engagement according to individual circumstances and the needs of their shareholders.

With this in mind, the BCA would like to highlight the positions below in relation to some of the more topical issues raised by the discussion paper, as well as areas where there could be scope for improvement.

In summary, the BCA:

- Supports the removal of the rule allowing 100 members to call a general meeting of a company under section 249D of the Corporations Act.
- Supports the consideration of appropriate statutory safe harbours for forward-looking statements in annual reports that could be applied in Australia, drawing on experience from safe harbours applied in jurisdictions such as the United States.
- Believes that there is considerable scope to simplify regulatory requirements in relation to remuneration reporting to both assist shareholders and reduce the regulatory burden on companies and boards. In this context, we will be carefully analysing the draft legislation recently released by the government to see whether it meets these twin objectives.
- Does not believe there is a case for regulatory intervention in relation to the conduct of proxy advisers. However, in the interests of better corporate governance, we would support the development of appropriate industry principles and guidance for proxy advisers. We would support the enhancement of existing voluntary industry-based codes, or a new code as necessary, for investors using proxy advisers.
- Supports direct voting before the AGM on the basis that it could enhance shareholder engagement in decision making. On this basis, we believe that it should be recognised in legislation but its application should be at the discretion of the company and according to its constitution.
- Supports the use of online voting, webcasting and online participation in AGMs where it is technologically and financially viable for companies. Legislative recognition would need to avoid being unnecessarily prescriptive and mandating use of these facilities.

Right of 100 members to call a general meeting of a company

Flaws in this current threshold have been widely recognised and amendment of this provision is well overdue. For example, in 1999 the Parliamentary Joint Statutory Committee on Corporations and Securities concluded that "the present provision for 100 members to requisition a meeting of the company is inappropriate and open to abuse".[2]

The holding of an extraordinary general meeting can cost major companies up to $1 million. This is not justified for such a low threshold of shareholders (less than 0.05 per cent of shareholders for many major companies).

As long as the 100-member rule under section 249D remains in the Act, there will be impetus for groups to unreasonably exploit it.

While previous attempts to repeal this rule have not been successful, the BCA considers that it is now necessary to consider a new proposal to remove the rule from the Act or alternatively to amend it to prevent further abuse. We note that successive Commonwealth Governments have been supportive of removing this rule but that past attempts to repeal this rule have been stymied by state attorneys-general who must vote on certain amendments to the Corporations Act under the referral of power from the states.

Removing only the 100-member rule under section 249D would still leave adequate protections for shareholders to participate in corporate governance. Under section 249D there would still be provision for members with at least five per cent of the votes, that may be cast at the general meeting, to request directors to call an extraordinary general meeting.

The BCA does not believe that repeal of the rule would place Australia out of line with international practice. Australia currently ranks 20th out of 144 countries on the World Economic Forum's Global Competitiveness rankings for the protection of minority shareholder interests, well above other advanced economies such as the United Kingdom, Germany and the United States.

Forward-looking statements

Significant issues of liability arise from the current requirements in relation to forward-looking statements. Annual reports must detail matters that will affect performance in future years and the operating and financial review must include information on a company's future prospects. While in many cases such disclosures have a necessary degree of uncertainty and should be treated with some caution by investors, they are subject to strict provisions regarding misleading and deceptive conduct in the Corporations Act and there has been a trend for shareholder actions to be based on statements containing forward-looking information.

In order to improve the balance in this area, the BCA would support the consideration of appropriate statutory safe harbours for forward-looking information that could be applied in Australia, drawing on experience from safe harbours applied in jurisdictions such as the United States. Such safe harbours would provide relief for directors and companies that took reasonable care in meaningfully outlining the limitations and appropriate caution that should be applied to certain disclosures.

Clutter in annual reports

As the Financial Reporting Council's report *Managing Complexity in Financial Reporting* recently found, there are a range of factors driving increased complexity in financial reports, including:

- increasingly complex business operations
- complexities in the regulatory framework
- a more litigious business environment driving increasing disclosures
- developments in integrated reporting.

2. Report on matters arising from the Company Law Review Act 1998, October 1999, para 15.16.

The BCA is concerned at the growing demands on annual reports to meet legislative obligations for both financial and non-financial disclosures.

While the BCA does consider that these growing demands are creating a degree of clutter and CAMAC may be able to shed further light on these issues, these issues can only be addressed through broader financial reporting reform undertaken by standard setters such as the International Accounting Standards Board, regulators and groups such as the Financial Reporting Council that look at balancing the needs of a range of users, including shareholders.

In the short term, the BCA considers that there is considerable scope to simplify regulatory requirements in relation to remuneration reporting to both assist shareholders and reduce the regulatory burden on companies and boards. We will be outlining these issues in further detail in our submission to the draft legislative amendments recently released by the government, with a focus on whether the government's proposal comprehensively meets these twin objectives.

The BCA also considers that the government should generally avoid using annual reports in order to meet broader policy objectives. Reporting is a relatively blunt instrument in meeting such objectives, while placing administrative burdens on companies. A recent example of this is the option being canvassed by government to require companies to disclose in annual reports the proportion of people with a disability in their organisations, including in senior positions. While the BCA is highly supportive of efforts to lift the participation of people with a disability and our member companies are engaged in a range of innovative initiatives to support this, we believe that such reporting is ultimately ineffective and will contribute to the 'clutter' in annual reports to which CAMAC refers in the paper.

Finally, technology is already playing a significant role in increasing the accessibility of annual reports. The provision by some companies of complementary documents, such as shareholder presentations and annual reviews on company websites alongside annual reports, allows shareholders to obtain information quickly and to filter between areas where high-level information is sufficient and others where further detail is required.

The BCA considers that the idea of moving some information out of the annual report and onto the company website with a link in the annual report, particularly for standard information that does not change greatly from year to year, has merit and is worthy of further consideration.

Conduct of proxy advisers

The BCA notes the concerns expressed regarding the increasing influence of proxy advisers, which have been raised by stakeholders in response to this discussion paper and also in relation to previous inquiries such as the Productivity Commission's 2010 inquiry into executive remuneration.

The discussion paper canvasses the option of developing standards for proxy advisers and investors using proxy advisers, to promote professional conduct and reinforce the role of investor as the ultimate decision maker.

In relation to proxy advisers specifically, in the interests of better corporate governance, we would support the development of appropriate industry principles and guidance for proxy advisers in relation to:

- disclosing various information such as qualifications of their advisers, voting policies and any outsourcing of analysis
- how the adviser will engage with both its client and companies in a timely and constructive fashion to ensure fairness and completeness of advice and ultimate decision making.

In relation to proposals for standards for investors using proxy advisers, the BCA notes that the Productivity Commission has previously found that stewardship codes for investors are best developed on a voluntary basis by relevant industry bodies. Given that such codes already exist through bodies such as the Financial Services Council, we would support the enhancement of existing voluntary industry-based codes or a new code as necessary. This could include matters

such as disclosure of voting policies, details of engagement of proxy advisers and how it conducts analysis of resolutions before voting.

Direct voting

The BCA strongly supports efforts to increase direct shareholder engagement. Therefore we support direct voting before the meeting on the basis that it could enhance shareholder engagement in decision making. On this basis, we believe that it should be recognised in legislation but its application should be at the discretion of the company and according to its constitution. Supplementary best-practice guidance may also boost the adoption of direct voting before a meeting.

Online voting, webcasting, online participation

Online voting may serve to boost shareholder engagement and there should be no unnecessary impediments to companies utilising it where appropriate and in the best interests of shareholders and good governance. Any legislative recognition would need to avoid being unnecessarily prescriptive and requiring companies to provide online voting facilities.

The BCA also supports the use of webcasting to complement the physical presence of the meeting and notes that this technology is already utilised by many companies.

We also support greater online shareholder participation where this is technically feasible. There should not be unnecessary legislative impediments to companies utilising suitable technologies to this end.

Detailed response to issues raised in discussion paper

CAMAC question	Business Council of Australia position
Shareholder engagement	
1. The role of the board collectively as it relates to engagement with institutional/retail shareholders throughout the year, including leading up to the AGM.	The BCA considers that the broad legislative framework obliging the board to act in the best interests of the company, and by association shareholders, provides a strong underpinning for effective engagement throughout the year. There are always opportunities for improvement and sharing of best practice between companies and the BCA believes that these are best facilitated by existing guidance mechanisms such as the ASX Corporate Governance Council Principles and Recommendations. In particular, Principle 6 highlights the importance of respecting the rights of shareholders and facilitating the exercise of those rights.
2.The role of particular board members, such as the board chair or the chairs of board committees, in relation to engagement with institutional/retail shareholders.	The whole board has an overarching responsibility to shareholders. The board and relevant shareholders will be in the best position to determine who undertakes meetings on behalf of the board regarding particular matters. The BCA does not see a need for legislative intervention in this area.
3. The role of institutional shareholders throughout the year, including leading up to the AGM: – Is there a problem with having a peak AGM season and, if so, how might this matter be resolved? – Should at least some institutional shareholders be required or encouraged to report on the nature and level of their engagement with the companies in which they invest, in the manner provided for in the UK Stewardship Code or otherwise?	With most listed companies holding their AGMs in October and November each year, the BCA acknowledges that this can place pressures on institutional investors, with associated challenges for companies in actively engaging institutional investors and proxy advisors. However, extending the timeframe for holding the AGM would see AGMs conducted further after end-of-year financial results and begin to encroach on half-year results. Extending the timeframe for AGMs, staggering AGMs or extending reporting dates are possible options but if any of these options were pursued, it would be important to first ascertain that they will not lead to coordination difficulties in excess of those already experienced, or have other unintended consequences. The Productivity Commission has previously found that stewardship codes for investors are best developed on a voluntary basis by relevant industry bodies. Therefore the BCA does not support regulatory intervention but would support the enhancement of existing voluntary industry-based codes or the development of a new voluntary industry-based code if necessary. Such codes already exist through bodies such as the Financial Services Council.
4. Corporate briefings	Given that corporate briefings are already heavily regulated by continuous disclosure and other requirements, the BCA does not believe that further legislative intervention is necessary. Prescriptive legislative intervention could unintentionally limit the flexibility of companies to engage shareholders applying technology and other innovative tools to their corporate briefings.
5. Should legislative or other initiatives (for instance, additional ASX Corporate Governance Council, or other, guidance) be adopted, and if so for what reasons, concerning the role of proxy advisers, including:	The BCA notes the concerns expressed regarding the increasing influence of proxy advisers, which have been raised by stakeholders in response to this discussion paper and also in relation to previous inquiries such as the Productivity Commission's 2010 inquiry into executive remuneration. The discussion paper canvasses the option of developing standards for investors using proxy advisers and proxy advisers themselves to promote

– Standards for investors using proxy advisers, including the extent to which these investors should be entitled to rely on the advice of proxy advisers in making voting decisions, or , alternatively, whether those investors should have some obligation to bring an independent mind to bear on these matters. – Standards for proxy advisers.	professional conduct and reinforce the role of investor as the ultimate decision maker. In relation to proxy advisers specifically, in the interests of better corporate governance, we would support the development of appropriate industry principles and guidance for proxy advisers in relation to: Disclosing various information such as qualifications of their advisers, voting policies and any outsourcing of analysis. How the adviser will engage with both its client and companies in a timely and constructive fashion to ensure fairness and completeness of advice and ultimate decision making. In relation to proposals for standards for investors using proxy advisers, the BCA notes that the Productivity Commission has previously found that stewardship codes for investors are best developed on a voluntary basis by relevant industry bodies. Therefore the BCA does not support regulatory intervention, but would support the enhancement of existing voluntary industry-based codes or the development of a new voluntary industry-based code if necessary. Such codes already exist through bodies such as the Financial Services Council.
6. Greater use be made of technology to promote shareholder engagement outside the AGM.	BCA members are utilising a range of technologies such as webcasting, social media and dedicated investor centre websites to increase shareholder engagement outside the AGM. The way in which technology is used is a matter for individual companies and should remain that way to account for the cost considerations of different-sized companies and varying shareholder profiles.

7. Amendment to the right of 100 members to call a general meeting of a company.	The right of 100 members to call a general meeting should be abolished. In supporting effective shareholder engagement, we believe that an appropriate balance needs to be struck so that the exercise of rights by shareholders does not unintentionally compromise the efficient governance of companies. The BCA is concerned with the ongoing potential for abuse of provisions under section 249D of the Act that allow just 100 shareholders to require that directors convene an extraordinary general meeting (EGM). To illustrate the incredibly small minority of shareholders that can demand an EGM regardless of the genuine urgency of their issues, it is useful to consider how the 100-member rule would apply to a handful of major Australian companies. For example, this would represent: • less than 0.03 per cent of all Woolworths shareholders • approximately 0.0125 per cent of all Commonwealth Bank shareholders • approximately 0.007 per cent of all Telstra shareholders. The conduct of EGMs to consider matters that can be properly addressed at annual general meetings consumes considerable unnecessary resources and diverts management from the day-to-day operations of the company. EGMs for large listed companies can cost up to $1 million. Flaws in this current threshold have been widely recognised and amendment of this provision is well overdue. For example, in 1999 the Parliamentary Joint Statutory Committee on Corporations and Securities concluded that "the present provision for 100 members to requisition a meeting of the company is inappropriate and open to abuse".[3] Removing only the 100 member-rule under section 249D would still leave adequate protections for shareholders to participate in corporate governance. Under section 249D there would still be provision for members with at least five per cent of the votes, that may be cast at the general meeting, to request directors to call an EGM.
Annual Report	
8. Unnecessary information ('clutter') in annual reports	As the Financial Reporting Council's report *Managing Complexity in Financial Reporting* recently found, there are a range of factors driving increased complexity in financial reports, including: • increasingly complex business operations • complexities in the regulatory framework • a more litigious business environment driving increasing disclosures • developments in integrated reporting. The BCA is concerned at the growing demands on annual reports to meet legislative obligations for both financial and non-financial disclosures. While the BCA does consider that these growing demands are creating a degree of clutter and CAMAC may be able to shed further light on these issues, these issues can only be addressed through broader financial reporting reform undertaken by standard setters such as the International Accounting Standards Board, regulators and groups such as the Financial Reporting Council, which look at balancing the needs of a range of users including shareholders.

3. Report on matters arising from the Company Law Review Act 1998, October 1999, para 15.16.

	In the short term, the BCA considers that there is considerable scope to simplify regulatory requirements in relation to remuneration reporting to both assist shareholders and reduce the regulatory burden on companies and boards. In this context, we will be carefully analysing the draft legislation recently released by the government to see whether it meets these twin objectives. The BCA also considers that the government should generally avoid using annual reports in order to meet broader policy objectives. Reporting is a relatively blunt instrument in meeting such objectives, while placing administrative burdens on companies. A recent example of this is the option being canvassed by government to require companies to disclose in annual reports the proportion of people with disability in their organisations, including in senior positions. While the BCA is highly supportive of efforts to lift the participation of people with a disability and our member companies are engaged in a range of innovative initiatives to support this, we believe that such reporting is ultimately ineffective and will contribute to the 'clutter' in annual reports to which CAMAC refers in the paper. Finally, technology is already playing a significant role in increasing the accessibility of annual reports. The provision by some companies of complementary documents such as shareholder presentations and annual reviews on company websites alongside annual reports, allows shareholders to obtain information quickly and to filter between areas where high-level information is sufficient and others where further detail is required. The BCA considers that the idea of moving some information out of the annual report and onto the company website with a link in the annual report, particularly for standard information that does not change greatly from year to year has merit, and is worthy of further consideration.
9. Should the reporting requirements be redesigned in any respect, including along any of the lines adopted, or under consideration, in overseas jurisdictions, such as having a strategic report and an annual directors' statement?	The BCA considers that before considering the redesign of reporting requirements along the lines of those adopted in other jurisdictions, such as having a strategic report and annual directors' statements, analysis would need to be undertaken of: • Underlying causes of complexity for current reporting arrangements and whether redesign along these lines would simply exacerbate such complexity and increase the compliance burden. • The nature of overseas jurisdictions' policies, including the problem they were introduced to address and the extent to which similar problems exist in Australia. • The extent to which Australian companies with large shareholder bases are already meeting the objectives of such policies through the publication of documents such as annual reviews.
10. What, if any, issues of liability might arise in the event of changes to the reporting requirements, particularly in relation to forward-looking statements, and how might this matter be dealt with?	Significant issues of liability arise from the current requirements in relation to forward-looking statements. Annual reports must detail matters that will affect performance in future years and the operating and financial review must include information on a company's future prospects. While in many cases such disclosures have a necessary degree of uncertainty and should be treated with some caution by investors, they are subject to strict provisions regarding misleading and deceptive conduct in the Corporations Act and there has been a trend for shareholder actions to be based on these forward-looking statements.

	In order to improve the balance in this area, the BCA would support the consideration of appropriate statutory safe harbours for forward-looking information that could be applied in Australia, drawing on experience from safe harbours applied in jurisdictions such as the United States. Such safe harbours would provide relief for directors and companies that took reasonable care in meaningfully outlining the limitations and appropriate caution that should be applied to certain disclosures.
11. How might technology best be employed to increase the accessibility of annual reports?	Companies should in principle have the flexibility to utilise technology wherever it provides net benefits. In this context, particular technology to increase the accessibility of annual reports should not be the subject of legislative mandate. Technology is already playing a significant role in increasing the accessibility of annual reports. The provision by some companies of complementary documents such as shareholder presentations and annual reviews on company websites alongside annual reports, allows shareholders to obtain information quickly and to filter between areas where high-level information is sufficient and others where further detail is required. The BCA considers that the idea of moving some information out of the annual report and onto the company website with a link in the annual report, particularly for standard information that does not change greatly from year to year, has merit and is worthy of further consideration.
12. What, if any, initiatives might be introduced to cater for future innovations in reporting?	In the first instance, the BCA considers that priority must be placed on making existing reporting practices work better, particularly getting a better regulatory balance on disclosures. If a financial reporting laboratory of the type established in the United Kingdom was ever to be established in Australia, it would have to be given the right government support and mandate to drive effective change in financial reporting on the ground, not just in concept. It would also need to have a high-level of engagement with business.
The AGM	
13. The statutory time frame for holding an AGM	It is not clear that changes to the statutory time frame for holding an AGM would improve the effectiveness of the AGM. See comments at Question 3 in relation to the peak AGM season.
14. In what respects, if any, might the requirements for information to be included in the notice of meeting for an AGM be supplemented or modified?	The current requirements for information to be included in the notice are appropriate and the BCA does not consider that they need supplementing or modification at this time.
15. How might technology be used to make this notice more useful to shareholders?	Technology is already being utilised to enhance shareholder convenience, with shareholders able to receive meeting materials electronically and meeting notices published electronically.
16. Might any other documents usefully be sent with the notice of meeting, and, if so, what?	It is not clear that further documents being sent with the notice of meeting will improve clarity and convenience for shareholders. If anything, further documentation requirements could have the unintended impact of increasing confusion and overloading shareholders.
17. Should there be provisions for companies to send information	The BCA supports the conclusions reached in the previous Companies and Securities Advisory Committee report on *Shareholder Participation in*

about an AGM directly to the beneficial owners of shares held by nominees and, if so, what type of information?	*the Modern Listed Public Company*. As the discussion paper notes, that report concluded that legislative procedures were unnecessary as: • people have the choice of being registered as shareholders or holding their shares through nominees • if they choose the latter approach then they can make their own arrangements regarding the receipt of information • compliance with mandatory notification requirements could impose too great an administrative burden on companies.
18. Should there be any provision for beneficial owners of shares in a company to participate in the AGM of that company and, if so, how?	See response to Question 17.
19. Should there be any change to the threshold tests for shareholders placing matters on the agenda of an AGM?	The threshold tests under sections 249N and 249P of the Corporations Act should not be changed, and should certainly not be reduced. Rather, the BCA considers that the priority should be on abolishing the 100-member rule in relation to the requirement to hold an extraordinary general meeting under section 249D of the Corporations Act.
20. Should there be any change to the timing requirements for the calling of an AGM, including for shareholders to place matters on the agenda of an AGM, to seek the circulation of statements concerning any resolution, or to nominate persons for the position of director?	The BCA is not aware of any systemic issues with the timing of the calling of an AGM impeding the ability of shareholders to place matters on the agenda. The practical requirements of holding an AGM for large companies generally mean that the date is organised months in advance, allowing companies to give substantially more than the minimum 28 days' notice of a general meeting.
21. Should companies be required to publish a pre-agenda notice and, if so, what should be the contents and timing of that notice?	The best means for companies to give shareholders appropriate notice of a general meeting is to advise shareholders of the date for the AGM as soon as possible. This does not require an additional legislative requirement for AGM documentation. However, companies should be actively encouraged in best-practice guidance to announce AGM timing to shareholders as early as practicable.
22. Does the current law concerning excluded material either create undue difficulties for shareholders who wish to criticise directors or, conversely, unduly restrict directors in vetting out information to be circulated to shareholders at the company's expense?	It is entirely appropriate that companies exclude certain resolutions where they are not able to be understood, do not have an appropriate legal basis to be acted upon or are defamatory in nature. These exclusions should not impede shareholders from exercising their lawful rights.
23. Should shareholders have greater scope for passing non-binding resolutions at AGMs?	The BCA believes that there is a need to uphold the different roles of the board and shareholders. Shareholders are able to exercise their rights to remove directors or sell their shareholding. Greater scope for passing non-binding resolutions could place boards in a precarious position and lead to 'micro management' of companies by shareholders, undermining the important distinction between the central role of boards and shareholders.
24. What, if any, additional legislative or best practice procedures should	The BCA does not see the need for additional legislative requirements in this area. We note that:

be adopted for companies to seek the views of shareholders on issues they would like discussed at the AGM, or to invite shareholders to submit questions prior to the AGM?	• The chair must already provide opportunities for shareholders to ask questions of directors and the auditor. • As noted in previous BCA publications, several companies already adopt the practice of inviting questions from shareholders before the AGM, including Telstra, Caltex and the Commonwealth Bank. • Some companies have also adopted information booths for shareholders to directly engage on their issues.
25. Should there be some obligation on the auditor (or the representative of the auditor) to speak at the AGM?	The auditor already has an obligation to be present at the AGM and answer questions of shareholders. A specific obligation on an auditor to speak at the AGM is likely to become a formality that would not engender enhanced shareholder engagement.
26. What, if any, obligations should a company or a company auditor have to answer questions from shareholders?	The existing provision under section 250T of the Corporations Act for an auditor to respond to questions is sufficient.
27. Should any matter be excluded from or, alternatively, added to the business of the AGM?	The BCA does not consider that any matter should be excluded or alternatively added to the business of the AGM.
28. What, if any, changes are needed to the current position concerning: • the general functions and duties of the chair? • the chair ensuring attendance of particular persons at the AGM? • the chair moving motions? • motions of dissent from a chair's rulings?	The chair has a duty to ensure that shareholders have a reasonable opportunity to ask questions and make comments, while also maintaining order of proceedings. Large companies will generally have the whole board in attendance and therefore there is no need for a formal requirement for the chair to ensure attendance of particular persons at the AGM. The BCA considers that this current practice is appropriate and that more detailed legislative provisions in this area would run the risk of unnecessarily constraining chairs in how they conduct the meeting.
29. Should a chair be obliged to provide shareholders with a reasonable opportunity to discuss a resolution before it is put to the vote?	See response to Question 28.
30. Should a chair have the power to impose any time, or other, limits on an individual shareholder speaking at the AGM?	In fulfilling the duties outlined above, the chair also has the ability to limit an individual speaking at an AGM in order to maintain order and to give other shareholders a reasonable opportunity to speak.
31. What changes, if any, should be made to the current requirements concerning: • informing shareholders of their right to appoint a proxy? • the proxy form • pre-completed proxies? • notifying the company of the proxy appointment? • providing an audit trail for lodged proxy votes?	The BCA notes the findings of the Australian Committee of Superannuation Investors (ACSI) report *Institutional Proxy Voting in Australia* and its recommendations to strengthen some operational weaknesses in the systems used to cast votes. The BCA would support further exploration of these recommendations. We do not believe that any other changes are warranted to proxy voting.

• the record date and the proxy appointment date? • irrevocable proxies? • directed and undirected proxies? • renting shares? • proxy speaking and voting at the AGM?, or • any other aspect of proxy voting?	
32. Should direct voting before the meeting be provided for by legislative or other means, and if so, what matters should be covered in any regulatory structure?	The BCA supports direct voting before the meeting on the basis that it could enhance shareholder engagement in decision making. On this basis, we believe that it should be recognised in legislation but its application should be at the discretion of the company and according to its constitution. Supplementary best-practice guidance may also boost the adoption of direct voting before a meeting.
33. In what circumstances, if any, should access to pre-meeting voting information be permitted?	If granted too widely, then access to pre-meeting voting information could encourage its vexatious use, increase costs and raise privacy concerns. Shareholders should not have rights of access other than those granted by a court order. Auditors and others should only be given access where agreed to by the company.
34. In what manner if any, should access to pre-meeting voting information be regulated before discussion on a proposed resolution?	This should be a matter for the chair.
35. In what manner, if any, should the current requirements concerning the disclosure of pre-meeting votes before voting on a resolution be amended?	This should be a matter for the chair.
36. Should there be legislative or other recognition of online voting during the course of an AGM and, if so, in what respects should this form of voting be regulated?	Online voting may serve to boost shareholder engagement and there should be no unnecessary impediments to companies utilising it where appropriate and in the best interests of shareholders and good governance. Any legislative recognition would need to avoid being unnecessarily prescriptive and requiring companies to provide online voting facilities.
37. Do any issues arise concerning voting exclusions on resolutions that must, or may, be considered at an AGM and, if so, how might those issues best be resolved?	In relation to voting exclusions on the remuneration report, it is a well-understood principle that directors and executives should not vote on their own remuneration. On this basis, the BCA believes that provision under the Corporations Act for offence provisions on a strict liability basis in relation to voting exclusion on the remuneration report is a disproportionate response to risks in this area.
38. Should any changes be made to the current provisions regarding voting by show of hands?	The chair should retain the ability to utilise voting by show of hands for routine or uncontentious matters.
39. What legislative, or other, verification initiatives, if any, should be introduced concerning voting by poll at an AGM?	Current provisions give the chair discretion to determine how votes are undertaken and this should remain the case to ensure the efficiency and effectiveness of proceedings.

40. Should one or more verification requirements apply in all instances or only if, say, a threshold number of shareholders requires it?	The BCA considers that appropriate mechanisms for verification of voting should be promoted through best practice guidance rather than mandated in legislation. Research from the Australian Institute of Company Directors suggests that a significant proportion of large companies already verify voting outcomes.
41. Should any steps be taken to promote more consistency in the disclosure to the market of voting results?	The BCA is not aware of any systemic issues in relation to the consistency of voting results released to the market.
42. Following the AGM, what, if any, rights of access should shareholders generally, or the person proposing a resolution, have to voting documents?	The existing rights to inspect voting documents, which must be obtained through a court order, strike an appropriate balance between upholding shareholder rights on the one hand and preventing vexatious use of such provisions by special interest groups.
43. What, if any, changes should be made to the requirements concerning the recording of details of voting in the minutes of the AGM?	The BCA is not aware of any systemic issues in the recording of details of voting in the minutes of the AGM that would give rise to the need for changes.
44. Should there be a statutory minimum period for retention of records of voting on resolutions at an AGM and, if so, for what period?	The BCA considers that determining whether a statutory minimum period is necessary and what that period is, requires further analysis of: • current practice adopted by companies • how current practice aligns with other provisions in the Corporations Act for the retention of documents, which generally require retention of seven years of records • how useful it is for companies to retain voting records for long periods, by which time there may be no practical way of revising the decision already made.
45. Should there be any legislative initiatives in regard to the election of directors, including in relation to: • the frequency with which directors should stand for re-election? • the right of shareholders to question candidates (and receive answers)? • the voting procedure?	The BCA does not believe that legislative changes are warranted to increase the frequency with which directors stand for re-election. Such frequent re-election would be unnecessarily disruptive and undermine the kind of long-term strategic decision making for which boards should be responsible. We also note that this is an area that is addressed under the ASX Listing Rules. We note that shareholders who do believe annual re-election to be appropriate in particular circumstances already have the power to propose changes to the company constitution regarding the frequency with which directors should stand for re-election. We also note that companies that are also listed in the US and UK have adopted more frequent re-election procedures to align with the regulatory arrangements in these jurisdictions. Companies and shareholders should retain this flexibility to tailor their re-election procedures to their particular circumstances. The BCA does not consider that legislative changes are necessary in relation to the right of shareholders to question candidates or the voting procedure. The chair of the meeting can determine if directors and candidates address the AGM. Companies also provide detailed information about candidates prior to the AGM.
46. Are there any matters concerning	The BCA notes that there is inconsistency between the United Kingdom

dual listing that should be taken into account in the regulation of AGMs?	and Australia in relation to the practice for director nominations, which may present issues in relation to AGMs. In Australia, it is possible for any shareholder to nominate someone for a board as long as their nomination is made on time and with the candidate's consent. In contrast, in the United Kingdom, a candidate requires support of 5 per cent of voting rights. The BCA would encourage further identification and analysis of the prevalence of such anomalies by CAMAC in consultation with dual-listed companies to determine if they warrant regulatory change at this point in time.
47. Are there any problems in the voting or other aspects of AGMs for overseas holders of shareholding interests in Australian regulated companies?	The BCA is not aware of any problems in this area.
48. For some or all public companies, should the functions of the AGM be changed in some manner, or the obligation to hold an AGM be abolished?	The BCA believes that the AGM should be retained as it promotes accountability to shareholders and shareholder engagement. The AGM should continue to facilitate both decision making functions and shareholder feedback and discussion. The legislative framework should allow the format of the AGM to be adjusted and evolve over time in line with the preferences of companies, their boards, shareholders and the development of technology. In our view, this requires a flexible and in many instances, non-regulatory approach rather than a prescriptive legislative approach.
49. What technological developments might be taken into account in considering the possible functions of the AGM?	The BCA supports the use of webcasting to complement the physical presence of the meeting and notes that this technology is already utilised by many companies. We also support greater online shareholder participation where this is technically feasible. There should not be unnecessary legislative impediments to companies utilising suitable technologies to this end.
50. For some or all public companies, and if the AGM is retained in some manner, what legislative or other initiatives, if any, should there be in regard to the possible formats of the AGM?	See 48 and 49.
51. In this context, what technological developments might be taken into account in considering possible formats for the AGM?	See 48 and 49.

BUSINESS COUNCIL OF AUSTRALIA
42/120 Collins Street Melbourne 3000 T 03 8664 2664 F 03 8664 2666 **www.bca.com.au**