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Market Conduct Division
The Treasury
Langton Crescent
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May 19, 2021

Dear Treasury,

Thank you for the opportunity to comment on the Consultation Paper on *Greater Transparency of Proxy Advice*, released 30 April 2021 and for meeting with us to discuss it on Thursday 13 May 2021 in Melbourne.

The proposals canvassed in the paper will have a significant impact on our small, staff-owned business and the clients we serve.

We were surprised to be named in the paper, without Treasury extending to us the courtesy of communication prior to its release. The paper makes several inferences and assumptions about our business, our operations and the regulatory regime under which we operate which have not been verified.

This is particularly disappointing given that when we last met Treasury on 19 November 2019, in the course of your consultation on ESG issues, we offered to share with you our data and research. That offer, which was made in good faith, remains open and we will provide any further data or research you request, subject to confidentiality.

We enclose our response and are comfortable that it be made public on the Australian Treasury website. We trust that it will be considered in the spirit of objectivity that has distinguished the Australian Treasury throughout its history.

Please feel free to contact us concerning any aspect of our submission.

Yours sincerely,

Dean Paatsch & Martin Lawrence

Ownership Matters Pty Ltd

Executive Summary

Ownership Matters Pty Ltd (OM) is a staff-owned Australian proprietary limited company, established in 2011 as a licenced provider (AFSL 423168) of investment research on ASX300 companies to wholesale investors.

The informed exercise of ownership rights by institutional investors is a crucial component of effective corporate governance. It provides a discipline on company management and ensures public companies are properly run and are accountable to their owners.

A well-functioning system of checks and balances on listed companies is in the national interest. Australian companies have a deserved reputation for good governance and their cost of capital is lower as a result.[1] This is due, in no small part, to the vibrant role that institutional shareholders play in communicating investor expectations to company boards who are stewards of their capital and, ultimately disciplining those boards through shareholder votes where they fall short.

OM provides a service that analyses proposals put forward for resolution at company meetings typically within a notice period of 28 days.[2] Our research publications assist institutional investors to exercise the ownership rights they have for the benefit of their clients. This might include advice about decisions on the election of directors, binding and non-binding votes on executive pay matters or the approval of related party transactions or selective share issues.

Our clients employ us for our expert and timely financial and governance analysis and for our voting recommendations. No client is obliged to contract with us. No client slavishly follows our advice, just as no institutional investor on receiving a report by a sell-side analyst recommending they buy a particular share is compelled to buy it.

We are simply an input into a client's independent processes to price the extant governance risk in a subject company, and where a meeting proposal is advanced, to arrive at a voting decision that is in *their* best interests, in accordance with *their* own contractual and fiduciary obligations.

OM opposes the two main options in the consultation paper that would directly affect it, namely:

- Option 3: any report containing the research and voting recommendations for resolutions at a company's meeting to be sent the relevant company five days before distributing the final report to subscribing investors; and
- Option 4: any report must notify our clients on how to access the company's response to the report.

Both options will restrict the time available for our analysis, increase our cost to serve our clients without any public benefit and will negatively impact upon our clients' ability to monitor and discipline company boards within the 28 day meeting cycle.

OM is not aware of any other form of opinion or advice in Australia where the State compels its provision to the subject prior to publication, explicitly for the purpose of allowing them to alter its content. This proposal should be of grave concern not just to other providers of financial research but to any person interested in preserving a functioning society that values freedom of expression and free enterprise.

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[1] See for example, Corporate Governance and the Cost of Capital: Evidence from Australian Companies, September 2012 Journal of Applied Corporate Finance 24(3):84-93

[2] The *Corporations Act* (s.249HA) requires companies to provide a minimum of 28 days' notice of general meetings; listed managed investment schemes are able to hold meetings on 21 days' notice (s.252F). Entities listed on ASX domiciled in other jurisdictions, such as NZ, may only be required to provide a minimum of 10 working days' notice of a shareholder meeting.

Further it is outrageous that the State is openly contemplating a requirement to force a private business to disgorge its valuable intellectual property to third parties without compensation or restriction. If implemented this would set a precedent that would act as a disincentive for any provider to establish a financial research business in Australia.

OM believes that the existing Australian Financial Service licensing regime is adequate to ensure researchers that provide proxy advice are accountable and transparent. Every aspect of OM's research output is classified as 'financial product advice' and thus already extensively regulated.

All providers named in the consultation paper are also already licenced and ASIC has adequate powers to discipline individual firms for all and any of their activities if they transgress well established norms about the production of financial product research as set out in *Regulatory Guide 79, Research providers: Improving the Quality of Investment Research* (RG 79). Option 3 directly contradicts a clear instruction in RG 79.141 that prohibits researchers pre-releasing research to companies in advance of publication to clients.

We oppose the development or imposition of 'industry-wide' standards without evidence that there are 'industry-wide' problems that require rectification. There are numerous unintended consequences for all producers of investment research if this direction is pursued.

If there are concerns about firms relying on exemptions to the AFSL regime for those providing services that impact on voting issues, then the regulatory exemptions (contained in Reg 7.1.30 of the Corporations Act) could be removed or altered to ensure they are also regulated on the same basis as OM.

The consultation paper does not identify any specific harms that the regulatory options it canvasses are designed to address.

We provide detailed evidence over the last 9.5 years that few, if any proposals at general meetings have been defeated for companies in the ASX 300:

- In 7,426 resolutions board endorsed non-executive directors were elected with an average vote in favour of 96.2%.
- Only six candidates were defeated (five because of takeover activity).
- Only 38 candidates withdrew their candidacy before the meeting results were tallied, many for routine causes (such as job changes).
- Further we provide evidence that on non-binding votes on remuneration issues, the feedback loop intended by Parliament is working as envisaged. For 131 companies that received 'strikes' on remuneration report resolutions of greater than 25% against – the vote against fell by an average of 23.0% in the subsequent year.

In many places the consultation paper lacks context, contains misunderstandings and incorrect assumptions about the services firms like OM provide.

Our response to the consultation paper addresses these failings before specifically responding to the consultation questions posed. We set out this information in the following order:

The proposals advanced are not consistent with overseas approaches or the existing AFSL regime. If pursued, these measures will adversely impact upon institutional investors' practice of monitoring Australian listed companies.

Background information on Ownership Matters and proxy advice in Australia

Ownership Matters Pty Ltd (OM) is an Australian proprietary limited company, established in 2011 as a provider of investment research principally on ASX300 companies[3] to wholesale investors. We are owned solely by our staff who have risked their capital in expectation of an acceptable return, in a stable regulatory environment.

OM has 10 employees and two consultants. We have paid the full rate of company tax on each dollar of profit we have earned since our inception. Although we qualified, we did not apply, nor did we receive, one cent of JobKeeper in the 2020 or 2021 fiscal years.

We provide a range of products and services that assist our clients to:

- Identify governance risk in companies they hold,
- Use shareholder rights to their advantage at company meetings,
- Monitor, defend and advance their ownership rights throughout capital markets, and
- Promote an intelligent, evidence-based public debate on governance issues.

We are an agenda-driven organisation with "broader objectives".[4] Capital must be raised and risked in an environment of trust. OM believes investors should not give their trust recklessly – capital markets serve us better when trust is earned, not assumed, and where it is tested regularly. The pro-markets manifesto that guides our endeavours is published on our website https://www.ownershipmatters.com.au/manifesto/. Our clients know that this is our guiding philosophy when they contract with us.

OM holds an Australian Financial Services Licence (AFSL 423168) which authorises us to carry on a financial services business to: (a) provide general financial product advice only to wholesale clients, for (i) interests in managed investment schemes; and (ii) securities.

We serve investment managers, asset owners and superannuation funds resident in Australia and offshore. The qualifications of our staff and responsible officers are published on our website. Our licence is publicly available, subject to generic conditions only and remains unblemished. We have never been notified by ASIC of a single complaint made by a user of our products or services. ASIC had unfettered access to our entire archive of research as part of its 2017/8 investigation into proxy advice[5] and did not notify us of a single error it had uncovered in our research.

One of the financial services products that we offer to our clients is a subscription service analysing the proposals put forward at securityholder meetings for ASX 300 entities. We analyse each resolution, guided by a set of publicly available principles that are available on our website. [6] Importantly however, these principles remain guidelines: we make detailed assessments of the financial performance of each company and we reserve the right to depart from the guidelines at any time, as the fundamental driver of any recommendation we

[3] We refer to 'ASX 300 companies', 'companies' and 'shareholders' for simplicity, acknowledging that we research other entities (such as trusts, stapled securities and managed investment schemes) that are ASX 300 listed.

[4] See Treasury, Greater transparency and accountability of proxy advice, p.5.

[5] See ASIC, REP 578 ASIC review of proxy adviser engagement practices, 7 June 2018.

[6] https://www.ownershipmatters.com.au/voting-guidelines/.

make is our assessment of whether any resolution proposed is in the long-term economic interests of shareholders.

Our clients employ us for our expert financial and governance analysis and for our recommendations about how they can vote to use the ownership rights attaching to shares to their advantage at meetings. No client slavishly follows our advice. No client is obliged to contract with us.

We are simply an input into a client's independent processes to price the extant governance risk in a subject company, and where a meeting proposal is advanced, to arrive at a voting decision that is in *their* best interests, in accordance with *their* own contractual and fiduciary obligations.

OM provides value to our clients through expert and timely identification of governance risk. Once we have published a report that discharges our responsibility to our clients (be it in an AGM context or elsewhere) we get out of the way and let shareholders and companies resolve the issues.

OM does not provide services that instruct custodians about the voting intentions of our clients, nor do we deliver vote instructions to company registries for the lodgement of proxy votes.

We do not and have never, solicited the votes of shareholders to vote in accordance with our recommendations. We are advisers only. Our clients can take or leave our advice, much as they can take or leave the recommendations to buy or sell stocks that are provided by sell-side research analysts, and who are subject to the same regulatory regime as OM.

OM provides companies with a free copy of any report that contains analysis on meeting proposals. The report is available to companies at the same time that we publish it to our clients, never beforehand. We engage liberally with companies before, during and after the release of our reports. We do not have 'black out' periods. These are choices we have made to meet the expectations of our clients that we will promote meaningful engagement between investors and companies. However, we defend the right of our competitors to deploy different operating models. Investors are permitted to buy securities based on the public statements of companies - research designed to aid voting decisions of investors should be no different.

As the consultation paper notes, there is a highly competitive market for research that analyses and makes recommendations about proposals on the agenda of ASX 300 companies. Australia is unusual in having two local providers with significant market share as an alternative to the offerings of the largest two US firms.

OM offers research and advisory services only, however competitor firms offer this category of research together with execution and reporting services. This enables institutional investor clients to analyse proposals, electronically instruct their custodians about their voting intentions and to record and report upon their voting activity within an online platform. Some clients who contract for these services may choose to implement their voting decisions in accordance with a pre-determined policy (either generic or bespoke), subject to individual over-ride. OM believes that this is a valid choice open to investors, just as they can choose to purchase a portfolio of securities based upon a policy or algorithm without any 'active' human intervention.

OM also offers a subscription service to clients that analyses and assesses governance risk in each ASX 300 company in three broad categories: management incentives, accounting risk and board oversight. Our subscription service complements our proxy voting service.

We look to highlight the risks associated with companies making or presenting aggressive accounting judgements; where ropey earnings numbers might trigger windfalls for executives

with poorly designed incentive structures and where these arrangements are overseen by complacent or poor performing boards.

We have a particular expertise in deconstructing complex accounting issues in public company financial statements. This work competes with research proffered by independent analysts, sell side researchers and hedge fund sales desks. Importantly, this work informs our voting recommendations and the financial judgements we make about accounting and earnings quality are frequently directly repeated or referred to in every report that also makes a voting recommendation.

We do not accept the premise inherent in the consultation paper that there is a settled, defined category of "proxy advice" that can be confined to a group of providers or to a particular product or service offered to institutional investors. "Proxy advice" is simply the provision of financial research that may impact on the voting decisions of investors.

The paper is gravely mistaken in its assertion that there are only four providers of "proxy advice". There are many more than four providers of financial research that may influence the voting intentions of investors who hold ASX 300 companies. There are numerous offshore entities that provide dedicated voting analysis on Australian companies.[7] Many sell-side brokers provide commentary that at times urges investors to accept or reject proposals, including control proposals, at general meetings or critiques the pay structures of executives or the performance of the board.[8] We are aware of numerous financial research providers that provide detailed analysis of remuneration structures and governance risks at ASX 300 companies that are used by investors to guide their decisions on resolutions at AGMs.[9] The Australian Shareholders Association openly publishes its voting intentions on its website and directly solicits proxies for it to cast from the floor of the meeting.[10] So-called private "engagement syndicates"[11] which draw together institutional investors to make joint representations to companies on environmental, social and governance issues also give input to investors on voting issues, using the insights they possess.

Proxy solicitation companies[12] also offer services on behalf of listed entities or the proponents of resolutions at general meetings. In the course of their work they distribute detailed material (both written and oral) that makes financial and other representations crafted to influence the voting intentions of institutional and retail investors.

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[7] For example: Pensions & Investment Research Corporation www.pirc.co.uk provides AGM analysis on ASX 100 companies. The Investment Association (an industry association owned by UK investment managers) provides AGM analysis on dual listed ASX stocks see https://www.ivis.co.uk/. There are numerous other specialist providers offshore that cover Australian stocks in the MSCI World or other indices.

[8] See, for example, JP Morgan, 'InvoCare Limited: Investor Strategy Day – Assessing Management's New Targets and the Business Case', 18 May 2021; 'Analysts divided on Westfield Australasian demerger option', *The Australian Financial Review*, 30 May 2014; 'Analysts differ on Westfield investors' share', *The Australian Financial Review*, 29 April 2014; ''Literally zero sense': AGL chairman under fire over CEO exit', *The Australian Financial Review*, 26 April 2021.

[9] Examples past and present include but are not limited to Regnan (a subsidiary of Pendal Group), Diogenes Research Pty Ltd & Credit Suisse.

[10] At least one wholesale investor we are aware of used the ASA intentions as a valuable input into its process.

[11] Such as Regnan www.regnan.com/ and the EOS Service at Federated-Hermes https://www.hermes-investment.com/au/stewardship/ .

[12] Including firms such as Orient Capital, Morrow Sodali & Georgeson.

The proponents of shareholder resolutions[13] also directly publish material or make direct representations that are designed to influence the voting intentions of institutional and retail investors. Various media outlets also publish material that can influence the voting intentions of institutional investors,[14] however they rely on a specific exemption to the AFSL regime.[15]

Existing regulatory framework for OM

Ownership Matters has an AFSL because we accept that every element of our product and service offering is already regulated under Section 766A and 766B of the *Corporations Act*. We provide 'general advice' (not personal advice) to wholesale investors only.

OM submits to the AFSL regime as we provide '*financial product advice*' in accordance with Section 766B, wherein we produce a "*recommendation or a statement of opinion, or a report*" that "*could reasonably be regarded as being intended to have such an influence" on "a person or persons in making a decision in relation to a particular financial product*".

OM accepts that every research report we produce we may influence decisions within our client group related to the buying or selling of securities, voting decisions '*in relation'* to those securities, or a combination of both.

OM does not rely on the exemptions about what constitutes *'financial product advice'* contained in Regulation 7.1.30 of the Corporations Regulations 2001.[16] That regulation exempts advice from the AFSL regime if it "*consists only of advising another person in relation to the manner in which voting rights attaching to securities may or should be exercised*". Our service offering does not fit this exemption.

Our business provides analysis of proposals put forward at general meetings. However, our analysis also presents detailed assessments of the financial performance of each company. For example – each AGM contains a non-binding vote on a remuneration report which invites shareholders to reflect on the relationship between a company's remuneration policies and company performance (the *Corporations Act*, in fact, requires a remuneration report to explicitly consider the relationship between remuneration outcomes and company performance).[17] We present a detailed analysis of company performance in the consideration of these resolutions and we acknowledge and accept that this report may influence our clients' views on buying and selling, or otherwise dealing with these securities.

Each report that contains a voting recommendation also presents summaries of our detailed assessments of the company's accounting quality. Similarly, when we make recommendations about the election of board directors, a detailed assessment of the company's performance and the director's track record is a pre-requisite to making an informed determination about that director's suitability for the role. Examples of such analysis are included as an appendix to this submission. We know of many examples where representations made within our proxy analysis has negatively influenced the sentiment of our clients toward individual securities.

Accordingly, the assertion within the consultation paper that "proxy advisers also provide advice on other resolutions, such as remuneration reports, board appointments and governance arrangements, which are not covered by the AFSL regime as they do not fall

[13] Both listed companies themselves and external organisations that file 'shareholder' resolutions including Market Forces https://www.marketforces.org.au/tag/shareholder-resolutions/ & ACCR https://www.accr.org.au/research/australian-esg-resolution-voting-history/.

[14] See for example 'Aurizon shareholders agitated over Prescott', *The Australian Financial Review*, Matthew Stevens, 27 September 2014.

[15] See Regulation 7.6.01B(o)(iii) of the Corporations Regulations 2001.

[16] See http://www5.austlii.edu.au/au/legis/cth/consol_reg/cr2001281/s7.1.30.html.

[17] See *Corporations Act,* s.300A; see sub-sections 300A(1)(b) and 300A(1AA).

within the meaning of a financial service"[18] is wrong: at least insofar as it applies to meeting related financial product advice produced by OM. Indeed, when working for a competitor firm prior to OM's formation, OM employees elected to apply for an AFSL despite the 'voting advice exemption' because ASIC staff explicitly advised us that our proxy advice required an AFSL.

We accept that Treasury may have copied this assertion without verification from page 4 of the *ASIC review of proxy adviser engagement practices (Report 578)* in June 2018, however the assumption of a universal 'regulatory gap' in relation to proxy advice is an ill-considered one, in both fact and law. A copy of our 2017 letter to ASIC on this issue is attached as an appendix to this submission.

The myth that proxy analysis is only partly regulated has been repeatedly advanced by conflicted business interest groups,[19] lawyers and various professional services courtesans.[20] This shibboleth will be no doubt be relied upon by submissions to this consultation; the authors of whom will never have read copies of our analysis. However, repeating a myth does not make it any truer even if it is repeated by 'leading' business figures.

It would take magical thinking for any fair-minded person to conclude that there is a hidden category of recommendation or opinion within our reports that would make them exempt from the current AFSL regime. Our advice and reports are never only about voting advice. Rather we assist our clients to price and remediate governance risk inherent in each security as part of our analysis. This is why our clients contract with us, as opposed to other providers.

It is true that some organisations that provide voting advice only may rely on the protection afforded by Regulation 7.1.30 of the Corporations Regulations 2001, so that their activities fall outside the AFSL regime. This exemption is relied on by the Australian Shareholders Association, specialist publishers,[21] proxy solicitors[22] and in some cases, by the proponents of shareholder resolutions.

OM makes no comment on the desirability or otherwise of maintaining this exemption for organisations who rely on it, save to highlight that the proponents of shareholder resolutions should never be subject to the AFSL regime. It would be a perverse outcome if challengers to underperforming directors were required to hold an AFSL before they were able to make their case for election to other investors.[23]

The AFSL regime tightly governs the operations of OM as we are a research report provider that produces general advice for wholesale clients. Under Section 912A of the *Corporations Act* we have responsibilities to provide our service efficiently, honestly and fairly.

ASIC Regulatory Guide 79 provides guidance on certain licensing and conduct obligations that we must comply with. This includes specific guidance on matters such as resourcing, competence, research quality, methodology and transparency; and avoiding, controlling and disclosing conflicts of interest.

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[18] See p.7 of the Consultation Paper

[19] See for example https://aicd.companydirectors.com.au/membership/company-director-magazine/2018-back-editions/march/proxy-music and https://www.bca.com.au/let_light_in_on_corporate_watchers

[20] See for example https://www.theaustralian.com.au/business/financial-services/leibler-calls-for-asic-oversight-of-proxy-advisory-firms/news-story/fe0031b5baf11b39182660016fc0446d and https://www.theaustralian.com.au/business/proxy-advisers-need-more-than-investor-relations-code/news-story/fe3d777c11413d2c0cfb916e9d8bfda7 and http://www.guerdonassociates.com/articles/regulation-of-proxy-advisory-firms-and-their-conflicts-of-interest-declarations/ for contrasting views.

[21] See for example, in the past, the Executive Remuneration Reporter service.

[22] See for example Georgeson Australia and Morrow Sodali

[23] See also ASIC, Regulatory Guide 128, Collective action by Investors, updated 23 June 2015 at page 13 where investors recommending other investors vote a particular way will not give rise to unacceptable circumstances.

We note that RG 79.141 contains the following edict: "*Research report providers should ensure that research reports or information about their contents are not communicated outside the research report provider before the report is provided to clients in the normal course of business*".

Regulatory objectives in context

The objective of the consultation paper is enunciated as follows:

> "*this consultation is designed to help assess the adequacy of the current regulatory regime and help develop reform options that would strengthen the transparency and accountability of proxy advice.*"

So that our response to the specific options canvassed by the consulting paper can be placed in context, OM would like to share its observations about the adequacy of the current regulatory regime.

Absence of harm

The consultation paper does not identify any harm to investors, companies or to financial markets that cannot be addressed within the existing regulatory framework.

Treasury presents no evidence whatsoever that there has been any detriment suffered as a consequence of the publication of financial research that may influence the voting intentions of institutional investors.

Treasury offers no explanation of 'regulatory gaps' which would prevent ASIC or any other regulator acting against aberrant financial product advice from any of the named providers in the consultation paper.

There is no evidence adduced in the paper or referred to in a previous ASIC report[24] that suggests that any investor who has used research of this type has ever been misled or deceived.

There has been no evidence produced of systemic errors perpetrated by providers of research of this type that would warrant an 'industry-wide' reaction from regulators.

There has been no evidence produced that investors are acting without independent oversight in reliance on research of this type against their clients' financial interests. Indeed, in its review of engagement practices by proxy advisers, ASIC found the following:

> *Many institutional investors have advised ASIC that proxy adviser reports are only one input into their voting decision processes. During the 2017 AGM season, there were media reports of institutional investors taking positions regarding certain issues that differed from those of proxy advisers. Indeed, proxy adviser firms often have different views on the same issue and many institutional investors will subscribe to more than one adviser's reports.*

Further, empirical data reviewed by ASIC in relation to the 2017 AGM season[25] appears to suggest that concerns regarding the extent of influence of proxy adviser recommendations on the voting outcomes of company resolutions is overstated.

Similarly, there is no evidence that companies have been negatively impacted by this type of financial research. No evidence has been produced as to the inadequacy of existing

[24] See ASIC, REP 578 ASIC review of proxy adviser engagement practices, 7 June 2018.
[25] Australian Securities & Investments Commission, *Report of AGM Season 2017*, Report 564

remedies that companies have under the Corporations Act (for example s.1041H[26]) against firms that produce financial research that impacts on voting intentions.

The absence of harm or evidence presented in the Treasury paper seems an odd pretext for detailed and intrusive regulatory intervention in the rights of private citizens (OM and our clients) to contract with each other, and which would provide regulatory fiat for large, well-funded companies to pre-emptively censor dissenting opinion through legal threats and harassment.

Evidence of meeting results

The consultation paper also presented no analysis of the effects of proxy analysis on meeting resolutions.

So that Treasury has a shared understanding of the effects of proxy advice on the outcome of meeting resolutions, it is our pleasure to share with Treasury some observations about general meetings held by ASX 300 companies since OM's inception (1 July 2011[27]) to 31 Dec 2020[28]:

- There have been 17,392 resolutions put to meetings in this 9.5 year period.
- Only 352 resolutions failed to pass with the requisite majority sought by the board – 213 of those resolutions were non-binding votes on the remuneration report.
- Resolutions that passed did so with an average of 95.2% in favour.
- 43.1% of all resolutions were director elections and 35.5% were remuneration related (eg. non-binding votes & long term incentive approvals).
- Of the director elections that went to a vote – only six board-endorsed directors were defeated, most as a result of a dispute with a controlling shareholder.[29]
- Board endorsed candidates received an average 96.2% votes in favour.
- Of 70 non-board endorsed candidatures – only 13 (at three companies) were successful in being appointed to a board – all with the backing of major shareholders in the course of corporate activity.
- 38 candidates withdrew their candidature in the period between the AGM notice being released and the meeting date – roughly half for reasons unrelated to shareholder voting (eg. executive changing jobs) and the remainder in response to proxies lodged – across 34 companies.
- There were 213 remuneration reports (7.8% of all reports tabled) that failed to attain at least 75% support (hence a 'strike') from eligible shareholders in a non-binding vote.
- 174 remuneration reports received between 25 – 50% votes against, 35 reports were defeated with 50 – 75% against and four were shellacked with greater than 75% against.

[26] See for example Rural Funds Management Limited as Responsible Entity for the Rural Funds Trust and RF Active v Bonitas Research LLC [2020] NSWSC 61 in relation findings on representations made by a hedge fund which did not lodge a defence.
27 This date co-incided with the introduction of the "Two Strikes" rule – see *Corporations Amendment (Improving Accountability on director and executive remuneration) Act s2011 (NO. 42, 2011)* for various amendments to the *Corporations Act*.
[28] OM data will be provided to Treasury for its consideration.
[29] See further Ownership Matters, Many are called, few are chosen, March 2020 for an in depth study on director appointments/reelections in the ASX 200 over 15 years and financial performance.

- In the 148 instances where the company remained in the ASX 300 the year following the initial 'strike'– the against vote on the subsequent remuneration report fell in 131 of those instances.
- Where 'strikes' had been recorded, the average vote against from shareholders fell by 23.0% in the subsequent period.

These data call into question Treasury's assertion in the consultation paper that advisers have "*a high degree of influence in the outcomes of company resolutions*".

A claim made by the President of Business Council of Australia[30] in support of the proposals that "*The advice [proxy firms] provide has significant impacts on the way a business is run and on the lives of their workers, suppliers, customers and communities*" seems hyperbolic when compared to reality.

Consideration of benefits: Engagement in action – the non-binding vote on the remuneration report

The consultation paper also presented no analysis of the ancillary benefits of proxy analysis to capital markets and thus the effect on the non-binding vote on remuneration provides a useful case study.

It is widely accepted that the most contentious resolution at AGMs is approval of the remuneration report.[31]

Our analysis of these resolutions frequently produces a visceral reaction from companies and their directors who claim that our difference of opinion on the link between executive pay and financial performance amounts to a 'factual error'. Indeed, this sensitivity over executive pay is apparent in the Business Council of Australia's support of the review of proxy adviser regulation – and in the interests of transparency and accountability, OM notes that the BCA is an organisation funded by shareholders but representing the interests of CEOs. [32]

In his second reading speech introducing the Howard Government bill that established the non-binding vote on remuneration, the then Treasurer, The Hon. Peter Costello expressed its intent as follows (emphasis added): [33]

> *"The vote is a mechanism for shareholders to directly and clearly communicate their views to the board of directors at a company general meeting. It will assist directors to more accurately assess the opinion of shareholders on remuneration than would otherwise be possible from discussion and comment at a general meeting alone.*
>
> *The vote does not detract from the authority and responsibility of directors to determine executives' remuneration and the vote is advisory only. This recognises that it is the proper function of directors to determine executives' remuneration. It also recognises that directors are ultimately responsible to shareholders for the decisions they make, including decisions on executive remuneration.*

[30] See Tim Reed, BCA President in https://www.afr.com/policy/tax-and-super/proxy-reforms-add-fuel-to-super-wars-20210502-p57o69

[31] The resolutions with the highest vote against is the Remuneration Report with an av. of 8.1% since July 2011.

[32] See https://www.bca.com.au/let_light_in_on_corporate_watchers.

[33] CORPORATE LAW ECONOMIC REFORM PROGRAM (AUDIT REFORM AND CORPORATE DISCLOSURE) BILL 2003 Second Reading Speech, The Hon Peter Costello (Treasurer), Hansard, Commonwealth Parliament of Australia, Thursday, 4 December 2003 Page: 23761.

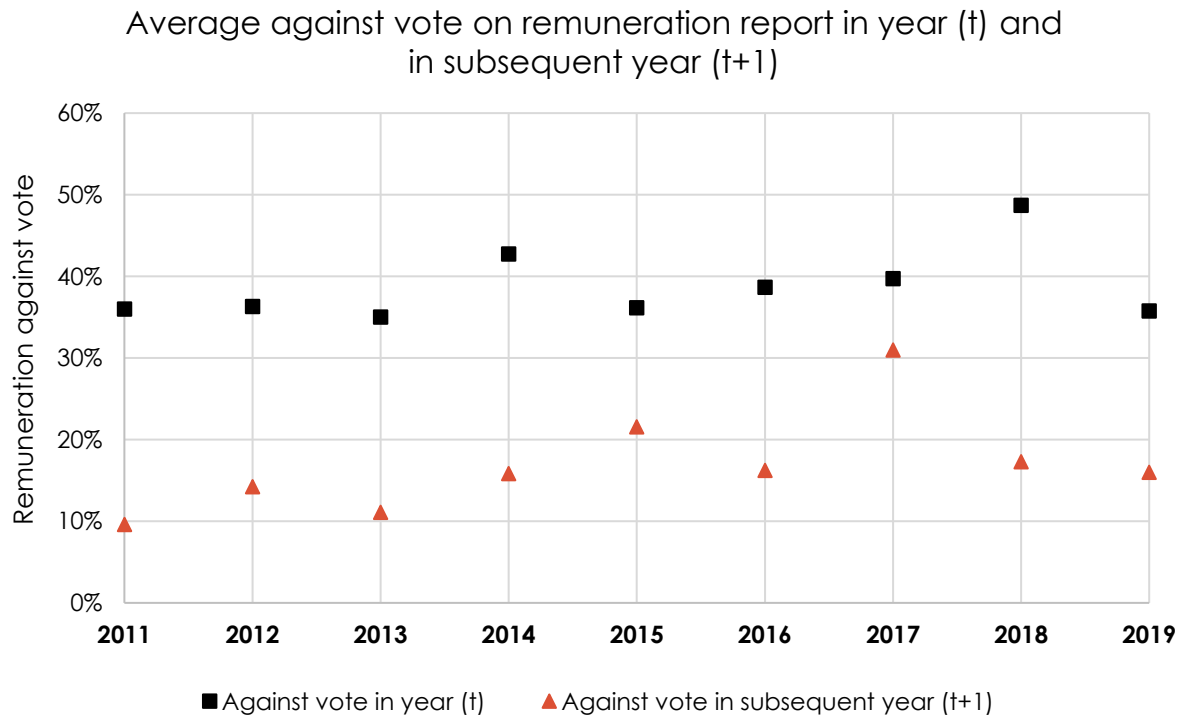
> ***However, by requiring that shareholders have the opportunity to clearly express their views on a detailed remuneration report, this amendment will enhance transparency and will improve accountability between directors and shareholders.***"

OM observes that even if a remuneration report is defeated, the vote is advisory only. There is no restriction on the ability or authority of a company's board to determine executives' remuneration. No board of an ASX 300 entity has been ejected using the so-called 'two strikes' mechanism since the regime was introduced in 2011 and outside the ASX 300 there are extraordinarily limited examples of spill resolutions occurring (with negligible success).

The lasting benefit of the Howard-Costello reforms on non-binding votes is the authentic dialogue that emerged between institutional investors and boards in its wake. In the view of OM, this measure provided the single biggest fulcrum to meaningful engagement between boards of Australian listed companies and their shareholders.

Australia, in contrast to other comparable jurisdictions, benefits from a lively 'engagement' scene between institutional investors and boards, where expectations and disagreements find mediation through regular contact as part of the AGM process. The role of proxy advice in the timely identification and highlighting of issues early in the AGM notice period, enhances, rather than diminishes, these processes. The annual vote is a scoreboard of investor sentiment on remuneration matters.

The evidence for the success of this system in resolving governance issues can be observed in the following chart showing the (lack of) persistence in against votes on remuneration issues. Where 'strikes' had been recorded in the ASX 300, the average vote against from shareholders fell by 23.0% in the subsequent period.



Whilst media headlines frequently decry large absolute levels of executive pay, Australia is distinguished amongst many competitor markets for restraint in aspects of CEO pay.[34] The non-binding vote and the effective engagement surrounding it, supported by able proxy advice,

[34] For a detailed 19 year longitudinal study on Australian Executive Pay, see CEO Pay in ASX 200 companies, ACSI, August 2020. This study is prepared by Ownership Matters.

has made an important contribution to this outcome, an outcome that understandably the BCA, its member CEOs and listed company management may dislike.

International regulations on proxy advice

The consultation paper suggests that recent regulatory attention in the US and UK on proxy advice reflect the reform proposals under consideration in Australia. Neither jurisdiction operates a regulatory framework like the AFSL regime in Australia, another major reform of the Howard-Costello era, and in any event the regulatory approaches adopted offshore bear no resemblance to the proposals being considered here.

The draft ruling by Securities & Exchange Commission referred to in the consultation paper turns on a determination that the activities of proxy advisers in the United States are investment advisers who are also in the business of 'soliciting' proxies.[35] This results from an interpretation that the services provided by advisers in the US are in effect exercising voting authority on behalf of their clients. This is a consequence of contracts with institutional investors wherein providers provide a full execution service – to vote the client's shareholding in accordance with pre-determined policies (subject to client over-ride or veto).

OM does not solicit proxies. We do not exercise voting authority on behalf of any client.

The draft ruling in the US does not take effect until December 2021. Investment advisers who are engaged in proxy solicitation within the terms of the rule are only required to provide their research to a concerned issuer "in a timely manner" after publication but before the meeting itself.[36] No pre-release is required, and it is disingenuous to represent otherwise. The draft ruling is subject to legal action[37] and is yet to take effect.

The regulations implemented in the United Kingdom bear no resemblance at all to the options canvassed in the consultation paper.[38] A proper reading of those regulations is that, in pursuance of obligations under the European Union Shareholder Rights Directive, proxy advisers[39] are required to disclose their systems and processes to their clients and the public. The regulations establish a complaints mechanism through the Financial Conduct Authority but are not prescriptive in any way. Reports are not required to be disclosed to issuers, nor are issuer's responses required to be included. In the UK a proxy adviser could make recommendations based on an astrological chart or a fish's entrails,[40] and provided that this was disclosed, no sanction could be applied.

The Australian AFSL regime is already more detailed and 'fit for purpose' than either of the US or UK jurisdictions. Any financial service provider such as OM, that offers a financial product advice in Australia that deals with more than voting decisions only is already caught and must conduct its operations on an equal footing with other providers such as sell side researchers, independent experts and hedge fund sales desks.

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[35] SEC Rule 14a-2(b)(9)
[36] See https://www.sec.gov/news/press-release/2020-161
[37] Institutional Shareholder Services Inc v Securities & Exchange Commission & Walter Clayton III, NO.1:19-cv-3275-APM, District Court of Columbia
[38] The Proxy Advisers (Shareholders' Rights) Regulations 2019
[39] 'Proxy adviser ' means a legal person that analyses, on a professional and commercial basis, the corporate disclosure and, where relevant, other information of listed companies with a view to informing investors' voting decisions by providing research, advice or voting recommendations that relate to the exercise of voting rights;
[40] See *Asterix and the Soothsayer*, p.18, Goscinny & Uderzo, 1972 Hachette Children's Books

Applying the AFSL regime in practice

Where any evidence exists that the holder of an AFSL is not providing its service in a manner that is efficient, honest or fair; or where such a holder is not meeting the expectations of research providers set out in RG 79, then ASIC already has appropriate remedies at its disposal.

OM submits that ASIC could then impose licence conditions relevant to an individual AFSL holder to ensure compliance with the existing law in relation to financial product advice that impacts on voting decisions of listed company securities. This would ensure a regulatory framework that is consistent with other forms of financial product advice (and the expectations of RG 79), especially given that organisations like OM already comply with those standards.

In the event of continued non-compliance with AFSL conditions, general or specific, a provider's licence could be cancelled.

There is no evidence that there is industry wide non-compliance with existing AFSL conditions which apply to financial product advice on the analysis of meeting issues. ASIC's investigation into proxy advice in 2017 and 2018 found no such evidence. Accordingly, we submit that there is no case for 'industry wide' conditions to be imposed on every AFSL holder's licence.

It seems manifestly unfair and nonsensical to change the operating model of all providers in anticipation of transgression of one – especially given there has not been a single complaint by a user of the financial product advice provided and no listed entity has sought to exercise their rights under the Corporations Act in relation to misleading or deceptive conduct.[41]

In particular, we oppose any attempt to develop a separate category of regulation for 'proxy advice' or to contrive 'Pro Forma' AFSL conditions under PF 209 which would serve as de facto operating standards that would dictate *how* a product of this type should be produced.

The AFSL regime is principles-based and, in the absence of widespread malfeasance and detriment to the consumers of the research[42] such intervention is unnecessary.

We also draw Treasury's attention to the risk that regulatory over-reach could impact the operating models of sell side researchers, investment banks, proxy solicitors and other firms who are also in the business of advising investors how to use their voting rights. Setting up a regime where these firms were required to pre-release their reports (as we would ours) would be curious, to say the least, in a global context.

[41] Section 1041H, Corporations Act 2001.

[42] See for example Pro Forma 209 Australian financial services licence conditions, pars 42-44 in relation to time-share sales

Specific response to consultation questions

Option 1: Improved disclosure of trustee voting

Superannuation funds would be required to disclose more detailed information in relation to their voting policies:

- how votes were exercised,
- whether any advice was received from a proxy adviser and who provided the advice, and
- whether the voting actions taken were consistent with the proxy advice

Option 2: Demonstrating independence and appropriate governance.

Proxy advisers would be required to be meaningfully independent from a superannuation fund they are advising to ensure that proxy advice is provided to and used by superannuation funds on an arm's length' basis.

Trustees could also be required to outline publicly how they implement their existing trustee obligations and duties around independent judgement in the determination of voting positions.

OM position

In OM's view the proposals advanced in Option 1 are uncontroversial. If there is a benefit to the consumers of financial products resulting from this type of disclosure, then it should be applied to all product issuers and not just superannuation funds.

In OM's view one of the proposals advanced in Option 2 is incoherent. There is a public interest in the providers of financial product advice being independent of the *companies* that they are analysing. If a proxy adviser is in a contractual relationship with a client of its service, be it a superannuation fund or investment manager, the independence of its research is not compromised by the existence of such a contract – unless the client itself is a listed company and the subject of the research. RG 79 already provides a procedure to deal with such a conflict, in the event that it arises.

Further, in OM's view, clients of a proxy adviser should not be prevented from taking an ownership stake in an adviser by reason of the category of financial product they offer. It would be incongruous that OM could seek equity investment from conflicted business representative groups like the Australian Bankers' Association, the Business Council of Australia and the Australian Institute of Company Directors yet be prevented from seeking an investment from a superannuation fund.

Responses to Consultation Questions 1 – 6

OM makes no specific comment save to say that there is no requirement whatsoever for independence criteria between a proxy adviser and its superannuation fund clients.

Option 3: Facilitate engagement and ensure transparency.

Proxy advisers would be required to:

- provide their report containing the research and voting recommendations for resolutions at a company's meeting, to the relevant company before distributing the final report to subscribing investors.

For example, a period of five days prior to the recommendation being made publicly available would give enough time for both the company and proxy adviser to comment and for the proxy adviser to amend the report in response if warranted.

Option 4: Make materials accessible.

Proxy advisers would be required to:

- notify their clients on how to access the company's response to the report. This could be through providing a website link or instructions on how to access the response elsewhere.

OM position

OM opposes the mandatory provision of any of its financial product advice reports to companies, either before publication to clients or afterwards. There is no precedent for pre-publication intervention in any serious capital market on the globe.

This proposal is also manifestly inconsistent with current financial services regulation in Australia designed to facilitate fair, orderly and transparent markets. ASIC's Regulatory Guide 79 specifically prohibits the disclosure of our research and recommendations prior to publication (see RG 79.141).

Researchers of any persuasion should be entitled to rely entirely on the written documentation distributed to support a company's views on resolutions at general meetings, without any further obligation to consult. As noted above, companies already have remedies in relation to the errant publication of proxy advice, including for misleading and deceptive conduct in relation to the provision of a financial service or product, for which there are substantial civil penalties.[43] As far as we are aware, no claim has ever been made against a proxy adviser under the Corporations Act.

It is also extraordinary for the State to compel a private business to disgorge its valuable intellectual property to a third party, with whom it has no contract, for no compensation.

It is an affront to free market principles, embarrassing for Australia's reputation as a financial centre and a significant disincentive for researchers to risk their capital in establishing a business of this type, if it is at risk of sovereign intervention in this manner.

Pre-publication is also likely to allow listed companies – many of which spend more annually on investor relations and duchessing the media than the aggregate annual revenue of OM - to attempt to preemptively censor publication of dissenting views through harassment and threats of litigation.

OM is not aware of any other form of opinion in Australia where the State compels its provision to the subject of the opinion prior to publication explicitly for the purpose of allowing them to alter its content. This proposal should be of grave concern not just to other providers of financial research but to any person interested in preserving a functioning society that values freedom of expression.

[43] Section 1041H, Corporations Act 2001

There is no precedent in the AFSL regime for any other financial product advice to be mandatorily published for the benefit of third parties, let alone provided in draft form prior to it being published to those who have voluntarily chosen to pay for it.

The post-publication provision of financial product advice to companies is a matter of choice for research providers and should not be compulsory. OM makes a copy of our report available without charge to companies at the time of publication as a matter of choice. However, we reserve the right to withdraw the offer in the event of a company misusing or republishing our material. This is an infrequent occurrence.

Companies the subject of our research are not parties to any contract with us, nor would they be subject to any AFSL regulation. OM would have no claim against those companies for the use or misuse of our intellectual property unless a separate – and extensive - legislative instrument were conceived as part of these reforms.

Companies in receipt of our recommendations, where a reasonable person would regard such information as likely to have a material effect on the price or value of the company's shares, would also be compelled to disclose it in compliance with continuous disclosure obligations.[44] This situation would result in unpublished information, licensed only for the consumption of wholesale investors, being published on the ASX before its release to our clients.

Where we identify a material issue from the public record, we should be free to share that insight with our paying clients (who can act on it to their advantage), rather than run the risk of a public company undermining our business model through unauthorised release or continuous disclosure.

There is no utility in mandating that OM communicate a company's response to our report. Companies already have adequate communications with their shareholders.

Responses to consultation questions 7 – 11.

7. How would the proposed options affect the level of engagement by proxy advisers with companies?

These proposed options would likely destroy the current productive and frequent engagement between companies and Ownership Matters given it would turn engagement into a mere compliance function. In addition, prior publication of proxy advice would restrict the time available for researchers to do their work to a high standard and limit the effective engagement by our clients.

OM has contractual deadlines with clients that compel us to produce research on general meetings between 18 and 14 days before the meeting date. This allows sufficient time for our clients to independently consider our research and contact the company for more information if required before reaching their final voting decision between eight and six days from the meeting date (institutional investors, in order to ensure their votes are counted by the custodial chain, typically must vote six to eight days prior to the date of meeting; this deadline can be longer if the institution is located outside of Australia).

Prior publication of our research to companies would create unsustainable time pressure. Notices of meeting as a matter of Australian law need only be published 28 calendar days prior to the date scheduled for a meeting. Before publication we do not know what is on the agenda. If we were to meet our contractual deadlines *and* deliver a draft of our research to the company five days before publication, OM would have (including weekends) only five to nine days to produce our research.

Prior publication of research within AGM time constraints necessarily means less time for research. This would affect quality and our ability to effectively monitor problematic resolutions

[44] Section 674, Corporations Act 2001

on behalf of our clients. It would also mean less time for engagement in the AGM period by our clients.

Prior publication of proxy advice would also absorb resources in unnecessary communications with company representatives, seeking to 'fact check' and litigate judgements we make in relation to our advisory work. OM foresees that this will create a hostile environment between companies and researchers, each arguing opposing positions. Whilst the level of engagement may rise if the volume of communication is the measure, there is no guarantee that either party will make their position more understood.

It is inevitable that prior publication will require more resources from researchers to deal with inbound communication from subject companies. This will imperil the already fragile economics of providing this type of research although we imagine that the BCA, the AICD and their members see this as a benefit of the proposals, given it would reduce the level of scrutiny to which they are subject from the owners of their companies.

There are also significant practical issues:

- Companies regularly change their meeting agenda after the release of the notice of meeting but prior to the date of the meeting. For example, Origin Energy published its AGM notice on 16 September 2020 prior to the AGM on 20 October 2020. It then withdrew a resolution in response to investor feedback and altered its executive remuneration structure, communicated by an ASX announcement on 5 October 2020. Would a proxy adviser, having already published its report, then have to resubmit the updated report to a company for another five days of review?
- Would a proxy adviser be able to alter its opinion on a resolution or change supporting content – for example, following a company downgrading its earnings or announcing a regulatory penalty – without having to resubmit its report to the company for another five day period?
- At what point would a proxy adviser be able to disregard a company's responses on the basis they are false, misleading, evasive or involve mere differences of opinion?
- How would a proxy adviser be required to submit proxy reports five days prior to publication? In what format? To whom? A handful of companies have no meaningful engagement programs with either their investors or researchers and provide no contact details and it is hard to escape that ASIC or some other authority would have to construct a detailed regulatory regime involving nominated contact persons and addresses at companies.

8. Would the proposed options mean that investors are more likely to be aware of a company's position on the proxy advice they are receiving?

No. This question, and indeed much of the consultation paper, appears to be born from an assumption that institutional investors have no agency and no means of communicating with company management outside of proxy advisers.

Institutional investors already have open lines of communication with company representatives such as non-executive directors, management, investor relations representatives and company secretaries.[45]

Investors can also read. Where a proxy adviser recommends against a proposal being supported by the company, the investor knows that the company has a different position. If the investor wants additional information, it can contact the company.

[45] Listed companies can easily discover the voting records before and after a company meeting under Part 6.C.2 of the Corporations Act. Services exist to discover the voting instructions of shareholders prior to the deadline for proxy lodgement.

Investors are accustomed to dealing with multiple, competing sources of information on complex issues. Voting decisions on AGMs are no different. It is the job of professional institutional investors to be aware of a company's views.

9. What is the most appropriate method for proxy advisers to notify their clients as to where the company's response to its report is?

Proxy advisers should have no obligation to notify their clients about a company's response to its report. No other provider of financial product advice has a similar obligation.

If the company is concerned that investors are being misled or deceived from proxy advice it has legal remedies (including injunctions) open to it. It can correct any misperceptions it believes are in the market through an announcement to the ASX which will be available to all investors, and not rely on selective disclosure and distribution through the proxy adviser's systems.

Failing that, the company can write to its shareholders. Or its shareholders can contact it. This question appears again to ignore the substantial money and time companies already spend communicating with their investors and other market participants such as sell-side researchers.

10. If proxy advisers were required to provide their reports to companies in advance of their clients, what would an appropriate length of time be that allows companies to respond to the report and for the report to be amended if there are any errors?

Question 10 is a non-sequitur.

There is no 'appropriate' length of time for pre-publication to issuers. This contradicts well established precepts in the production of financial product research that prevent the prior disclosure of recommendations to issuers – to do so would be inconsistent with RG 79.141.

Creating a quasi-entitlement for a company to respond to a report before publication unnecessarily restricts the operating model of independent researchers and appears designed to allow company management to pre-emptively stifle and censor dissenting views. Regulation should be focused on the output of research, not the method in which research is produced.

Companies are not a party to a financial services contract with OM. Our wholesale clients are quite capable of determining whether our research has been prepared to the appropriate standard, and whether it has been informed by the appropriate level of engagement with companies.

11. Are there any requirements that should be placed on companies during this period, such as confidentiality? Are there any requirements that should be placed on proxy advisers during this period, such as not making their recommendation otherwise publicly known?

These questions are risible, but we offer a serious response in light of the impact of the proposals on us and the market as a whole.

OM's position is that researchers should not be compelled to provide reports to companies (see above).

Companies are not a party to a contract with OM so any restrictions on the use of our reports would need to be imposed by regulatory fiat or cumbersome deeds. Unless clear obligations and substantial penalties were applied for misuse of our material, OM would be powerless to enforce misuse of our publications by issuers. We note ASIC's terrible record of enforcement against listed companies. We also note that companies are not subject to the AFSL regime, so

any "requirements" would presumably involve separate regulation. We further note that we cover many listed entities,[46] that are not subject to the *Corporations Act*.

Notwithstanding any restrictions, companies will be subject to continuous disclosure requirements and in certain circumstances be compelled to publish our material, intended for wholesale investors only, to the general public.

It is a preposterous that Treasury is suggesting that OM be required to disgorge its valuable intellectual property, to a third party (a listed entity) it has no contract with, for no consideration, in advance of publication to our clients - solely for the purpose of allowing company management to pre-emptively censor and stifle dissenting opinion.

We consider this suggestion an affront to the right of private citizens to freely contract with each other, our freedom to advise our clients to act in their own interests in a timely, unrestricted manner and the rights of free expression in a democratic society.

These proposals in effect constitute state sanctioned theft of our property – for which uncertain and unenforceable 'confidentiality obligations' cannot compensate. The suggestion that we would also be prevented from making our private views known to the public is simply staggering.

If the proposed reforms were adopted, it would set a precedent that would act as a disincentive for any provider to establish a financial research business in Australia.

Option 5: Ensuring advice is underpinned by professional licensing.

Proxy advisers would be required to obtain an AFSL for the provision of proxy advice.

The purpose of the license would be:

- to ensure that proxy advisers are making assessments on issues that have a material impact on the conduct of business in Australia with appropriate regulatory oversight and the necessary care and skill required.

OM position

OM's view is that any provider of '*financial product advice*' in accordance with Section 766B must already obtain an AFSL. As stated previously OM has an AFSL.

OM submits to the AFSL regime as we provide '*financial product advice*' in accordance with Section 766B, wherein we produce a "*recommendation or a statement of opinion, or a report*" that "*could reasonably be regarded as being intended to have such an influence*" on "*a person or persons in making a decision in relation to a particular financial product*".

OM accepts that every research report we produce we may influence decisions within our client group related to the buying or selling of securities, voting decisions '*in relation*' to those securities or a combination of both.

OM does not rely on the exemptions about what constitutes '*financial product advice*' contained in Regulation 7.1.30 of the Corporations Regulations 2001. That regulation exempts advice from the AFSL regime if it "*consists only of advising another person in relation to the manner in which voting rights attaching to securities may or should be exercised*". Our service offering does not fit this exemption.

[46] Including but not limited to Oilsearch, ResMed, Inc, News Corporation Inc, Janus Henderson plc, Amcor plc, Fletcher Building Limited, Fisher & Paykel Healthcare Limited, Spark New Zealand, Chorus, James Hardie plc, Unibail-Rodamco SE

We produce reports that contain a combination of traditional financial analysis and voting advice. Our report is subject to regulation in its entirety, not individual representations within it.

As mentioned previously we regard RG 79 as an appropriate framework, with sufficient clarity and detail to regulate our activities in a manner consistent with other sell side researchers.

12. Is the AFSL regime an appropriate licensing regime through which to regulate the provision of proxy advice?

Yes, advice on voting issues is unequivocally financial product advice.

The AFSL regime already provides detailed regulatory guides for researchers dealing with licensing and conduct obligations that we must comply with. RG 79 is the most applicable instrument. This includes specific guidance on matters such as resourcing, competence, research quality, methodology and transparency; and avoiding, controlling and disclosing conflicts of interest. There is no basis for distinguishing "proxy advice" further from this regime. OM and other sell side researchers whose research influences voting decisions should not be compelled to abide by two sets of contradictory rules.

Where a researcher falls afoul of the expectations set out in RG 79, ASIC already has well established procedures to impose specific licence conditions on an individual provider.

As noted, there is no evidence of industry wide non-compliance with AFSL conditions. All four providers named in the consultation paper have an AFSL. In OM's case we have an unblemished record of compliance with our AFSL obligations.

We oppose the establishment of industry-wide conditions that would apply to the 'proxy advisory industry'. There is no basis to define such an 'industry' with clarity or to distinguish proxy advice from other financial product advice within the AFSL regime. Further there is no evidence of harm that has been identified which would provide the basis to do so.

13. Would coverage under the AFSL regime result in an improvement in the standard of proxy advice?

No. All four providers of proxy advice listed in the consultation paper already are covered under the AFSL regime.

Improvements in the standard of proxy research will emerge from the demand for higher quality expressed by institutional investor clients and a free, open and competitive market for proxy research where good providers can win business away from poor performers.

We note that two of the providers named in the consultation paper are multi-national companies and could easily provide their service from offshore, outside the AFSL jurisdiction, should they choose to do so. Penalising our successful Australian owned firm by increasing our cost to serve, dictating our operating model and reducing our competitiveness would be a particularly undesirable consequence if the misguided reforms were pursued and offshore players abandoned their Australian domicile.

OM has no problem that there is a market for badly prepared proxy advice, so long as there is no obligation of investors to buy it or follow it. We accept that there should be minimum standards, consistent with those applied for the production of all sell-side research, under the AFSL regime. However, we note that wholesale investors are sophisticated consumers of investment research, and that they are quite capable of determining good advice from bad.

Issuers aggrieved by poorly prepared research have grounds to complain to ASIC, who in turn, are empowered to impose tailored licence conditions on individual firms to improve standards.

Appendix A: Research examples

Under the terms of our AFSL we are unable to make our reports publicly available given our restrictions to advise only wholesale investors. We have excerpted components of historical research reports to illustrate the false distinction between providing 'voting' advice only and 'financial product advice'.

We are happy to privately make available examples of our research to Treasury.

Extract 1: Brambles Limited, 2017 AGM - non-binding vote on remuneration & director elections

Shareholders should vote **AGAINST** the remuneration report. Long term incentives granted in FY15 vested at 40% of maximum at the end of FY17 based on performance against revenue growth and profit after capital charge targets despite BXB's poor FY17 performance. Former CEO Tom Gorman was due to receive 56,000 shares from vesting of this allocation.

The former CEO and CFO also both received 5% fixed pay increases for FY17 despite the CFO having announced his retirement during FY16 and the board initiating a succession process for the CEO in FY16.

Shareholders should also vote **AGAINST** the reelection of Stephen Johns and Brian Long in the interests of board accountability for BXB's disappointing performance over the past 12 months, including substantial downgrades and a major change in strategy with the company abandoning its long-stated goal of achieving a return on capital target of 20% by FY19.

The recommendation in favour of Tahira Hassan's reelection reflects the fact she is one of only three of the eight non-executive directors on the BXB board based outside Australia despite BXB deriving more than 90% of its revenue outside Australia.

Extract 2: Westpac Banking Corporation, 2015 AGM - non-binding vote on remuneration

Shareholders should vote **AGAINST** the remuneration report. Management in FY15 received the benefit of having a $354 million write-off of capitalised software expenditure excluded from cash earnings, the primary earnings measure used to assess management. If this write-off, under a new policy for capitalising software, had not been excluded then the cash EPS hurdle applying to half the long-term incentives due to vest at the end of FY15 would not have been met.

This means that this IT expenditure has not impacted cash earnings as it was first capitalised and then when written-off it was excluded from cash earnings. The cash EPS hurdle for the LTIs tested at the end of FY14 was also only narrowly met; if cash earnings had been just 1.3% ($97 million) lower in FY14 then those incentives would also have not vested.

The cash cost to settle the EPS component of the FY11 - FY14 LTI was $10.6 million and to settle the FY15 LTI would be approximately $10.7 million at current share prices. Former CEO Gail Kelly is the largest single beneficiary of the EPS hurdle being achieved at the end of FY14 and FY15. A number of incumbent senior executives, including deputy CEO (and former CFO) Phil Coffey are also major beneficiaries.

Extract 3: Goodman Group, 2020 AGM - non-binding vote on remuneration & equity incentives

Securityholders should vote **AGAINST** the remuneration report and the equity allocations for the three executive directors. This is largely because the primary incentive metric at Goodman Group is operating EPS, which excludes all equity incentive expenses from earnings – these

represent roughly half of total employee expenses – and instead captures this expense through making a small, unique to GMG, adjustment to the securities on issue. In FY20, equity incentive expenses of $164mn were equivalent to $0.09 per security (operating EPS was $0.575); the adjustment GMG made to account for the impact of equity incentives reduced operating EPS from $0.581 to $0.575.

Some securityholders may wish to vote FOR the remuneration report and the executive director equity allocations given GMG for FY21 has made an important change in how it captures the cost of cash-settled equity incentives. In FY20 and prior years, these cash settled incentives did not appear in operating EPS and in FY20 GMG paid cash to settle 3.438mn securities at a time when the security price was $14.52. To settle the 3.578mn cash settled incentives due to vest at the end of August 2020, the board issued securities to a third party for cash. This at least means that the securities issued will reduce operating EPS in the future; in the past cash settling of equity incentives meant they were not captured in operating EPS. This change in approach is why OM is not recommending against the election of incumbent directors at this AGM as it did in 2019.

Securityholders should also note that the GMG incentive structure, largely unchanged over the past decade, which emphasises equity incentives over annual cash bonuses, has been in place during a time of strong securityholder returns. This is reflected in the ~$60mn in vested equity incentives received by the CEO over the past two years.

Extract 4: Ramsay Health Care Limited, 2016 AGM – CEO & CFO equity grants

Shareholders should vote **AGAINST** these resolutions because the EPS hurdles applying to half the proposed allocations are explicitly tied to Ramsay's initial market guidance – for example, for FY17, the guidance given in August 2016. For the past eight years Ramsay has substantially upgraded its initial guidance to the market.

Commencing with allocations for FY16 (approved for the CEO and CFO at the 2015 AGM) RHC has explicitly aligned the annual EPS hurdles it sets for management with the guidance it gives to the market with its full year results. The hurdle is assessed based on aggregate performance against the three annual EPS targets over the vesting period. This was a substantial improvement over past practice which consistently permitted substantial vesting under the EPS hurdle for performance well below the bottom end of original market guidance.

The FY17 EPS hurdle for this allocation – vesting commences at 9%, and the stretch target is 13% against EPS guidance of growth of 10% to 12% - must however be considered in light of RHC's history of upgrading earnings guidance. Table 1 below shows that for the past eight years RHC has substantially upgraded its original guidance every year and has then either beaten or been at the upper end of revised market guidance in every one of the past eight years.

Table 1: RHC original and revised guidance FY09 – FY16

Year	Original guidance	Upgraded guidance	Timing of upgrade	Outcome
FY16	12% - 14% (EPS)	15% - 17%	Feb 2016	17.7%
FY15	14% - 16% (EPS)	18% - 20%	Feb 2015	20%
FY14	12% - 14% (EPS)	16% - 18%	Feb 2014	20.6%
FY13	10% - 12% (EPS)	13% - 15%	Feb 2013	17.1%
FY12	10% - 12% (EPS)	13% - 15%	Feb 2012	14.8%
FY11	10% - 12% (EPS)	18% - 20%	Dec 2010	19.6%
FY10	12% - 14% (NPAT)	18% - 20% (NPAT)	Feb 2010	21.9%
FY09	10% - 12% (EPS)	"In excess"	Feb 2009	22.1%

Extract 5: QR National Limited, 2012 AGM - grant of LTI rights to QR National CEO

Vote **AGAINST** this resolution because: the ZEPOs would be granted with two-thirds subject to financial hurdles that do not appear sufficiently demanding.

EPS hurdle: The EPS hurdle requires average annual growth in EPS over the period to 2015 of 7.5 percent per annum for any vesting to occur, with full vesting for 10 percent per annum growth. The growth ranges are well below analyst forecasts for growth in earnings for QRN used by the independent expert, Grant Samuel, in its analysis of the proposed selective buy-back proposal following this AGM (see page 22 of Grant Samuels' report; the forecasts imply a 23 percent increase in 2013 profit).

In addition, at the EGM following this AGM, QRN will seek approval to repurchase shares representing 11.9 percent of shares on issue and this buy-back will improve EPS substantially. After taking account of the costs of the debt to fund the buy-back (assuming a borrowing rate of 6.1 percent per annum, QRN's 2012 average borrowing cost) and forecast cost savings of $75 million per annum under its voluntary redundancy scheme flagged in the August 2012 results announcement, QRN's EPS with no other increase in earnings would be $0.21 per share, a 16.3 percent improvement on actual 2012 EPS (this also assumes a 30 percent tax rate). The impact of the buy-back together with existing initiatives will deliver more than two-thirds of the EPS required for vesting without any other earnings improvement.

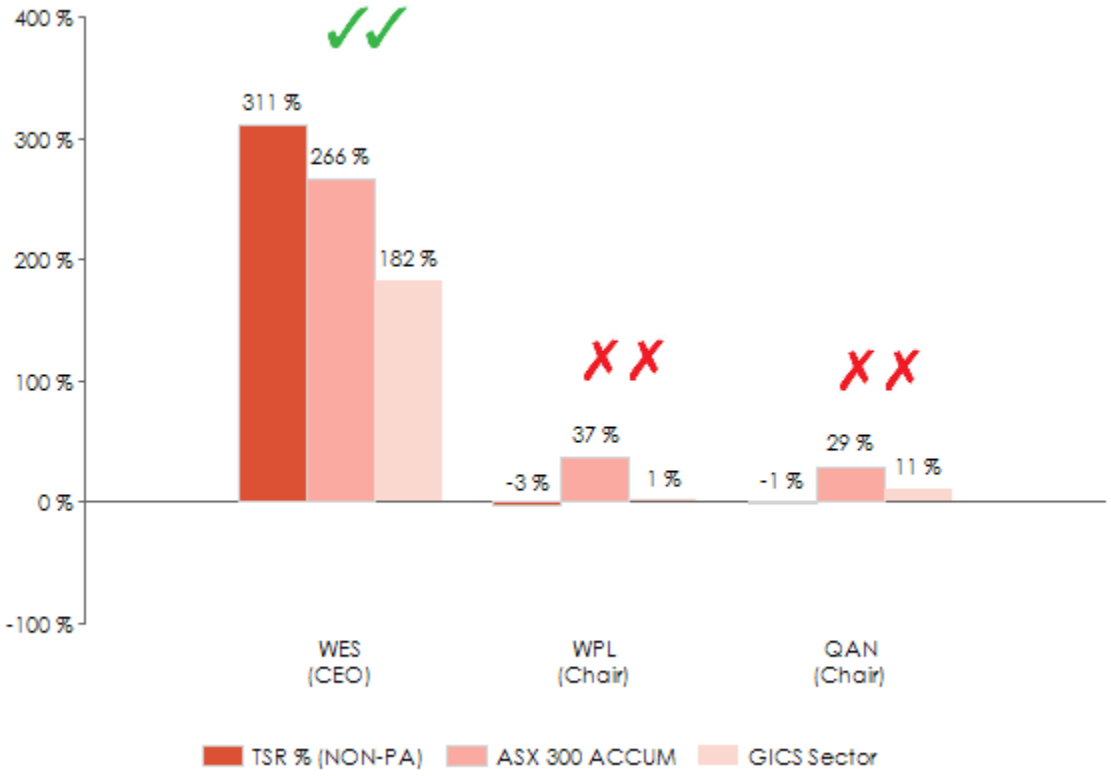
Operating ratio hurdle: This hurdle will reward the CEO for improvements to QRN's margin, defined as 1 - underlying EBIT over revenue. In 2012, QRN's operating ratio was 84 percent and in its August 2012 announcement QRN said it was targeting a ratio of 75 percent in 2015. This hurdle will deliver for full vesting for an operating ratio of 75 percent, in line with target, but will deliver half of maximum for an operating ratio 4.5 percent lower, at 79.5 percent. Over the 2011 and 2012 years, QRN's operating ratio has improved from 91 to 84 percent.

In assessing whether the EPS and operating ratio hurdles are sufficiently demanding, shareholders should also note that close to 9 percent of QRN's 2012 EBIT was as a result of accounting policy changes.

Extract 5: Director TSR of Richard Goyder, included in analysis of his reelection to the Woodside Petroleum board in 2021

Richard James Barr Goyder (as at: Mar-21)

ASX Code	Company Name	Position	Date Appointed	Date Resigned	Years	GICS Sector
WES	Wesfarmers Limited	CEO	Jul-02	Nov-17	15.3	Retail
WPL	Woodside Petroleum Limited	Chair	Aug-17	-	3.6	Energy
QAN	Qantas Airways Limited	Chair	Nov-17	-	3.3	Transport



Appendix B: Analysis of meeting resolutions ASX 300 between 1 July 2011 – 31 Dec 2020

Table 1: Distribution by resolution type

All Resolutions		
7,502	Director elections	43.1%
6,172	Executive remuneration	35.5%
1,032	Placement resolutions	5.9%
595	NED remuneration	3.4%
539	Capital structure related	3.1%
391	Auditor related	2.2%
1,161	Other	6.7%
17,392	Total resolutions put to a vote	100.0%

Table 2: Resolution outcomes

Passing of All Resolutions		
17,040	Board endorsed view passed	98.0%
352	Board endorsed view not passed (includes non-binding rem report strikes of 25%)	2.0%
17,392	Total resolutions	100.0%

Table 3: Director election outcomes

ASX 300 Director election resolutions that went to vote (July 2011 - to date)		
7,432	Board endorsed candidates	99.1%
70	External candidates / removal resolutions	0.9%
7,502	Number of resolutions	100%

Board Endorsed director elections - the results		
7,426	were passed by shareholders	(6 did not pass - only 1 without major s/holder dispute)
99.9%	percentage of board endorsed director elections passed	
96.2%	FOR votes by shareholders (when endorsed by the board)	

Non-board Endorsed director elections/removals	
13	passed by shareholders (i.e. voted in directors or removed incumbent)*
18.6%	percentage of non-board endorsed director resolutions passed
28.0%	average FOR votes by shareholders (when non-board endorsed)

*all as a result of controlling shareholder dispute

Candidates who withdrew their nomination in AGM period for ASX 300 company	
38	Less than half we categorise as due to a shareholder dispute / proxies received

Table 4: Remuneration Reports

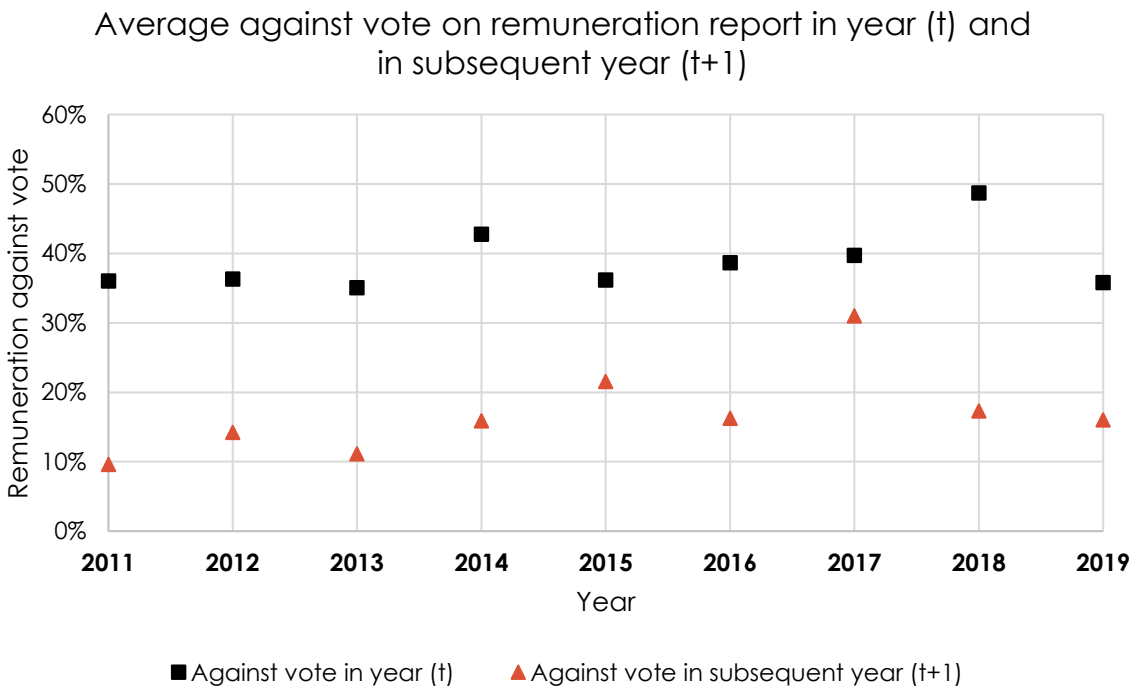
ASX 300 Remuneration reports (July 2011 - present)		
2,509	Rem reports/say-on-pay passed	92.0%
213	went against board (strike of 25% or defeated)	8.0%
2,722	Total	100.0%

'Strikes' on Remuneration Reports of ASX 300 companies July 2011 - Dec 2020		
174	votes against were between 25% - 50%	81.7%
35	votes against were between 50% - 75%	16.4%
4	votes against were between 75% - 100%	1.9%
213	total strikes	100.0%

Shareholder voting post remuneration strike	
148	data points for rem report votes following a strike*
131	cases where AGAINST vote was lower than when received strike
88.5%	of the time companies respond to shareholder feedback

23.0% Average fall in the amount of AGAINST votes in the subsequent year to a strike.

*this may be due to the company leaving the ASX 300 or not presenting its 2021 report



Appendix C: OM Letter to ASIC in response to Roundtable on Proxy Advisors – 2017

OWNERSHIP MATTERS

Suite 4, Level 5, 167 Queen St, Melbourne VIC 3000 **T** +61 3 9602 4548 **www.ownershipmatters.com.au**

28 August 2017

Mr John Price
Commissioner
ASIC
Level 5, 100 Market Street
Sydney NSW 2000

Email: john.price@asic.gov.au

RE: Proxy advisor roundtable
Dear Mr Price,

Thank you for your letter dated 22 August 2017 and for ASIC's co-ordination of the roundtable on proxy advisors earlier in the year.

Ownership Matters (OM) acknowledges ASIC's view that its powers to regulate proxy advisors are limited to those matters involving dealing in financial products. This is an accurate reflection of the intention of Parliament at the time of introducing the AFSL regime, which was reinforced by regulation 7.1.30 of the Corporations Regulations 2001 (Cth). This regulation made it abundantly clear that advice in relation to voting rights attaching to securities, of itself, was not to be swept up in the AFSL regime.

This interpretation would limit ASIC's purview of proxy advisors to AFSL-related activity - on voting issues such as Schemes of Arrangement, selective buy-backs, placement approvals and the like; which may be interpreted as constituting financial advice.

Regardless of the technically correct legal interpretation, OM's position has always been that we should operate across all our activities as if the obligations under our (wholesale investor only) AFSL applied. We are particularly cognisant of ASIC's Regulatory Guide 79 on Improving the Quality of Investment Research. In particular we regard ASIC's guidance 79.89, (i.e. that reports be based on 'reasonable grounds') and guidance 79.141 (on communication with issuers) as setting the baseline for our standard operating practice.

RG 79.141 specifically provides:

> *Research report providers should ensure that research reports or information about their contents are **not communicated** outside the research report provider before the report is provided to clients in the normal course of business. This does not mean that a research report provider cannot **check the factual accuracy of parts of a research report with a product issuer before it is provided to clients**. However, we expect that this checking would be done in a carefully controlled way (e.g. **without communicating** the recommendations or opinions also contained in the report).*

This guidance sets out a clear expectation that we should not pre-emptively disclose our research, that we can opt (but are not compelled) to check factual accuracy with issuers and that we should be careful about revealing final recommendations ahead of publication.

These principles guide our existing approach to engagement with issuers on proxy voting research, namely:

- Subject to availability we will meet with issuers on governance issues at any time of the year, without 'black out' periods or restriction;
- Where factual uncertainties exist we will use our best endeavours to contact issuers to resolve them; whilst reserving the right to rely on their public announcements;
- Where we are considering an "AGAINST" recommendation we will use our best endeavours to seek any publicly available information or commercial context that might inform our position without selectively revealing our final recommendation; and
- We will make available a copy of our final research report and recommendations to issuers, free of charge, at the same time that we publish it to our client group.

Any material errors in our reports will be corrected as soon as possible, but differences of opinion and the disappointment of directors will be ignored.

The policy set out above has been in place since our inception in 2011, is public and we believe that it is well understood by our clients and the issuers we cover. Our approach is regarded as 'best-practice' in the Australian market; and has not been the subject of a single complaint to ASIC from our wholesale investor clients (for whom the AFSL regime is primarily designed to protect). Nor are we aware of any proceedings from issuers or clients alleging that any of our reports are misleading and deceptive under Section 1041 H of the Corporations Act.

Your letter solicits a schedule, to be provided by 12 January, 2018, that details actual engagements that will take place during the forthcoming AGM season where we make an AGAINST recommendation on any resolution, together with copies of our reports on those companies. Given the limitations discussed above, we presume ASIC is seeking this information on a voluntary basis.

Whilst we are supportive of ASIC's efforts to learn more about the production of proxy voting research, as a matter of principle we don't consider that there are any grounds to treat engagement around proxy advice any differently to other forms of investment research. We believe strongly that the provisions of Regulatory Guide 79 in respect of communication with issuers should guide ASIC's approach in this area.

We note that no other investment research provider is currently compelled to contact issuers ahead of publication or provide copies of their research to issuers. This is something OM chooses to do because we believe it improves the quality of our research, communicates investor expectations and we know that our clients value this as part of our service. We are aware of many investment researchers serving wholesale investors (that also hold an AFSL)

that do not interact with issuers or provide them with copies of research reports. Indeed most hedge fund sales desks in Australia operate on this basis. Provided no investor is being misled or deceived, and that the standard of research passes the 'reasonable grounds' test, the investment research market (including proxy research) should be free to develop operating models that serve the requirements of its clients without regulatory proscription.

Notwithstanding our reservations, we would be delighted to comply with the spirit of ASIC's solicitation. We genuinely support your efforts to educate issuers and investors about proxy advisory work, however in light of the matters we have set out above, we would ask that you re-consider the breadth of your request. During calendar year 2016 we recommended against the board's recommendation on 177 resolutions at 104 companies. Detailing all of our engagements is a very steep and costly administrative burden on OM, especially since our work has not been the subject of complaint.

Our standard engagement procedure is not the subject of a formal, central log that we maintain, rather it is ingrained in our culture, whereby each analyst contacts the company concerned or makes notes that inform their analysis. ASIC's request comes on the eve of our very busy AGM season, after our resources have been locked in place. We distribute our reports free-of-charge to issuers through the Miraqle platform provided by Orient Capital to all listed companies, and on request to those listed entities that do not have access to the Orient platform. We currently have no system in place to report on the timing of these distributions.

Accordingly we propose that we provide you with a sample of 10-15 engagements where we have recommended AGAINST the board's recommendation during this year's AGM season.

If this is acceptable please let us know at your convenience. We would also welcome some direction on the types of resolution or specific companies that ASIC would be interested in investigating.

With best regards

Dean Paatsch & Martin Lawrence

Ownership Matters Pty Ltd