Market Conduct Division
The Treasury
Parkes ACT
By email: MCDproxyadvice@treasury.gov.au

Proposed legislation to "kneecap" proxy advisers

Dear Treasurer Frydenberg (via Treasury's Market Conduct Division),

Thank you for the opportunity to contribute to the deliberations about the regulation of proxy advisers in the Australian market.

I have been engaging with and influenced by proxy advisers for more than 20 years as a long time business journalist and Australia's best known retail shareholder activist. This has included asked questions at almost 500 public company AGMs since 1998 and running for 54 public company boards.

Many of my questions at AGMs over the years have been informed by the good work and research by a variety of proxy advisers, often after their voting recommendations are reported in the media.

My lived experience of AGMs is that the proxy advisers tend to be all over the governance issues that matter and boards often try to cover this up at the AGM whilst the retail shareholders usually have no idea when asking questions from the floor.

Whilst I broadly admire the work of proxy advisers, they are often too conservative and pro-board and have been no supporters of my various governance campaigns. Indeed, despite proxy advisers making recommendations on more than 150 occasions about my various board tilts, voting support has only been forthcoming on the following 4 occasions:

+ ASA with AFIC in 2013
+ ISS with Centro Retail in 2008
+ ISS and Ownership Matters with Harvey Norman in 2019

In other words, they all too often side with the incumbent board and rarely support challenging candidates. Disappointingly, proxy advisers have also rarely directly engaged with me before recommending against in a board tilt, let alone shown me the report five days ahead of publication for fact checking purposes.

The same thing happens with external shareholder resolutions (usually related to climate change) put up by the likes of the Australasian Centre for Corporate Responsibility or Market Forces. Proxy advisers such as ASA and Ownership Matters rarely support them or engage with the proponent, even on matters such as giving shareholders more constitutional power to put up US-style opinion-based resolutions.

I also served two volunteer stints over 5 years on the board of The Australian Shareholders' Association, plus was a paid consultant in charge of their proxy voting advice operations for the 2012 and 2013 AGM seasons when serving as ASA Policy and Engagement Co-ordinator.

When working as a proxy adviser for the ASA, I directed the voting of almost $10 billion worth of undirected proxies over a two year period and engaged with numerous companies, However,

in hindsight I admit that our engagement practices were inconsistent because the approximately 350 proxy voting reports generated during this period were largely written by close to 100 ASA company monitoring volunteers.

In terms of fact checking, most monitors engaged with senior company personnel (often the chair) before the AGM and then even showed their draft reports to the company before publication. However, this was not mandatory and others did not.

In terms of the questions asked at AGMs, some ASA monitors email them through to the chairman or company secretary ahead of time, whilst others choose to not telegraph their punches. I strongly prefer the latter approach as the AGM is a chance to see how a chair and CEO handle unscripted questions without notice.

On the occasions where I've had an opportunity to be briefed by an informed proxy adviser ahead of an AGM, the quality and incisiveness of my questions is usually significantly better. This experience has caused me to lament the locked up private nature of these reports given the quality of the material and the importance of public company governance, particularly in a country with compulsory superannuation and such a large asset allocation to Australian equities. Literally every worker (excluding SMSFs) is exposed to these companies through their superannuation, so why doesn't the government take a greater interest in promoting good public company governance?

All the ASA voting intentions reports were effectively public because some were unlocked on the ASA website and others could be accessed by ASA members who paid the modest annual membership fee of approximately $130. The ASA has a unique role in the Australian market because it is the only proxy adviser which services retail investors and it also acts as a proxy aggregator voting billions of dollars worth of undirected proxies at AGMs each year.

ASA proxies peaked at close to $8 billion in 2007-08 when the market hit a record high before the GFC but have since fallen away to approximately $4 billion, largely due to the shift to online voting and retail shareholder fatigue in terms of continually appointing the ASA to little effect. The ASA has never applied for an AFSL to conduct its proxy advice activities and I believe it should, particularly when it is effectively giving financial advice by recommending and voting on corporate control transactions, buybacks and the like. If the wholesale proxy advisers are licenced, why not the ASA, particularly when the costs are said to be less than $20,000 per year.

I also believe there are inherent problems with quality control in the ASA model of relying on largely retired volunteers to engage with companies and generate proxy voting recommendations. Whilst the one Sydney-based staff member who co-ordinates the monitoring program, Fiona Balzer, does a great job, she is under-resourced and monitors are too often charmed or captured by the companies they cover. There are also inherent conflicts of interest with ASA generating close to 10% of its annual income by selling corporate memberships to companies which they cover.

I believe many companies pay money to ASA and offer up their senior brass for engagement with the monitor in the hope that this will lead to support for all board recommendations at the AGM, minimal AGM debate and no negative media coverage.

That said, ASA tends to recommend against more board-endorsed resolutions than the 4 wholesale proxy advisers: ACSI, CGI Glass Lewis, ISS and Ownership Matters.

There is a real public good in the work of proxy advisers and it is shame all of the good work by the 4 wholesale providers are not seen by the public, retail investors or even the ASA.

A better model for ASA would be to subscribe to the work of the proxy voting professionals and then recommend voting based on their expert advice, balanced against a right of reply from the companies. The ASA volunteer army could then be focused on AGM attendance, physically casting the votes, asking questions and direct company engagement to effect change, such as improved disclosure or the appointment of more independent directors.

Unfortunately, under their licence and insurance arrangements, the likes of ISS, CGI Glass Lewis and Ownership Matters are not permitted to make their reports public or provide them to retail investors.

This is a shame given the quality of the work involved. A good solution here would be the for the government to recognise the public good of proxy advisers and offer government subsidies to beef up their capability and make their reports public, even if it is only shortly before the AGM. Alternatively, why not pay them each $1 million a year to publish their full back catalogue?

Their institutional clients do need to receive the reports at least 10 days before the AGM because most tend to vote around 4-6 days before the AGM. The current time frame does not allow for a 5 day fact checking and right of reply period, unless the government is minded to increase the present 28 day notice period for the publication of the items on the agenda at public company AGMs.

Overall, I am largely supportive of the submission advanced by Ownership Matters and strongly believe the government should not force private researchers to disgorge their valuable intellectual property to third parties against their wishes.

Has the government and Treasury forgotten about the concepts of freedom of choice, freedom of speech and the rights of private entities to contract with each other free of government intervention. Please ditch this idea just like the other recent Treasury/Frydenberg thought bubble pushed at the behest of the directors' club, namely permanently ditching the physical AGM. Why don't you try coming up with some reform that might actually improve transparency, disclosure and good governance in public company land? Every time you step up of late, it seems to be to promote a retrograde step that will make life easier and less accountable for the public company directors and their CEOs.

Other potential more useful reforms

If you really need to tinker with the current proxy voting system on a permanent basis, please instead consider introducing the following reforms:

Allow the Australian Electoral Commission or other independent bodies to run public company elections thereby removing the obvious conflict of interests where incumbent boards game the system to tilt outcomes in their favour. Forcing proxy advisers to fact check their reports with boards will just further tilt the playing field in favour of directors.

Require ASX200 companies to include “Australian Shareholders’ Association” in the drop down box for investors who are voting online and considering appointing a proxy other than the chairman. This will increase the amount of proxies held by the ASA, thereby increasing the influence of retail investors as a class and reducing the amount of undirected proxies that finish up in the hands of the chair.

Require public companies to make an ASX announcement disclosing the proxy votes the day before the AGM, including an explanation of any significant against votes. Where relevant, this should include details of which proxy advisers recommended votes against resolutions and why. Too often protest votes happen at public company AGMs which are not publicly explained by the company, the proxy advisers or the shareholders who voted against.

Require ASX200 companies to maintain a public register of engagement with all proxy advisers and significant shareholders, similar to the way Victorian councils are required to publicly disclose the issues discussed at meetings involving councillors and at least one officer. See an example of disclosures about 17 informal meetings of councillors starting on page 263 of this agenda from the May 25 2021 City of Manningham council meeting.

Encourage proxy advisers to turn up at AGMs and explain to all shareholders why they are recommending against a particular resolution. If the ASA can do this, why not the wholesale proxy advisers, some of whom have never even attended a physical AGM of a public company.

Require public companies to publish a full transcript of their AGM to the ASX and on their website along with a full video or audio webcast so there is a full and accessible record of what was said. This is no different to requiring a Parliamentary Hansard or transcripts of court proceedings. You wouldn’t ask lawyers and politicians to scroll back through video archives of Parliament or court cases, so get with the program and mandate transcripts of AGM debates.

Make it easier for institutional shareholders to vote directly or by proxy at the actual meeting, to reduce the so-called Davis Cup dead rubber effect, where retail shareholders are voting knowing that institutions have already decided the outcome. This could be achieved by moving the record date for voting from 48 hours before the meeting to 5 working days before the meeting, thereby creating more time to sort out proxy appointments to facilitate live institutional AGM voting. This would make directors earn their majorities in the way they address shareholders at the meeting before the final poll is conducted, because an arrogant or dismissive answer to a question could be punished with a changed late vote at the meeting.

Yours Sincerely

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