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17 June 2016

The Manager, Corporations and Schemes Unit
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By email to corporations.amendments@treasury.gov.au

ASA SUBMISSION – TECHNOLOGY NEUTRALITY IN DISTRIBUTING COMPANY MEETING NOTICES AND MATERIALS PROPOSAL PAPER

Dear Sirs

The Australian Shareholders' Association (ASA) represents its members to promote and safeguard their interests in the Australian equity capital markets. The ASA is an independent not-for-profit organisation funded by and operating in the interests of its members, primarily individual and retail investors, self-managed superannuation fund (SMSF) trustees and investors generally seeking ASA's representation and support. ASA also represents those investors and shareholders who are not members, but follow the ASA through various means, as our relevance extends to the broader investor community.

We refer to the Treasury's proposal paper titled "Technology neutrality in distributing company meeting notices and materials" dated May 2016. We note the Government's objective of striking the right balance between encouraging innovation, reducing compliance costs for businesses and ensuring that shareholders receive the information they need to exercise their rights.

Our comments in this submission apply to the delivery of notices of meetings by a company (including for annual and extraordinary general meetings), annual reports, takeover materials and other shareholder communications. The proposal paper implicitly covers only Australian listed companies; we assume that it is intended to include such companies even if incorporated overseas. We have not commented on unlisted public companies, although (where relevant) the same principles of transparency, fairness and timeliness should apply to them also.

Summary of ASA's position

We applaud the sentiments expressed in the paper's foreword. However, we do not believe that the proposals strike the right balance between efficiency and cost savings to companies and ensuring that shareholders are able to exercise their rights in a properly informed manner. In our view, the paper places too great an emphasis on the compliance burden on, and cost savings to, companies. We strongly believe that if the proposals are implemented, they will not only result in a lesser degree of shareholder engagement and participation in the AGM (whether by proxy vote, direct voting or AGM attendance), but also in shareholders being less informed more generally

regarding their investments, because they are less likely to read the lengthy documents distributed by companies in electronic form. Neither of these would be a positive outcome.

Concerns about implied and deemed consent

We have serious concerns about the concept of "implied consent" which would allow companies to switch shareholders to email communications (i.e. receipt of a notice of meeting or notification of release of documents by email) without the shareholder's knowledge. For example, a shareholder emailing a company with a question would unlikely think that this would result in all future correspondence from the company being defaulted to email, or that particular email address. We are not aware of such a concept being applied in any other context and believe this would certainly result in a higher number of disengaged shareholders who might miss an email or SMS because they were expecting hard copy documents. As the proposed changes relate to fundamental shareholder rights to be informed and be in a position to exercise voting rights, any consent must be express and with the shareholder's knowledge.

Support for "opt-in" system for hard copy documents

The critical principle must be that each individual shareholder gets documents in whatever form he or she wants, which is not reversed or changed by a generic prescription. We are supportive of an "opt-in" system for receiving hard copy documents, with the default position being electronic communications, but only where shareholders are able to make a positive election to receive hard copy documents. Electronic communications could involve placing the documents on a website, but it remains critical that the shareholder is advised (in his or her preferred manner) that the documents have been posted and how to access those materials. This appears to be consistent with the responses to the 2012 CAMAC discussion paper on *The AGM and shareholder engagement*. We trust that Treasury has considered the responses to the CAMAC paper to the extent relevant.

Reading soft copy documents

We accept that there is a trend towards a greater use of technology. However, the statistics presented in the paper do not differentiate between the types or volumes of material that users are accessing via mobile phones or the internet. Using a phone or tablet to view news articles, make phone calls or communicate with people overseas via Skype is very different from viewing a scheme booklet or an annual report in excess of 100 pages on a small screen. A recent study by KPMG[1] found that the average length of an Australian listed company annual report is 155 pages, with 70 pages dedicated to the financial statements. Reading and analysing one page of a company's financial statements on a phone would be difficult, let alone reviewing the full annual report. On a smaller scale, the same is true of notices of meeting.

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[1] KMPG report, "Survey of Business Reporting 2016 – Room for improvement", accessed at https://home.kpmg.com/au/en/home/insights/2016/04/kpmg-survey-business-reporting-second-edition.html on 9 June 2016.

Issues with selecting communications preferences

It is important that there is an ability for shareholders to elect to receive different forms of communications for different documents (eg notices of meeting, annual reports, and dividend and tax statements) via post or electronically, depending on their preferences. We have historically found that communication preferences selected on share registry websites are inflexible and not always reliable; they often result in shareholders receiving all or nothing in the post/by email, and for such preferences to apply to all of their holdings even where such a decision was not made, or made with respect to only one investment. Nearly all Australian listed companies have outsourced their registry functions to a handful of commercial registries; we acknowledge that there is scope for beneficial and efficient changes to communications practices, but they must be implemented carefully to respect the individual wishes of investors.

Declining AGM numbers

Declining AGM attendance numbers should not be used to try to justify sweeping changes to communications methods, including the purported reason of reducing the costs of sending AGM materials to shareholders. The two matters are both important, but not causally related. Commentary often focusses on statistics showing that the level of "shareholder engagement" via the AGM has reduced over time. This observation is simplistic: it ignores the much larger numbers of investors who vote by proxy or directly, and those who use webcasts. The attribution of a claimed $1 million AGM cost to only those physically present is highly misleading. ASA's view is that the proposed changes would further exacerbate shareholder disengagement.

Instead, rather than entrenching the trend towards a greater number of passive, uninformed and disengaged shareholders, regulatory change should focus on providing guidance to companies on how they can improve shareholder communications and engagement. This should include new forms of technology (including webcasting AGMs and promoting virtual AGMs), improving company (and share registry) websites, making better use of the AGM so as to encourage shareholders to attend and/or vote and preparing disclosure materials in a more reader-friendly and less legalistic manner. In this regard, we believe that refreshment of the ASX's Guidance Note on notices of meetings would be welcome, as well as the proposed guidance from ASIC. The means of communication is important but secondary to the quality of content: notices should be comprehensive, not misleading by omission or inclusion, and free of legalese.

Amount of notice

We do not support the proposal to reduce the notification requirement to 21 days. We have observed that companies generally send meeting materials for an AGM (notice of meeting and annual report) at the same time. With deemed notice provisions in most company constitutions, this would generally mean that the materials are only despatched the day before the 28 day deadline. With Australia Post now taking substantially longer to deliver mail, to further reduce this period would not allow adequate time for shareholders to consider the materials. This is particularly so as shareholders would often receive the materials for several of the companies they hold shares in at around the same time in the two main reporting seasons of the year.

Further, if a shareholder was receiving electronic communications and subsequently contacted the company to request a hard copy, the documents would need to arrive in time to allow the shareholder to consider the documents and then decide how he or she will vote. A shorter notice period and Australia Post delays would only make this harder.

The paper does not provide evidence to support the following assertions: 'the 28 day notice requirement has been perceived to be too onerous as it places greater demands on directors and company management and could increase costs without any measurable corresponding benefit to the shareholders'. In our view, the benefit to shareholders of the 28 day notice period far outweighs any perceived demand on directors and management, or extra cost.

If anything, directors and management should be encouraged to provide more notice to shareholders than the minimum required by legislation. In order to make an informed vote on certain resolutions (e.g. the remuneration report) shareholders need to read and consider various sections of the annual report. This is already difficult for investors in multiple companies, and would be made even harder by shortening the available time. Companies already have to concentrate most of their financial reporting effort into the two month deadline for reporting results to the ASX, so it is difficult to see that they would gain much benefit from a 7 day reduction in the statutory notice period.

As a separate but related point, we were recently advised by an ASX100 company that 66 proxies were received after the deadline for proxies for its AGM. This means that these 66 proxies were not counted. Given the online proxy service would naturally close at the deadline, we assume these were proxies sent by post (and to a lesser extent, facsimile). We give this example to emphasise that Australia Post delays are a serious matter and must be taken into account in considering any proposal to reduce the notification period.

Listed Australian trusts

It is unfortunate that the paper makes no reference to the serious and long-standing omission that listed Australian trusts are not required to have AGMs, either under the Corporations Act or the ASX Listing Rules. This is completely contrary to the spirit of good governance and investor engagement, and unsatisfactory given that all listed entities, irrespective of their capital structure, have at some time raised capital from the public.

Responses to specific questions

1. **Is the proposed framework an effective mechanism for informing shareholders of their rights, and providing them with sufficient opportunity to select their preferred distribution method?**

See above comments. In our view, any proposed change to the current rules must, at a minimum, clearly set out how communications should be made (e.g. hard copy or by email). It would then be open to each company to use technology to communicate to its shareholders via other mediums such as SMS, apps and its website in addition to the minimum requirements.

We find the proposed framework somewhat confusing and believe that there is undue scope for differing interpretations on the options. We also do not fully comprehend the scope of Method C as proposed and how it will operate.

In particular, we have serious concerns about allowing companies to interpret certain actions by shareholders, such as writing an email to the company or providing an email address, to be "implied consent", and allowing a company to amend its constitution to provide for "deemed consent" in these circumstances. Whilst constitutional amendments do require the approval of shareholders, the way such changes are described in the explanatory notes is generally highly legalistic; we doubt whether the majority of shareholders approving such amendments would fully appreciate the nature and impact of the changes.

Any consent should be express (including for the purpose of any "opt-in" system) and should be in writing or email (not oral) to avoid any doubt whether consent has in fact been given.

2. How would the proposed framework impact on shareholder communications and exercise of voting rights?

As discussed above, our view is that the proposed framework, which clearly facilitates companies moving shareholders to receiving electronic communications, will result in fewer shareholders reading the important disclosure materials (especially on more complex resolutions) and therefore being less engaged and less minded to exercise their voting rights. Whilst electronic distribution would reduce costs to the company, it is important to emphasise that the materials in question are important documents that affect their rights and should be read by all shareholders.

As an example, when we surveyed ASA members about how often they read our monthly member magazine, we found that of ASA members who are subscribed to receive the hard copy magazine, 79% said they read the magazine. Of those receiving the electronic version, 57% said they read the magazine. Our magazine is 24 pages long and already we saw a material drop in reader levels between the hard copy recipients and soft copy recipients. We think that such differences would be much greater in the case of annual reports and notices, and the reality is that many shareholders receive AGM material from several companies in a short timeframe.

3. If a shareholder does not make an election of their preferred delivery method of communication when asked by the company, what other notification obligation (if any) should the company have with respect to that shareholder?

3.1. What if there is repetitive non-response from the shareholder?

As discussed above, we are supportive of electronic communications by email being the default communication method, with shareholders being able to elect to receive particular documents in hard copy. The company should notify the shareholder via email, post and telephone (provided the company has these details) regarding the shareholder's preferred delivery method. If the shareholder is not contactable or no response is otherwise received within a reasonable timeframe, then the default mode of communication (email) would apply. The company should

notify the shareholder that the shareholder will be receiving documents electronically in the future.

4. Should the initial notification requirement be discontinued after a period of time as the market becomes accustomed to the new rule?

No. All shareholders should receive a direct notification from the company providing them with an opportunity to elect to receive documents in hard copy form. This should be the case irrespective of how long any new framework has been in place. This should be done separately by each company and not as a bulk election from the major share registries regarding multiple holdings.

5. How could the legislation facilitate the ability of companies to obtain the necessary details from shareholders to use alternative communication methods to post?

We do not consider that any legislative changes are required in this regard. However, if Government believes that legislation is required, the most market-friendly means would be through giving ASIC the power to make and modify the appropriate instruments.

6. What further transitional arrangements (if any) are necessary?

None that we are aware of.

7. The proposal contemplates that notification involves notice individually directed at the member.

7.1. Should a member be able to consent to a more general public notice under Method B?

7.2. Similarly, are there circumstances where a company should be able to determine general public notice as effective under Method C?

We consider that it is imperative that all shareholders should receive a direct notification from the company providing them with an opportunity to elect to receive documents in hard copy form. A public notice can hardly be considered as an effective form of communication and its role, if any, should only be to assist in alerting shareholders to expect the notification, rather than being the notification itself.

8. Is it appropriate to expand the proposal to delivery of:

8.1. notices of all company meetings (i.e. annual general meetings, special general meetings, takeover meetings, meetings of members of scheme arrangements);

8.2. annual reports; and

8.3. other documents.

Our comments in this paper apply to the delivery of notices of meetings by a company (including for annual and extraordinary general meetings), annual reports, takeover materials and other shareholder communications.

Please do not hesitate to contact me if you have any queries.

Yours faithfully,

Diana D'Ambra
Chairman, Australian Shareholders' Association