OWNERSHIP MATTERS

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

16 August 2012

Mr John Kluver
Executive director
Corporations & Markets Advisory Committee (CAMAC)

Email: john.kluver@camac.gov.au; camac@camac.gov.au

RE: Submission on 'The AGM and shareholder engagement' discussion paper

Dear Mr Kluver,

Thank you for the opportunity to comment on CAMAC's discussion paper, 'The AGM and shareholder engagement'. Ownership Matters (OM), formed in 2011, is an Australian owned governance advisory firm serving institutional investors. The opinions contained in this submission are those of OM and not those of its clients.

This submission will respond only to those 'questions for consideration' in the discussion paper where OM considers its views are relevant. In general, OM supports the retention of the physical AGM as a requirement for listed companies as it provides an opportunity for shareholders large and small to engage with company boards and management directly, an opportunity unlikely to be available to small shareholders outside of the AGM. OM understands that the costs of a physical AGM for a large company – excluding costs of delivering company documents such as annual reports along with meeting notices – are immaterial. OM observes that many companies hold general meetings (the cost of which is largely the same as that of an AGM) for the sole purpose of seeking approval for equity grants to executives or for relatively trivial purposes such as name changes.

In relation to specific 'questions for consideration':

- **The role of the board in engagement with shareholders:** OM does not see any need for legislative or other initiatives to be adopted in relation to engagement between listed entity boards and their constituent directors and investors. The level of meaningful engagement between listed entities and their institutional investors has increased substantially over the past five years, with both the quantum and quality of engagement increasing over this time. A notable feature has been the increasing role that non-executive directors have played in discussing issues with shareholders and groups representing shareholders – as an example, in the past 12 months OM has had face-to-face or phone discussions with approximately 100 directors of S&P/ASX 300 entities **in addition** to discussions with executives.
- **The role of proxy advisers:** A substantial proportion of OM's operations relate to proxy advisory services for its institutional investor clients. OM holds an Australian Financial Services Licence (Number 423168) and operates in a market where there is no requirement for investors to purchase its services, with low barriers to entry and highly sophisticated and value-conscious clients. There is no evidence of any

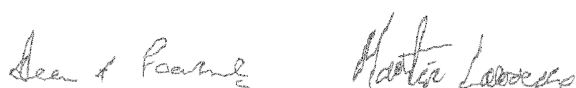
dysfunction in the proxy advisory market and OM notes the Productivity Commission's findings in this regard.

- OM also notes that the CAMAC discussion paper references regulatory reviews of proxy advisers in Europe, Canada and the US; in each of these reviews OM also notes there is no empirical evidence produced to back claims concerning the negative influence of proxy advisory firms. This point has been acknowledged by several of the regulatory bodies conducting these reviews.
- OM also notes that as a matter of practice it makes copies of its reports available at no cost to listed entities upon publication to clients. OM also as a matter of practice contacts listed entities to obtain more information about problematic issues prior to publication of reports in order to provide that information to clients. OM views this as a key competitive advantage and part of its promise to its clients. It is also aware that institutional investors routinely discuss voting items with directors and management of listed entities prior to deciding how to vote and do not simply follow our advice without careful consideration.
- **Timing requirements of AGM items:** OM considers there to be merit in improving the ability of shareholders to utilise their rights to submit resolutions and candidates for election at company AGMs by adapting the current requirements of the New Zealand Stock Exchange's Listing Rules. NZSX Listing Rule 3.3.5 requires a listed entity to make an announcement to the market at least 10 business days prior to the closing date for director nominations ahead of the AGM. A similar requirement under the ASX Listing Rules for listed entities to make an announcement 10 business days prior to the deadline for nominations and shareholder resolutions would give investors greater certainty about the applicable deadline for submitting candidates for election or resolutions for consideration. This would address the uncertainty noted in section 5.4.3 of the CAMAC discussion paper.
- **Obligation on auditor to answer questions:** A statutory obligation for the auditor to respond to written or spoken questions at a company's AGM would improve shareholders' ability to seek information on the financial accounts of the company, one of the key rationales for the AGM.
- **Additions to the business of the AGM:** The discussion paper notes that the rights of shareholders in listed companies are confined to a handful of matters – the election of directors, major transactions, related party transactions, constitutional amendments and other statutory requirements such as remuneration report matters. Australian shareholders at present under the Act and the ASX Listing Rules have limited rights in relation to the allocation of shares to executives and other employees – there is no requirement for shares to be allocated only under shareholder approved incentive schemes and no limit on allocations under incentive schemes other than the general limit on new issues of 15 percent over any 12 month period without preemptive rights to non-related parties.
- Australia's liberal related party regime also means companies are not required to seek approval for the purposes of the Corporations Act or Listing Rule related party provisions for equity incentives so long as they do not involve the issue of shares to a director. Companies are able to avoid the limited protection under ASX Listing Rule 10.14 by simply using shareholder funds to acquire company shares on-market on behalf of directors.

- This lack of shareholder control over allocation of company shares to insiders such as executives and other employees under incentive schemes creates significant potential for dilution and abuse. It could be remedied by requiring any allocation of equity, whether by the issue of new shares or acquisition of shares on-market using shareholder funds, as part of remuneration from the company to be made under a scheme approved in advance by shareholders, with such approval to include limits on the number of shares that may be allocated over any three year period under the approval. Any such change should also consider the submission by the ASX to the Productivity Commission inquiry into executive remuneration suggesting that provisions presently in the Listing Rules dealing with matters of remuneration and related party issues be shifted to the Corporations Act.[1]
- **Proxy voting:** In relation to the questions raised around the proxy voting process, including voting exclusions, OM endorses the recommendations contained in the Australian Council of Superannuation Investors' research paper, *Institutional Proxy Voting in Australia*, on improving the integrity and efficiency of the voting system.
- **Access to voting information prior to the AGM:** Section 672B of the *Corporations Act* presently allows listed companies (or those working on their behalf) to demand custodians disclose the voting instructions they have received from shareholders **prior** to the AGM. These voting instruction provisions are necessary to ensure companies (and regulators) are able to identify shareholders acting in concert and/or potentially in breach of foreign investment or takeover laws but OM is aware that presently there is widespread use of these provisions by companies to demand that custodians disclose voting information on items such as the adoption of the remuneration report. There does not appear any justification for allowing companies and their advisers to demand voting information of this kind prior to AGMs for a fee of $5 (proscribed under the Corporations Regulations).
- **Record keeping:** OM supports a statutory requirement for retention of voting records for all company meetings for a period of at least 15 months.
- **Voting procedure for directors:** OM supports the present framework for director elections at Australian companies (subject to the recommendations of the ACSI paper noted above). It also endorses the 2011 amendments to the Corporations Act that prohibit an incumbent board from declaring there to be 'no vacancy' on the board in response to a non-board endorsed director candidate unless shareholders have endorsed the present size of the board.

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

Yours sincerely,



Dean Paatsch & Martin Lawrence

Ownership Matters Pty Ltd

---

[1] See Australian Securities Exchange, 'Regulation of director and executive remuneration in Australia', Submission to Productivity Commission, 29 May 2009, available at http://www.pc.gov.au/__data/assets/pdf_file/0003/89544/sub064.pdf.