# Submission

**by**

**Australasian Centre for Corporate Responsibility**

**(ACCR)**

**to**

**Corporations and Markets Advisory Committee**

**(CAMAC)**

**in regard September 2012 discussion paper *"The AGM and shareholder engagement"***

**December 2012**

# Australasian Centre for Corporate Responsibility (ACCR)

Quaker Meeting House, Bent St, Turner ACT, 2601

12 Dec 2012

Mr John Kluver

By email john.kluver@camac.gov.au

Cc: camac@camac.gov.au

**RE: Request for submissions in regard to issues raised in CAMAC discussion paper "*The AGM and shareholder engagement*"**

Dear Mr Kluver,

Please find attached below our submission on some of the issues raised in the September 2012 discussion paper.

This submission is not confidential. We would be happy to speak further to its content if you have any queries.

By way of background the ACCR is a recently established association whose primary purpose is to promote ethical investment, in particular shareholder engagement and advocacy, with the aim that corporate activity assists humanity live more justly and within the carrying capacity of supporting ecosystems. It is modelled on the US Interfaith Center on Corporate Responsibility.

Yours sincerely

Howard Pender

Office Bearer, ACCR

on behalf of ACCR establishment committee (Liz Cham, Robert Howell, John McKinnon, Howard Pender and Jill Sutton)

# Executive summary

1. Healthy corporate democracy can and should be a vital part of the Australian commercial landscape.
2. Public policy should support intellectual engagement between shareholders and boards in order to nurture healthy corporate democracy whilst deterring vexatious engagement.
3. Current Australian legal arrangements fail to adequately protect shareholder interests when they endeavour to engage with other shareholders and the boards of the companies they own.
4. The paper "The AGM and shareholder engagement" misses an opportunity to canvass proposals and describe possible arrangements (based on overseas experience) which would enhance the functioning of Australian corporate democracy.
5. We propose Australian law should be amended to: make it easier for shareholders to put resolutions at AGM's (and to requisition the distribution of statements prior to the AGM by the company to all shareholders); make it harder to call meetings; & to empower ASIC to act as an "instant arbiter" in regard shareholder/board disputes over these sort of issues (much like the US SEC is able to do at present).

# 1. General comments

a. The paper overstates the practical power of shareholders in Australian registered and listed companies. In some cases dated opinions as to the legal situation are stated without reference to recent practical experience**.**
b. The paper is deficient in omitting to frame its discussion with a view to the economics of corporate governance. In particular no mention is made of three fundamental economic issues the law of corporate governance deals with:
    - firstly, the principal agent problem - boards are agents of shareholders with incentives to shirk that responsibility and avoid transparency in regard their discharge of that role;
    - secondly, the free rider problem amongst shareholders - it's not in any one shareholders interest to devote due resourcing to monitoring an individual board's discharge of its role, so the state has an interest in encouraging such scrutiny provided it does not become vexatious;
    - thirdly, a substantial fraction of the listed ASX market is owned by index funds which, by construction, seek to enjoy the benefits of share ownership without discharging any of the responsibilities.
c. The paper fails to describe the healthy dimensions of corporate democracy in other jurisdictions particularly the US and Scandinavia. Some of these are:

- the very different practical arrangements in the US (as compared to those in Australia) for the placing and consideration of shareholder resolutions. The US Interfaith Centre on Corporate Responsibility coordinates hundreds of resolutions each year, an activity virtually unknown in Australia. The typical levels of support in the US (often building over some years) is 20%;
- the clear statement by the SEC as to what constitutes management business and the way the SEC acts as an instant arbiter in regard disputes over a proposed shareholder resolution;
- legal arrangements which enable shareholders to have an intellectual disagreement with a board on an issue without it becoming an issue of personal conflict.

d. The paper contained very little sense of recent statistics in regard formal shareholder engagement and attempted placement of resolutions with boards. The following statistics deal with ASX 200 companies and the period since 2000. We are aware of 4 campaigns by unions which involved a request for distribution of statements & lodging of resolutions. In addition we are aware of 10 requests to distribute statements or place resolutions on AGM agendas lodged by non-union groups. Out of these 10 resolutions:
    - one was withdrawn as the board agreed to the request (Oilsearch,2011);
    - in three cases the board refused to put the resolution on the notice of meeting arguing that shareholders did not have the power to pass a resolution dealing with the content of a board report to shareholders (ANZ,2011;Paladin Energy,2010 & Aquila Resources,2010). In one of these cases (ANZ,2011) the board refused to even distribute a statement to all shareholders (though the request satisfied the procedural requirements), implicitly arguing the content of the directors report to shareholders wasn't a matter for consideration at a general meeting. These sort of issues were conclusively addressed (in favour of shareholder's rights) long ago in regard US law[1];

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[1] In a 1954 case Auer v. Dressel , a US appeal court held that shareholders could propound and vote upon resolutions which, even if adopted, would be purely advisory.

In a 1970 case Medical committee for Human Rights v SEC a US appeal court considered an SEC decision supporting a company which had refused to put a resolution on its agenda to amend the charter of Dow Chemical such that "napalm shall not be sold to any buyer unless that buyer gives reasonable assurance that the substance will not be used on or against **human** beings." The court found against the SEC stating

**"*the proposal relates solely to a matter that is completely within the accepted sphere of corporate activity and control. No reason has been advanced in the present proceedings which leads to the conclusion that management may properly place obstacles in the path of shareholders who wish to present to their co-owners, in accord with applicable state law, the question of whether they wish to have their assets used in a manner which they believe to be more socially responsible but possibly less profitable than that which is dictated by present company policy."***

In fact it appeared profit would increase if napalm production for military use was to be ceased.

- six resolutions were considered by shareholders (Woolworths,2012; Woodside,2011; Gunns & Boral,2003;CBA & NAB,2002), of these five were special resolutions, the average level of support for these six resolutions was 10%;
- no resolution has ever been put multiple years in a row as is standard US practice.

On the basis of these statistics there does not appear to be any problem with vexatious abuse of shareholder rights in Australia. To the contrary the statistics support the view that current arrangements unduly stymy the exercise of shareholder rights and responsibilities.

# 2. Specific comments

## Chapter 2

1. P 13, the discussion implies shareholders are able to vote on the content of the annual financial report, director's report and auditor's report. This contention, though perhaps not strictly theoretically inaccurate, is quite misleading as a matter of practice. Shareholders are unable in Australia by virtue of practice to consider "pious" [2]resolutions commenting on the content of the annual financial report, director's report or auditor's report. See the discussion above which sets out experience with recent resolutions. Despite the fact these reports are addressed to shareholders, company secretaries have prevented shareholders considering a resolution commenting on the content of such reports. There is one law firm which we understand is happy to provide company secretaries with an opinion that Australian law precludes shareholders formally even commenting on the content of an annual financial report, director's report or auditor's report despite the fact these are addressed to the shareholders in general meeting.

# Chapter 3

1. The discussion on pages 28 to 34 describing the UK situation omits a number of important issues:
    - firstly, the situation in Australia in regards the relationship between the board and the general meeting does not apply in the UK. Shareholder resolutions in the UK are explicitly expressed as " The shareholders direct the board… ", which would be nonsensical in Australia;
    - secondly, voting by institutional shareholders is easier as a result of explicit "board must look through custodian" provisions in UK law.

[2] A "pious" resolution expresses the sentiment of a meeting without mandating a course of action.

This section would have been much more useful, as a stimulus to Australian discussion, if it contained some description of the situation in the US. Routinely, foundations, religious groups, US state governments and concerned individuals place resolutions on US company AGM agendas.

2. Answer to query in regards "3.4 Questions for consideration"

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

Yes, as part of a quid pro quo which makes it easier to put resolutions and harder for boards to resort to legal tactics to avoid shareholder scrutiny. The latter would best be achieved by ensuring ASIC can and does act like the SEC in regard shareholder/board disputes over AGM resolution and related issues.

The ACCR does not in general support requisition by members of EGM’s. However, in our view arrangements to promote awareness amongst all shareholders of scrutiny by individual shareholders without imposing undue cost on all shareholders are best provided by making it harder to call meetings but easier to put resolutions ( & requisition the distribution of statements) in regard meetings which have been/must be called. In light of the experience since 2000 (described above) with the 100 member rule there is unlikely to be a problem with vexatious behaviour if this rule was relaxed in regard to requiring distribution of statements/placement of resolutions. In our view use of the same numeric test (100 members) as a threshold to both put a resolution and to call a meeting is poor public policy. We support continuation of the 5% threshold in both situations.

# Chapter 5

3. P 64,the first paragraph under heading 5.4.2 omits to canvass an important distinction in current Australian practice:
    - a shareholder statement does not have to concern a resolution and the ACCR is aware of 2 recent situations where the board has rejected pious resolutions (whereby shareholders sought to comment on the content of the annual directors report to shareholders) on the grounds such comment is not shareholder business;
    - but the boards did distribute statements on the matter because it could be considered at an AGM;

4. p 65 The CASAC suggestion of requiring each of the 100 shareholders hold a minimum $1,000 parcel is almost superfluous because it's hard to get a parcel less than a marketable parcel $500. The exception is where the value of the shares of the company have decreased a lot. And in this situation it is arguable those shareholder should have a right to put resolutions.
5. P 66, Footnote 236, this listing rule is very commonly not complied with.