Law Council
OF AUSTRALIA

Mr Martyn Hagan
Acting Secretary-General

9 January 2013

Mr John Kluver
Executive Director
CAMAC
GPO Box 3967
Sydney NSW 2001

Dear Mr Kluver,

CAMAC Discussion Paper: The AGM and Shareholder Engagement

I enclose a submission in response to CAMAC's Discussion Paper "The AGM and Shareholder Engagement" which has been prepared by the Corporations Committee of the Business Law Section of the Law Council of Australia.

The Committee has extracted the questions raised in the Discussion Paper and prepared its submission as responses to each of these questions.

The submission has been endorsed by the Business Law Section. This submission is lodged by the authority delegated by the Directors to the Acting Secretary-General, but does not necessarily reflect the personal views of each Director of the Law Council of Australia.

Should you have any questions, in the first instance please contact the Committee's Deputy Chair, Andrew Lumsden, on 02-9210 6385 or via email: Andrew.Lumsden@corrs.com.au

Yours sincerely,

Mr Martyn Hagan
Acting Secretary-General

Enc

GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone +61 2 6246 3788
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

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OF AUSTRALIA

Mr Martyn Hagan
Acting Secretary-General

Submission - Business Law Section

The AGM and Shareholder Engagement Discussion Paper

CAMAC September 2012

Question	Ref	BLS Comment
Should legislative or other initiatives (for instance, additional ASX Corporate Governance Council, or other, guidance) be adopted, and if so for what reasons, concerning: • the role of the board collectively as it relates to engagement with institutional/retail shareholders throughout the year, including leading up to the AGM • the role of particular board members, such as the board chair or the chairs of board committees, in relation to engagement with institutional/retail shareholders • the role of institutional shareholders throughout the year, including leading up to the AGM. In this context: – is there a problem with having a peak AGM season and, if so, how might this matter be resolved – should at least some institutional shareholders be required or encouraged to report on the nature and level of their engagement with the companies in which they invest, in the manner provided for in the UK	3.4	1 The Committee does not support additional legislation or other initiatives to further govern the way that the board of directors of modern ASX listed entities engages with their security holders. 2 Although the Committee supports strong engagement between a company's board and its shareholders, the current regulatory framework appropriately accommodates the need for establishing a minimum level of shareholder engagement while leaving boards to determine the most appropriate form of engagement having regard to the wide variety of listed entities and their varying needs. 3 The Committee understands that it is already common practice for a company's chairman and board committee(s) chairman to informally meet with significant shareholders. Maintaining the informal nature of these meetings allows directors to determine how best to utilise the meeting in either seeking to explain and advocate their company's governance and strategy or take a more passive role in seeking

GPO Box 1989, Canberra
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19 Torrens St Braddon ACT 2612

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639

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Stewardship Code or otherwise • corporate briefings • the role of proxy advisers, including: – standards for investors using proxy advisers, including the extent to which these investors should be entitled to rely on the advice of proxy advisers in making voting decisions, or, alternatively, whether those investors should have some obligation to bring an independent mind to bear on these matters. – standards for proxy advisers • any other aspect of shareholder engagement?		additional viewpoints about these issues. 4 The Committee considers that mandating that directors participate in more frequent structured briefings may involve directors unnecessarily having to advocate management's execution of the strategy on an ongoing basis. This could have the effect of lessening directors' objectivity. 5 Conversely, failing to advocate company performance risks division between management and the board. By not mandating additional formal board engagement, greater scope is provided to directors to use those discussions as simply a forum to obtain different views without needing to proactively comment on the company's performance. 6 Not formalising additional engagement also enables directors to determine how best to meet shareholder expectations. Where investors have particular concerns in relation to remuneration, financial oversight or risk management, companies will often offer consultation with the chairman of the relevant board committee. This more targeted approach ensures that shareholders are appropriately provided access to the director(s) who is best skilled to address shareholder questions. 7 Finally, following the 2011 *Centro* decision[1], additional focus has been placed on directors taking a proactive role in managing workload. For large companies, a director's workload is already significant with non-executive directors often attending 25-35 board and board committee meetings per

[1] *Australian Securities and Investments Commission v Healey* [2011] FCA 717

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		year with substantial pre-reading required for each meeting. In addition, directors are required to undertake ongoing education while also participating in existing engagements such as the AGM. 8 The Committee submits that adding to this workload by mandating additional formal engagements (which would trigger additional preparation of each meeting) is inconsistent with recent trends relating to the management of director workload. **Avoiding the AGM peak season** 9 See our comments below in relation to the potential extension of the statutory time period for holding an AGM (5.3.1). **The role of proxy advisers** *Standards for investors using proxy advisers* 10 The Committee sees no reason to alter the existing use of proxy advisers by Australian investors. The Committee supports efforts to ensure that institutional investors actively make voting decisions and devote sufficient time and resources to think about the issues involved. 11 The Committee notes concerns from various parties about the level of influence a proxy adviser recommendation may have on institutional investors voting behaviour. Even if this influence is not real, it is perceived, and is therefore potentially damaging to the efficiency of our financial market. The level of influence is likely to be significant where: • the institutional investor lacks the internal resources to consider and

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		analyse recommendations within the short timeframe required, resulting in proxy advisers becoming de facto decision makers. • there are structural incentives within the voting organisation to agree (and not to disagree) with a proxy adviser's recommendation (for example, disagreement with a recommendation may require the matter to be elevated, creating extra paperwork and time pressures for the officer involved). 12 The Committee's concerns echo the comments of those organisations such as the Australian Institute of Company Directors (AICD) set out in 3.1.5 of the Discussion Paper. *Standards for proxy advisers* 13 As a matter of policy, the Committee believes that all proxy advisers should be required to hold an Australian Financial Services Licence (AFSL) and supports establishing an appropriate licensing regime, including providing information on how conflicts of interest are managed. 14 Section 3.1.5 of the CAMAC report suggests that the major proxy advisers in Australia hold an AFSL. 15 The Committee notes with interest the recommendations from France (Autorite des Marches Financiers (AMF)) and the current discussion paper in Canada (Canadian Securities Administrators), summarised in section 3.3.2 of the CAMAC report. 16 The Committee thinks it is important that proxy advisers be required to engage with a company when their proposed voting recommendation differs to the voting recommendation provided by a company's board. In

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		some circumstances engagement can be critically important. For example, resolutions on a remuneration report where a 'no' vote emerges could have serious consequences for the board and the company having regard to the "two-strikes" and "board spill" legislation.
	17	Where a proxy adviser's voting recommendation differs to the voting recommendation of the company's board then, like the AMF, the Committee believes there is strong merit in requiring proxy advisers to: • distribute a copy of their draft report to the company (free of charge); • include in their final report any comments provided by the company; and • correct any substantive errors in the report identified by the company.
	18	Companies should be afforded a reasonable time to respond to a draft report.
	19	Implementing, reporting and auditing compliance with these requirements could form part of the AFSL license conditions.
	20	The Committee agrees that there should be no requirement for proxy advisers to publicly disclose their reports.
	21	The Committee believes there would be merit in obtaining better empirical data from institutional investors and proxy advisers to determine the extent of actual, as distinct from perceived, influence that proxy advisers exert. If market participants had a clear sense that proxy adviser recommendations were being used to inform, rather than substitute,

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			investors' voting decisions, this would, in its view, promote market efficiency.
		22	The Committee also supports the proposal to decouple the discussion function of an AGM from its decision making function (see below). If this occurs, institutional shareholders should be encouraged to attend the discussion function of the AGM and, if proxy advisers propose to provide a recommendation on any resolution to be put to the AGM, they should be required to attend the discussion function of the AGM as a condition of their licensing regime. The Committee has already recommended that proxy advisers be required to provide a copy of their report to the company if they proposed to recommend against any resolution at the meeting. This draft report should be required to be provided to the company prior to the date of the AGM discussion function.
Could greater use be made of technology to promote shareholder engagement outside the AGM and, if so, how?	3.4	23	The Committee agrees with the recommendations put forward in the Discussion Paper and further recommends that companies make active use of social media in their shareholder engagement.
		24	The CAMAC Discussion Paper notes various recommendations for the use of technology to promote shareholder engagement. For example: • the ASX Corporate Governance Council, Commentary on Recommendation 6.1, proposes that significant group briefings (including, but not limited to, results announcements) should be made widely accessible, including through the use of webcasting or teleconferencing or posting a transcript or summary of the transcript on their websites; • the Canadian Coalition for Good

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			Governance Report 2012 advocates that the limitations of communication with shareholders by in-person meetings may be reduced by companies using innovative approaches like websites and social media to reach a broader audience (giving the example of a Canadian company establishing a dedicated investor relations twitter account that is updated regularly).
		25	The Committee generally agrees with these recommendations, although strategies are needed to accommodate the interactive nature of some social media. However (consistently with the PJC Report, paragraph 2.1), the Committee recommends a non-regulatory approach to increasing the use of available technology for shareholder engagement purposes. This is because there is no need for legislative intervention here; market forces and best practice are likely to move listed entities towards the use of emerging technologies; and conversely regulation is likely to find it difficult to keep up with technological developments.
		26	The Committees does not see any impediment to broadcasting briefings in these ways. However, listed entities should give careful thought to the nature and sophistication of the likely audience, and to whether appropriate warnings should be included in the broadcast information to avoid misleading conduct (especially where the primary audience is likely to be more sophisticated than those who acquire the information through the website).
Should there be an amendment to the right of 100 members to call a general	3.4	27	The Committee continues to support the abolition of the 100 member rule.

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meeting of a company?		28	It is a legal anomaly that 100 shareholders may compel a general meeting, regardless of whether the company has 500 shareholders, or 500,000 shareholders.
		29	The 100 member rule does not make sense in today's context of large listed companies and the rule heavily contradicts the rationale for the 5% member threshold that currently operates separately to the 100 member rule.
		30	Australian listed companies are vulnerable to EGMs being used as a weapon against them by groups who disapprove of their operations. The recent Woolworths EGM in July 2012 called under the 100 member rule in relation to the proposed ban of gambling operations highlights the need to deal with this issue.
		31	In 2003, the Wilderness Society used the provision as part of its attack against Gunns. The society successfully requisitioned an extraordinary general meeting to put a resolution to ban old-growth logging. When the meeting went ahead, the resolution was defeated. In 2002, the Australian Manufacturing Workers Union rallied shareholders to requisition an EGM of the NRMA, which the motoring services company claimed would have cost it $3.75 million to stage. The meeting did not go ahead as the dispute was resolved. Other companies to face EGMs spearheaded by activist groups include Boral (from The Workers Union in 2003) and National Australia Bank (from the Wilderness Society in 2002).
		32	In the recent years, the 100-member rule has not often been used by

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			activist groups to tactically impede a company's operations as it was a far more common tactic 10 years ago. However, considering that other jurisdictions such as UK and France are only using the 5% threshold for EGMs, the 100-member rule in Australia is anomalous, outdated and should be abolished.
Should legislative or other changes be adopted, and if so for what reasons, concerning any aspect of the annual report requirements? In this context: • do the current reporting requirements produce any unnecessary information ('clutter') in annual reports and, if so, how might this be reduced • should the reporting requirements be redesigned in any respect, including along any of the lines adopted, or under consideration, in overseas jurisdictions, such as having a strategic report and an annual directors' statement • what, if any, issues of liability might arise in the event of changes to the reporting requirements, particularly in relation to forward-looking statements, and how might this matter be dealt with • how might technology best be employed to increase the accessibility of annual reports • what, if any, initiatives might be introduced to cater for future innovations in reporting (for instance, would it be beneficial to establish the equivalent of a Financial Reporting Laboratory)?	4.4	33	The Committee supports the development of enhanced narrative reporting as a way of better enabling investors and others to determine the value of a company. However before changing the rules the Committee believes there should be appropriate safe harbours for directors because of the need to make statements about the future (for example on risk) which, necessarily, have an element of uncertainty.
		34	Current legislation (requiring compliance with accounting standards) ensures that a minimum level of content is included in a company's annual report.
		35	Section 299 of the Corporations Act prescribes the type of information required to be provided by a company or disclosing entity in an annual report.
		36	Section 299A imposes additional requirements on a company or disclosing entity that is a listed public company to include an 'operating and financial review' (OFR) in the directors' report. The OFR must contain information that members of the entity would reasonably require to make an informed assessment of the entity's operations and financial position, as well as business strategies and the entity's prospects for future financial years (unless

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		disclosure would be likely to result in unreasonable prejudice). OFR is sometimes to referred to as "management commentary".
	37	ASIC has proposed a set of guidance for section 299A obligations in Consultation Paper 187 and the draft Regulatory Guide annexed to that Consultation Paper. In the draft Regulatory Guide, ASIC stated that information on business strategies and prospects for future financial years should: • focus on matters that may have a significant impact on the future financial performance and position of the entity; • discuss strategies and prospects in the short term as well as the long term, and not be limited to just the next financial year; and • contain balanced discussion about prospects, for example, by outlining the main risks which could adversely affect the entity's achievement of its outcomes.
	38	In addressing prospects, ASIC stated that a narrative discussion will be sufficient, but if financial forecasts are included, the guidance in *Regulatory Guide 170 Prospective financial information* should be considered.
	39	The draft Regulatory Guide further provides useful examples of disclosure about business strategies and prospects, in particular the level of detail that ASIC considers being appropriate for these types of disclosures.
	40	As a general principle, the Committee supports the draft Regulatory Guide, provided that the same time regulators provide a safe harbour for those preparing the forward looking

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		statements.
	41	While financial reports generally provide reasonable insight into past performance, the Committee agrees that many companies are reluctant to provide forward-looking commentary relating to future company performance.
	42	Where the directors' report is required to "refer to the likely developments in the entity's operations in future financial years and expected results of those operations"[2] many companies are cautious in addressing this requirement, being concerned about the inherent risk associated with any form of a subjective forward-looking statement.
	43	There is indeed benefit in companies providing forward-looking commentary, but the Committee notes that this benefit needs to be balanced against the common desire of companies to not provide any form of earnings guidance or disclose commercially sensitive information.
	44	In balancing the competing goals of keeping certain information confidential against encouraging disclosure to shareholders about the likely future performance of the company, the Committee notes the approach taken in other jurisdictions, most notably the United States[3] in providing a safe harbour for forward-looking disclosure made in good faith.
	45	While the operation of those off-shore approaches could be simplified, the Committee supports the inclusion of similar safe harbour.
	46	Other than as indicated above the

[2] s299(1)(e)
[3] s21E of the Securities Exchange Act 1934

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			Committee does not support additional regulation governing the content or presentation of the annual report.
		47	The Committee believes that investor expectations already drive companies to draft a report as streamlined and efficient as regulation allows.
		48	The Committee believes additional detailed regulation risks leading to undue complexity, with no better example than the Directors' Remuneration Report.
		49	The additive requirements of the Corporations Act, accounting standards and information desired by shareholders often leaves these reports poorly drafted, lengthy and containing information not used by stakeholders.
		50	The Committee supports reviewing the mandatory contents of this report to better reflect information useful to shareholders.
Should there be any change to the statutory time frame for holding an AGM?	5.3.1	51	The Committee supports the statutory time period for holding an AGM being extended by one month to three months subject to more fully understanding the position of ASX listed entities on the issue.
		52	Under current law, a listed public company must hold its AGM within five months after the end of its financial year: s250N(2). The company must lodge its annual report with ASIC within three months after the end of the financial year: s319(3). The company must provide the report to shareholders by the earlier of 21 days before the AGM, or four months after the end of the financial year: s315(1).
		53	Effectively this means there is a

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		window of two months for the interaction of shareholders with directors between completion of the annual report and the holding of the AGM.
	54	Extending the statutory time period could remedy the obvious difficulty of having approximately 1,500 AGMs held by the end of November each year.
	55	The Committee agrees that that the continuous disclosure regime in Australia has lessened the need for the annual report and AGM date to be in any way contemporaneous.
	56	Providing an extended time period would also facilitate greater engagement not only by retail shareholders, but also by institutional shareholders who would be less likely to experience clashes. The high number of AGMs in such a short space of time places enormous pressure on institutional investors who as a result, are compelled to delegate a great part of the voting process to proxy advisory firms. An extension of the time for holding an AGM will provide institutional shareholders with more time to engage with companies in relation to proxy advisers recommendations and more time for proxy advisers to engage with companies in relation to their recommendations
	57	This extension will become particularly favourable if the focus of the AGM shifts from reporting to a discussion. This is because attendance and involvement in the deliberation will become more relevant while the urgency of reporting to ensure the currency of information will become irrelevant.

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		58	The CSA/Blake Dawson discussion paper, Rethinking the AGM (2008), proposed extending the statutory period for holding the AGM by one month, on the grounds that this would prevent the bunching of AGMs in November and consequently allow institutional investors more time to consider the agendas for those meetings; and also the window for interaction of shareholders with directors would be extended from 2 to 3 months.
		59	However in the Allens Listed Client Survey (2012), the majority of respondents opposed this proposal, although the authors of the Allens Report suggested (in the passage quoted in the CAMAC Discussion Paper) that there were good reasons for supporting the proposal notwithstanding the reviews of the survey respondents.
		60	The Committee's view is that the case for change has not yet been made out. First, the result of the Allens survey is significant. For whatever reason, a substantial majority of respondents opposed the proposal.
		61	On a practical issue such as this, change should only be made if it is desired by those affected. Second, extending the timeframe to 6 months might simply produce a bunching up of AGMs in December rather than November, a worse outcome because the tidying up process after an AGM would need to be carried out in the traditional Australian holiday period. Clearly there is scope to more fully understand the issue before advocating change.
In what respects, if any, might the requirements for information to be	5.3.2	62	The CAMAC Discussion Paper, paragraph 5.3.2, sets out the legal

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included in the notice of meeting for an AGM be supplemented or modified?			requirements and guidelines for the contents of notice of the AGM, and notes that the Australian law is in accordance with the recommendations in the OECD Principles of Corporate Governance (2004). No criticism of the Australian law is offered.
		63	In these circumstances, the Committee does not propose any change to the legal requirements for content of the notice of meeting. Obviously these remarks do not extend to the contents of the annual report.
How might technology be used to make this notice more useful to shareholders?	5.3.2	64	The Committee recommends that section 249L be amended to accommodate the Canadian 'notice and access' approach.
		65	The Canadian 'notice and access' approach essentially involves despatch of a short notice to shareholders by mail or electronically, advising shareholders that information regarding the meeting has been posted on the company's website and explaining how to access the material. That is an attractive means of streamlining the process, and reducing the cost, of giving notice of an AGM.
		66	Current Australian law would not permit the Canadian approach to be taken here, because Australian law requires that a notice containing the information prescribed by section 249L must be sent to all shareholders in the manner prescribed by section 249J. It would be appropriate to amend section 249L to allow an abbreviated notice of meeting, incorporating by reference material displayed on the website. The amendment should make provision to

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			accommodate updating of the website up to a reasonable time before the meeting.
Might any other documents usefully be sent with the notice of meeting, and, if so, what?	5.3.2	67	No, except to the extent required by the directors' general law obligation to make full and fair disclosure to shareholders.
Should there be provisions for companies to send information about an AGM directly to the beneficial owners of shares held by nominees and, if so, what type of information?	5.3.3	68	The Committee supports steps being taken to facilitate direct communication between listed companies and the beneficial owners of their shares.
		69	The Committee empathises with the comments from the CASAC Report raised in the Discussion Paper. The task of identifying every beneficial share owner to directly engage with is incredibly burdensome from the company's point of view, and there is a strong argument that beneficial share owners have chosen to hold their shares through a "nominee" and many sophisticated investors still have procedures and process that may remove legal and beneficial ownership.
		70	Legislators and regulators need to consider ways to streamline the process of directly notifying beneficial owners or compelling the nominees to notify the beneficial owners about an AGM and giving them an adequate opportunity to consider the proposed matters and direct their voting.
Should there be any provision for beneficial owners of shares in a company to participate in the AGM of that company and, if so, how?	5.3.3	71	Yes, see the Committee's comments above.
Should there be any change to the threshold tests for shareholders placing matters on the agenda of an AGM?	5.4.2	72	No.
Should there be any change to the timing requirements for the calling of an AGM,	5.4.3	73	The Committee supports the approach proposed in the Discussion

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including for shareholders to place matters on the agenda of an AGM, to seek the circulation of statements concerning any resolution, or to nominate persons for the position of director?		Paper as to the extended notice requirements.
	74	In particular, the Committee considers it prudent for public companies to give more notice to shareholders, consistent with its earlier recommendation in relation to the extended statutory period to call AGMs.
	75	The Committee further recommends, as an overarching policy, that CAMAC consider the benefits of separating the discussion function of the AGM from its decision making function.
	76	There is a common feeling amongst shareholders that because of proxies, decisions are made before and without the benefit of deliberation at the AGM. Decoupling the discussion and decision-making functions of the AGM might enable shareholders to have the opportunity to reflect on the questions posed at the AGM, the directors' responses to those questions and any other issues that were raised on the day, prior to voting.
	77	Institutional shareholders should be encouraged to attend the discussion function of the AGM and if proxy advisers propose to provide a recommendation on any resolution to be put to the AGM, they should be required to attend the discussion function of the AGM as a condition of their licensing regime. The Committee has already recommended that proxy advisers be required to provide a copy of their report to the company if they proposed to recommend against any resolution at the meeting. This draft report should be required to be provided to the company prior to the

<table>
<tr><th>Question</th><th>Ref</th><th colspan="2">BLS Comment</th></tr>
<tr><td></td><td></td><td></td><td>date of the AGM discussion function.

78 In order to decouple the discussion, information exchange and questioning from the formal voting process, it might be possible to provide that voting should open at the commencement of a general meeting and stay open for a further set period.

79 Subject to further consultation on any limitations with the electronic voting system, a possible meeting timetable is set out below. An extended period has been provided from the date of the meeting to voting to allow sufficient time for proxy advisers to finalise their recommendations and for institutional shareholders to properly consider the recommendations, engage with the company in relation to the vote and complete any internal escalation procedures.
<table>
<tr><th>Date</th><th>Event</th></tr>
<tr><td>Day 1</td><td>Dispatch of NoM</td></tr>
<tr><td>Day 20</td><td>Meeting date – discussion only</td></tr>
<tr><td>Day 27</td><td>Time for determining voting entitlements</td></tr>
<tr><td>Day 28</td><td>Last day for receipt of votes on meeting (other than direct voting)</td></tr>
<tr><td>Day 30</td><td>Last day for receipt of direct voting on meeting</td></tr>
<tr><td>Day 31</td><td>Publication of results of voting</td></tr>
</table></td></tr>
<tr><td>Should companies be required to publish a pre-agenda notice and, if so, what should be the contents and timing of that notice?</td><td>5.4.3</td><td>80</td><td>No.</td></tr>
<tr><td>Does the current law concerning excluded material either create undue difficulties for</td><td>5.4.4</td><td>81</td><td>No.</td></tr>
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Question	Ref	BLS Comment	
shareholders who wish to criticise directors or, conversely, unduly restrict directors in vetting out information to be circulated to shareholders at the company's expense?			
Should there be any rule regarding the failure to present a resolution at an AGM?	5.4.5	82	No.
Should shareholders have greater scope for passing non-binding resolutions at AGMs?	5.4.6	83	No.
What, if any, additional legislative or best practice procedures should be adopted for companies to seek the views of shareholders on issues they would like discussed at the AGM, or to invite shareholders to submit questions prior to the AGM?	5.5.3	84	There is no need for additional regulation for companies to seek the views of shareholders on issues they would like discussed at the AGM.
		85	The Committee believes there is already an efficient informal practice of seeking shareholder opinions before an AGM. The Committee supports this practice as a general principle but takes the view that there is no need for prescriptive rules.
Should there be some obligation on the auditor (or the representative of the auditor) to speak at the AGM?	5.5.3	86	No.
What, if any, obligations should a company or a company auditor have to answer questions from shareholders?	5.5.3	87	None in addition to the current requirements at common law and contained in the Corporations Act.
Should any matter be excluded from or, alternatively, added to the business of the AGM?	5.6	88	No.
What, if any, changes are needed to the current position concerning: • the general functions and duties of the chair • the chair ensuring attendance of particular persons at the AGM • the chair moving motions • motions of dissent from a chair's rulings?	5.7.5	89	The obligations of the chair at common law are clear and adequate and the Committee sees no need to codify them.
Should a chair be obliged to provide shareholders with a reasonable opportunity to discuss a resolution before	5.7.5	90	This is the position at common law and the Committee sees no need to codify this.

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it is put to the vote?			
Should a chair have the power to impose any time, or other, limits on an individual shareholder speaking at the AGM?	5.7.5	91	There is no need for any further prescriptive rules in connection with the conduct of the AGM..
		92	Companies should be afforded sufficient flexibility to mange the flow of the AGM as appropriate. The chairman should be free to oversee and directs the course of an AGM as he or she sees fit.
What changes, if any, should be made to the current requirements concerning: • informing shareholders of their right to appoint a proxy • the proxy form • pre-completed proxies • notifying the company of the proxy appointment • the record date and the proxy appointment date • irrevocable proxies • directed and undirected proxies • renting shares • proxy speaking and voting at the AGM, or • any other aspect of proxy voting.	5.8.10	93	The Committee considers that there should not be any change to the current requirements around proxy voting other than those discussed earlier in this submission at 3.4.
		94	However, the Committee notes findings of the Australian Committee of Superannuation Investors (ACSI) in their report entitled Institutional Proxy Voting in Australia which found evidence of a number of operational weaknesses in the systems used to cast votes.
		95	The issues identified include unrealistic deadlines for sub-custodian messages, lack of reconciliation of holdings data with votes lodged and the extensive use of faxes to submit proxies.
		96	One particular issue raised is that the coincidence of the time for the determination of vote entitlements (not more than 48 hours prior to a meeting) and the deadline for the submission of proxies (normally two calendar days before a meeting) has led to unrealistic time pressures and reconciliation difficulties.
		97	AICD's report recognized similar problems. Share registries have expressed difficulties reconciling the votes received with the correct number of shares held by the share

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		owner within the 48 hours between the receipt of proxy forms and the company meeting. 98 To assist your review, the Committee has repeated the recommended regulatory reforms in the ACSI Report as below: • separate the coincidence of the time for the determination of voting entitlements (suggested 5 business days before a meeting) with the deadline for proxy lodgements (retain at 2 calendar days before a meeting); • standardise the application of vote exclusions on capital raising resolutions to protect the rights of investors whose votes may be excluded if their holdings are combined (through sub-custodians) with other investors who are ineligible to vote; • require companies to report to the market the total number of proxy votes exercisable by all proxies validly appointed but excluded; • empower shareholders representing more than 5 percent of a company (the same threshold at which a meeting can be called) to appoint an independent assessor to oversee or review a poll; • require companies (in electronic form only) to acknowledge that the votes of shareholders have been processed (or discarded) and to confirm what proportion of the final results their votes represented; and • make poll voting mandatory for listed companies so that the votes of all investors are counted on resolutions and not just those present at the meeting. 99 In addition, ACSI has recommended the following market reforms: • all custodians, sub-custodians

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		and voting agents (both institutional and custodial) should make use of the SWIFT proxy voting messages to enable the automated processing of proxy messages on the investor's side; • registries should ensure that online systems for the lodgement of proxies enable 'split' voting, file exchanges and are capable of releasing vote confirmations in a format compatible with the SWIFT proxy voting messages; and • online proxy voting platforms should enable users to identify if they have participated in placements so that they can comply with the terms of vote exclusion statements on capital raising resolutions.
Should direct voting before the meeting be provided for by legislative or other means, and if so what matters should be covered in any regulatory structure?	5.9.2	100 Direct voting should be provided for by legislative means. 101 Direct voting is a simple method by which the shareholder completes a binding voting form instead of completing a proxy form. In this sense, direct voting improves the exercise of voting rights because it removes the intermediary between the shareholder and the company. 102 The Australian Company Secretary Service summarised the benefits of direct voting in a memo as: • giving shareholders full control over their votes – by using direct voting instead of appointing a proxy, shareholders will have certainty over their voting intentions; • shareholders are able to promptly and securely vote either by mail, fax or electronically without needing to attend the meeting – therefore, no matter where the shareholder is located, they are able to simply and conveniently cast their vote; and • direct voting encourages more

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		shareholders to vote at meetings – the convenience of direct voting ensures greater participation, enabling more effective engagement with shareholders. 103 The Committee notes several additional compelling reasons to legislate for direct voting: • many companies have already implemented direct voting via amendment of their constitution. Amending the Corporations Act would provide greater certainty to these companies, especially regarding the validity of votes and provide shareholder confidence; • legislative backing will encourage more companies to use direct voting; • noting that there has been a dismal percentage of shareholder attendance in recent years at most AGMs, direct voting can assist in revitalising the AGM process and re-establishing engagement with shareholders; and • direct voting is more desirable than proxy voting, which is a complex area of the law. 104 The law needs to catch up with technological advances and the widespread use of the internet. It is only a matter of time before direct voting (particularly online) is the preferred method for voting. 105 5.9.2 of the Discussion Paper raised the following two issues: **Should votes be final?** 106 The Committee suggests: • votes should be counted on the basis that the last vote received and registered during the voting window will be effective; and • time of receipt should be 48 hours before AGM for non-electronic or

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		up to close of AGM for electronic methods **How should amendments to resolution/s be dealt with?** 107 The Committee suggests: • a similar system to that used by proxies should be adopted for non-electronic votes as suggested by the Discussion Paper; • electronic voting during the AGM can overcome this issue 108 Due to the use of postal and facsimile votes (non-electronic votes) there must be provisions in the Act addressing such logistical issues. However, electronic voting does not suffer from the same inadequacies due to its instantaneous and automated process. It is therefore proposed that separate rules should govern electronic votes and non-electronic votes. 109 Other considerations for regulators include document requirements for direct voting (similar to the s250B, s250BA requirements for proxies) such as: • manner of receipt (for example. electronic, postal, facsimile); • manner of electronic signatures (validation/authentication process as determined by the company); and • AGM notice requirements.
In what circumstances, if any, should access to pre-meeting voting information be permitted?	5.10.1	110 Access to pre-meeting voting information at the company's discretion should be permitted as a general principle, but should not be regulated
In what manner if any, should access to pre-meeting voting information be regulated before discussion on a proposed	5.10.2	111 See the Committee's comments above. This area should not be regulated.

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resolution?			
In what manner, if any, should the current requirements concerning the disclosure of pre-meeting votes before voting on a resolution be amended?	5.10.3	112	No amendments are recommended.
Should there be legislative or other recognition of online voting during the course of an AGM and, if so, in what respects should this form of voting be regulated?	5.11	113	See our earlier comments on direct voting (5.9.2).
		114	The Committee supports the legislative recognition of online voting, with the caveat that any legislative reform in this respect should make it abundantly clear that technology risk rests with the shareholders who wish to take on the online voting option.
		115	It would be desirable, in the interests of enhanced shareholder participation in AGMs, to take whatever legal steps are necessary to permit online voting to take place, both on a 'show of hands' and on a poll, if the directors of the company determine that adequate technological facilities are available to permit such voting to take place.
		116	The Minter Ellison paper on online participation in shareholder meetings, to which the CAMAC Discussion Paper refers, suggests that although legislative amendment may not be needed (because of s 33B of the Acts Interpretation Act), a specific legislative amendment to permit online voting would put the matter beyond doubt. As the CAMAC Discussion Paper notes, an amendment would provide some encouragement for listed companies to offer that facility.
		117	The Committee agrees with CAMAC that legislative reform should make it clear that the technology risk would rest with the shareholders seeking to vote by online voting, so that inability to vote online during the course of an AGM because of technological failure

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			would be analogous to the shareholder failing to attend because of, say, a transportation breakdown.
		118	The Committee's comments in response to paragraph 5.11 of the Discussion Paper are confined to online voting. Online participation, as opposed to online voting, is considered in our response to paragraph 6.3.2 below. A shareholder who votes online without participating in the meeting should not be regarded as present for quorum purposes or any other purposes. Online voting would take effect when received by the company, and at that point the vote would be irrevocable.
		119	The interrelationship between online voting and voting by a proxyholder representing the same shareholder would be governed by analogy with the case where a shareholder appoints a proxy and then attends in person; the online vote would constitute revocation of the proxy, and so the proxyholder's vote would be ineffective. These matters should be clarified in the amending legislation.
		120	Listed companies should be encouraged to supplement the statutory reform with constitutional provisions addressing the issues identified in the Minter Ellison paper.
Do any issues arise concerning voting exclusions on resolutions that must, or may, be considered at an AGM and, if so, how might those issues best be resolved?	5.12	121	No issues.
Should any changes be made to the current provisions regarding voting by show of hands?	5.13.3	122	No.
What legislative, or other, verification initiatives, if any, should be introduced concerning voting by poll at an AGM?	5.14	123	None.

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Should one or more verification requirements apply in all instances or only if, say, a threshold number of shareholders require it?	5.14	124	None.
Should any steps be taken to promote more consistency in the disclosure to the market of voting results?	5.15.1	125	No need.
Following the AGM, what, if any, rights of access should shareholders generally, or the person proposing a resolution, have to voting documents?	5.15.2	126	No additional access is necessary.
What, if any, changes should be made to the requirements concerning the recording of details of voting in the minutes of the AGM?	5.13.3	127	No need for change.
Should there be a statutory minimum period for retention of records of voting on resolutions at an AGM and, if so, for what period?	5.15.4	128	No.
Should there be any legislative initiatives in regard to the election of directors, including in relation to: • the frequency with which directors should stand for re-election • the right of shareholders to question candidates (and receive answers) • the voting procedure?	5.16.3	129	No.
Are there any matters concerning dual-listing that should be taken into account in the regulation of AGMs?	5.17	130	No.
Are there any problems in the voting or other aspects of AGMs for overseas holders of shareholding interests in Australian regulated companies?	5.18	131	See the Committee's comments on beneficial share owners (5.3.3).
For some or all public companies, should the functions of the AGM be changed in some manner, or the obligation to hold an AGM be abolished?	6.2.2	132	The Committee does not advocate the abolition of the AGM as a meeting at which the company's senior officers orally report to shareholders, and then shareholder deliberation and decisions take place. However, the Committee supports CAMAC's Option 1: Limit the AGM to the deliberative

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		and decision-making functions.
	133	In the Committee's view, much time is wasted at AGMs during the course of consideration by shareholders of the annual financial report, directors' report and auditor's report as required by section 250(1)(a). The law does not require a vote to be taken on this item, and nowadays the usual practice is that the reports are considered without any decision or vote. This item of business tends to be dominated by a small number of retail shareholders, whose comments and questions do not always demonstrate a basic understanding of the reports, and by other retail shareholders who have a particular axe to grind, sometimes in their capacity as customers or debtors of the company rather than as shareholders. By the time the meeting moves on to deliberation of matters for decision, there is an exhaustion factor that limits the quality of the discussion.
	134	This problem can be avoided by removing the requirement to consider the annual report (other than the remuneration report, upon which shareholders make a decision by advisory vote) at the AGM, and substituting a requirement for the notice of meeting to stipulate an electronic address, accessible to all shareholders, at which members could post their comments and questions up to a specified time before the meeting. The company would be required to respond to all questions, individually or by categories, at the AGM or on the website prior to the AGM, but without any follow-up questions at the meeting.

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In this context, what technological developments might be taken into account in considering the possible functions of the AGM?	6.2.2	135	As noted, shareholders should be permitted to make comments and ask questions on the annual reports by posting them at an electronic address which would be accessible to all shareholders. The company would be empowered to remove scurrilous or defamatory material, though it should be given general protection from liability for material published by shareholders.
For some or all public companies, and if the AGM is retained in some manner, what legislative or other initiatives, if any, should there be in regard to the possible formats of the AGM? In this context, what technological developments might be taken into account in considering possible formats for the AGM?	6.3.2	136	The Committee supports CAMAC's Option 1 in the discussion paper.
		137	The Committee does not advocate CAMAC's Option 2: Online-only meeting, for the reasons given by CAMAC in the Discussion Paper.
		138	First, if (as advocated above) the AGM is retained for deliberation and decision-making by shareholders, including on the remuneration report, a physical meeting offers face-to-face accountability for management that cannot be replicated online.
		139	Second, the law should not assume that all shareholders will have, or be able to use, online access to the meeting. A fortiori, the Committee does not advocate Option 3: Virtual meeting.
		140	However, the Committee submits that there is sufficient potential advantage in Option 1: Hybrid physical-online meeting to warrant further study of overseas implementations with a view to developing a detailed proposal for implementation in this country. In that regard, the Turkish initiative noted by CAMAC seems particularly promising.
		141	Under Option 1, shareholders would be able to observe the proceedings at the physical location of the AGM (or the principal physical location)

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		through live streaming, and they would be given the opportunity to participate by electronically transmitting their comments and arguments on the motion, as well as by voting.
	142	As noted in its response to 5.11, the Committee agrees with the suggestion by Minter Ellison that it would be undesirable to rely on section 33B of the Acts Interpretation Act, and instead there should be specific legislative authorisation for hybrid physical-online meetings. On balance, the Committee considers that shareholders who participate online should not be taken to satisfy a quorum requirement and should not be treated as present for other purposes. Consequently a shareholder could participate online after having appointed a proxy to attend a physical meeting, although (as noted at 5.11) if the shareholder casts an online vote, doing so should be taken to have extinguished the proxyholder's authority to vote.
	143	As noted at 5.11, listed companies should be encouraged to supplement the statutory reform that would permit online participation, by appropriate constitutional provisions addressing the kinds of issues identified in the Minter Ellison paper.

Working Group members

Andrew Lumsden
Hon Dr Robert Austin
Stephanie Daveson
Glenn Vassallo
Amanda Harkness
Guy Alexander
Chelsey Drake