SANDON CAPITAL

Sandon Capital Pty Ltd
ABN 98 130 853 691
AFSL 331 663
Level 5
139 Macquarie Street
Sydney NSW 2000

Manager
Market Conduct Division
The Treasury
Langton Crescent
Parkes ACT 2600

Via email: MCDproxyadvice@treasury.gov.au

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To whom it may concern,

Thank you for the opportunity to comment on the Treasury's Consultation Paper entitled **Greater Transparency of Proxy Advice (**the **Consultation Paper)**. Please find below a submission by Sandon Capital Pty Ltd (**Sandon Capital**).

About Us

Sandon Capital is an investment manager for entities that invest in the Australian share market. Our focus is on medium- to long-term investment returns from investing in undervalued listed companies, using shareholder activism as a tool to positively shape and influence the future direction of these companies. This activist aspect of our investment philosophy involves us engaging with a company's stakeholders, including directors and management as well as other shareholders. We have long held the view that Australia's corporate laws and regulations are among the most shareholder friendly in the developed world.

Executive Summary

We consider the proposals outlined in the Consultation Paper, if enacted, would:

- serve to further entrench underperforming listed company directors and management;
- shield these directors and management from accountability to their owners, the shareholders;
- create an increased regulatory burden, whose costs will ultimately be borne by superannuation fund members; and
- ultimately weaken shareholder (and ownership) rights in Australia, leading to poorer outcomes for Australians.

An owner's perspective

Despite our shareholder-friendly regulatory framework, there are still far too many instances in Australia of persistently underperforming companies whose management and directors (**corporate agents**) are entrenched and remain safe from accountability to their owners (the shareholders).

Indeed, one only needs to consider the number of high-profile corporate scandals that have come to light in Australia in recent years. Notable examples include Commonwealth Bank, Westpac, National Australia Bank, Crown and AMP. In each instance, we believe stronger oversight and influence by shareholders (as the ultimate owners) may have helped avoid the worst of these scandals. Instead, millions of Australians whose futures are dependent on investment returns either in the short term (for example, those whose incomes rely on investment linked pensions) or in the longer term (for example, those accumulating for their retirement in superannuation schemes) have suffered.

Perhaps it is the recent spate of company directors and CEOs being forced to resign in the aftermath of these scandals that has caused these corporate agents to fear, perhaps for the first time, they may be held to account by their shareholders.

The Consultation Paper paints a picture of corporate Australia under siege by an unregulated and unfettered proxy advisory industry, prone to errors and misstatements. There is no evidence to support this.

The Consultation Paper also claims the options proposed will simply bring Australia in line with recent changes in the United Kingdom and the United States. What the Consultation Paper fails to mention is that the proposals requiring proxy advisers to provide their research to companies for review was met with widespread investor outrage. Indeed, in recent days the U.S. Securities and Exchange Commission (SEC) announced a review of those new rules due to be implemented on 1st December 2021. It is highly likely these will be repealed.

There were numerous submissions made to the SEC on the proposed changes to proxy advice. Rather than comparing the new SEC rules with the Consultation Paper proposals, we believe a high-level review of submissions to the SEC on its proposals are informative.

Looking at the submissions disclosed In the SEC Final Rule document[1] for the Exemptions from the Proxy Rules for Proxy Voting Advice, it becomes clear that companies and their stakeholders (including directors, management, governance lobbies etc) proposed, and were all resoundingly in favour of, increased regulation and rules that sought restrict the impact of proxy advice, while

[1] https://www.sec.gov/rules/final/2020/34-89372.pdf

investors and their stakeholders (fund managers, pension funds and shareholder associations) were resoundingly in favour of the status quo.

What was clear from the SEC Final Rule, was that corporate America had lined itself up against proxy advisers. In doing so, corporate America was lined up squarely against the interests of investors. As noted above, in recent days, the SEC announced it would review the changes instituted by the previous administration.

"*…a solution in search of a problem*"

Before responding to the questions asked by the Consultation Paper, we believe additional context about shareholder rights and voting at annual general meetings needs to be set out. We don't believe this is adequately addressed in the Consultation Paper.

The Consultation Paper seems to propose solutions to problems that only seem to exist in the eyes of some ASX-listed companies, their directors, senior executives and industry groups whose purpose is to lobby for the interests of directors and executive. As noted by William Stromberg, President & CEO of USD1.2 trillion investment manager, T. Rowe Price, in his submission to the U.S. SEC, *"the* [SEC] *Proposal appears to be a solution in search of a problem."* [2,3] We think the same applies to Treasury's Consultation Paper.

The Consultation Paper alludes to systemic issues with proxy advisers, yet it offers no evidence of instances where proxy advice has been manifestly wrong, nor does it offer evidence of any harm that has occurred. The Consultation Paper should have provided, or at least cited, evidence of such inaccuracy or harm.

The narrative from Australia's corporate agents and their lobbyists implies that they are facing an avalanche of failed resolutions at annual members meetings. It would seem shareholders are feeding rocks into the gears of corporate Australia and decision-making will soon grind to a halt.

It seems corporate agents are anticipating the worst and seeking changes they hope will stave off the impending disaster. Yet there is far less terror in the facts. To these corporate officers, we commend Alfred Hitchcock's words: "*there is no terror in the bang, only in the anticipation of it.*"

[2] William J. Stromberg, President & CEO, T.Rowe Price, Submission to SEC Proposals on Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice.
[3] In his submission, Stromberg noted his company's unique perspective from sitting on both sides of the debate, as a corporate agent and as an investment management firm.

Data published by the Australian Securities and Investments Commission (ASIC), which reviews each year's annual general meeting seasons does not suggest that companies are suffering in any way at the hands of shareholders in general meeting[4]. ASIC's data shows that whatever influence proxy advisers might have, shareholder voting remains overwhelmingly favourably disposed towards and supportive of boards. Shareholder criticism of directors and remuneration increased in 2019, however that was in no small measure as a result of the shocking findings of the Hayne Royal Commission.

Data presented in an article entitled "*2019 Australian annual general meeting season review*"[5] demonstrates how shareholders of ASX200 companies are overwhelmingly supportive of incumbent directors and management teams. If this sample is indicative of how shareholders are voting, which we believe it is, then corporate Australia has little to fear from shareholders and proxy advisers.

There seems to be a preconception in the Consultation Paper that proxy advisers are generally recommending their clients vote against the recommendations of directors. If this were true, which it is not, then that advice is not being heeded by shareholders.

It seems to us the greatest objection to proxy advisers (and perhaps indeed shareholders) comes from corporate agents who are obliged to face scrutiny for poor performance and remuneration practices considered by shareholders as excessive or inappropriate given company performance.

The real targets?

We believe attempts to further regulate proxy advice are designed to strike at the ability of shareholders to debate issues they consider relevant to their investment and investment objectives. Such debate ranges from remuneration reports, on which many proxy advisers provide granular and thoughtful analysis through to broader social and environmental issues, that interest groups opine on. Regardless of our firm's views on any of these matters, we vehemently believe those views and any ensuing debate should take place freely and unfettered.

Beyond the argument for free speech, the argument that proxy advisory firms (and others, such as environmental groups) should submit their voting recommendations to issuers for comment and so that they may correct any mistakes or misunderstandings seems at odds with the issuer's obligations of disclosure, which require that all information necessary should be put to shareholders in the

[4] ASIC Report 564 Annual general meeting season 2017, released 29 January 2018; ASIC Report 609 Annual general meeting season 2018
[5] Governance Directions, Vol.72, No.1, Michael Chandler, Sovereign Governance Advisory

explanatory memorandum. If investors, or their advisers, choose to undertake wider research, such as considering proxy adviser recommendations when forming their views, that must remain their prerogative.

CONSULTATION PAPER QUESTIONS

Ensuring independence between superannuation funds and proxy advice

1. How would the proposed options affect superannuation fund members?

We do not believe there is a need for any changes to current disclosure obligations.

As noted by the Consultation Paper, "*there are existing regulations which require superannuation funds to publicly disclose their proxy voting policies…*"[6] The Consultation Paper details the relevant laws pertaining to these disclosures.

It is not clear how the proposed options (both Option 1 and Option 2) would improve outcomes for superannuation fund members. Option 1 presupposes that proxy advice alone is the determinant for how a superannuation fund votes. We understand that superannuation funds consider various factors when determining how to vote on a particular resolution. Most superannuation funds and their underlying investment managers are regularly meeting with listed companies in lead ups to AGMs. This gives companies direct contact with their shareholders, irrespective of whether they have met with proxy advisers. Other factors considered include the views of any investment managers who may be appointed to manage investments on behalf of the superannuation fund. In many cases, the superannuation fund may consider the views of several fund managers for the resolutions of a single company.

Option 2 presupposes that independence is the sole arbiter of sound advice. We do not believe this is the case.

We believe these options, if adopted, would add additional administrative burdens including costs, that will ultimately be borne by superannuation fund members. It also risks overwhelming members with information.

We are also concerned that the proposals would ultimately lead to increasingly timid and homogenised superannuation fund voting. We firmly believe that a diversity of views is essential for not only good governance, but also effective operation of a market-based economy.

[6] Australian Treasury, "Greater transparency of proxy advice "Consultation Paper April 2021, page 3

2. ***What impact would the proposed options have on superannuation funds in complying with these regulatory requirements?***

The proposed options add unnecessary burdens, including additional costs, on superannuation funds that will ultimately be borne by their members. SEC Commissioner Allison Herron Lee a critic of some of the changes made in the US, was of the view that the SEC changes added "complexity and cost."[7] We expect the same would be true here.

3. ***What should be the regularity and timing of reporting? For example, should trustees be required to provide their proxy voting policy to members ahead of an AMM?***

We believe an annual review of proxy voting policies is adequate. This would allow members to be made aware of the policy and any changes that might have occurred.

We are unclear as to what is meant by a requirement for trustees to provide their proxy voting policy to members ahead of an AGM. If this means to suggest the provision of the proxy voting policy ahead of the AGM for each company in the superannuation fund portfolio, then such a requirement would be so unwieldly as to be impossible to comply with. The sheer volume of documentation would be enormous. This would be unworkable.

4. ***What other information on how voting is informed by proxy advice should be disclosed by superannuation funds and why?***

We believe superannuation funds, like any investor, should ultimately be able to discharge their fiduciary obligations as they see fit, without the need for onerous and unnecessary disclosures.

A requirement that superannuation funds disclose what external advice they consider when making proxy decisions may be an acceptable level of disclosure. This would be similar to listed companies that disclose they have sought advice from remuneration consultants when considering executive remuneration. Importantly, those listed companies are not obliged to disclose that remuneration advice.

As noted in our response to question 1, proxy advice is not the only input into a shareholders' voting decision process. We believe it is unfair and impractical to require disclosure of all reasons behind decisions taken by superannuation funds.

[7] Public statement by US SEC Commissioner Allison Herron Lee, 22 July 2020, https://www.sec.gov/news/public-statement/lee-open-meeting-2020-07-22#_ftnref1

5. ***What level of independence between a superannuation fund and a proxy adviser should be required?***

We do not believe there is any need for independence between a superannuation fund and a proxy adviser. Other than targeting specific proxy advisers who are owned by superannuation funds, we are not aware of any empirical evidence of the need for such a requirement.

6. ***Which entity should the independence requirement apply to (superannuation fund or proxy adviser)?***

Given our response to question 5, there is no need to respond to this question.

Facilitating engagement between companies and proxy advisers

7. ***How would the proposed options affect the level of engagement by proxy advisers with companies?***

Option 3 is problematic to us for a number of reasons. Firstly, it would require a private business disclose its valuable intellectual property to those other than its paying clients. No business would consider this to be a fair proposition. Furthermore, if such a policy were to apply to proxy advisers, the risk it that is would end up applying to all those who develop intellectual property that concerns listed companies. The extent of engagement by a proxy adviser with a company should be a matter for each proxy adviser, just like anyone who engages in the analysis of corporate information.

The Consultation Paper states that "*business representative groups have raised the importance of companies being able to engage with proxy advisers and be able to present their views to the investors who receive the reports…*" It continues by saying that the "*opportunity to engage allows companies to point out any factual inaccuracies and convey additional context or information…that may impact the final voting recommendation.*"[8]

We find these statements problematic and concerning.

The Consultation Paper seems to overlook the fact that listed companies are subject to well established (though recently weakened) rules of continuous disclosure. In simple, practical terms, this means a company must disclose, in a timely manner, all information that is relevant to its shareholders' investment decisions. Listed companies are obliged to "communicate" with their shareholders via the ASX, through the release of material that enables a company to comply with its continuous disclosure obligations. When it comes to AGMs, a company is required to provide a

[8] Australian Treasury, Greater transparency of proxy advice Consultation Paper, Page 6

notice of meeting, in which are listed the resolutions shareholders are being asked to consider, and if thought fit, approved. The notice of meeting also typically includes an Explanatory Memorandum, in which the company will provide a background to the resolutions, including any board recommendations. These materials could be described as the directors' arguments for their recommendations to shareholders.

A company presumably makes all the arguments it believes are needed to persuade shareholders to vote according to the directors' recommendations in the explanatory memorandum. Shareholders can consider the explanatory memorandum but are not limited to it. They can consider any other information or advice they choose when deciding how to vote.

We believe it would be highly intrusive and inappropriate to attempt to regulate or legislate what information shareholders can consider. It also follows that shareholders should not be obliged to disclose details of how they came to a decision, just as directors are not necessarily obliged to disclose all of the details of how they came to a decision.

8. ***Would the proposed options mean that investors are more likely to be aware of a company's position on the proxy advice they are receiving?***

A company's position on resolutions put to shareholders are outlined and detailed in the notices of meeting and explanatory memoranda. We do not believe there is a need for further disclosure or explanation.

We currently do not subscribe for any proxy advice. As a consequence, we do not know what proxy advisers are advising their clients, aside from what is reported in the media. Similarly, we do not receive stockbroking research from firms of which we are not clients. This is normal and customary. Their research is proprietary and valuable. We are opposed to any regulation that would force a private enterprise to disclose its valuable intellectual property to anyone other than its clients.

9. ***What is the most appropriate method for proxy advisers to notify their clients as to where the company's response to its report is?***

If option 4 were to be adopted, if a company were to provide additional "context" or "information" to a proxy advisers, to the extent this information is material and relevant to a resolution being considered by shareholders, then that context or information should be disclosed to all shareholders by way of the ASX.

10. ***If proxy advisers were required to provide their reports to companies in advance of their clients, what would an appropriate length of time be that allows companies to respond to the report and for the report to be amended if there are any errors?***

We do not believe proxy advisers should be required to provide their reports to companies in advance of their clients who have paid for this advice.

The work of a proxy adviser, like that of any other business that prepares any advice, is proprietary and valuable. We believe such a requirement would be a gross infringement of the intellectual property rights of the proxy advisers. As such, we believe it could set a very dangerous precedent for anyone or any company in the business of providing advice.

Furthermore, we believe the independence of proxy advisers will be compromised should they have to provide their reports to companies in advance of their clients. Such an arrangement would allow corporate agents to interfere with the advice, thereby stripping it bare of its independence.

There is well enshrined regulation in developed markets (e.g. FINRA Rule 2241 in the U.S) that precludes investment banking research analysts from providing their reports to companies in advance of clients in order to preserve their independence. It seems ludicrous that directly conflicting regulations should apply to different advice providers.

11. ***Are there any requirements that should be placed on companies during this period, such as confidentiality? Are there any requirements that should be placed on proxy advisers during this period, such as not making their recommendations otherwise publicly known?***

We disagree with the proposition that proxy advisers should be required to provide companies with advance notice of their advice. However, we also strongly object to there being any requirements placed on proxy advisers (or indeed anyone providing an opinion on how to vote) restricting public disclosure of their recommendations, should they choose to do so. While Australia does not have any constitutional protections of free speech, this does not mean government should actively seek to reduce one's ability to speak freely.

Require suitable licensing for the provision of proxy advice

12. ***Is the AFSL regime an appropriate licensing regime through which to regulate the provision of proxy advice?***

We believe the current AFSL regime and regulations that apply to proxy advice, are appropriate and adequate. Each of the four proxy advisers referred to in the Consultation Paper hold AFSL with the appropriate license conditions for the advice they provide.

13. ***Would coverage under the AFSL regime result in an improvement in the standard of proxy advice?***

We do not believe this question as asked warrants a response. Firstly, the advice of proxy advisers is adequate captured by the current AFSL regime (see our response to question 12). Secondly, the question presupposes that the standard of proxy advice in Australia needs improvement. We do not believe there is any evidence suggesting that proxy advice is generally poor or error-prone. Proffering an opinion that goes against directors' recommendations does not mean the advice is poor, simply that there is a difference of opinion.

Furthermore, we believe Corporations Act Section 1041H, which prohibits misleading and deceptive conduct in relation to financial products or services, applies generally to proxy advisers (and others) and provides more than adequate protections without the need for changes to the AFSL regime.

We thank the treasury for the consideration of our perspective. If you have any questions or would like to discuss this response to the Consultation Paper, please do not hesitate to contact me.

Yours sincerely,

Gabriel Radzyminski
Director, Sandon Capital Pty Ltd
e: Gabriel@sandoncapital.com.au
m: 0408 936 357