ACTU
australian council of trade unions

ACTU Level 4/365 Queen Street, Melbourne Victoria 3000
p +61 3 9664 7333 w actu.org.au australianunions.org.au
President Michele O'Neil Secretary Sally McManus

4 June 2021

Market Conduct Division

The Treasury

Langton Crescent

Parkes ACT 2600

Via email: mcdproxyadvice@treasury.gov.au

Dear Director,

Re: Greater transparency of proxy advice, consultation paper

The 1.8 million workers we represent are among the millions of working and retired Australians who entrust their retirement savings to be invested via the superannuation system. The Government's proposal to increase regulation of proxy advisers will harm the ability of important intermediaries – superannuation funds and their investment managers – to identify poor corporate behaviour and protect these investments on behalf of working people.

The consultation paper fails to outline harm to shareholders or businesses from the current legislative and regulatory regime, fails to outline examples of misconduct, and has no justification for its consideration of changes to the regulatory environment. Despite this, it recommends changes which would chill corporate engagement from institutional shareholders and limit the ability for the custodians of workers' retirement savings to ensure that the companies they are invested in act and operate in a way which generates long-run returns for members and are held accountable for their failings to the community and to their shareholders.

The consultation paper's focus on the provision of proxy advice to one class of institutional shareholder, superannuation funds, shows the proposed changes are borne of political mistrust of these institutional investors in particular as opposed to insurers, banks, investment funds, and other international asset owners (including foreign-owned pension funds).

An apparent reason for this focus and for the proposal as a whole, is that 'there is insufficient public information today to determine whether superannuation funds, in this area, are acting in a manner

consistent with their legal obligations.'[1] That there is insufficient public information to determine this after the Financial Services Royal Commission, an ASIC review of proxy advice in 2018, the increased powers and resources awarded to the Australian Prudential Regulation Authority and the Australian Security and Investments Commission, and increased public scrutiny on the superannuation sector shows there is no doubt to the legality of the advice and its use. The failure of the Consultation Paper to produce a single case of misconduct in support of a radical set of regulatory measures based on political suspicion rather than the best interests of members.

Even the consultation paper's references to the United States' introduced reforms are tenuous at best. While the SEC under President Trump introduced rules with the intent to stymie the work of proxy advisers and shareholder's holding their assets accountable, these rules were significantly revised in their implementation.[2] The 2019 and 2020 rules now face the scrapheap, with President Biden's SEC appointee pausing their enforcement and reviewing them with the intent to repeal them.[3]

It is unlikely to be a coincidence that as proxy advisers set out recommendations in relation to companies to increase gender diversity on boards the Government, with its own gendered failings in focus, has retaliated.

Each step the Government has taken in corporate governance has been to decrease the workload and accountability of non-executive directors of listed companies, and to increase the unilateral power of CEOs over their companies. From the decision to suspend of disclosure requirements for directors, their protection of companies and directors from class actions, to their numerous interventions in industrial relations cases; at every turn the Government has sided with management and non-executive director class over shareholders and workers.

Proxy advisers play an important role for superannuation funds and the investment managers. Their research informs voting proposals at company meeting sand shines a light on poor corporate governance practice including excessive CEO incentives and poor performing company directors. It is critical that this work is done to protect the retirement savings of working Australians.

Proxy advisers give their clients and members frank advice on the progress of companies they hold consistent with their policies. From time to time, the views of shareholders will differ from management and the board. As both the Banking Royal Commission and the investigations into Crown Casino displayed, a failing of many listed-entities' boards has a major impact on investors large and small. These case studies show that rather than holding management accountable for the decision-making, ensuring

---

[1] The Australian Government the Treasury, *Greater Transparency of Proxy Advice* (Canberra: Commonwealth of Australia, 2021).
[2] Chanticleer, 'Forgotten Investors Slam Proxy 'reforms'', *Australian Financial Review*, 2 June 2021 <https://www.afr.com/chanticleer/forgotten-investors-slam-proxy-reforms-20210601-p57x4a>.
[3] Michael Roddan, 'US Watchdog Bursts Treasury's Proxy Bubble', *Australian Financial Review*, 2 June 2021 <https://www.afr.com/companies/financial-services/us-watchdog-bursts-treasury-s-proxy-bubble-20210602-p57xck>.

that processes are interrogated, and representing the long-term view of the shareholders; these boards become uninterested or overly cosy – failing shareholder and community expectations.

The costs for these failings are borne by shareholders, which in the case of superannuation funds, is their members – everyday working people. The remit of proxy advisers is to mitigate these governance risks by providing advice on a broad range of matters such as diversity on the board, executive pay practices, and to respond to emerging risks which may otherwise be ignored by the short-term vision of bonus-chasing executive teams. Catastrophic failures like the destruction of Juukan Gorge by Rio Tinto or the systemic rip-offs by AMP lead to material losses for super members.

The purpose of these reforms is to dilute the efficacy and hamper the efficiency of the work of proxy advisers, by impeding their internal processes or even shutting them down. This would cause working people to retire poorer. Their superannuation funds would be less able to respond to systemic risks, less able to represent their interests, and companies would be less accountable. Some of the reforms could force superannuation funds to duplicate research in-house without the intervention and vetting of management.

Option 1: Disclosure of trustee voting

This option would require trustee directors not only to disclose votes made, but if proxy advice was used in relation to the vote and if that vote was consistent with the advice received. The union movement supports funds disclosing their proxy voting record in a consistent and accessible manner. Superannuation funds should also have clear and accessible proxy voting policies available to members.

The disclosure of whether proxy advice was obtained and if the vote was consistent with the advice could be misleading. Proxy advice is simply advice. It is non-binding. The reception of proxy advice is not necessarily a determining factor in the casting of a particular vote. It is the role of the fiduciary to weigh advice both external and internal in the execution of their responsibilities. Advice received can inform the actions of the fund in casting a vote, even if the vote cast is in opposition to the advice received.

Whether the vote was consistent with the advice does not reflect whether the advice was valuable, and if the vote is the same as the advice, it does not show that the advice was the sole or a key determinant in making that decision. Publishing whether a vote was consistent with advice received would likely mislead members and subject companies alike.

Option 2: Independence

This option is a blatant political attack on the Australian Council of Superannuation Investors (ACSI), and no other proxy adviser. The Government has long attacked industry super funds and their associations, despite their superior performance, better governance, and lower fees. These attacks are due to the ideological opposition to industry funds by the Government, which has always supported banks over people and executives over workers.

The consultation paper garbles through citations of trustees' fiduciary duty and competition between superannuation funds to find some justification to barring superannuation funds from owning proxy advisers.

There is no policy justification for this. There is no international precedent for barring this ownership structure. There is no evidence of misconduct arising as a result of this structure. There is not even a theoretical reason as to why members would be disserved by this ownership structure.

Through an organisation like ACSI, superannuation funds save members money and better align the interests of those providing advice with the members of the industry fund. No industry fund nor any listed entities have raised concerns with the conduct of ACSI in the marketplace, and superannuation funds are not bound to use proxy advice services and could leave if they found the services were not providing value.

Despite this ownership, funds make their own decisions regardless of the advice provided based on their own fiduciary responsibility. Not all funds which are members of ACSI vote in alignment with ACSI on every proxy vote.

This thought-bubble which is clearly political retaliation should be discarded.

Option 3: Facilitate engagement and ensure transparency and Option 4: Make materials accessible

These proposals would hamper the ability for proxy advisers to provide timely advice in an efficient way. It also mischaracterises the relationship between listed entities and their investors, assuming that institutional investors are somehow inaccessible to listed entities and that lines of communications do not exist. Proxy advisers and investors continually engage with companies especially where there are differences on material issues. The consultation paper is attempting frame these policies in response to problems which do not exist. As is a motif in the consultation paper, there is no evidence of misconduct, or misinformation cited to demonstrate existing processes are harmful.

Requiring companies to have access to proxy advisers' reports and recommendations ahead of supplying them to those who paid for the reports would have the ostensible outcome of allowing companies a 'right of reply' to a proxy adviser report. But this mischaracterises the purpose of proxy advice and potentially devalues it. Proxy advice is sought primarily because it is an independent assessment of the company in question. High-quality proxy advice incorporates the views of the company based upon engagement.

Proxy advisers operate on incredibly tight timeframes, and it is unlikely they would be able to compress their work by an additional five days, as suggested by the consultation paper. It would require either an increase in costs or a decrease in quality.

This proposal should be discarded.

It is common for proxy advisers to supply their advice to investors and subject companies simultaneously. Some proxy advisers even state some of their recommendations publicly. The consultation paper does

not demonstrate that current proxy advice is inaccessible. A company's reply to proxy advice is also already accessible. Companies can issue media releases, engage directly, or use the Australian Stock Exchange's communication platform to quickly communicate with all investors. A lack of availability of opinions, claims, and counterclaims is not a concern for superannuation funds due to the significant avenues for communications; such a reform would add no value to their decision-making process.

Option 5: Require all proxy advisers to hold AFSLs

This, too, may be an unnecessary increase in regulation in a sector that is already highly regulated. The Treasury has not demonstrated harm arising from proxy advice coming from those without an Australian Financial Services Licence. The four largest proxy advisers already have Australian Financial Services Licences. This unnecessary red tape could reduce competition in the proxy advice market by increasing barriers to entry, reducing the capacity for non-specialist proxy advisers to comment on upcoming votes – even when that commentary is not aligned to the recommendations of existing proxy advisers.

The quality of the advice ultimately rests with the judgement of the fiduciary considering the advice. Low-quality advice, either relying on weak evidence or coming from an unreliable source is not a concern as trustees easily recognise that.

The motivation of the Government to hamper the work of proxy advisers is clear ideological retaliation to the movement of capital markets in recognising climate change as a systemic financial risk, gender diversity as an important governance risk, the impact of executive remuneration rewarding CEO's for poor performance and the impact of companies on the communities they operate. All these issues are material factors in investment returns and can impact the retirement savings of working Australians. These proposals run counter to the prudent operation of a superannuation fund seeking to maximise long-run returns in members' best interests and are designed purely for short-term political gain.

These poorly thought-out proposals should be abandoned.

Yours sincerely,

Scott Connolly
Assistant Secretary

D No. 28/2021