



ASX Limited
ABN 98 008 624 691
Level 7, 20 Bridge Street
Sydney NSW 2000
PO Box H224
Australia Square
NSW 1215

Telephone 61 2 9227 0867
Facsimile 61 2 9227 0917
www.asx.com.au

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The Secretary
Parliamentary Joint Committee on Corporations and Financial Services
Suite SG.64
Parliament House
Canberra ACT 2600

(via email: corporations.joint@aph.gov.au)

Dear Sir

Inquiry into Shareholder Engagement and Participation

Thank you for the opportunity to provide comments on the engagement and participation of shareholders in the corporate governance of companies in which they are investors. ASX has responded to the Committee's terms of reference in its capacity both as a licensed market operator and as a publicly listed corporation.

This submission is primarily intended to provide an information base to assist the Committee with its work. We do not raise any issues calling for a legislative or regulatory response, although we acknowledge that companies can have practical challenges in actually identifying which entities are their shareholders and with which individuals in corporate shareholders they might need to engage.

Overview of ASX as a Publicly Listed Company

ASX Limited was created in July 2006 by the merger of the former Australian Stock Exchange and SFE Corporation, holding company for the Sydney Futures Exchange. ASX is one of the world's top-10 listed exchange groups measured by market capitalisation. ASX believes being at the centre of Australia's capital markets is a privilege that provides scope to fulfil certain responsibilities. These include helping to build the knowledge and confidence of retail investors, and promoting good corporate governance among Australia's listed companies.

ASX is a strong supporter of the drive for financial literacy in our community through a range of information and education services. Understanding the share market and the principles of investing are increasingly important with almost half the adult population of Australia – or around 7.3 million people – owning shares, either directly or through a managed fund or via their self-managed super fund.

ASX has chaired the ASX Corporate Governance Council since its inception in August 2002. The Council brings together 21 business, investment and shareholder groups with the mission to develop a principles-based framework for corporate governance that provides a practical guide for listed companies, their investors and the wider Australian community. In 2007 the Council reviewed its corporate governance principles and recommendations for the first time since they were issued in March 2003. After receiving more than 100 public submissions, a revised set of principles was released on 2 August 2007 with a start date set for 1 January 2008. The revised Corporate Governance Principles and Recommendations continue to provide a flexible, practical and non-prescriptive framework for the Australian market. Market disclosure remains the cornerstone. The more transparent listed companies are about their corporate governance practices, the better placed investors will be to make informed investment decisions. ASX recognises that

corporate governance is an evolving debate and will endeavour to ensure that the principles remain relevant to the Australian business and investment communities.

Corporate Governance: the role of shareholders and the role of the board

The ASX Corporate Governance Council describes corporate governance as:

“The framework of rules, relationships, systems and processes within and by which authority is exercised and controlled in corporations’.¹ It encompasses the mechanisms by which companies, and those in control, are held to account. Corporate governance influences how the objectives of the company are set and achieved, how risk is monitored and assessed, and how performance is optimised.”

Australia’s corporate governance framework, whereby shareholders are represented by elected directors who act on their behalf, works well. Shareholder involvement in corporate governance primarily consists of monitoring the performance of the board of directors and the company as a whole. The agency costs associated with this model, such as continuous disclosure compliance and other forms of shareholder monitoring and company communication, are outweighed by the efficiencies which flow from this model.

Starting therefore from the basis that the current governance framework works well, and contributes to market efficiency, any exception to the default position that shareholders appoint directors as their agents to act on their behalf needs to be supported by an identifiable and justifiable principle. An example of such a principle is regulation providing for a direct shareholder vote in circumstances where a conflict of interest between shareholders and directors cannot be managed by any other means. In our view, current regulations give adequate effect to this principle.

Overview of ASX as a Licensed Market Operator

ASX administers seven (7) rule books governing its equities and futures trading, clearing and settlement markets. As a market licensee, ASX has a legislative obligation to deal with certain matters in its operating rules and procedures, and to ensure that the market is fair, orderly and transparent.

ASX’s overriding objective when considering whether to amend existing rules or introduce new operating rules is to ensure that it meets its statutory obligations. The key terms, fair, orderly and transparent are not defined in the Corporations Act. ASX has researched the meanings commonly applied to these terms in other jurisdictions and in guidance issued by the International Organization of Securities Commissions (IOSCO). Accordingly, ASX applies the following interpretation:

A market operator is likely to have satisfied its obligation to maintain an appropriate balance between fairness, orderliness and transparency if the infrastructure and rules which it provides and the trading operations which it satisfactorily monitors, enable users to be confident that:

- Prices obtained on the market are a reflection of genuine supply and demand² (fair market);
- The market structure does not unduly favour some market users over others³ (fair market);
- Market users with fiduciary responsibilities do not take improper advantage of persons to whom such fiduciary duties are owed (clients) in the conduct of market transactions⁴ (fair market);

¹ Justice Owen in the HIH Royal Commission, *The Failure of HIH Insurance Volume 1: A Corporate Collapse and Its Lessons*, Commonwealth of Australia, April 2003 at page xxxiii and Justice Owen, *Corporate Governance – Level upon Layer*, Speech to the 13th Commonwealth Law Conference 2003, Melbourne 13-17 April 2003 at page 2.

² For market users to be confident of the integrity of this price formation process, there must be no tolerance of trading practices – such as market manipulation – which involve attempts to create artificial prices. A market which is fair and efficient because of the absence of manipulation, is also less likely to be disorderly.

³ The provision of price and time priority for limit orders in auction markets is an example of structural arrangements designed to ensure that some market users are not unduly favoured over others. Ensuring that investors have equal and timely access to material information concerning the issuer of traded financial products is another example.

⁴ The right of a client to obtain best execution and the right not to be disadvantaged by the acts of a fiduciary (e.g. front-running) are primary examples of the objective of not tolerating trading practices or structural arrangements which are improper by virtue of intermediaries taking improper advantage of clients.

- There is an absence of wide or rapid variations in prices caused, resulting otherwise than from new information (orderly market);
- Market users know with some degree of certainty whether, and at what prices, they can deal and can know the prices and volume of all individual transactions concluded (transparent market).

Other matters also taken into account by ASX when considering whether to amend existing rules or introduce new operating rules include:

- An assessment of intended and potentially unintended impacts of any regulation. Is the regulation justified in light of the regulatory burden it will create for participants when weighed against the benefits that will flow from the regulation to the market as a whole? ASX places particular emphasis on promoting the efficiency of the capital markets as a whole.
- An assessment of whether ASX, or another body (eg ASIC; ASX Corporate Governance Council) is best placed to administer the regulation, taking into account the scope of the subject matter, the regulatory sanctions necessary to enforce the regulation, and the current supervisory framework.
- The extent to which the regulation will lead to improved confidence in the integrity of the market.

Practical Barriers to Effective Shareholder Engagement by Companies

A practical impediment to effective shareholder engagement is the difficulty sometimes encountered by companies in seeking to identify their shareholders. A lack of transparency as to ultimate shareholder identity may result from the understandably widespread use by shareholders of custodians through which to hold their investments. The use of trading techniques involving equity derivatives and short selling may also make ultimate economic ownership of securities difficult to establish. We mention these practical issues in order to highlight the fact that shareholder engagement is a complex issue and that practical impediments exist (for legitimate reasons) notwithstanding genuine intentions on the part of the company to engage with their investors.

The Committee's terms of reference are addressed in turn below.

1. barriers to the effective engagement of all shareholders in the governance of companies

ASX is not aware of any significant barriers to effective shareholder engagement in the governance of companies. ASX as a market operator has ongoing involvement in a number of initiatives which contribute to shareholder engagement. These include:

- Free, real-time company information is available on the ASX website www.asx.com.au. Delayed price and volume traded information is also freely available. Investors who rely on the internet for information are most likely to use the ASX website as their primary source of information.⁵
- ASX listing rule 3.1, continuous disclosure, requires a company to immediately announce material information to the market. This rule underpins the orderliness of ASX's markets and is rigorously enforced in order to ensure that all material information is equally available to all market users.
- ASX Chairs the ASX Corporate Governance Council, which released updated Corporate Governance Principles and Recommendations in August 2007. Companies are encouraged to use the guidance as a focus for re-examining their governance practices, and to assist in reporting key governance information to shareholders.
- The ASX Listing rules requires companies to report annually on the extent to which they have followed the ASX Corporate Governance Council's Recommendations. Companies must identify any Recommendations not followed, and state the reasons for not following the Recommendation and outline any alternative practices adopted to achieve the relevant Principle.
- ASX conducts investor education through its website and through seminars held in all capital cities (see further, term of reference 5 below).

⁵ ASX Share Ownership Study, 2006.

ASX as a listed company engages in the following initiatives which contribute to the engagement of ASX shareholders:

- Full and comprehensive governance information is available on the ASX website.
- The ASX holds regular analyst briefing sessions which are available for all investors to download at no charge from the ASX website.
- In 2006, ASX updated its constitutional terms relating to proxy forms to reflect changes to the Corporations Act and to facilitate the electronic transmission to ASX of proxy instruments.
- In 2007, ASX included in its Annual Report a comprehensive overview of capital and risk management, in addition to fulsome corporate governance reporting against the ASX Corporate Governance Recommendations.

2. whether institutional shareholders are adequately engaged, or able to participate, in the relevant corporate affairs of the companies they invest in

ASX is not in a position to comment on the level of institutional shareholder engagement or participation. However, we have included below for the information of the Committee key statistics about the type of institutional investor in the equities market, and how this investor breakdown has changed over the past nineteen years.

Institutional shareholders comprise a growing proportion of the equity market. This probably reflects the increasing value of superannuation funds under management. The table below contains a breakdown of the equities market by investor type and distinguishes between different types of institutional investor.

The table compares a snapshot of the market taken in June 1988 with data from March 2007. Total levels of domestic institutional investment (including banks, life and other insurance companies, pension funds and other financial institutions) totalled \$34.1 bn (23.1% total investments) in 1988 and \$600.6 bn (40.4% total investments) in 2007. In addition, a significant proportion of holdings of the rest of the world totalling \$56.8 bn (38.6% total investments) in 1988 and \$482.9 bn (32.5% total investments) in 2007 would represent foreign institutional investment.

Holdings of Listed Equity (including units in trusts)	Jun-88		Mar-07	
	\$A bn	%	\$A bn	%
Private non-financial corporations	3.2	2.2%	34.1	2.3%
Banks	3.1	2.1%	29	2.0%
Life insurance companies	9.7	6.6%	85.5	5.8%
Pension funds	12.5	8.5%	245.3	16.5%
Other insurance companies	2.1	1.4%	13	0.9%
Financial institutions (nec)*	6.7	4.6%	227.8	15.3%
Government	0	0.0%	16.3	1.1%
Households	53.1	36.1%	351.6	23.7%
Rest of the World	56.8	38.6%	482.9	32.5%
Total	147.2	100.0%	1485.5	100.0%

* includes managed funds, brokers, etc

Source: ABS 5232.0 Australian Financial Accounts

3. best practice in corporate governance mechanisms, including:

a) preselection and nomination of director candidates;

b) advertising of elections and providing information concerning director candidates, including direct interaction with institutional shareholders;

c) presentation of ballot papers;

d) voting arrangements (eg. direct, proxy); and

e) conduct of Annual General Meetings.

The governance mechanisms referred to in this third term of reference are regulated by the Corporations Act and a company's constitution. As a matter of principle, ASX believes that companies should be encouraged to adopt governance mechanisms which enhance shareholder participation in general meetings and particularly the election of directors, but that the nature of those mechanisms is a matter for each company to determine within the framework established by the Corporations Act. Principle 6 – Respect the rights of shareholders - of the ASX Corporate Governance Council's Corporate Governance Principles and Recommendations also discusses companies respecting the rights of shareholders and facilitating the effective exercise of those rights – see below. In addition, the ASX Corporate Governance Council has developed Guidelines for notices of meetings' provides guidance in respect of notices of meetings, appointment of proxies, appropriate drafting of resolutions, bundling of resolutions, and notices for election and removal of directors. To a limited extent ASX's Listing Rules address some aspects of these mechanisms, as set out below.

a) preselection and nomination of director candidates;

Listing rule 14.3 requires that listed entities accept nominations for directors up to 35 business days before the date of a general meeting (or, in the case of a meeting that members have requested the directors to call, 30 business days) unless the constitution of the entity specifies a different cut-off time (which may be longer). This ensures that outsiders to the current board have an opportunity to put themselves forward for election.

Listing rule 14.5 requires that an election of directors be held every year.

Listing rule 14.4 requires that no director hold office for longer than 3 years after his/her appointment, or past the third AGM following his/her appointment, whichever is longer. A director appointed to fill a casual vacancy must not hold office past the next AGM without putting up for re-election. This ensures that the board is not self-perpetuating.

b) advertising of elections and providing information concerning director candidates, including direct interaction with institutional shareholders;

c) presentation of ballot papers

No listing rule requirements

d) voting arrangements (e.g., direct, proxy);

Listing rule 14.2 requires a notice of meeting to include a proxy form.

Listing rule 14.2.1 states that the proxy form must provide for a shareholder to vote for or against each resolution.

Listing rule 14.2.2 states that the proxy form must allow a shareholder to appoint a proxy of the shareholder's choice, and may specify who is appointed as default proxy if the shareholder does not nominate a person.

Listing rule 14.2.3A and 14.2.3B: In essence these rule state that shareholders must give informed consent to the Chair using their votes as undirected proxy if the Chair has an interest in the resolution.

If there is a resolution to which a voting exclusion statement under the listing rules applies, and the Chair of the meeting is a person whose vote is excluded; and if the Chair of the meeting is the default proxy for shareholders who do not nominate a person as proxy on their proxy forms; then the proxy form must include:

- A statement of how the Chair intends to vote undirected proxies; and
- A box for the shareholder to tick, indicating that he understands that if he/she does not direct the proxy how to vote, and has either appointed the Chair as his/her proxy or not appointed anyone so the Chair will be appointed as default proxy, that the Chair may exercise the shareholder's votes on that resolution even though the Chair has an interest in the resolution.

Various listing rules prescribe that particular things may only be done with shareholder approval. Listing rule 14.11 prescribes the parties whose votes are to be excluded on these resolutions.

e) *conduct of AGMs*

ASX Issuers department examines draft notices of meeting concerning listing rule approvals, which includes ensuring that the relevant voting exclusion statements are included.

Under listing rule 14.6, if a listing rule requires a notice of meeting to include something, but the notice does not include that thing, the approval of security holders is not effective.

Under listing rule 14.8, ASX may require the entity to appoint a scrutineer. In practice, this rule is rarely applied.

NB: The above only applies to notices/resolutions under the listing rules. Election of directors is not governed by the listing rules, so these rules are not relevant to director-election resolutions.

4. *the effectiveness of existing mechanisms for communicating and getting feedback from shareholders*

Set out below is information relating to:

- ASX Company Announcements Platform (CAP), which is used by listed entities to disseminate to the market all disclosures required by the Corporations Act or ASX operating rules;
- Relevant ASX Corporate Governance Council guidance relating to shareholder communication.

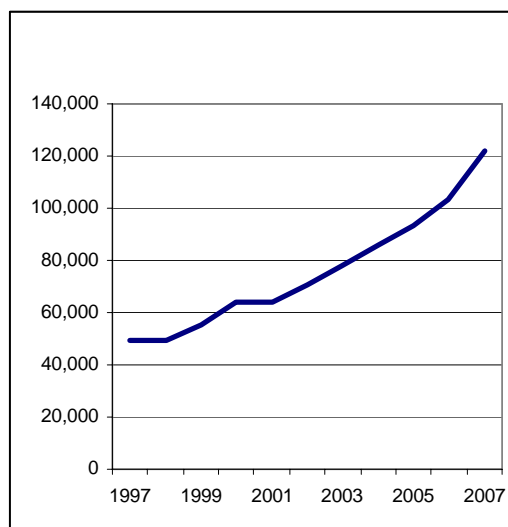
ASX Company Announcements Platform (CAP)

ASX Limited operates the Company Announcements Platform (CAP) for dissemination of announcements from entities listed on ASX. CAP enables announcements to be electronically lodged by listed entities in pdf format on ASX's secure intranet site or faxed directly to the Company Announcements Office.

CAP uses workflow process queues to distribute announcements to relevant ASX staff for review, e.g. Market Control, Compliance, Surveillance and Securities Administration. When announcements have been cleared for release to the public, CAP disseminates announcements to market data vendors and to the ASX public website, www.asx.com.au.

The ASX public website is visited by over 1.4m unique visitors each month. It is the most visited financial news and information website in Australia, making it a primary venue for shareholder communications by listed entities.

The volume of company announcements has grown significantly in recent years, from 42,000 in 1995/96 to 103,000 in 2005/06 and an estimated 122,000 this financial year



Company Announcement Volumes

Announcements have also increased considerably in average size and complexity with companies distributing full colour analyst presentations and detailed geological diagrams

ASX has recently made a significant investment in a 2 year project to replace the existing CAP system. The new system, CAPII, went live on 9 July 2007.

CAPII benefits included:

- The announcements service on ASX's public website was significantly upgraded with announcements now displayed in their original pdf format in full colour;
- An archive of announcements from 1998 is now available including the ability to search for key words or phrases in announcements issued after 9 July 2007;
- Listed entities can now enter their own heading to be disseminated with the announcement or select from a range of standard headings, enabling them to put their desired emphasis on communications to shareholders.

ASX Corporate Governance Council

Principle 6 of the Corporate Governance Principles and Recommendations states:

"Companies should empower their shareholders by:

- communicating effectively with them
- giving them ready access to balanced and understandable information about the company and corporate proposals
- making it easy for them to participate in general meetings."

Principle 6 also encourages companies to engage with shareholders using electronic means of communication:

"Companies should use their websites to complement the official release of material information to the market. This will enable broader access to company information by investors and stakeholders. Measures companies may consider include:

- placing all relevant announcements made to the market, and related information (for example, information provided to analysts or media during briefings), on the company website after they have been released to ASX
- web-casting or tele-conferencing analyst or media briefings and general meetings, or posting a transcript or summary to the website
- placing the full text of notices of meeting and explanatory material on the website - see Guideline 12 in the Guidelines for notices of meeting at www.asx.com.au
- providing information about the last three years' press releases or announcements plus at least three years of financial data on the website.
- providing information updates to investors by email."

5. the particular needs of shareholders who may have limited knowledge of corporate and financial matters

Governments face an ongoing challenge in balancing the need to protect unsophisticated investors, with the need to minimise regulation in order to avoid stifling economic growth. ASX welcomed the most recent amendments to the financial services regime which sought to achieve this balance. To some extent, the market mechanism also works to protect uninformed investors – for instance in liquid stocks, uninformed investors are effectively price protected as a result of institutional investor activity.

ASX believes that investor education and specifically financial literacy education is an important activity which can be undertaken to address the needs of shareholders with limited knowledge of corporate and financial matters. ASX is a strong supporter of the drive for financial literacy in our community through a range of information and education services. ASX investor education involves online education, presentations by industry experts and printed materials.

The ASX sharemarket games are popular with many novice investors and also with teachers and high school students. The ASX sharemarket game involves an authentic investment experience because it involves real time or "live" prices. Over 40,000 participants play the public game annually with approximately 50% of all Australian secondary schools registering to play. A CFD simulator based largely on the new ASX sharegame format is scheduled to go live later this year to provide prospective investors with some practical experience of these leveraged instruments.

ASX's online education is provided free of charge. Greater take-up of the internet has meant growing popularity of these online courses. Course usage for 2006/07 (123,837 users) was up by more than 20% on 2005/06. A series of courses identifying the risks and benefits of exchange traded contracts for difference (CFDs) have been launched to complement the commencement of this new ASX market.

ASX continues to provide practical, balanced education in the form of explanatory booklets. These are available in hard copy at no charge or can be downloaded from the ASX website. Over 180,000 copies of 'Getting Started in Shares' were downloaded 2006/07, representing 265% increase on 2005/06. 84,000 copies 'Understanding Options Trading' and 43,000 'Understanding Trading and Investment Warrants' were also downloaded.

ASX Investor Hours are put on in collaboration with the Australian Shareholders Association and the Securities and Derivatives Industry Association. This has resulted in broader program. Numbers have been at record levels. Over 14,500 people attended nationally in 2006/07 which necessitated the relocation to bigger CBD venues with improved facilities and in some instances two lectures being delivered in one day. The reach of these seminars has been extended by making these seminars and the presentation slides available on the internet in the form of podcasts. The podcast page on the ASX website receives an average of 11,300 page impressions per month.

6. the need for any legislative or regulatory change

ASX is not currently aware of the need for any legislative or regulatory change to enhance shareholder engagement or participation in the corporate governance of entities in which they are investors.

Please contact myself or Heidi Zwar (02 9227 0844) if you have any queries in relation to any aspects of this submission.

Yours sincerely



Malcolm Starr
General Manager, Regulatory and Public Policy