

Wednesday, 28 May 2008

Mr David Sullivan
Parliamentary Joint Committee of Corporations and Financial Services
Suite SG.64
Parliament House
Canberra ACT 2600

Also by email care of: Andrew.Bomm@aph.gov.au

Dear Mr Sullivan,

Re: Inquiry into Shareholder Engagement and Participation

I refer to the above matter.

Would you please find **enclosed** as requested the ASA's answers to questions asked by Senator Murray at the inquiry hearing, and responses to proposal's put in other submissions to the inquiry.

Yours sincerely,

Claire Doherty
Policy and Research Manager

Monday, 19 May 2008

ASA Response to questions from the PJC on Corporations and Financial Services, Inquiry into Shareholder Engagement and Participation

The ASA provided a submission to the Parliamentary Joint Committee on Corporations and Financial Services, Inquiry into Shareholder Engagement and Participation on 14 September 2008 and a representative of the organisation appeared before the Committee on 16 April 2008. A number of questions were asked by Senator Murray which required consideration. In addition the Committee also asked the ASA to provide responses to proposals made in other submissions to the inquiry.

The ASA

The Australian Shareholders' Association (ASA) is a not-for-profit organisation formed to represent, protect and promote the interests of investors in shares, managed investments, superannuation and other financial investments.

Response

1. The following questions were asked of the ASA by Senator Andrew Murray and additional time granted to the ASA to provide answers.

Should the law specify that share lending can only occur with the informed consent of the lender?

Senator Murray explained that informed consent in this context would mean that the borrower of securities would be required to obtain the informed consent of the lender.

In the fallout from the broker Opes Prime, a number of clients of the broker who had entered into securities lending agreements claimed not to have understood the contract signed passed ownership of their shares and collateral to the broker as the "borrower". There are allegations that Opes Prime made misrepresentations to the lenders which induced them to believe that they retained ownership of their shares. Also reported in the press are allegations that staff of the ANZ may have misrepresented the nature of the agreements to lenders.

It is unclear at this stage to what extent lenders understood the nature of the contracts they entered into. Various lenders have been reported as saying they believed the document amounted to a mortgage and a standard margin lending agreement.

The agreement which lenders signed was the Australian Master Securities Lending Agreement otherwise known as an AMSLA. The AMSLA is a contract for the sale and repurchase of securities. It passes legal title from the "Lender" to the "Borrower".

Investors caught up in the Opes Prime collapse, were almost invariably at the sophisticated end of the retail shareholder spectrum. Many were executives of small cap companies who borrowed on margin in order to exercise options. Other investors used Opes specifically because the broker allowed borrowing on conditions which a standard margin lender would not allow. Those conditions included the nature of the companies which they chose to invest in. The ASA are not aware of any members who used the services provided by Opes Prime.

What appears extraordinary is that investors with significant amounts of collateral at risk did not seek legal advice as to the nature of the agreement. Possibly this is because of the representations made about the agreement which were false, and induced investors to believe that the agreement was an arrangement with which they were familiar, such as a margin loan. Again possibly these investors would have gone ahead in any event given that they were in a high risk area of investment. It is possible that they accepted the nature of the agreement as part of the risk they were willing to take.

The most significant problem in relation to the collapse of Opes Prime appears to be, not the nature of the agreement or the document, but rather the conduct of the borrower. It is submitted that a duty to obtain informed consent would not provide any greater protection where the borrower is willing to act in a way which is in breach of the existing law.

The ASA position is that the current law with regard to contract provides a sufficient remedy to lenders who have been induced to believe that the document signed was of a different nature. It is the view of the ASA that specific regulation is unnecessary.

Do you think that share lending should be prohibited if the loan is for voting purposes?

The ASA believes that borrowers of securities under a securities lending agreement should be prohibited from utilising the voting rights of the stock.

Do you think share lending should be prohibited for directors, public officers and management of a company if it results in the transfer of ownership?

The ASA believes that this is a matter for self regulation. There is a clear duty to disclose director share trading. The ASA would not go so far as to attempt to prohibit this activity, but believe that given the risks inherent in the activity there are unlikely to be any circumstances where such activities provide a return to shareholders as a whole, which

justify the risks involved. The ASA does believe that this is a matter on which companies should have a clear policy.

2. The ASA as a representative of retail shareholders was asked to comment proposals put forward by other organizations which submitted to the inquiry. Where those proposals are matters upon which the ASA is able to comment, the responses are below. Where the same or substantially the same proposal was present in more than one submission, only one response is provided.

Responsible Investment Consulting

Proposal: Companies be required to provide a web-based question and answer system for shareholders. It is proposed that the facility be restricted to shareholders with holdings of \$100,000 or more and the companies within the ASX 50

The ASA does not support a system which would allow one set of shareholders greater access to management than other shareholders with smaller holdings and accordingly do not support this proposal. The proposal would require significant resources. Shareholders are able to correspond with management without this added layer of technology, and if "required" means required by law, further compliance costs.

Governance and Social Responsibility Unit – Curtin University of Technology

Proposal: Direct Voting

The ASA supports companies providing direct voting as an option, provided that the existing system of voting by proxy is retained.

Proposal: Provision of objective information on resolutions ahead of AGM and voting decisions

The ASA supports this call for detailed information to be provided, particularly as it relates to proposed new directors

Proposal: Active approach by the Nominations Committee to identify a broader pool of talent for boards.

The ASA supports this proposal on the basis that many current directors hold a significant number of appointments.

Chartered Secretaries Australia

Proposal: Short form reports to shareholders should be made available at the discretion of the company and not be subject to regulation.

The ASA supports the above. There are significant costs involved in producing reports to shareholders. Individual companies are best placed to determine whether it is necessary to provide these in addition to full reports.

Proposal: Only companies in the ASX 300 should be required to hold AGM's as a matter of course.

The ASA does not support this proposal. The AGM is the only forum for shareholders to directly question the board with regard to the management of the company. It is the one opportunity for directors to hear directly the views of shareholders and is an important part of shareholder participation and engagement. In the experience of the ASA, companies within the ASX 200 are generally better at communicating with shareholders. It is those companies the CSA seek to exclude where shareholders most need this forum.

Proposal: Reform of section 249D of the Corporations Act (requiring 100 members to requisition a meeting)

The ASA supports the status quo.

Proposal: Electronic Communication with shareholders

The ASA supports continuing exploration of effective ways to communicate with shareholders, including electronic communication. However companies need to be mindful of the fact that many members do not have access to electronic communication and continue to provide alternatives.

Proposal: Shareholder Privacy – access to the share register

Whilst the ASA is mindful of the fact that shareholder registers can be misused, it would not support moves to restrict this information. On balance the importance of the legitimate reasons to access to register outweigh the privacy arguments. Shareholders are aware that they are investing in a public company. That the registers are open to abuse by predatory share offers is clear, but the solution to this problem should not be found in restricting the legitimate rights of shareholders to identify and contact each other.

IAG Australia

Proposal: Unsolicited Share Offers – action required

The ASA agrees that there needs to be further attempts to restrict the practice of currently legal predatory share offers. The ASA applauds those companies which take the trouble to write to shareholders when they become aware of offers, but this reactionary step is often too late for many shareholders. The ASA believe that a long term commitment by the Government and ASIC to public education about the share market is the only way to

Australian Council of Super Investors Inc

Proposal: Electronic Voting and Lost Votes

The ASA supports moves which would create an end to end audit trail for proxy voting. The ASA does not support any move to make all proxy voting electronic given that a significant number of retail shareholders do not have access to electronic communication.

Proposal: Annual Reports to include details of remuneration consultants

The ASA would support this proposal on the basis that it would assure shareholders as to the independence of such consultants.

Proposal: Presentation of Ballot Papers

The ASA supports the use of electronic means for the circulation and completion of ballot papers, provided hard copy ballot papers remain available.

Proposal: Exclusion of associates' vote on remuneration report

The ASA supports this proposal. The ASA agrees with ACSI that the purpose of the non-binding vote on remuneration is to indicate shareholders position on the remuneration of executives. If all shareholders, including directors and executives who are the beneficiaries of the remuneration arrangements are allowed to vote the results have little value to the company. The ASA support the principle of this proposal, but note that there are issues such as how the open proxies voted by the chair are treated, which would need to be given careful consideration.

Proposal: Improved Conduct of AGMs including encouragement of questions on notice and web-casting

These proposals are in line with the ASA's position on improvement of AGM's.

Proposal: Re-instate pre-October 2005 version of Listing Rule 10.4 which requires approval by shareholders of equity grants to executive directors

The ASA does not support this proposal. If awards of cash to executives to buy the securities personally can be made without approval of shareholders the ASA does not see that resurrecting this rule will have any material effect. It is the ASA view that new shares should not be issued for the purpose of remuneration as this causes a dilution of the holdings of existing shareholders.

Stephen Mayne

Proposal: Various proposals with regard to the conduct of AGMs

The ASA agrees with Mr Mayne that the AGM requires revitalising. The ASA do not believe that legislative change can help to make AGM's more meaningful. What is required is a significant change in approach by companies to value the input of shareholders and make meetings relevant to them.

Proposal: Legislative change to ensure annual reports are 200 pages or less

The ASA does not support this proposal.

Proposal: Timing of Annual Meetings

The ASA agrees that companies should hold meetings at times and dates which are convenient for as many shareholders as possible.

Proposal: Press should be allowed to ask questions at the AGM

The ASA agrees that the Press should be allowed to ask questions at the AGM. The ASA do not believe that there should be a separate press only briefing, but rather that the press should attend the meeting and ask their questions whilst shareholders are present.

Australasian Investor Relations Association

Proposal: Amendment of section 672 of the Corporations Act so that derivative instruments are captured by the tracing provisions

The ASA supports this proposal for the reasons given by AIRA.

Proposal: Extend the "Opt-in" requirement for receipt of the full annual report to the notice of meetings

The ASA does not support this proposal. All shareholders should be notified of all meetings. There is a significant danger that shareholders might opt out on the basis that they do not wish to be advised of the AGM and in the process fail to be notified of an EGM or other one off meeting which has significant ramifications for their holding.