

31 March 2022

Fiona Balzer
Policy & Advocacy Manager
Australian Shareholders Association

Email: policy@asa.asn.au

Dear Fiona,

ASA Consultation Voting and Engagement Guidelines (Guidelines) Update 2022

Who we are

Governance Institute of Australia is a national membership association, advocating for our network of 40,000 governance and risk management professionals from the listed, unlisted, public and not-for-profit sectors.

As the only Australian provider of chartered governance accreditation, we offer a range of short courses, certificates and postgraduate study. Our mission is to drive better governance in all organisations, which will in turn create a stronger, better society.

Our members have primary responsibility for developing and implementing governance frameworks in public listed companies as well as unlisted and private companies, not-for-profit organisations and the public sector. They have a thorough working knowledge of the operations of the markets and the needs of investors. We regularly contribute to the formation of public policy through our interactions with Treasury, ASIC, APRA, ACCC, ASX, ACNC and the ATO.

Our members consider that the ASA plays a vital role in representing retail shareholders and they welcome the opportunity to contribute to the update of the Guidelines. Their aim has always been to promote better engagement between companies and their owners and to encourage transparency.

General comments

Governance Institute, like ASA is a founding member of the ASX Corporate Governance Council. The Council's Corporate Governance Principles and Recommendations (Principles and Recommendations) have played a vital role in improving corporate governance in Australian listed companies since the release of the first edition in 2003. Their history is one of practical statements on governance that have brought meaningful change to governance practice.

The 'if not, why not' model is one of the great strengths of the Principles and Recommendations and enables listed entities to adopt practices which are appropriate for their individual circumstances, provided they explain how their practices meet the spirit and intention of the relevant recommendation. This is especially important for smaller listed entities, including those in the ASX 200, which may adopt alternative practices for legitimate reasons. This ability to explain alternative practices is important, given the preponderance of other governance guidelines issued by multiple parties. While there can be commonality in some areas between these guidelines, they can also conflict. The approach can also at times be unduly prescriptive.

As we have observed on many occasions, some users of corporate governance information treat commentary in the Principles and Recommendations as if it were a reporting requirement and assume that entities must ‘comply’ with the Recommendations or be ‘marked down’ on governance practice.

Our members also note that the Guidelines are directed to a subset of all listed entities, the ASX 200, and that there is a wide variety of entities and governance practices within this group. Entities will have differing practices for a variety of reasons related to their history, capital structure, sector and areas of operation. Our members therefore consider it is critical to approach the governance practices of listed entities and any assessment of differing entities’ approaches thoughtfully with proper consideration of their individual circumstances. While shareholders have every right to challenge explanations if they are unconvincing, they should not be evaluated in a mechanistic way.

Our members also note that proxy advisors and, frequently, large investors have their own guidelines. Ultimately, the Board is charged with acting in the best interests of the entity and guidelines need to be assessed in that context.

Comments on the current Guidelines

Part A: Governance and Transparency

1. Composition of boards – the discussion about board diversity has continued to advance since the Guidelines were last revised and we would commend to you our most recent Board Diversity Index which includes a broad discussion of five aspects of diversity.¹ [Comment: The guidelines were updated in June 2020]

4. CEO transition to non-executive role – our members consider that the discussion in this section does not reflect some of the nuance of the discussion in Recommendation 2.3 and Box 2.3 of the Principles and Recommendations. They would welcome expansion of this section to reflect the fact that boards need to make a proper assessment of the factors relevant to assessing director independence.

7. Workload of non-executive directors – our members consider this issue is best managed by the chair with the support of the nomination committee and would prefer a less prescriptive approach.

9. Determining director (re-) election voting – our members query the phrase ‘poorly performing companies’ without reference to what constitutes ‘poor performance’.

Our members do not consider it appropriate to require listed entities to disclose the reasons for the unexpected resignation of a director in an ASX announcement, unless it is a continuous disclosure matter. Unexpected resignations can occur for several reasons including a change in personal circumstances such as serious illness which they should not necessarily have to disclose to the market.

18. Importance of annual report – our members note that the Guidelines refer to shareholder’s expectation that annual reports will include a five-year history. This section also lists a range of 11 metrics. Their main comment is that it may be more useful to refer to the key metrics impacting the entity’s business. This section also refers to entities making it easier for shareholders to receive hard copy annual reports by mail. Our members acknowledge some shareholders still want to receive hard copy annual reports and most companies go to significant trouble to accommodate their preferences. However, increasingly they see shareholders preferring to either

¹ See [2021 Board Diversity Index](#), Watermark Search International and Governance Institute of Australia.

receive an electronic copy of the annual report or a notification about where to download an electronic copy. The increased cost and decreased reliability of Australia Post during COVID-19 has partly driven this change in preferences. This change has been recognised in the recent amendments to the Corporations Act.² In addition, companies want to reduce their environmental footprint and paper wastage so many companies are trying to reduce hard copy printing.

Part B: Executive Remuneration

20. CEO remuneration, 21. Short term incentives – our members note the expectation that at least 50 per cent of a CEO's total pay should be genuinely at risk. However, remuneration frameworks are different for each company. While in some cases this may be appropriate for an entity's circumstances, in others it will not (and in some cases CEO at risk remuneration exceeds 50 per cent). While this is acknowledged later in the section it may be preferable to make this point at the opening of the section.

26. On-market purchases v newly issued equity – our members note ASA's concerns about dilution but also note that boards have responsibility for capital management. Where an issue of shares has been previously approved entities should be able to issue new shares under that approval and if no approval has been obtained, within the applicable thresholds under Listing Rule 7.

27. Opposition to underlying earnings as a performance metric – our members note ASA will require any calculation of earnings per share to be based on statutory profit. Their main observation is that this will not be suitable for all entities, and it will depend on the nature of the business. Where an entities performance can be assessed based on non-IFRS metrics, it is not unreasonable to include such a measure as a performance metric.

29. Executive sign-on benefits 30. Retention payments 31. Termination payments - our members main observation on these sections is that ASA's requirements fail to account for the fact that entities will have an employment strategy which for good reason may include some of these features. They also noted that termination payments are regulated by the Corporations Act and question whether it is necessary to cover them in the Guidelines.

Part C: Capital Management

While our members in principle support equal access for retail shareholders to capital raisings, listed entities will have capital management needs. As the last two years have demonstrated there will be times when listed entities must go to the market to raise capital quickly to maintain liquidity.

Areas for review

Corporate Governance

We note the observation in this section that retail shareholders rarely have an opportunity to meet with directors outside the AGM. In our members' experience ASA monitors, as representatives of retail shareholders, maintain an active program of annual engagement meetings with listed entities. Given the existence of these engagement meetings they would be interested to understand what additional engagement ASA considers would assist.

Remuneration

We note the proposed expansion of the Guidelines to take into account the revised APRA Prudential Standard on remuneration. While this is entirely appropriate for listed APRA-regulated entities our members would be concerned were this to apply across all sectors. We recommend careful consideration of the changes to these sections.

² Corporations Amendment (Meetings and Documents) Act 2022.

Say on climate resolutions

While some companies have committed to including advisory 'Say on Climate' resolutions on their 2022 notices of meeting, many companies are still forming their views on these resolutions. The impact of climate change on companies is extremely broad and will depend on many factors. For this reason, our members consider it may be premature to include these in the revised Guidelines.

Governance Institute supports listed entities using the Recommendations of the Task Force on Climate related Financial Disclosures (TCFD) as a framework for disclosure of climate change risk. We would draw your attention to our 2020 publication on climate change risk disclosure which provides practical guidance for listed entities on reporting against the TCFD Framework.³

AGMs

Our members note that ASA has expressed concern in public submissions and other commentary about virtual AGMs and has indicated its intention to oppose resolutions to amend company constitutions to allow virtual AGMs.

Our members have consistently expressed the view that companies should have the flexibility to hold meetings in the way best suited to their unique circumstances. For many companies, virtual meetings have increased accessibility and engagement. A number of companies have noted increased shareholder attendance over the last two years when virtual meetings have been the predominant form of meeting due to widespread restrictions on physical meetings. Our members have also consistently advocated for modernisation of the Corporations Act to make it technology neutral to avoid the situation where the Act is rapidly out of date. The final form of the recent amendments to the Corporations Act to enable meetings using technology requires that companies' constitutions specifically allow virtual meetings.⁴ Our members consider that where the requisite number of shareholders approve a constitutional amendment to enable virtual meetings, companies should be able to use this format.

If you have any questions in connection with this submission, please contact Catherine Maxwell.

Yours sincerely,



Megan Motto
CEO

³ See [Climate change risk disclosure: A practical guide to reporting against the ASX Corporate Governance Council's Corporate Governance Principles and Recommendations](#), Governance Institute of Australia, 2020.

⁴ See Note 2 above.