



Australian Government
The Treasury

TSY/AU

Greater transparency of proxy advice

Consultation Paper

April 2021



© Commonwealth of Australia 2021

This publication is available for your use under a [Creative Commons Attribution 3.0 Australia](https://creativecommons.org/licenses/by/3.0/au/legalcode) licence, with the exception of the Commonwealth Coat of Arms, the Treasury logo, photographs, images, signatures and where otherwise stated. The full licence terms are available from <http://creativecommons.org/licenses/by/3.0/au/legalcode>.



Use of Treasury material under a [Creative Commons Attribution 3.0 Australia](https://creativecommons.org/licenses/by/3.0/au/legalcode) licence requires you to attribute the work (but not in any way that suggests that the Treasury endorses you or your use of the work).

Treasury material used 'as supplied'.

Provided you have not modified or transformed Treasury material in any way including, for example, by changing the Treasury text; calculating percentage changes; graphing or charting data; or deriving new statistics from published Treasury statistics — then Treasury prefers the following attribution:

Source: The Australian Government the Treasury.

Derivative material

If you have modified or transformed Treasury material, or derived new material from those of the Treasury in any way, then Treasury prefers the following attribution:

Based on The Australian Government the Treasury data.

Use of the Coat of Arms

The terms under which the Coat of Arms can be used are set out on the Department of the Prime Minister and Cabinet website (see www.pmc.gov.au/government/commonwealth-coat-arms).

Other uses

Enquiries regarding this licence and any other use of this document are welcome at:

Manager
Media and Speeches Unit
The Treasury
Langton Crescent
Parkes ACT 2600
Email: media@treasury.gov.au

Contents

- Contentsiii**
- Consultation Process1**
 - Request for feedback and comments1
- Greater transparency of proxy advice2**
 - Introduction.....2
 - Proxy advice market in Australia.....2
 - Regulation of proxy advisers3
 - Proxy advice in the superannuation sector.....3
 - International developments.....3
- Consultation Objectives4**
- Potential Reforms.....4**
 - Ensuring independence between superannuation funds and proxy advice.....4
 - Facilitating engagement between companies and proxy advisers6
 - Require suitable licensing for the provision of proxy advice7

Consultation Process

Request for feedback and comments

Interested parties are invited to comment on the issues raised in this consultation paper.

While submissions may be lodged electronically or by post, electronic lodgement is preferred.

All information (including name and address details) contained in formal submissions will be made available to the public on the Australian Treasury website, unless you indicate that you would like all or part of your submission to remain in confidence. Automatically generated confidentiality statements in emails do not suffice for this purpose. Respondents who would like part of their submission to remain in confidence should provide this information marked as such in a separate attachment.

Legal requirements, such as those imposed by the *Freedom of Information Act 1982*, may affect confidentiality of your submission.

View Treasury's [Submission Guidelines](#) for further information.

Closing date for submissions: 01 June 2021

Email MCDproxyadvice@treasury.gov.au

Mail Market Conduct Division
 The Treasury
 Langton Crescent
 PARKES ACT 2600

Enquiries Enquiries can be directed to MCDproxyadvice@treasury.gov.au

Greater transparency of proxy advice

Introduction

Part of the regulatory framework supporting good corporate governance is the requirement for companies to hold Annual General Meetings (AGMs), at which senior company officers engage with shareholders and put certain matters to shareholders as resolutions for their approval by vote. Some resolutions are required under the *Corporations Act 2001* (Corporations Act), and some may be required by the company's own constitution. There is a broad range of resolution types, including those related to strategic or commercial decisions, the composition of the Board and changes to a company's name, type or constitution.

Many institutional shareholders, such as superannuation funds, use the services of proxy advisers to assist in arriving at voting decisions, particularly those with diversified holdings in a large number of companies.

Proxy advisers typically undertake research and provide voting recommendations on resolutions put at a company's meeting. They provide this information in a proxy report to a range of institutional investors, such as superannuation funds, asset owners, pension funds and other major investors. Investors can use the proxy advice report and other sources of information to arrive at a vote decision.

Australia has the fifth largest pool of pension funds¹ and there are more than 2,000 companies listed on the ASX. At the same time, there are only four main proxy advisers operating in Australia. This gives these advisers a high degree of influence in the outcomes of company resolutions and therefore the conduct of business in Australia.

Proxy advice market in Australia

In Australia, the four main proxy advisers are Institutional Shareholder Services Australia, CGI Glass Lewis, Ownership Matters and the Australian Council of Superannuation Investors. There are other entities operating as proxy advisers to non-institutional investors². Entities that are offering proxy advice or proxy services to non-institutional investors are not the focus of this consultation.

Each of the four main proxy advisers have their own proxy voting guidelines and policies that outline the underlying principles that guide the voting recommendations. Proxy advisers also abide by bespoke engagement policies that outline how they engage with companies. For example, one proxy adviser has a particular period where they do not engage with companies; another, provides their proxy advice report to the company for comment, prior to publication³. These policies are not legally binding on the proxy advisers.

Apart from the proxy advice report, proxy advisers also provide other services such as data, analytics, insights and governance advice.

¹ Investment Company Institute data, sourced via Australian Trade and Investment Commission release *Australia's pension funds shine in 2021 global rankings*

² For example, the Australian Shareholders Association monitors companies and offers advice to its membership base of individual investors.

³ Proxy adviser policies are publicly available from proxy adviser websites.

Regulation of proxy advisers

Proxy advisers are required to hold an Australian Financial Services License (AFSL) for advice they provide to wholesale investors in respect of votes that relate to dealings in financial products.

However, proxy advisers also provide advice on other resolutions, such as remuneration reports, board appointments and governance arrangements, which are not covered by the AFSL regime as they do not fall within the meaning of a financial service.

Proxy advisers are also subject to misleading and deceptive conduct provisions⁴, which means that they must not engage in conduct in relation to a financial product or a financial service that is misleading or deceptive, or likely to mislead or deceive. This is regardless of whether the proxy adviser is engaging in a service covered by their AFSL or not.⁵

Proxy advice in the superannuation sector

Background

Superannuation funds typically own shares in Australian listed companies as part of an overall investment strategy. As at 31 December 2020, superannuation funds with more than four members owned 20 per cent or \$443.7 billion of the Australian Stock Exchange (ASX) on behalf of their members.

These shares have voting rights attached, and where superannuation fund trustees exercise voting rights they are obliged to do so in the best interests of their members (with legislation currently before Parliament clarifying that this obligation means members' best *financial* interests).

Australians currently have at least 9.5 per cent of their salary contributed towards their retirement and they should have confidence that trustees are acting to maximise their retirement savings, including when trustees exercise voting rights and in interactions with listed companies.

Given the volume of company resolutions a trustee may be entitled to vote on in a given year, some superannuation funds may decide to engage proxy advisers to provide additional information and recommendations on how to exercise their voting rights. In such circumstances, it is still a matter for the superannuation fund to ultimately determine how to exercise their voting rights. There is insufficient public information today to determine whether superannuation funds, in this area, are acting in a manner consistent with their legal obligations.

There are existing regulations which require superannuation funds to publicly disclose their proxy voting policies and summary of when and how the fund exercised its voting rights at AGMs of listed companies for the previous financial year.

Section 29QB of the Superannuation Industry (Supervision) Act 1993 (SIS Act) and s 2.38(2) of the Superannuation Industry (Supervision) Regulations 1994 (SIS Regulations) set out requirements as to which documents and information need to be publicly disclosed.

International developments

The regulation of proxy advisers has been the subject of recent reforms in the United Kingdom and the United States. Overall, the reforms are primarily focused on transparency, accountability and independence.

⁴ *Corporations Act 2001*, s1041H

⁵ ASIC review of proxy adviser engagement practices 2018 (Report 578), page 4.

The Securities Exchange Commission (SEC) in the United States consulted on proposed amendments to regulate proxy advisers between 2019 and 2020. The SEC adopted the final amendments which will come into effect December 2021. The amendments specify that proxy voting advice generally constitutes a solicitation. They also provide exemptions from the information and filing requirements of the proxy rules, where the proxy adviser provides conflict of interest disclosure in their advice and has policies and procedures that⁶:

- ensure advice is made available to companies subject of their reports before or at the time it is provided to their clients; and
- they provide a mechanism for their clients to view any written statements by the companies in relation to their advice before the relevant meeting.

Similarly, the United Kingdom amended regulations in 2019 to require proxy advisers to disclose actual or potential conflicts of interests, disclose information about their research capabilities and how the research supports the advice and recommendations and disclose instances where there is deviations from the proxy adviser firm's code of conduct or why the firm has not adopted a code of conduct.⁷⁸

Consultation Objectives

Given the influential role of proxy advisers in corporate governance in Australia and the high degree of institutional share ownership, this consultation is designed to help assess the adequacy of the current regulatory regime and help develop reform options that would strengthen the transparency and accountability of proxy advice. Additionally, given the millions of Australians who have their superannuation savings invested in shares, it is critical that the voting rights attached to the members' superannuation assets are managed to maximise the retirement savings of Australians and for the sole purpose of retirement benefits.

Potential Reforms

Ensuring independence between superannuation funds and proxy advice

Trustees of registrable superannuation entities should be held to the highest standards of governance, transparency and efficiency to ensure assets are managed to maximise members' retirement savings.

Recent policy initiatives, including the Government's *Your Future, Your Super* (YFYS) legislative package, currently before Parliament, will continue to strengthen the superannuation system in these critical areas. For example, under the YFYS reforms, from 1 July 2021 trustees will have a duty to always act in the best financial interests of members. Transparency will also be enhanced through improved portfolio holdings disclosure requirements and more information being provided to members ahead of the Annual Members' Meeting (AMM).

⁶ SEC Press Release 2020-161 – *SEC adopts rule amendments to provide investors using proxy voting advice more transparent, accurate and complete information*

⁷ Financial Conduct Authority proxy advisers information page, last updated 11/11/2020

⁸ Explanatory Memorandum to *The Proxy Advisors (Shareholders' Rights) Regulations 2019 – 2019 No. 926 (UK)*

There is scope to further improve transparency and member engagement by ensuring trustees provide simpler and clearer information about how funds manage members' money, including in the exercise of voting rights. While some funds publish detailed information on their voting, this is not consistent across the industry, and rarely includes information on the proxy recommendation received – attributable in part to a legislative requirement on trustees to publish only their proxy voting policies and a summary of their votes for listed companies.

There is also scope to also ensure that the role of proxy advisers in advising and interacting with trustees is appropriate and transparent. Trustees have specific fiduciary and statutory obligations to their members, including to act in the best interests of members and to maintain high standards of governance. Proxy advisers are not subject to the same framework, and therefore may have broader objectives than those that a trustee is required to consider. Superannuation funds compete for members and investment returns. There are also questions therefore as to whether superannuation funds should be jointly involved in determining their voting positions, including through shared ownership of a proxy adviser. In this context, it is appropriate to consider whether there is a need for meaningful independence between superannuation trustees and proxy advisers.

Options

Stakeholder views are sought on the following options aimed at improving independence of proxy advisers for the purposes of ensuring superannuation funds are held to the highest standards of governance and transparency.

Option 1: Improved disclosure of trustee voting. Under this option, superannuation funds would be required to disclose more detailed information in relation to their voting policies and actions for each financial year. The details to be disclosed could include how votes were exercised, whether any advice was received from a proxy adviser and who provided the advice.

If proxy advice is received, disclosure could include whether the voting actions taken were consistent with the proxy advice.

Option 2: Demonstrating independence and appropriate governance. Under this option, proxy advisers would be required to be meaningfully independent from a superannuation fund they are advising to ensure that proxy advice is provided to and used by superannuation funds on an 'arm's length' basis.

Trustees could also be required to outline publicly how they implement their existing trustee obligations and duties around independent judgement in the determination of voting positions.

Consultation questions

1. How would the proposed options affect superannuation fund members?
2. What impact would the proposed options have on superannuation funds in complying with these regulatory requirements?
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?
4. What other information on how voting is informed by proxy advice should be disclosed by superannuation funds and why?
5. What level of independence between a superannuation fund and a proxy adviser should be required?
6. Which entity should the independence requirement apply to (superannuation fund or proxy adviser)?

Facilitating engagement between companies and proxy advisers

Proxy advice reports are generally provided to investors 14 to 21 days prior to a company's meeting.⁹ Currently, proxy advisers are not required to engage with companies on their research, report and recommendations, either before or after providing their reports to investors.

Business representative groups have raised the importance of companies being able to engage with proxy advisers and being able to present their views to the investors who receive the reports, including in situations where a company may disagree with some of the research or recommendations in the reports. The opportunity to engage allows companies to point out any potential factual inaccuracies and convey additional context or information to the proxy adviser that may impact the final voting recommendation. This is important given that there are only a few proxy advisers that are providing advice to what is a large proportion of their shareholder base for some companies.

Given that AGMs are not distributed evenly throughout the year, with a high proportion of Australia's AGMs happening in the last quarter of the year, large institutional investors may have limited capacity to engage with multiple sources of information in relation to each AGM. Having proxy advice accompanied by the company's response to that advice, or a simple direction on how to find it, would simplify accessing and contrasting information and perspectives.

Options

Stakeholder views are sought on the following options that are aimed to facilitate engagement and transparency.

Option 3: Facilitate engagement and ensure transparency. Under this option, proxy advisers would be required to provide their report containing the research and voting recommendations for resolutions at a company's meeting, to the relevant company before distributing the final report to subscribing investors. For example, a period of five days prior to the recommendation being made publicly available would give enough time for both the company and proxy adviser to comment and for the proxy adviser to amend the report in response if warranted.

Option 4: Make materials accessible. Under this option, proxy advisers would be required to notify their clients on how to access the company's response to the report. This could be through providing a website link or instructions on how to access the response elsewhere.

Consultation questions

7. How would the proposed options affect the level of engagement by proxy advisers with companies?
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?
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?
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?
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 recommendation otherwise publicly known?

⁹ Australian Institute of Company Directors, *Institutional Share Voting and Engagement: exploring the links between directors, institutional shareholders and proxy advisers*, 2011

Require suitable licensing for the provision of proxy advice

As noted above, proxy advisers provide advice on a range of company-related matters, much of which does not require specific licensing, in spite of the influence on the conduct of business in Australia. Making assessments on issues such as the appropriateness of a proposed executive remuneration package, the performance of a director and whether they should be re-elected, and the outcome of a change in the company's constitution all require a high degree of expertise to assess. The investors that proxy advisers sell their service to are for the most part seeking financial returns for their members and clients, especially superannuation funds that are required to act in the best interests of their members.

Australia's existing regime for financial services is the AFS Licensing regime, to which only a subset of proxy adviser activities is currently subject. If an entity is required to hold an AFSL to provide financial services, they are required to comply with obligations under the Corporations Act and their licence conditions, unless relief is granted by ASIC or an exemption in the law applies. The AFSL is issued by ASIC under Chapter 7 of the Corporations Act in line with its regulatory responsibility for the financial services industry.

An AFSL holder must comply with the general obligations under the Corporations Act, including the following:

- (a) do all things necessary to ensure that the financial services covered by the AFS licence are provided efficiently, honestly and fairly;
- (b) have adequate arrangements in place to manage its conflicts of interest;
- (c) comply with AFS licence conditions;
- (d) comply with financial services laws; and
- (e) take reasonable steps to ensure that your representatives comply with the financial services laws.

An AFSL holder is also required to comply with various conduct obligations, particularly in Part 7.6 of the Corporations Act, including:

- (a) notifying ASIC of significant breaches or likely breaches of certain AFS licensee obligations;
- (b) assisting ASIC in their regulatory oversight of the licensee;
- (c) complying with certain procedures when dealing with clients' money and other property; and
- (d) keeping financial records and preparing and lodging financial statements.

Options

Stakeholder views are sought on the following option:

Option 5: Ensuring advice is underpinned by professional licensing. Under this option proxy advisers would be required to obtain an AFSL for the provision of proxy advice.

The purpose of the license would be to ensure that proxy advisers are making assessments on issues that have a material impact on the conduct of business in Australia with appropriate regulatory oversight and the necessary care and skill required.

Consultation questions

12. Is the AFSL regime an appropriate licensing regime through which to regulate the provision of proxy advice?
13. Would coverage under the AFSL regime result in an improvement in the standard of proxy advice?