

20 April 2015

Ms Melissa Liu
Lawyer, Corporations
Australian Securities & Investments Commission
Level 5, 100 Market Street
SYDNEY NSW 2000

Dear Melissa,

**RE: ASIC Consultation Paper 228
Collective action by investors: Update to RG 128**

AustralianSuper is pleased to provide the following submission to ASIC's *Consultation Paper CP228 – Collective Action by Investors: Update to RG128*.

About AustralianSuper

AustralianSuper is one of Australia's largest super funds and is run only to benefit members. We don't pay commissions to anyone to recommend us, nor do we pay dividends to shareholders. We have over 2.1 million members and manage over \$85 billion of members' assets. Our sole focus is to provide the best possible retirement outcomes for members.

Introduction

AustralianSuper welcomes ASIC Consultation Paper 228. In particular, AustralianSuper is supportive of ASIC's efforts to provide a level of comfort to institutional investors who consider that, where they have a significant investment in an investee company, their responsibilities to their stakeholders will often attract a responsibility to engage actively with the investee company. AustralianSuper approaches such engagement from the perspective of a long-term asset owner and the creation of long term value for our members.

AustralianSuper understands the scope and relevance of the 'associate' and 'relevant interest' concepts contained in the Corporations Act. AustralianSuper also understands that ASIC needs to be cautious in providing guidance to market participants as to circumstances that are likely or not likely to attract those concepts. However, notwithstanding these matters, AustralianSuper considers that further comfort than that currently provided by Draft RG 128 could be given to institutional investors who engage actively with their investee companies.

There are two areas in Draft RG 128 where this view prompts AustralianSuper to request that ASIC consider modifications to Draft RG 128. Those areas are described below.

1 Draft RG 128 provides limited assistance to investors who wish to convey views on substantive commercial or strategic matters to an investee company in conjunction with other investors

In brief, AustralianSuper considers that there should be:

- greater recognition in RG 128 of the capacity of multiple investors to attend meetings with representatives of an investee company on substantive commercial or strategic matters without triggering the associate or relevant interest tests; and
- some alterations to language in Draft RG 128 that, in its current form, may serve to discourage such engagement.

1.1 Engaging on substantive matters

Draft RG 128 provides some assistance to collective action aimed at improving corporate governance practices. AustralianSuper recognises the strictures of the association and relevant interest concepts in the Corporations Act. However, AustralianSuper considers it an undesirable outcome if joint conduct in relation to matters of process is given some encouragement, whilst, effectively, joint conduct in relation to matters of substance is discouraged.

In AustralianSuper's view, it is possible to distinguish between:

- co-ordinated conduct of activist shareholders jointly pursuing a strategy aimed at pressuring an investee company into taking a particular corporate action; and
- an institutional investor, alongside one or more other institutional investors, engaging with a company on a particular business issue (whether it be a 'governance' issue or a substantive commercial issue) to understand fully the company's position, to debate the merits of the company's position, to discuss alternative viewpoints and (potentially) to advocate a particular course of action.

AustralianSuper considers that the latter category of conduct will generally not give rise to an association or result in the investors acquiring a relevant interest in each other's shares in the relevant company. AustralianSuper considers that this type of conduct is an important form of key stakeholder engagement and should be encouraged.

In several places in Draft RG 128 there are references to collective engagement on governance matters. In AustralianSuper's view, the language used in at least some of these sections of Draft RG 128 should be expanded modestly to recognise that there is scope for engagement on a broader range of issues without triggering association or relevant interest issues.

Examples of this language are contained in the following sections of Draft RG 128: paragraph 128.6, paragraph 128.13(a), paragraph 128.20, Table 1 (Row 3, first paragraph) and paragraph 128.50.

1.2 Specific suggested modifications to language used in Draft RG 128

Table 1 in Draft RG 128 sets out examples of collective conduct considered by ASIC to be unlikely to constitute acting as associates or to give rise to relevant interests. The third row of Table 1 addresses the following conduct:

Institutional investors making representations to the company's board about the company's policies, practices or particular actions that the company might consider taking.

In its 'explanation and analysis' of this type of conduct, Table 1 includes several statements that AustralianSuper considers are unnecessarily restrictive:

(a) **First paragraph of 'explanation and analysis' in Table 1**

The first paragraph places an emphasis on joint representations in respect of governance matters. The paragraph implies that joint representations in respect of substantive business issues may be problematic.

In AustralianSuper's view, whilst it may be right that joint representations on governance matters are less likely to give rise to association or relevant interest issues, it is not the case that joint representations or commercial issues cannot be undertaken without triggering association or relevant interest issues. AustralianSuper considers that it is quite possible for two institutions to make representations to a company on a commercial issue without having an understanding for the purpose of influencing the conduct of the company's affairs and without either of them having any influence over the voting of the other's securities in the company.

Further, in AustralianSuper's view, from a policy perspective, it is undesirable for RG 128 to deter an institution from making representations to a company on a particular commercial issue alongside other significant investors. Meetings involving multiple significant investors and the relevant company are an efficient means of

communicating views of significant stakeholders to the company and for the company to provide responses to those views¹.

As an example, assume a company proposes developing a particular project. Assume there are two institutions on the register who have significant reservations about the project. The two institutions may feel that their level of concern might be better conveyed to the company through a joint meeting. The institutions might also consider that the company would be more likely to engage seriously with them if they were to meet the company together. In an example such as this, the two institutions may have no joint plans or intentions. The extent of their collective behaviour is the wish to present views to the company and to hear the response of the company to the concerns. In AustralianSuper's view such behaviour is wholly consistent with good corporate governance and ought to be encouraged.

AustralianSuper considers that the language in the first paragraph should be amended by deleting the example and deleting the last sentence.

(b) **Second paragraph of 'explanation and analysis' in Table 1**

In AustralianSuper's view, this paragraph uses language that might inhibit legitimate engagement with a company. When institutions or other shareholders engage with a company in which they hold voting securities it is always done with both 'sides' fully knowing and understanding that, ultimately, if the company takes a path that the institution disagrees with, the institution may decide to exercise its voting powers to endeavour to prevent the company taking that path. Obviously, in many cases, it is that possibility that prompts the company to agree to a request from a shareholder for engagement.

The mere fact that an institution, or multiple institutions, at a meeting with a company might voice this obvious and recognised possibility ought not to be treated as something which, of itself, could change the legal complexion of the meeting. AustralianSuper suggests that the second sentence of the paragraph be re-drafted as follows:

"If accompanied by threats ~~about dealings with shares or voting rights~~ *of some form of collective or co-ordinated exercise of rights* attached to shares, it can raise concerns that...."

2 **Revocation of Class Order [CO 00/455]**

AustralianSuper submits that, rather than revoking [CO 00/455], ASIC modifies it in a manner that makes it relevant to the way in which institutional investors might be prepared to act. In AustralianSuper's view, the main problem with [CO 00/455] is that it requires the existence of a 'voting agreement'. For the purposes of the class order, a voting agreement is:

An agreement between two or more institutions relating to voting in a particular way, on a particular issue, or abstaining from voting, at a specified or a proposed meeting of a company in relation to which the institutions have voting power.

In AustralianSuper's experience, it would be unusual for Australian institutional investors to be in a position where they might wish to enter into a voting agreement with another institution. More relevant to Australian institutional investors, in AustralianSuper's view, would be class order relief that permitted institutions to act collectively in endeavouring to marshal shareholder opposition or support for a particular shareholder resolution.

Class order relief of that nature, even if subject to the fairly strict conditions that currently apply to [CO 00/455], would enable institutional investors to play a more active role in respect of proposals required to be approved by shareholders.

¹ This is explicitly recognised in paragraph 128.2 of Draft RG 128.

Conclusion

AustralianSuper reiterates that it welcomes the ASIC's review of RG128 and its intention to support long term asset owner engagement with investee companies. We hope that our comments provide useful feedback on how it may be improved to better achieve that aim.

Please do not hesitate to contact me if you wish to discuss this further. We are happy to provide further information on request.

Yours sincerely

ANDREW GRAY
Manager, Investments Governance