european corporate governance institute

Stewardship and Collective Action: The Australian Experience

Law Working Paper N° 491/2020
April 2020

Tim Bowley
Monash University
Jennifer G. Hill
Monash University and ECGI

© Tim Bowley and Jennifer G. Hill 2020. All rights reserved. Short sections of text, not to exceed two paragraphs, may be quoted without explicit permission provided that full credit, including © notice, is given to the source.

This paper can be downloaded without charge from:
https://doi.org/10.67929/ecgi-law-491-2020

european corporate governance institute

ECGI Working Paper Series in Law

Stewardship and Collective Action: The Australian Experience

Working Paper N° 491/2020

April 2020

Tim Bowley
Jennifer G. Hill

The authors would like to acknowledge the valuable research assistance provided by Mitheran Selvendran in connection with this chapter.

© Tim Bowley and Jennifer G. Hill 2020. All rights reserved. Short sections of text, not to exceed two paragraphs, may be quoted without explicit permission provided that full credit, including © notice, is given to the source.

Abstract

Institutional shareholder stewardship codes ('stewardship codes') exist in many jurisdictions. They reflect the growing importance of institutional shareholders in capital markets, and a belief that increased engagement by institutional shareholders improves corporate decision-making and provides protection against excessive risk-taking.

In theory, there is considerable sense in shareholders undertaking their stewardship activities collectively. By acting collectively, shareholders leverage their power, pool their resources and share costs, thereby making stewardship more feasible and less speculative. Consistently, the stewardship codes of many jurisdictions refer to, and implicitly support, collective action by institutional investors.

This paper examines the role of collective action as a form of stewardship, with particular reference to the Australian context. Australia provides favourable conditions for institutional investor stewardship and is, therefore, an interesting case study concerning the potential of collective action as a stewardship tool.

This paper's examination of collective action in Australia reveals, however, a nuanced image of this governance practice. Evidence indicates that investors do not routinely engage in direct forms of collective action, such as forming a coalition for the purpose of intervening in a company's governance. Instead, investors more typically leverage their collective influence through intermediary organisations, such as industry bodies and service providers that undertake behind-the-scenes engagement activities for investors.

The nuanced image of collective action emerging from the Australian experience highlights that collective action by institutional shareholders is by no means a simple governance phenomenon. The paper explores the implications of this insight for how securities and takeover laws apply to collective action, and how the issuers of stewardship codes frame their codes' expectations regarding collective action. This analysis is relevant to policy makers, regulators and researchers who are interested in the role and regulation of collective action as a corporate governance tool.

Keywords: stewardship, institutional investors, activism, collective action, corporate governance, securities law, takeover law.

JEL Classifications: D70, G23, G30, G32, G34, K22, N20

Tim Bowley
Sessional Lecturer
Monash University, Faculty of Law
Clayton Campus
Melbourne, NSW 3800, Australia
phone:
e-mail: tim.bowley@monash.edu

Jennifer G. Hill*
Professor and Bob Baxt AO Chair in Corporate and Commercial Law
Monash University, Faculty of Law
Building 15, Clayton Campus
Clayton, Victoria 3800, Australia
phone: +61 3 9905 3838
e-mail: jennifer.hill@monash.edu

*Corresponding Author

Stewardship and Collective Action: The Australian Experience

Tim Bowley and Jennifer G Hill

30 March 2020

An edited version of this paper will be published as a chapter in Global Shareholder Stewardship: Complexities, Challenges and Possibilities (Dionysia Katelouzou and Dan W Puchniak eds, Cambridge University Press, forthcoming)

I. INTRODUCTION

The 2008 Global Financial Crisis (GFC) gave rise to competing narratives about shareholders and their engagement in corporate governance.[1] A common view in the United States depicted shareholders as instigators of the crisis, by placing pressure on corporate managers to engage in excessive risk-taking to increase profitability.[2] A similarly negative view of shareholders arguably underpins recent US developments, such as the common ownership debate[3] and the Business Roundtable's recently announced jettisoning of a shareholder-centred conception of corporate purpose, in favour of a stakeholder paradigm.[4]

A different interpretation of the GFC prevailed in a number of other jurisdictions, including the United Kingdom, where the real problem was perceived to be lack of shareholder participation in corporate governance.[5] This explanation of the GFC was based on a positive narrative concerning the corporate governance potential of shareholders. According to this narrative, greater engagement by institutional investors is a beneficial corporate governance technique,[6] which operates as a check on centralised

The authors would like to acknowledge the valuable research assistance provided by Mitheran Selvendran in connection with this Chapter.

An edited version of this paper will be published as a chapter in Global Shareholder Stewardship: Complexities, Challenges and Possibilities (Dionysia Katelouzou and Dan W Puchniak eds, Cambridge University Press, forthcoming).

[1] See Jennifer G Hill, 'Good Activist/Bad Activist: The Rise of International Stewardship Codes' (2018) 41 Seattle University LR 497.

[2] See, e.g., John C Coffee, 'Systemic Risk After Dodd-Frank: Contingent Capital and the Need for Regulatory Strategies Beyond Oversight' (2011) 111 Columbia LR 795, 799.

[3] See, e.g., Einer Elhauge, 'Horizontal Shareholding' (2016) 129 Harvard LR 1267.

[4] See David Gelles and David Yaffe-Bellany, 'Feeling Heat, CEOs Pledge New Priorities' *The New York Times* (New York, 20 August 2019) A1 <https://www.nytimes.com/2019/08/19/business/business-roundtable-ceos-corporations.html> accessed 11 February 2020.

[5] According to the Walker Review, a lack of institutional investor engagement with UK banks was a key governance problem in relation to the global financial crisis: 'A Review of Corporate Governance in UK Banks and Other Financial Industry Entities – Final Recommendations' (26 November 2009) [5.11] (hereinafter Walker Review) <https://www.accaglobal.com/content/dam/acca/global/PDF-technical/corporate-governance/cdr898.pdf> accessed 11 February 2020.

[6] See, e.g., Financial Reporting Council, *UK Stewardship Code* (2020) (hereinafter UK Code), 4 < https://www.frc.org.uk/getattachment/5aae591d-d9d3-4cf4-814a-d14e156a1d87/Stewardship-Code_Final2.pdf> accessed 11 February 2020 (referring to the potential for stewardship to 'create long-term value for clients and beneficiaries leading to sustainable benefits for the economy, the environment and society').

managerial power.[7]

Shareholder stewardship codes (stewardship codes) embody this positive narrative. They reflect the growing importance of institutional investors in capital markets around the world,[8] and the belief that increased engagement by institutional investors improves corporate decision-making and provides protection against excessive risk-taking.[9]

From the perspective of the positive narrative, there is considerable sense in shareholders undertaking their stewardship activities collectively. By acting collectively, shareholders can leverage their power, pool their resources and share costs, thereby making stewardship more feasible and less speculative. The Walker Review, for example, encouraged 'strengthening methods of collaboration among shareholders with similar concerns', on the basis that boards of directors were more likely to be responsive to collective, as opposed to individual, shareholder pressure.[10] The stewardship codes of many jurisdictions today refer to, and implicitly support, collective action by institutional investors.[11]

In contrast, for critics of shareholder participation in corporate governance, collective action merely exacerbates the risks posed by shareholder power.[12] Activist hedge funds engaged in coordinated conduct have accordingly been described as 'locusts'[13] and 'wolf

---

[7] See Walker Review (n 5) [5.11]–[5.12].

[8] See, e.g., Securities and Exchange Board of India, 'Report Submitted by the Committee on Corporate Governance' (5 October 2017) 93 <https://www.sebi.gov.in/reports/reports/oct-2017/report-of-the-committee-on-corporate-governance_36177.html> accessed 11 February 2020 (noting that, as a result of this increasing importance, institutional investors are 'expected to shoulder greater responsibility towards their clients/beneficiaries by enhancing their monitoring of and engagement with their investee companies').

[9] See, e.g., Andrew G Haldane (Chief Economist, Bank of England), 'Who Owns A Company?'(University of Edinburgh Corporate Finance Conference, Edinburgh, 22 May 2015) <https://www.bankofengland.co.uk/-/media/boe/files/speech/2015/who-owns-a-company.pdf> accessed 22 November 2019 8, 11 (stating that 'companies tend to have higher valuations when institutional investors are a large share of cashflow, perhaps reflecting their stewardship role in protecting the firm from excessive risk-taking').

[10] Walker Review (n 5) 5.43.

[11] See below, Part III.

[12] See, e.g., Christopher M Bruner, 'Corporate Governance Reform in a Time of Crisis' (2011) 36 J Corp L 309, 309–10; Alan Dignam, 'The Future of Shareholder Democracy in the Shadow of the Financial Crisis' (2013) 36 Seattle University LR 639, 682; Leo E Strine, Jr, 'Who Bleeds When the Wolves Bite? A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System' (2017) 126 Yale LJ 1870.

[13] Mark Landler and Heather Timmons, 'Poison Ink Aimed at "Locusts"' *The New York Times* (New York, 31 March 2006) C00008 < https://www.nytimes.com/2006/03/31/business/media/poison-ink-aimed-at-locusts.html> accessed 11 February 2020.

packs'.[14]

This Chapter examines the role of collective action as a form of stewardship, with particular reference to the Australian context. This is because Australia provides favourable conditions for institutional investor stewardship and is therefore an interesting case study concerning the potential of collective action as a stewardship tool. In particular, Australian law provides shareholders with favourable shareholder rights[15] and Australia has a capital market structure that is conducive to investor stewardship, including high levels of institutional ownership and low levels of controlling stakes held by non-institutional blockholders.[16] As a result, Australia is one of only four jurisdictions — together with the United Kingdom, the United States and Canada — which the OECD classifies as having a dispersed ownership structure for listed companies.[17] Yet share ownership in Australia is concentrated in the sense that relatively small groups of shareholders tend to hold a significant proportion of a company's shares. Studies covering different periods between 1990 and 2006 have found that on average the 20 largest shareholders in an Australian listed company (a significant proportion of which are institutional investors) hold between 60–70% of the company's shares.[18]

These conditions suggest that it would make considerable sense for institutional investors in Australian listed companies to undertake their stewardship activities collectively. In many companies, the collective voting power of even a handful of institutions is likely to represent a very significant proportion of a company's issued capital, giving those institutions potentially significant collective leverage.

---

[14] In the United States, 'wolf pack' refers to the situation where an intervention by an activist hedge fund against a company gains momentum as a result of other activist hedge funds buying into the target company. It is claimed that this results in activist hedge funds holding, collectively, a material proportion of the target company's shares, exerting significant pressure on the target's board to acquiesce to the lead hedge fund's demands. Commentators have expressed concerns regarding the leverage this provides hedge fund activists: see, e.g., John C Coffee and Darius Palia, 'The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance' (2016) 41 J Corp L 545.

[15] Australian corporate law, for example, provides shareholders with much stronger shareholder rights than US corporate law: Jennifer G Hill, 'Subverting Shareholder Rights: Lessons from News Corp's Migration to Delaware' (2010) 63 Vanderbilt LR 1.

[16] Ownership data reveals that institutions own significantly more than half of all publicly-traded equities: see, e.g., Susan Black and Joshua Kirkwood, 'Ownership of Australian Equities and Corporate Bonds' (RBA Bulletin, Reserve Bank of Australia, September 2010) 27 (noting that by early 2010 Australian institutional investors held approximately 40% of listed equities and foreign investors, which would include foreign institutional investors, approximately 40%).

[17] OECD, OECD Corporate Governance Factbook 2019 (11 June 2019) 17 <http://www.oecd.org/daf/ca/Corporate-Governance-Factbook.pdf> accessed 11 February 2020.

[18] See, e.g., Reza M. Monem, 'Determinants of Board Structure: Evidence from Australia' (2013) 9 J Contemp Accounting and Economics 33, 38 (reporting that in 2006 the top 20 shareholders in a listed company held on average 63.68% of the company's issued shares).

However, the reality of collective action in Australia is more complicated. Among other things, Australia's stewardship codes address collective action briefly and in very general terms only.[19] Moreover, evidence reveals that, insofar as investors seek to exert collective influence in their stewardship activities, they typically favour indirect forms of collective action. That is, rather than wielding influence by entering into *ad hoc* coalitions with fellow investors, they more routinely channel collective influence through representative organisations and industry intermediaries, such as industry bodies and engagement firms.

This Chapter examines these developments. It argues that the nuanced image of collective action emerging from the Australian experience highlights that collective action is by no means a simple governance phenomenon. This has implications for how stewardship codes frame their expectations regarding collective action and how securities and takeover laws apply to collective action. These insights are relevant, both in Australia and internationally, to policy makers, regulators and researchers who are interested in the role and regulation of collective action as a stewardship tool.

The Chapter proceeds as follows. Part II provides an overview of the development of stewardship in Australia. Part III discusses the significance of collective action within the general stewardship framework. Part IV assesses the nature and role of collective action as a stewardship tool in Australia. Parts V and VI conclude and outline key insights from the analysis.

II. STEWARDSHIP CODES IN AUSTRALIA

A. The Evolution of Stewardship Codes in Australia

By international standards, Australia was a late convert to stewardship codes.[20] According to some industry representatives, the fact that Australia had emerged relatively unscathed from the GFC meant that the crisis did not initially prompt the same degree of scrutiny of investors' role in corporate governance, as it did in other countries.[21]

As stewardship codes were spreading internationally during the early years of the

[19] See below, Part III.B.

[20] As explained below, Australian industry bodies adopted stewardship codes in 2017 and 2018. By this time, codes had already been adopted in approximately 20 other jurisdictions: Alice Klettner, 'The Impact of Stewardship Codes on Corporate Governance and Sustainability' (2017) 23 NZ Business LQ 259, 274.

[21] MSCI and Responsible Investor, *Stewardship and ESG Integration in the Asia-Pacific Region* (2016) 14–15 (quoting industry representatives to this effect).

2010s, Australian asset owners[22] and asset managers[23] were in fact resisting the introduction of a stewardship code in Australia. In 2012, for example, the two peak industry bodies for asset owners and asset managers, the Australian Council of Superannuation Investors (ACSI) and the Financial Services Council (FSC), made submissions to a government inquiry,[24] arguing that a stewardship code was unnecessary. The industry bodies claimed that Australia already had a strong culture of company-shareholder engagement and that a number of existing industry-promulgated guidelines covered matters commonly addressed in stewardship codes.[25] One submission noted, somewhat dismissively:

> While the UK Stewardship Code is an important international precedent … ACSI does not believe that a similar instrument is necessary for Australian investors … [W]e believe that if a similar code were to be introduced in Australia, it would be somewhat inconsequential and potentially send confusing signals to companies and investors. [26]

However, the industry eventually relented. It was conscious of mounting criticism regarding the adequacy and transparency of institutions' engagement activities[27] and was

---

[22] E.g., pension funds (more commonly known as 'superannuation' funds in Australia).

[23] E.g., fund managers.

[24] Corporations and Markets Advisory Committee, *The AGM and Shareholder Engagement — Discussion Paper* (September 2012) <http://www.camac.gov.au/camac/camac.nsf/byheadline/pdfdiscussion+papers/$file/agm.pdf> accessed 11 February 2020.

[25] Australian Council of Superannuation Investors (hereinafter ACSI), *Submission to Corporations and Markets Advisory Committee — The AGM and Shareholder Engagement* (21 December 2012) 3, 6, 8 (claiming that industry had already adopted broadly-equivalent governance guidelines such as UNPRI and rules requiring disclosure of voting practices by pension funds) <http://www.camac.gov.au/camac/camac.nsf/byheadline/pdfsubmissions_6/$file/bca_agm.pdf> accessed 11 February 2020; Financial Services Council (hereinafter FSC), *FSC Submission — Future of the AGM* (31 December 2012) 9 (claiming that elements of the UK Stewardship Code had already been adopted in Australia such as the FSC's guidance regarding managing conflicts of interest and disclosing proxy voting activities) <http://www.camac.gov.au/camac/camac.nsf/byheadline/pdfsubmissions_6/$file/fsc_agm.pdf> accessed 11 February 2020.

[26] ACSI (n 25).

[27] ACSI, *Asset Owner Stewardship Code Can Build Trust* (May 2018) <https://www.acsi.org.au/publications-1/acsi-articles/1514-asset-owner-stewardship-code-can-build-trust.html> accessed 11 February 2020. For an example of criticism, see Guerdon Associates, 'Pressure on Asset Managers and Proxy Advisers to Lift Their Game — But Not in Australia' (12 December 2016) <http://www.guerdonassociates.com/articles/pressure-on-asset-managers-and-proxy-advisers-to-lift-their-game-but-not-in-australia/> accessed 11 February 2020.

also concerned that a failure to adopt a stewardship code would threaten the international standing of Australia's fund management sector.[28] The industry's two peak bodies took the initiative. The FSC issued FSC Standard 23: Principles of Internal Governance and Asset Stewardship in July 2017 (FSC Code).[29] ACSI published the Australian Asset Owner Stewardship Code in May 2018 (ACSI Code).[30]

It is not apparent from the public record why these industry bodies formulated separate codes. A likely explanation lies in the different institutional roots of the FSC and ACSI. The FSC is a representative body for asset management firms, insurance companies, financial advisers, and other financial services firms.[31] The asset managers and asset owners that are included in its membership generally form part of commercial banks, insurance companies and other financial conglomerates.

In contrast, ACSI is the peak body for particular types of asset owners; namely, public sector superannuation funds, Australia's 'industry' superannuation funds,[32] and a handful of overseas pension funds.[33] ACSI's member funds tend not to form part of commercial financial conglomerates and the sponsors of these funds do not seek to derive profits from operating them.[34] The industry superannuation funds, which comprise the majority of ACSI's fund members, have their origins in initiatives by trade unions in the 1980s to extend occupational superannuation coverage throughout the Australian workforce.[35] The industry superannuation funds have grown significantly on the back of Australia's

[28] FSC and Alliance Bernstein, 'Setting the Standard: Fund Managers Lift Their Game' (February 2018) 2–3 <https://www.alliancebernstein.com/library/fund-managers-lift-their-game.htm> accessed 11 February 2020.

[29] FSC, *FSC Standard 23: Principles of Internal Governance and Asset Stewardship* (July 2017) (hereinafter FSC Code) <https://www.fsc.org.au/web-page-resources/fsc-standards/1522-23s-internal-governance-and-asset-stewardship> accessed 11 February 2020.

[30] ACSI, *Australian Asset Owner Stewardship Code* (May 2018) (hereinafter ACSI Code) <https://www.icgn.org/sites/default/files/Australian%20Code.pdf> accessed 11 February 2020.

[31] FSC, *About the FSC's Members* <www.fsc.org.au/about/membership> accessed 22 November 2019.

[32] The name 'industry' superannuation fund (hereinafter industry superannuation fund) recognises that these funds were originally established to provide retirement savings for workers in particular industries; however, most of these funds are now open to the general public: Australian Super, 'Retail or Industry Super Funds, What is the Difference?' <www.australiansuper.com/superannuation/superannuation-articles/2018/10/retail-or-industry-super-funds> accessed 3 December 2019.

[33] ACSI, *ACSI Members* <www.acsi.org.au/section-heading/acsi-members-html> (hereinafter ACSI Members) accessed 22 November 2019.

[34] Australian Securities and Investments Commission, 'Types of Super Funds' (Money Smart, 12 February 2019) <www.moneysmart.gov.au/superannuation-and-retirement/how-super-works/choosing-a-super-fund/types-of-super-funds> accessed 22 November 2019.

[35] See generally, Bernard Mees and Cathy Brigden, *Workers' Capital: Industry Funds and the Fight for Universal Superannuation in Australia* (Allen & Unwin 2017).

mandatory retirement savings scheme, making them powerful participants in the funds management sector.[36] There exists commercial tension between the memberships of the FSC and ACSI because of the significant growth of industry superannuation funds relative to the superannuation funds operated by banks and other financial conglomerates which are members of the FSC. A notable example of this tension occurred in 2018 when the industry superannuation funds commissioned the 'fox in the hen house' television advertisement. The advertisement portrayed the FSC's members as foxes whose 'for profit' business model threatened the retirement savings (i.e., hens) of Australian workers.[37] It is conceivable that these distinct institutional roots and commercial tensions explain why the FSC and ACSI adopted separate approaches to the development of stewardship codes.

When they issued their respective codes, both the FSC and ACSI were self-consciously taking a different approach to the issuers of codes in other jurisdictions. The FSC Code notes that 'unlike other stewardship codes which focus on asset stewardship and conflicts of interest, the [FSC Code] takes a broader view and also includes the internal governance of the Asset Manager'.[38] In the media release announcing the publication of its code, ACSI acknowledged the existence of overseas codes but commented: 'However, this is the first stewardship code to focus exclusively on the activities of Australian asset owners'.[39] Both the FSC and ACSI had a relatively long tradition of policy formulation in relation to corporate governance matters — including in the area of institutional investors' governance activities[40] — which may explain their intentionally distinctive approaches.

In summary, stewardship codes in Australia are an industry-led initiative. Instead of being imposed by an external party to encourage changes in how investors engage in corporate governance, they have been adopted by industry bodies as a response to scrutiny of investors' governance activities. Their development has also been influenced by Australia's very particular institutional and market context.

---

[36] Mees and Smith report that industry superannuation funds have tripled their market share since the mid-nineties: Bernard Mees and Sherene A Smith, 'Corporate Governance Reform in Australia: A New Institutional Approach' (2019) 30 British Journal of Management 75, 76–7.

[37] Joanna Mather, 'Union Funds call a Truce' The Australian Financial Review (Sydney, 24 September 2018) 1.

[38] FSC Code (n 29) 7.

[39] ACSI, 'Australian First Stewardship Code for Asset Owners Unveiled', (17 May 2018) <https://www.acsi.org.au/publications/media-releases/1479-australian-first-stewardship-code-for-asset-owners-unveiled.html> accessed 11 February 2020.

[40] As explained by each of the organisations in their submissions to the government inquiry referred to above in n 25.

B. Overview of the Australian Codes

1. The FSC Code

The FSC Code is applicable to institutions which undertake asset management functions and have elected to become full members of the FSC.[41] Membership of the FSC is voluntary and financial institutions can choose their preferred level of membership.[42] Full members of the FSC currently include both Australian fund managers and a substantial number of international fund managers.[43] Klettner reports that, as of 2017, the 50 full members who were bound by the FSC Code managed a large majority of total funds under management in Australia.[44]

The FSC Code addresses not only the internal governance of asset managers,[45] but also their stewardship activities.[46] In relation to stewardship, the FSC Code states that asset managers 'should' exercise effective stewardship over their investments, encourage investee companies to meet the highest standards of governance and ethical practices, and use the 'tools' available to investors to hold boards and executives accountable.[47]

The FSC Code is a designated 'FSC Standard'.[48] Compliance with FSC Standards is compulsory for full members of the FSC and non-compliance can expose full members

[41] FSC Code (n 29) 4.

[42] Financial services organisations can apply to become full members, associate members or supporting members of the FSC: see FSC, *Become a FSC Member* <https://www.fsc.org.au/about/membership/become-a-member> accessed 19 February 2020.

[43] FSC, *FSC Full Members* <https://www.fsc.org.au/about/fsc-members> accessed 22 November 2019. In Australia, the distinction between 'domestic' and 'international' fund managers is complicated, however, by virtue of the fact that some large Australian fund managers have material operations in other countries.

[44] Klettner (n 20) 260.

[45] For example, the FSC Code requires asset managers to make disclosures regarding their ownership, structure, internal governance, and the experience and competencies of their key personnel: FSC Code (n 29) 8–9.

[46] ibid 7.

[47] ibid 10.

[48] FSC, *FSC Standards Fact Sheet* (September 2018) <https://fsc.org.au/resources/standards> accessed 19 February 2020.

to disciplinary action by the FSC.[49] In this sense, the FSC Code is mandatory in nature. However, the FSC Code does not in substance oblige full members to undertake any particular stewardship activities; it merely requires them to disclose their approach towards stewardship.[50] It also provides guidance regarding matters which investors' disclosures should address, although this guidance is limited to seven brief bullet points which merely identify relevant disclosure topics.[51] These bullet points refer to monitoring of company performance; engagement with companies and escalation of issues which are not addressed through initial engagement efforts; use of ESG considerations in investment decision-making and engagement activities; approach to voting; collaborative engagement with other investors; approach to policy advocacy; and approach to engaging with clients regarding stewardship.[52] The FSC Code operates on a 'comply-or-explain' basis, which means that full members have the choice of providing disclosure in relation to these disclosure topics, or simply explaining why such stewardship activities are not relevant to them'.[53] The FSC Code takes the view, nonetheless, that requiring investors to explain publicly their approach to stewardship will encourage them to improve their approach to stewardship.[54]

An interesting feature of the FSC Code is that environmental, social and governance (ESG) considerations are not seen as a central or defining element of stewardship.[55] Instead, as noted in the previous paragraph, ESG-focused stewardship is simply listed by the code as one of several potential stewardship activities.

2. The ACSI Code

The ACSI Code applies to asset owners who choose to become signatories to the code.[56] As at March 2020, there were 16 signatories, comprised solely of Australian

[49] ibid. This fact sheet indicates (at 2) that instances of non-compliance are overseen by the FSC's Standards, Oversight and Disciplinary Committee and may result in that committee initiating 'any appropriate response which may include disciplinary action', The fact sheet does not indicate what form such disciplinary measures might take.

[50] The FSC Code requires asset managers to report against the code at the end of each financial year, commencing with the financial year ended 30 June 2019: FSC Code (n 29) 10.

[51] ibid.

[52] ibid.

[53] ibid 8.

[54] ibid (noting that 'good practice will develop organically' as a result of these disclosure requirements).

[55] See Chapter [Dionysia Katelouzou and Alice Klettner] regarding sustainable investment and stewardship.

[56] ACSI Code (n 30) 5.

public sector and industry superannuation funds.[57] This represents almost 40 percent of ACSI's membership base.[58] The ACSI Code is principally focused on asset owners' stewardship in relation to their equity holdings, although it notes that 'asset owners may wish to extend the application of the Code across their portfolio'.[59]

The ACSI Code sets out six principles. Three of them state that investors 'should' undertake specific types of stewardship activity, namely: (i) engage with companies; (ii) monitor asset managers' stewardship activities; and (iii) encourage better alignment of the financial system and regulatory policy with the interests of long-term investors.[60] The other three principles provide that investors 'should' make certain disclosures regarding stewardship, namely: (i) disclose publicly how they approach their stewardship responsibilities; (ii) disclose publicly their policy for voting at company meetings and their voting activities; and (iii) report to beneficiaries regarding their stewardship activities.[61] Unlike the FSC Code, the ACSI Code does not address the internal governance of asset owners.[62]

The ACSI Code is effectively aspirational only. There is no obligation for asset owner members of ACSI to become signatories and the Code does not oblige signatories to undertake any particular form of stewardship. Instead, the ACSI Code operates on an 'if not, why not' basis, which requires signatories to explain how they apply the code's principles or, to the extent they do not apply any of the principles, explain why they have not done so.[63] The Code requires signatories to have published a 'stewardship statement' by 30 September 2019 which contains these explanations.[64] Signatories are 'encouraged'

---

[57] ACSI, 'Australian Asset Owner Stewardship Code'<https://acsi.org.au/members/australian-asset-owner-stewardship-code/> accessed 15 March 2020. ACSI's website discloses that it has six international members (including CalPERS and the United Kingdom's Universities Superannuation Scheme). However, none of these international members are shown on ACSI's website as signatories to the ACSI Code.

[58] ACSI Members (n 33).

[59] ACSI Code (n 30) 5.

[60] ibid Principles 3, 4 and 5.

[61] ibid Principles 1, 2 and 6.

[62] A point that is specifically acknowledged by the ACSI Code: ibid 6.

[63] ibid.

[64] ibid 5–6. The ACSI Code does not indicate what consequences, if any, it might impose if a signatory fails to publish a stewardship statement. However, failure to publish a statement would potentially become a matter of public record, since ACSI's website contains a list of signatories together with hyperlinks to their stewardship statements: see ACSI, *Australian Asset Owner Stewardship Code* <https://acsi.org.au/members/australian-asset-owner-stewardship-code/> accessed 19 February 2020. As at the time of writing, this list indicates that all signatories have published stewardship statements.

to revise their statements every two years.[65]

Whereas the FSC Code simply references ESG-focused stewardship as one of several stewardship activities, the ACSI Code envisages that ESG considerations will play a fundamental role in shaping investors' overall approach towards stewardship. The ACSI Code states that 'ACSI members … are committed to incorporating environmental, social and governance (ESG) considerations into their investment strategies and engaging collaboratively with companies to improve their ESG performance'.[66] It defines stewardship as 'the responsibility asset owners have to exercise their ownership rights to protect and enhance long-term investment value for their beneficiaries by promoting sustainable value creation'.[67]

3. Calls for a Revised Approach to Stewardship in Australia

Although they are non-prescriptive, both the ACSI Code and the FSC Code assume that they will improve stewardship practices by requiring investors to disclose their approach to stewardship.[68] However, within a year of issuing the ACSI Code, ACSI has already raised doubts regarding the efficacy of this approach and, in May 2019, published a discussion paper calling for reform of Australia's approach to stewardship.[69] The paper expresses concern about variations in investors' stewardship practices and argues for the imposition of minimum standards of stewardship, potentially as part of a regulatory, rather than industry-based, initiative.[70] Casting doubt on the existing, fragmented industry approach towards stewardship, ACSI states that one outcome of the review should be the introduction of a single stewardship code[71] that is applicable to 'all institutional

[65] ACSI Code (n 30) 5.

[66] ibid 4.

[67] ibid 5.

[68] See FSC Code (n 29) 8. The ACSI Code states that transparency 'will lead to increased accountability for asset owners to beneficiaries and other stakeholders': ACSI Code (n 30) 5.

[69] ACSI, *Towards Stronger Investment Stewardship* (May 2019) <https://acsi.org.au/images/stories/ACSIDocuments/ACSI-Towards-Stronger-Investment-Stewardship-May-2019.pdf> accessed 22 November 2019.

[70] Specifically, ACSI argues that the review should focus on 'what effective stewardship entails, what the minimum expectations should be, and how to strike the right balance between regulation and voluntary codes': ibid 5.

[71] A similar discussion about the need to introduce a single stewardship code has taken place in India: see Chapter [India chapter].

investors'.[72] ACSI claims that requiring all institutions to report against the requirements of a single code would facilitate comparison and assessment of the stewardship practices of different investors.[73] To date, there have been no apparent attempts by the financial sector, the government or the regulator to initiate the review called for by ACSI.

III. COLLECTIVE ACTION AND STEWARDSHIP

A. The potential of collective action as a stewardship tool

A shareholder who wishes to participate in a company's governance faces a potentially challenging cost-benefit analysis.[74] This cost-benefit analysis can be particularly challenging for institutional investors, given the large number of investments in their diversified portfolios, free-riding concerns, the pressure to seek economies in their governance activities owing to industry competition, and conflicts of interest.[75] As a result of these considerations, some commentators have queried whether institutions actually have sufficient incentives to act as stewards.[76]

Collective action, however, has the potential to make stewardship more feasible. By acting collectively, shareholders can pool their resources, share the costs of their stewardship activities, and leverage their influence.[77] Consequentially, stewardship may be significantly less speculative and more cost effective if undertaken collectively rather than individually.

The potential governance benefits of collective action mean that collective action is

---

[72] ibid. ACSI's discussion paper does not explain what the phrase 'all institutional investors' contemplates. It is therefore not clear, for example, whether the phrase is intended to refer to all institutional investors operating in Australia, irrespective of whether they are domestic or international.

[73] ibid.

[74] See, e.g., Edward B Rock, 'The Logic and (Uncertain) Significance of Institutional Shareholder Activism' (1991) 79 Georgetown LJ 445.

[75] ibid. More recently, see Lucian A Bebchuk, Alma Cohen and Scott Hirst, 'The Agency Problems of Institutional Investors' (2017) 31 Journal of Economic Perspectives 89. In the Australian context, see Geof P Stapledon, 'Disincentives to Activism by Institutional Investors in Listed Australian Companies' (1996) 18 Sydney LR 152.

[76] See, e.g., Ronald J Gilson and Jeffrey N Gordon, 'The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights' (2013) 113 Columbia LR 863, 868–9. See also Chapter [Jill Fisch's chapter], which argues that index funds have particularly limited incentives to engage in stewardship.

[77] See, e.g., Gaia Balp and Giovanni Strampelli, 'Institutional Investor Collective Engagements: Non-Activist Cooperation vs Activist Wolf Packs' (2019) 14 Ohio State Business LJ (forthcoming).

generally recognised by stewardship codes as a desirable stewardship tool. However, the codes can differ in terms of the emphasis they place on collective action.[78] In the United States, stewardship principles were adopted in 2017 by the Investor Stewardship Group.[79] Although the principles contemplate collaboration between institutional investors, this appears to be directed at adopting and implementing corporate governance and or stewardship principles, rather than as an activity undertaken to facilitate engagement with companies.[80] The UK Stewardship Code 2020 (UK Code) is far more direct and specific about collective action than its US counterpart. For example, Principle 10 of the UK Code states that institutional investors should 'where necessary, participate in collaborative engagement to influence issuers'.[81] Principle 10 requires signatories to disclose the collaborative engagement they undertake and the reasons why.[82]

B. The Australian codes and collective action

Neither of the Australian Codes obliges, or even explicitly encourages, investors to undertake any form of collective action. This is consistent with their non-prescriptive approach towards stewardship.[83]

The FSC Code addresses collective action in only brief terms. It states that asset managers should disclose in their stewardship statement, 'where relevant,' their approach to 'collaborative engagement with other investors including involvement with industry groups and associations'.[84] Besides the reference to 'industry groups and associations', the FSC Code does not elaborate on the forms of collective action which investors could undertake.

The ACSI Code goes somewhat further. Principle 3 of the ACSI Code is headed 'Asset Owners Should Engage with Companies (Either Directly, Indirectly or Both)'.[85] Under this principle, the code acknowledges that investors can undertake engagement 'in

[78] See further, Chapter [Katelouzou/Siems].

[79] ISG, *The Principles: Stewardship Framework for Institutional Investors* (January 2017) <https://isgframework.org/stewardship-principles/> accessed 22 November 2019. See Chapter [Jill Fisch's chapter] for further details regarding stewardship in the United States.

[80] ibid Principle F.

[81] UK Code (n 6) 19. See Chapter [x] for further details regarding stewardship in the United Kingdom.

[82] ibid.

[83] See above, Part II.B.

[84] FSC Code (n 29) 10.

[85] ACSI Code (n 30) 10.

collaboration with other investors'.[86] It also observes that collective action may be helpful where investors wish to escalate issues of concern. It notes how, in these circumstances, investors could raise their concerns collectively with asset managers or other asset owners, or hold discussions with 'other equity, bondholders or stakeholders'.[87]

An interesting feature of the ACSI Code is that it highlights a distinction between direct and indirect forms of collective action. Specifically, it notes that collective action can be undertaken 'with other individual asset owners' or 'through a third-party service provider'.[88] As this Chapter will show, the latter form of collective influence-wielding is prominent in the Australian market.

IV. HOW INSTITUTIONAL INVESTORS USE COLLECTIVE ACTION AS A STEWARDSHIP TOOL IN AUSTRALIA[89]

A. Overtly aggressive interventions

Overtly aggressive activist interventions, such as board spills and other high-profile public campaigns, are not common in Australia. Industry research reports an average of approximately 75 activist campaigns a year in the period 2013–17.[90] This is in the context of a market comprised of more than 2000 listed entities.[91] These campaigns predominantly targeted small-capitalisation companies.[92]

Overseas hedge funds, domestic activist investors, and institutional investors did not play a prominent role in these campaigns.[93] Evidence suggests, instead, that overtly

[86] ibid 8, 10.

[87] ibid 10–11.

[88] ibid 11.

[89] This section draws heavily on research in Tim Bowley, 'The Importance of Context: The Nature of Australian Shareholder Activism and its Regulatory Implications' (PhD thesis, University of Sydney 2019).

[90] JP Morgan, *Shareholder Activism in Australia: Navigating the Evolving Landscape* (April 2017); FTI Consulting, *Australia* <www.ftiactivism.com/map/countries/australia/> accessed 22 November 2019.

[91] ASX Ltd, *Historical Market Statistics* <http://www.asx.com.au/about/historical-market-statistics.htm#No of Companies> accessed 22 November 2019 (reporting 2242 listed entities as at October 2019).

[92] JP Morgan (n 90) (reporting that 77% of campaigns targeted companies with a market capitalisation of less than AUD$100 million). A 2018 report by Activist Insight and Schulte Roth & Zabel reports that nearly two-thirds of Australian companies targeted in 2018 had a market capitalisation of less than US$50 million, which they describe as a 'historical pattern': Activist Insight and Schulte Roth & Zabel, *The Activist Investing Annual Review 2019* (2019) 6, 23.

[93] JP Morgan (n 90) 8 (reporting that dedicated activist funds accounted for only 24% of campaigns in 2016, up from 12% in 2014); Activist Insight and Arnold Bloch Leibler, *Shareholder Activism in Australia: A*

aggressive campaigns are largely undertaken by non-institutional blockholders[94] such as company founders, trading companies, private investment vehicles and entrepreneurs.[95]

The low-levels of hedge fund activism mean that, to date, Australia has not witnessed the type of 'wolf pack' collective action seen in other jurisdictions,[96] or the interaction between activist investors and institutional investors highlighted in the United States by Gilson and Gordon.[97]

However, in recent years, environmental and social activists have begun to play a role that is somewhat analogous to the role of hedge funds described by Gilson and Gordon. At several annual shareholder meetings of large capitalisation companies in 2018, environmental and social activists tabled voting proposals addressing ESG-related concerns, such as requesting more comprehensive disclosure from companies regarding climate change risks.[98] These proposals appear to have provided an opportunity for institutional investors to escalate their ESG-related concerns.[99] A number of them received significant levels of shareholder support, including from institutional investors.[100] Although these interventions have been high-profile, in absolute terms they are, however, relatively infrequent.[101]

Review of Trends in Activist Investing (2016) 5 (reporting that the capital available for domestic activist funds is 'scarce'). As to the limited involvement of institutional investors in such campaigns, see JP Morgan (n 90) 9; Activist Insight and Arnold Bloch Leibler 5–6; Myriam Robin, 'Shareholder activism not in 'mentality' of Australian fund managers' *The Sydney Morning Herald* (Sydney, 12 May 2017) 26 (noting anecdotal evidence regarding the disinclination of institutional investors to undertake aggressive activist interventions) <https://www.smh.com.au/business/markets/shareholder-activism-not-in-mentality-of-australian-fund-managers-20170511-gw2hma.html> accessed 11 February 2020.

[94] JP Morgan (n 90) 8 (reporting that the 'bulk' of campaigns identified by its research were undertaken by 'usually existing investors' in small-capitalisation companies who are 'often one-time activists'). The findings of the unpublished doctoral research by one of this paper's authors reports similar findings: see Bowley (n 89).

[95] Bowley (n 89).

[96] See Coffee and Palia (n 14).

[97] Gilson and Gordon (n 76).

[98] Noted in Australian Securities and Investments Commission, *Report 609 Annual General Meeting Season 2018* (January 2019) 8–10.

[99] Each of the companies targeted was in the S&P/ASX 200 index, which is comprised of substantial listed entities. Proxy votes in favour of the ESG resolutions represented on average 18.6% of all proxy votes; in two cases, proxy votes in favour of the resolutions exceeded 40%: ibid. As these proposals targeted large companies, in which institutional investors tend to concentrate their investments, this voting data suggests that these proposals attracted material levels of voting support from institutions.

[100] ibid.

[101] ibid 9 (noting that in 2018, in relation to the 200 largest entities included in the S&P/ASX 200 index, there were seven such interventions, involving four companies).

B. Coordinated share voting

Institutional investors do not appear to routinely seek to coordinate their share voting. Although Australia's takeover laws constrain such behaviour,[102] this, of itself, does not appear to explain institutions' infrequent attempts to form voting blocks. This is because a safe-harbour existed for nearly 20 years, which permitted institutional investors to coordinate their share voting at shareholder meetings in precisely this way.[103] In 2015, ASIC reported that it was aware of only one instance of institutions relying on the safe-harbour during that period.[104] Based on market feedback, ASIC concluded that institutions' reluctance to use the safe-harbour was due to the fact that institutional investors primarily sought to engage with companies in behind-the-scenes interactions rather than at shareholder meetings.[105] Another possible explanation, not explored by ASIC, is whether the emergence of proxy advisers may have contributed to a degree of standardisation in institutions' voting practices, negating the need for institutions to coordinate their voting directly.[106]

In light of the apparent lack of demand from investors for a safe-harbour to permit them to coordinate their share voting, ASIC declined to renew the safe harbour.[107]

C. Behind-the-scenes engagement with companies

Consistent with ASIC's observation, evidence indicates that there is indeed a significant amount of private interaction (or 'engagement') between institutional investors and their investee companies in Australia.[108] However, it is unclear to what extent institutions seek to leverage their influence by undertaking their engagement activities collectively. Investors' stewardship disclosures made in accordance with the

[102] See below, Part V.D.

[103] The safe-harbour was contained in Australian Securities and Investments Commission, *Class Order 00/455 Collective Action by Institutional Investors* (4 October 2013).

[104] Australian Securities and Investments Commission, *Consultation Paper 228 Collective Action by Investors: Update to RG 128* (February 2015) 7.

[105] ibid 10.

[106] See below, Part IV.D for discussion of the role of proxy advisers in Australia.

[107] Australian Securities and Investments Commission (n 104) 12.

[108] See, e.g., Productivity Commission, *Executive Remuneration in Australia* (19 December 2009) 303 (noting a submission from the representative body for company directors that 'there has been a considerable increase in active engagement by large institutional investors') <https://www.pc.gov.au/inquiries/completed/executive-remuneration/report/executive-remuneration-report.pdf> accessed 11 February 2020.

Australian codes frequently contain only generic statements regarding investors' approach to collective engagement with companies. Examples include non-specific statements such as 'engagement can be undertaken … in collaboration with other investors'[109] and '[w]here appropriate, we will hold joint engagement meetings with other investors who share our concerns'.[110]

A number of stewardship disclosures suggest that institutions only resort to joint engagement as an escalation mechanism in relation to major governance concerns. The stewardship statement of the superannuation fund, AustralianSuper, notes that collective action may be reserved for more difficult engagements in order to 'amplify our voice and influence'.[111] Fund manager, JP Morgan, notes that, as part of its escalation approach, 'will hold joint engagement meetings with other investors who share our concerns'.[112] The fund manager, Colonial, states that '[t]he vast majority of our engagement is conducted by each team directly with companies',[113] although it acknowledges that, as part of its escalation approach, 'we might collaborate on further engagement with other like-minded investors'.[114]

In recent years, instances have come to light in the financial press of institutional investors collectively pushing for changes in the affairs of prominent listed companies.[115]

---

[109] Cbus, *Cbus Stewardship Statement — For the Period Ended 30 September 2018* (2018) 2 <https://www.cbussuper.com.au/content/dam/cbus/files/governance/reporting/Stewardship-Statement.pdf> accessed 11 February 2020.

[110] JP Morgan Asset Management, *Principles of Internal Governance and Asset Stewardship* (29 November 2018) [3.2], [3.5] <https://am.jpmorgan.com/content/dam/jpm-am-aem/asiapacific/au/en/policies/principles-internal-governance-asset-stewardship.pdf> accessed 11 February 2020. See also ChristianSuper, *Stewardship Statement: 1 July 2017 to 30 June 2018* (2018) 3 (referring to their preparedness to 'work[] with likeminded investors') <https://www.christiansuper.com.au/wp-content/uploads/Christian-Super-Stewardship-Statement_2018.pdf> accessed 11 February 2020.

[111] AustralianSuper, *Stewardship Statement: 1 July 2017 to 30 June 2018* (2018) 2 <https://www.australiansuper.com/-/media/australian-super/files/about-us/financial-statements/2019-fund-financial-statements.pdf> accessed 11 February 2020.

[112] JP Morgan Asset Management (n 110) [3.2], [3.5].

[113] Colonial First State Global Asset Management, *Principles of Internal Governance and Asset Stewardship 2018* (June 2018) (hereinafter Colonial First State) 16 <https://www.firststateinvestments.com/content/dam/cfsgam/about-us-files/responsible-investment/ri-policies/principles-of-internal-governance-and-asset-stewardship-2018.pdf> accessed 11 February 2020.

[114] ibid 14. See also Cbus, *Escalation Process* <https://www.cbussuper.com.au/about-us/sustainability/escalation-process> accessed 25 November 2019 (noting that escalation may include '[e]xpressing concerns … collectively with asset managers or other asset owners' and '[h]olding discussions with other equity, bondholders or stakeholders').

[115] See, e.g., Mercedes Ruehl and Robert Harley, 'How the Wild, Wild Westfield Restructure Deal Was Eventually Won' *The Australian Financial Review* (Sydney, 29 December 2014) 38 (reporting how a 'cabal of institutions' opposed a restructuring transaction involving Westfield Retail and Westfield

However, it is not possible to establish how common this form of collective action is in practice based on this anecdotal evidence.

D. Collective influence-wielding through intermediary organisations

An interesting feature of the Australian landscape is the significant role played by intermediary organisations in facilitating institutional investors' collective influence in the governance of listed companies.

Industry bodies, in particular, are a long-established feature of the Australian governance landscape[116] and play an important role in advocating for the interests of institutional investors in Australia. As noted earlier, the two principal industry bodies are the FSC and ACSI. The FSC can trace its origins to the Australian Investment Managers Group (AIMG), which was established in 1990.[117] The AIMG's purposes included assisting investors to take action against companies where warranted.[118] ACSI was established in 2001 by industry superannuation funds to advocate for the funds' interests in matters of corporate governance.[119] Today, both ACSI and the FSC advocate for law reform, publish policies outlining investors' expectations regarding the governance practices of publicly-traded companies, and are members of the Australian Securities Exchange (ASX) Corporate Governance Council, the body which issues the 'comply or explain' corporate governance code applicable to ASX-listed entities.[120] They also occasionally engage in high-profile company-specific governance interventions.[121]

Group); Elizabeth Knight, 'Angry Shareholders Ignored Westpac's Bluff and Raised the Stakes' *The Sydney Morning Herald* (Sydney, 26 November 2019) 22 (noting how a 'wall of shareholders' demanded board change at the bank, Westpac, in light of its alleged serious breaches of money laundering laws) <https://www.watoday.com.au/business/banking-and-finance/angry-shareholders-ignored-westpac-s-bluff-and-raised-the-stakes-20191126-p53ea9.html?ref=rss&utm_medium=rss&utm_source=rss_feed> accessed 11 February 2020.

[116] See generally Jennifer G. Hill, 'Institutional Investors and Corporate Governance in Australia', in Theodor Baums, Richard M. Buxbaum and Klaus J. Hopt, eds., *Institutional Investors and Corporate Governance* (Walter de Gruyter 1994) 583.

[117] ibid 600.

[118] ibid.

[119] For an overview of the history and activities of ACSI, see Mees and Smith (n 36).

[120] ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations*, 4th Edition (February 2019) <https://www.asx.com.au/documents/regulation/cgc-principles-and-recommendations-fourth-edn.pdf> accessed 15 March 2020.

[121] See, e.g., Nassim Khadem, 'Investors Willing to Flex Muscle Against Companies', *The Sydney Morning Herald* (Sydney, 9 May 2018) 21 (noting how ACSI demanded board change at financial services group, AMP, and observing that 'this is not the first time ACSI … has moved to influence companies') <https://www.smh.com.au/business/banking-and-finance/investors-willing-to-flex-muscle-against-

In their stewardship disclosures, investors often cite their involvement in industry bodies as a form of collective action.[122] Stewardship disclosures also refer to investors' participation in organisations which represent the collective interests of investors on specific ESG-related issues. Examples include the Investor Group on Climate Change,[123] the Climate Action 100+ Australasian Engagement Group,[124] the Carbon Disclosure Project,[125] the Workforce Disclosure Initiative,[126] and the Responsible Investment Association Australasia.[127]

Institutional investors also rely on engagement providers to facilitate their private interactions with investee companies.[128] These organisations undertake behind-the-scenes engagement assignments with companies on behalf of multiple investor clients. The principal organisations are Regnan and ACSI,[129] both of which report material levels of activity. For example, in 2018–19, ACSI held 267 meetings with 192 companies in the

companies-in-the-wake-of-amp-20180508-p4ze31.html> accessed 11 February 2020; James Eyers and Jemima Whyte, 'UniSuper, ACSI Split Over Bloodletting' *The Australian Financial Review* (Sydney, 28 November 2019) 4 (reporting ACSI's call for board change at the bank, Westpac, in light of its alleged breaches of money laundering laws).

[122] Colonial First State (n 113) 16 ('[o]ccasionally we engage with companies alongside other investors as part of an industry group'); JP Morgan Asset Management (n 110) [3.5] (disclosing that collective engagement activities include 'indirect engagement through industry bodies').

[123] Colonial First State (n 113) 16; AustralianSuper, *ESG Management and Responsible Investing* <https://www.australiansuper.com/investments/how-we-invest/esg-management> accessed 25 November 2019; UniSuper, *Responsible Investing at UniSuper* <https://www.unisuper.com.au/investments/responsible-investing/our-approach-to-responsible-investing> accessed 25 November 2019.

[124] AustralianSuper, *2017–18 Annual Report* (2018) 23 <https://www.australiansuper.com/-/media/australian-super/files/about-us/annual-reports/2018-annual-report.pdf> accessed 11 February 2020; Cbus, *Sustainability* <https://www.cbussuper.com.au/about-us/sustainability> accessed 25 November 2019.

[125] See, e.g., AustralianSuper (n 123); UniSuper (n 123).

[126] Cbus (n 124).

[127] Perpetual Investment Management, *Principles of Internal Governance and Asset Stewardship* (2018) 5 <https://www.perpetual.com.au/~/media/perpetual/pdf/corporate-trusts/pct-principles-of-internal-governance-and-asset-stewardship.ashx?la=en> accessed 11 February 2020.

[128] Investors note their use of engagement firms in their stewardship disclosures: see, e.g., Pendal Group, *Principles of Internal Governance and Asset Stewardship* (July 2018) 9 <https://www.pendalgroup.com/wp-content/uploads/2018/09/Principles-of-Internal-Governance-and-Asset-Stewardship.pdf> accessed 11 February 2020; ChristianSuper (n 110) 3 (disclosing its use of ACSI); Cbus (n 124) (disclosing that it uses ACSI for ASX 300 holdings and Hermes EOS for global shareholdings).

[129] In addition to its role as industry advocate, ACSI also provides company engagement and proxy advisory services to those of its members who subscribe for these services: ACSI, *2019 Annual Report* <https://acsi.org.au/wp-content/uploads/2020/02/19-ACSI-Annual-Report.pdf> 12–14 accessed 19 February 2020.

S&P/ASX 300 index.[130] In 2018, Regnan undertook 86 engagements with 55 companies in the S&P/ASX 200 index, covering issues such as climate change, human capital management, ethical business conduct, board composition and independence, and ESG disclosures.[131] Hermes EOS also reports some activity in Australia.[132]

Institutions' stewardship disclosures indicate that investors use engagement firms in order to leverage their influence and achieve economies in their engagement activities. The pension fund, AustralianSuper, states that using ACSI's engagement services enables AustralianSuper to 'expand the breadth of our engagement coverage and strengthen our voice and influence'.[133] Research by the Australian Institute of Directors into institutional investor share voting and engagement practices concludes that, through their ongoing interaction with investors, engagement firms can be 'highly influential' in developing the views of institutional investors into consensus positions on corporate governance issues.[134]

Proxy advisers also play a role in facilitating institutions' collective influence.[135] By

---

[130] ibid 12.

[131] Pendal Group, *Corporate Sustainability and Responsibility 2018* (2018) 2 <https://www.pendalgroup.com/wp-content/uploads/2018/11/2018-Corporate-Sustainability-Report-.pdf> accessed 11 February 2020.

[132] Hermes EOS, *Public Engagement Report Q3 2018* (2018) 2 (reporting engagement with two companies in relation to environmental concerns) <https://www.hermes-investment.com/us/insight/stewardship/public-engagement-report-q3-2018/> accessed 11 February 2020. In March 2019, ACSI and Hermes EOS announced they had entered into an agreement to pool their engagement services, giving investors access to ACSI's services in the Australian market and Hermes' services in overseas markets: ACSI, *ACSI and Hermes EOS to Share Company Engagement Expertise* (12 March 2019) <https://www.acsi.org.au/publications/media-releases/1601-acsi-and-hermes-eos-to-share-company-engagement-expertise.html> accessed 11 February 2020.

[133] AustralianSuper (n 111) 3. Similarly, the university sector pension fund notes that using ACSI for engagement services 'provides a strong unified voice on issues and widens the extent of our own direct engagement': UniSuper, *UniSuper Stewardship Statement (2018)* (2018) 2 <https://www.unisuper.com.au/~/media/files/forms%20and%20downloads/investment%20documents/unisuper-stewardship-statement.pdf?la=en> accessed 11 February 2020.

[134] Australian Institute of Company Directors, *Institutional Share Voting and Engagement: Exploring the Links between Directors, Institutional Shareholders and Proxy Advisers* (September 2011) 45.

[135] Relevantly, some institutions' stewardship disclosures note the use of proxy firms as a form of collective action. Under the heading 'Indirect Company Engagement', AustralianSuper discloses its use of the proxy advice service provided by ACSI: AustralianSuper (n 111) 3. See also, UniSuper, Responsible Investment Report — 1 July 2018–31 December 2018 (2019) 2 <https://www.unisuper.com.au/~/media/files/forms%20and%20downloads/proxy%20voting%20reports/responsible-investment-report-31-july-2018-31-december-2018.pdf> accessed 11 February 2020. Tuch has noted how proxy firms act as a form of representative body for institutional investors in the United States and United Kingdom: Andrew F Tuch, 'Proxy Adviser Influence' (2019) 99 Boston University LR 1459, 1480. Tuch suggests that proxy advisers may be 'functional substitutes' for investors' representative bodies: ibid 1488.

analysing and providing recommendations regarding voting proposals, proxy firms make it feasible for institutional investors to exercise their voting power in relation to the significant number of voting proposals put before them each year.[136] Proxy advisers' policies and guidelines also augment institutional investor 'voice' by making clear to companies the expectations of institutional investors and the intermediaries that advise them.[137]

V. LESSONS FROM AUSTRALIA

A. Collective action is not a simple governance phenomenon

In theory, market conditions in Australia suggest that it would be both feasible and beneficial for institutions to undertake their stewardship activities collectively.[138] Nonetheless, direct forms of collective action — such as investors jointly undertaking proxy contests, coordinating their share voting or jointly engaging behind-the-scenes with corporate managers — are not common in practice. Institutional investors' stewardship statements suggest that they reserve direct forms of collective action for serious governance concerns only.

Evidence indicates instead that investors more typically wield collective influence through intermediary organisations such as industry bodies and engagement firms. In this regard, the Australian experience is not unique. Overseas commentators have also noted the role of intermediaries in leveraging institutional investor influence in corporate governance.[139]

It can make considerable sense for institutions to undertake their stewardship activities collectively through intermediary organisations, as opposed to forming *ad hoc* coalitions and directly engaging with companies. By acting through an intermediary, an investor does not need to assume the role (and directly bear the cost) of initiating and

[136] Australian Institute of Company Directors (n 134) 71 (noting that institutional investors can receive voting proposals from up to 300 companies each year, the majority of which need to be addressed within a two-month 'peak AGM season' which occurs in October and November).

[137] Ben Power, 'Proxy Music' 34 Company Director 42, 45 (quoting a Commissioner of the Australian corporate regulator who observes that proxy advisers 'play an important role … promoting a focus on corporate governance issues relevant to shareholders').

[138] See above, Part I.

[139] See, eg, Balp and Strampelli (n 77); Tuch (n 135). See also [Italy chapter], which notes the role of the investor organisation, Assogestioni, in facilitating shareholder influence-wielding in Italian corporate governance.

coordinating an intervention.[140] Moreover, free-riding concerns are mitigated where an intermediary organisation has a significant membership or client base.[141] Intermediaries specialise in representing the interests of institutional investors and, as a result of this focus, may accumulate knowledge and expertise that enables them to achieve economies unavailable to *ad hoc* coalitions of investors. Because they are 'repeat players', intermediaries may also be able to adopt a strategic approach towards their governance activities. In the Australian context, Mees and Smith claim that ACSI has adopted a 'gradualist, due process approach… with their biannually updated corporate governance guides consistently more progressive and demanding than those issued by other key institutions'.[142]

The foregoing considerations are likely to be significant ones for institutional investors given their limited incentives to engage in corporate governance activities.[143]

There are potentially two additional explanations for the significant role played by intermediary organisations in Australia. First, the activities of intermediaries will generally fall outside of the reach of Australia's restrictive acting-in-concert takeover laws. In summary, these complex laws can expose investors who coordinate their governance activities to significant regulatory consequences, including public filing obligations, restrictions on acquiring shares in the target company, and the risk of criminal or civil sanctions for breaching Australia's 20% takeovers 'threshold'.[144] However, the law contains an exemption which applies to service providers such as engagement and proxy firms.[145] In addition, stewardship activities undertaken by an industry body will generally fall outside the reach of takeover laws provided the activities are based on the body's independent assessment of where its members' interests lie and do not involve an agreement or understanding with its investor-members regarding an intervention against a particular company.[146]

---

[140] Coordinating a coalition of investors may be a difficult exercise given the potential divergence in interests and objectives of investors: Elroy Dimson, Oguzhan Karakas and Xi Li, 'Coordinated Engagements' (29 October 2019) 4 <https://ssrn.com/abstract=3209072> accessed (25 November 2019).

[141] Balp and Strampelli (n 77).

[142] Mees and Smith (n 36) 86.

[143] See above (n 74–5) and accompanying text.

[144] For an overview, see Australian Securities and Investments Commission, *Regulatory Guide 128 Collective Action by Investors* (June 2015) <https://download.asic.gov.au/media/3273670/rg128-published-23-june-2015.pdf> accessed 11 February 2020.

[145] Corporations Act 2001 (Cth), s 16(1)(a).

[146] See also Hill (n 116) 606-7 (concluding that takeover laws should not present a barrier to the activities of industry bodies).

Second, by acting through intermediaries, individual investors are able to avoid direct confrontation with companies. Commentators have claimed that owing to the small, concentrated and interconnected nature of the Australian market, investors can be reluctant to engage in confrontational behaviour with investee companies.[147] This would suggest that investors may see an advantage in allowing intermediaries to take the lead in engaging with companies and advocating for the interests of investors.[148]

B. Exploring the governance significance of intermediary-led stewardship

The Australian experience highlights the governance potential of intermediary-led stewardship. Whereas Professors Gilson and Gordon emphasise the role of activist hedge funds in leveraging the governance influence of rationally reticent institutional investors,[149] experience in Australia suggests that intermediary organisations can play a similar role. It is important that both policy makers and researchers appreciate this potential governance significance of intermediaries.

That said, there is some divergence of views regarding the effectiveness of intermediary-led stewardship. Balp and Strampelli go so far as to suggest that intermediaries are a 'promising lever by which to foster a more convincing and viable corporate governance role for non-activist institutional investors' and, in particular, may 'activate passively managed funds with particularly weak financial incentives for being active'.[150] Others suggest there are limits to intermediary-led stewardship. In a 2011 report, the UK Financial Reporting Council criticised investors' apparent preference for undertaking collective action through governance intermediaries and claimed that direct collective action is preferable for addressing significant corporate governance concerns:

> [M]any statements around the principle of collective engagement focused on membership

[147] See, eg, Paul Garvey, 'Change of Name Not Enough to Spare Sandalwood Group Quintis' *The Australian* (Sydney, 24 March 2017) 23 (quoting an Australian activist investor who claims that '[t]he number of people who operate in this market, be it at fund management level, broker level, management level, is very small … Most people here would know each other within two or three degrees of separation in the corporate world, and I think that means people here are probably more reluctant to genuinely confront [corporate] underperformance') <https://www.theaustralian.com.au/business/companies/change-of-name-not-enough-to-spare-sandalwood-group-quintis/news-story/ae9dab3ab5ce2b48269ab3c1c3833e44> accessed 11 February 2020.

[148] This consideration has also been noted outside of the Australian context: see Dimson, Karakas and Li (n 140) 11.

[149] Gilson and Gordon (n 76).

[150] Balp and Strampelli (n 77).

> of collective bodies. While this is welcome, it skirts round the main reason for [encouraging investors to engage in collective action], which is the need for investors to be able to join forces at critical moments to ensure that boards acknowledge and respond to their concerns.[151]

Doidge et al note that intermediary-led stewardship may be less well suited for addressing company-specific issues, such as issues of commercial strategy.[152] They claim that there is likely to exist a greater variation in the views of individual investors regarding such company-specific issues, making it more costly for intermediaries to establish a common viewpoint on which to base an intervention.[153] If this is indeed correct, intermediary-led activism may not serve as a functional substitute for the role of hedge funds highlighted by Gilson and Gordon.

Jurisdiction-specific considerations are likely to be relevant to this debate. For example, the Australian investment community is relatively small,[154] has an established tradition of using industry bodies to advocate for its interests,[155] and is serviced by relatively few industry bodies and engagement firms.[156] In jurisdictions without such features, it may be unrealistic to expect intermediaries to play a significant role in mobilising investors' stewardship activities.[157] Any analysis of the governance

---

[151] Financial Reporting Council, *Developments in Corporate Governance 2011: The Impact and Implementation of the UK Corporate Governance and Stewardship Codes* (December 2011) 22 <https://www.frc.org.uk/document-library/frc/2011/developments-in-corporate-governance-2011-the-imp> accessed 11 February 2020.

[152] Craig Doidge, Alexander Dyck, Hamed Mahmudi and Aazam Virani, 'Collective Action and Governance Activism' (2019) 23 Review of Finance 893, 895.

[153] According to Doidge et al, it generally makes more sense for intermediaries to pursue 'process proposals' in relation to mainstream issues of corporate governance practice. This is because such proposals can be put forward in respect of multiple companies (enabling economies of scale) and because such proposals are likely to be easier to formulate since investors' views on 'process' issues are likely to be more closely aligned than in respect of highly company-specific issues: ibid. Highlighting this point, the Australian press recently reported a divergence in views between ACSI and one of its members, the superannuation fund UniSuper, over the company-specific issue of which directors should be removed from the board of the bank, Westpac, in light of serious allegations of compliance failure at that bank: Eyers and Whyte (n 121).

[154] See Garvey (n 147) above and accompanying text.

[155] See Part IV.D above.

[156] ibid.

[157] Tuch suggests that industry bodies have played a significant role in the UK because of (i) the geographical proximity of institutional investors in that country; (ii) shareholders in English companies enjoy favourable legal rights; and (iii) policy settings have encouraged investors to participate in corporate governance. Tuch notes that, in contrast, industry organisations are less prominent in the United States and suggests this may be due to the geographical dispersion of significant investors in the

significance of intermediaries may therefore need to pay close regard to market conditions in particular jurisdictions.

C. Recognising the varieties of collective action when developing stewardship norms

The Australian codes do not prescribe in detail what is expected of investors in terms of collective action. As explained earlier, ACSI has expressed concern regarding this approach, arguing that it may be necessary to introduce a single code containing minimum standards, in order to promote greater consistency in investors' stewardship activities.[158] Given that the Australian codes currently refer to collective action in very general terms, any such overhaul of the Australian approach to stewardship would need to consider, among other things, the extent to which collective action should be addressed in more prescriptive terms.

This Chapter's analysis indicates that formulating more prescriptive requirements regarding collective action would not necessarily be straightforward. In view of the varieties of collective action highlighted by this Chapter, a key challenge would involve determining what forms of collective should be prescribed. This would require consideration of the issues noted in the previous section regarding the feasibility, and relative effectiveness, of different forms of collective action.

This Chapter's analysis also suggests that it is necessary for investors' stewardship statements to provide more detailed disclosure concerning collective action. The generic disclosures commonly found in Australian investors' stewardship statements — such as claims that investors are prepared to act 'with other like-minded investors'[159] or utilise the services of an intermediary organisation[160] — provide little insight into what this Chapter has revealed to be a governance practice which can be quite varied in nature. In order for outsiders to appreciate fully the nature, extent and impact of investors' stewardship activities, it would seem necessary for investors to report, in more particular terms, on the forms of collective action they undertake, the circumstances in which different forms of collective action are used, and the extent to which they are used.

The recently revised UK Code illustrates a potential approach. Principle 10 of the UK

United States, weaker shareholder rights and a more management-centred approach to corporate governance. See Tuch (n 135) 1488–89.

[158] See (n 69–73) above and accompanying text.

[159] See (n 109–110, 114) above and accompanying text.

[160] See Part IV.D above.

Code requires signatories, where necessary, to participate in collaborative engagement to influence companies. The UK Code requires signatories to disclose what forms of collaborative engagement they have participated in and why, 'including those undertaken directly or by others on their behalf'.[161] The last phrase would appear to acknowledge that collective action can be undertaken directly or through intermediaries. Consistent with the new code's approach of requiring investors' stewardship disclosures to focus on activities and outcomes,[162] Principle 10 requires investors to disclose the issues addressed by their collective action, the method of collective action used, their own role and contribution in relation to the collective action, and the outcomes of the collective action.[163] Assuming that, in practice, investors give effect to the UK Code's desire for disclosures to be 'as specific and as transparent as possible',[164] Principle 10's disclosure requirements should prompt disclosures which are more granular than the current non-specific disclosures observed, for example, in the stewardship statements of Australian investors. Such particularised disclosures should enable observers to understand better the role played by collective action and its significance as a mechanism for facilitating investors' stewardship activities.

D. Collective stewardship and acting-in-concert rules

Acting-in-concert rules ensure that persons who accumulate voting power through cooperative stake-building or the coordinated exercise of shareholder influence are subject to takeover regulation.[165] These rules can apply to shareholders who act collectively in relation to the governance of their companies[166] and are often regarded as a constraint on collective action.[167] The Australian experience suggests, however, that a more subtle analysis is required when considering the precise impact of acting-in-concert

[161] UK Code (n 6) 19.

[162] ibid 6.

[163] ibid 19.

[164] ibid 6.

[165] Reiner Kraakman et al, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (2nd ed, OUP 2009) 255; Martin Winner, 'Active Shareholders and European Takeover Regulation' (2014) 3 European Company and Financial LR 364, 367.

[166] The Walker Review, for example, recognised that collective shareholder action could sometimes collide with, and contravene these rules: Walker Review (n 5) [5.44].

[167] The extent to which collective action should be accommodated by acting-in-concert rules has been explored by regulators in several jurisdictions: see, e.g., Ana Taleska, 'Shareholder Proponents as Control Acquirers: A British, German and Italian Perspective on the Regulation of Collective Shareholder Activism via Takeover Rules' (2018) 19 European Business Organization LR 797.

rules on investors' attempts to wield collective influence in corporate governance.

This point can be highlighted by reference to the attempt by the Australian regulator, the Australian Securities and Investments Commission (ASIC), to accommodate collective action under Australia's acting-in-concert rules. In *Regulatory Guide 128: Collective Action by Investors* (RG 128), issued in 2015,[168] ASIC outlined the scope which it believes exists for shareholders to engage in collective action without attracting the operation of Australian takeover law. According to RG 128, acting-in-concert rules do not apply where shareholders exchange information or views with one another, exhort each other to address issues of concern, or jointly raise 'general issues' of concern with corporate managers.[169] ASIC also indicates that it is unlikely to take enforcement action in respect of temporary collective action which seeks to promote 'the improvement of a company's corporate governance'[170] — which it defines as collective action directed at mainstream corporate governance concerns, such as better disclosure practices and more comprehensive board performance evaluation processes.[171]

However, RG 128 provides little comfort for investors who wish to use collective action to escalate their governance concerns. RG 128 cautions that 'if … conduct extends to the formulation of joint proposals to be pursued together or there is an understanding that the investors will act or vote in a particular way, then concerns may arise'.[172] It states that if shareholders threaten to pursue their objectives by coordinating their voting or collectively seeking to change the composition of a company's board, such conduct is likely to trigger the application of the acting-in-concert rules.[173]

RG 128's accommodation of low-intensity forms of collective action should provide comfort to investors who seek to engage in lower-intensity forms of stewardship — such as information sharing and non-confrontational engagement with investee companies. However, it is questionable whether RG 128 will significantly enhance the overall levels of this type of collective stewardship by investors. This is because, as this Chapter shows, these types of lower intensity collective action are already facilitated to a significant extent by intermediary organisations, including industry bodies and engagement firms,

[168] Australian Securities and Investments Commission (n 144).

[169] ibid Table 1.

[170] ibid [128.49].

[171] ibid [128.50].

[172] ibid Table 1.

[173] ibid Tables 1, 2 and 3.

whose activities are not generally caught by acting-in-concert rules.[174]

The more significant aspect of RG 128 is arguably its hostile stance towards higher intensity forms of collection action, such as investors jointly making demands or threatening to exercise their collective voting power against the re-election of directors. As this Chapter shows, it appears that investors are more likely to engage in direct forms of collective action in order to assist them in undertaking these more difficult forms of intervention.[175] It is therefore possible that RG 128 fails to provide regulatory latitude for collective stewardship in situations where such latitude is most needed.

The Australian experience highlights, therefore, the need for any attempt to accommodate collective stewardship under acting-in-concert laws to be guided by a thorough understanding of the actual role and nature of collective action in any given jurisdiction.

VI. CONCLUSION

Australia provides an interesting case study concerning the role of collective action as a form of stewardship. It reveals collective action to be a nuanced governance practice. In particular, it highlights the significance of intermediary-led collective action and argues that this form of collective action warrants further research, as well as more detailed consideration when developing stewardship norms. The Australian experience also highlights the potential regulatory challenge of accommodating collective action under acting-in-concert rules, yielding insights which are relevant to regulators and researchers in other jurisdictions who are examining the intersection of collective action and takeover law.

[174] See (n 144-6) above and accompanying text.

[175] See above, Part IV.C.

european corporate governance institute

about ECGI

The European Corporate Governance Institute has been established to improve *corporate governance through fostering independent scientific research and related activities.*

The ECGI will produce and disseminate high quality research while remaining close to the concerns and interests of corporate, financial and public policy makers. It will draw on the expertise of scholars from numerous countries and bring together a critical mass of expertise and interest to bear on this important subject.

The views expressed in this working paper are those of the authors, not those of the ECGI or its members.

european corporate governance institute

ECGI Working Paper Series in Law

Editorial Board

Editor	Amir Licht, Professor of Law, Radzyner Law School, Interdisciplinary Center Herzliya
Consulting Editors	Horst Eidenmüller, Freshfields Professor of Commercial Law, University of Oxford
	Martin Gelter, Professor of Law, Fordham University School of Law
	Geneviève Helleringer, Professor of Law, ESSEC Business School and Oxford Law Faculty
	Curtis Milhaupt, Professor of Law, Stanford Law School
	Niamh Moloney, Professor of Law, Department of Law, London School of Economics and Political Science
Editorial Assistant	Úna Daly, ECGI Working Paper Series Manager

https://ecgi.global/content/working-papers