Unethical Practices at the Meeting of AMP Shareholders

Shann Turnbull*

AMP is the largest investor in the Southern Hemisphere and a significant global investor. It is also the largest shareholder in companies listed on the Australian Stock Exchange. On 7 April 2000 the company secretary received the following communication, addressed to the board, from one of its shareholders.

Dear Directors,

I congratulate the company on its commitment "to maintain high standards of "ethical behaviour" as stated on page 31 of your 1999 Annual Report. Could you please advise me how these high standards will be applied to the conduct of the AGM on April 9th?

In particular, could you advise me (on) the rules by which the meeting will be conducted and the policies of the Chair in running the meeting. For example, what traditional rules of debate will be adopted, the role of the Chair, the use of proxies by the Chair for substantive or procedural motions, what standard procedural motions will be accepted, policies to be followed for shareholders, directors, auditors, management, service providers, customers, or others, to address the meeting, etc. Could you please post your answer on your web page and have a hard copy available for people attending the AGM? I will share this letter with others, and as a very long-term shareholder in your company I would welcome the opportunity to assist you in the task requested.

My interest in the ethical conduct of AGM's arose from being a policyholder in AMP limited and attending their first AGM after de-mutualisation last year. My concerns over the conduct of the meeting and the governance of the AMP are set out in the attached Appendix I. This Appendix was sent to each director of the AMP with my letter of December 2nd, 1999. It provides both benchmarks and suggestions for raising the standards of Corporate Governance of the AMP.

Yours faithfully, Shann Turnbull

Appendix I

Appendix I 'The ethics of chairing a meeting: board games need new rules'

The AMP has a very special responsibility in providing leadership to the community as it is concerned with the wealth, health and welfare of more voters in Australia than any other private sector organisation. It is also the largest investor in the Southern Hemisphere and a significant global investor. The AMP is the largest shareholder in more publicly traded companies on the Australian Stock Exchange than any other investor. This places a very special responsibility on the AMP to be a responsible, active shareholder for influencing many other companies in Australia and elsewhere to lift their standards. But to do this it first needs to become a role model.

Practices accepted in the past by the International Olympic Committee and Members of Parliament in managing their conflicts of interest, and high profile media commentators in this country are no longer acceptable. This also applies to the unethical and undesirable practices commonly found in the conduct of shareholder meetings of publicly traded companies in Australia

The public are expecting and seeking higher standards. As a result, members of Parliament are now expecting businesspeople to likewise lift their standards with the proposal by

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Senator Andrew Murray that all publicly traded companies in Australia establish a Corporate Governance Board (CGB), refer to http://www.aph.gov.au/senate/committee/corp_sec_ctte/companylaw/minreport.htm In the spirit of the statement on page 30 of your 1998 report that "the Board seeks to identify the expectations of the shareholders", directors may wish to seek feedback from members on the proposals I am putting forward on the democratic basis of one vote per member. Any feedback provided on the plutocratic basis of one vote per share is likely to reflect the views of only the handful of financial institutions, which dominated the voting at your AGM. Only six of your largest shareholders needed to vote to cast more votes than those used at the meeting, where only 18% of the total shares on issue were voted. The lack of participation by your largest shareholders illustrates the negligence of institutional investors in exercising their ownership privileges

Before de-mutualisation, officers of the AMP led industry initiatives to improve the standard of corporate governance in Australia. Demutualisation of the AMP, with the demutualisation of the Australian Stock Exchange has resulted in officers of both organisations appearing to become less critical of unethical and undesirable practices in other publicly traded corporations. The time has come to walk the talk and back up past rhetoric with practical leadership.

As a courtesy to the board last year, I did not explicitly state at the first public meeting of AMP shareholders that some corporate governance practices were unethical or undesirable, and that those used by the company for monitoring operational performance were unacceptable. However, I did raise these issues obliquely and perhaps too opaquely for some people to understand my concerns about the governance of the AMP. To remind directors of my questions, as these are not recorded in the minutes, I asked: (i) How the chairman was going to manage his conflicts of self-interest in exercising his discretion to vote open proxies on the resolution to double directors fees, and (ii) What processes did the board have in place to obtain information on the performance of the business and management, independently of management?

The chairman did not answer my first question but the minutes of the meeting indicate that he used his discretion to further the self-interest of directors and voted for the resolution. The minutes also indicate that the trustees appointed by the AMP to the board of the AMP Foundation voted in concert with the self-interest of directors or gave the chairman the discretion to vote their shares. If the trustees follow your Code of Conduct then they are obliged to vote in concert or give an open proxy to the Chairman to avoid a conflict of interest with the AMP. The Foundation is the fifth largest shareholder of the AMP. According to advice provided by your Deborah Schmidt on November 29th 1999 it would seem that the AMP Foundation Limited was funded by contributions from members so it may be compared with the Beswick structure of BHP, which directs its votes to support or entrench management. This practice of using members funds for these purposes has been a matter of public debate with many commentators considering it undesirable.

The chairman answered my second question by stating that processes to obtain information independent of management were impractical and that you had to trust management. The reliance on trust without fail-safe fallback position to detect when trust is misplaced is unacceptable for fiduciaries with stewardship for billions of dollars. It is also unacceptable not to have rapid response processes to take corrective action when trust is misplaced. The recent performance of the AMP, including the conduct of its take-over for the GIO, provides compelling evidence that strong executives require directors to have stronger processes for monitoring, directing and controlling management. Both a CGB and Stakeholder Councils could assist in this regard.

The AMP already has a number of advisory boards and these could be re-organised into Stakeholder Councils. Employees, customers and suppliers on whom the company depends for its very existence possess expert knowledge on all aspects of the AMPs operations and competitive standing. The establishment of self-selected and independently elected stakeholder advisory councils could provide both management and external directors with expert feedback information from people with intimate operational interest and commitment to the company

Professor Porter (1992:16&17) made recommendations along these lines for making US corporations competitive with those in Japan and Germany. His recommendation to "Policy Makers" and "Corporations" was to "Encourage board representation by significant customers, suppliers, financial advisers, employees and community representatives". Stakeholder Councils constituted by each of these constituencies provide a way of implementing his recommendations without compounding board conflicts of interest in a single board. It also assist the Board to ensure that "areas of

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significant business risks are identified by management and that arrangements are in place to adequately manage those risks" as stated on page 30 of your 1998 report.

Chief Executive Officers (CEOs) are by their nature, usually strong willed, intelligent, knowledgeable and very persuasive leaders. These characteristics can make it very difficult for a board to direct, monitor control, let alone negotiate their remuneration in the best interest of shareholders. This is especially so if the CEO becomes influential in determining the tenure of directors or in determining their pay, perks or information provided to them to assess his or her performance. This is why it is unacceptable for your Code of Conduct to provide your Managing

Director the power to decide how Directors can manage their conflicts of interest as advised to me by your Deborah Schmidt in her e-mail of November 30th 1999. The reason for having any external directors on a board is largely lost if the external directors feel more obligated to the CEO than to the company as a whole or if they cannot obtain information independent of management to evaluate management.

A CGB creates a division of power to provide external directors with a process to control strong willed executives, or even rogues, without the need for non-executive directors to vote against proposals in which an executive director has an interest. A CGB provides process to protect the reputations of all directors . It would permit directors to "conform to the AMP corporate value of acting with integrity" as stated on page 30 the last Annual Report under the heading "Code of Conduct". More importantly, as a CGB is elected on the basis of one vote per investor, it can protect minority shareholders of any exploitation by related party interests.

The AMP is itself a significant minority shareholder in many companies and so a CGB in those companies would protect the interests of AMP policy-holder's from expropriation of value by related party interests.

Many small publicly traded companies do not have sufficient directors and/or external directors to establish remuneration, audit and nominating committees of the board and these are no longer required with a CGB. A CGB provides a cost-effective way to reduce the cost of raising equity even for companies too small to be publicly traded as demonstrated with my own experience.

As the chairperson of the CGB would chair meetings of shareholders the AMP would avoid the following unethical or undesirable practices, which occurred at the first AGM:

1. The chairman speaking for resolutions at meetings of shareholders.
   Renton (1979: 31) states that if a chairman "feels sufficiently strongly about a matter, he should vacate the Chair temporarily. It is not, however, ethical to leave the Chair to participate in a debate, which has been progressing for some time; the moment to leave the Chair is before debate starts or immediately after the mover has spoken. This privilege should not often be availed of, as a Chairman's too frequent participation in detailed debate endangers his reputation for impartiality justice must not only be done but must be seen to be done." Refer also to Shackleton (1973:22)
2. The chairman of directors chairing a shareholders discussion on directors' fees
   Renton (1979: 31) states that "The Chairman should also leave the Chair whenever he is affected, eg, during an election he is contesting, or during a discussion of motions either censuring or congratulating him".
3. The chairman of directors chairing a member's meeting and joining the discussion on the level of directors' fees.
4. The chairman of directors chairing a meeting of members and exercising his discretion to vote proxies himself and not nominating the Company Secretary, Auditor or some other person when resolutions before the meeting affect himself.
5. The chairman using his discretion to vote uncommitted proxies in favour of a resolution in which he has an interest.

The basic problem is that all Australian public company directors are imprisoned in a defective system. It is a system, which can compromise their integrity, jeopardise their reputation, and lead to unacceptable economic performance. I am sure the directors of the AMP share my concern that the share price of the AMP has dropped by a third of its original value reducing shareholders values by billions of dollars. The adverse results of the company provide an additional compelling reason for the AMP to provide leadership in reforming the Australian system of corporate governance and its practices.

References

Renton, N.E. (1979), *Guide for Meetings and Organisations*, The Law Book Company, Third Edition.

Sydney Shackleton, F. (1973), *The Chairman's Guide and Secretary's Companion*, Ward Lock Limited, London

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The author comments

With a unitary board, there is neither a process for mediating changes in the composition or role of the directors nor a process for safeguarding debate when genuine differences of opinion exist between directors or between directors and shareholders. One way to resolve this problem is for companies to change their constitutions, under existing law, to establish a Corporate Governance Board (CGB) as proposed in Parliament by Democrat Senator Andrew Murray.

The constitution of AMP Limited, like most publicly traded companies in Australia gives the Chair power to determine the conduct and procedures of General Meetings, including the processes of electing directors. This can makes the position, influence and perks of Directors subject to the Chairman's favour.

Directors of companies with a unitary board have absolute power on how they manage their conflicts of interest, which can corrupt both people and performance. The solution is a division of power such as introducing a CGB, which would take over some of the roles delegated to Board Audit, Remuneration and Nomination sub-committees. This would also provide a process to ethically manage any related party transactions with their dominant shareholder as occurs with Coles-Myer, Qantas, Axa and many other companies.

Without a CGB directors are placed in the unethical situation of setting and marking their own exam papers. This arises because directors determine the accounting procedures, within accepted accounting standards, on how to value assets and so the reported profits. A situation which compromises auditors, the accounting profession, the utility of accounting standards, and the obsession of regulators for disclosure as well as the ethics of directors who go along with the desire of a CEO to report low profits when they are first appointed but much better profits later.

It is only natural for lawyers, who write corporate constitutions, to facilitate the discretions of their clients as much as possible. Because lawyers write corporate constitutions, directors and investors assume that they are consistent with both The Corporations Law and ethics. The idea that the law could accept unethical constitutions would not occur to many people.

Without a member of the CGB chairing shareholder meetings it can become impossible for shareholders to make directors accountable. This is because the Chair has discretion to determine where the meeting is held, what evidence is required to allow eligible persons to attend and who else may attend. The Chair has discretion as to who may speak, when they are out of order, and cease to speak. The Chair has power to accept or reject some procedural motions, withdraw motions put forward by the company, and can adjourn the meeting. A contentious issue is the ability of the Chair to use proxies for procedural motions for which they was no mention in the notice of meeting and which do not involve the proxy givers.

In his book, *Guide for Meetings and Organisations*, Nick Renton states, "A Chairmans's reputation for impartiality can be speedily undermined if he does from the Chair any of the things that should be done from the floor, such as speaking to motions in general meeting or nominating members to some office". Renton goes on to say that the Chairman should vacate the chair if he feels strongly about a matter and wants to speak. Then he goes on to say "it is not, however, ethical to leave the Chair to participate in a debate which has been progressing for some time".

However, such ethical practices are generally ignored at most shareholder meetings. As the largest shareholder in many other companies the AMP Limited should be both a role model and agent for raising standards. However, last year the AMP Chairman not only entered into the debate on motions before the Chair but those in which he had a financial interest to double the level of director's fees!

Unlike Parliament and some political parties, corporations do not have "standing orders" for the processes of debate at either shareholder meetings or those of directors. With millions of Australian holding shares in companies its time Parliament ensured that our public corporations cannot register constitutions, which allow unethical and uncompetitive practices. This would also remove the nervous energy and deliberating turmoil required at present to change a company Chair.

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