

25 July 2017

Committee Secretary
Senate Standing Committees on Economics
PO Box 6100
Parliament House
CANBERRA ACT 2600

via email: economics.sen@aph.gov.au

Dear Secretary

Inquiry into the Corporations Amendment (Modernisation of Members Registration) Bill 2017

Thank you for the opportunity to provide a submission on the Corporations Amendment (Modernisation of Members Registration) Bill 2017 (**Bill**). The Bill proposes to amend s 169 of the *Corporations Act 2001* (Cth) (**Corporations Act**) to include an email address as information that must be contained in the register of members of a company. Currently, s 169 only requires a register to contain the member's name and address.

The Australian Institute of Company Directors (**AICD**) is committed to excellence in governance. We make a positive impact on society and the economy through governance education, director development and advocacy. Our membership of more than 40,000 includes directors and senior leaders from business, government and the not-for-profit sectors.

The ability to communicate effectively with company members about matters relevant to their interests and rights is integral to good governance. The AICD is supportive of measures that appropriately protect members' interests and facilitate the effective exercise of their rights. It was partly for this reason that the AICD supported amending the Corporations Act so that the requirements for distributing meeting notices and materials to members are technology neutral.¹

As the Committee is aware, changes to the Corporations Act have the potential to create significant practical and compliance impacts on Australian companies of all sizes. The intersection of company and governance obligations in the Act make careful consideration of the flow-on effect of any change vital, including related provisions, offences and practical business and compliance impacts on organisations.

For this reason the AICD is strongly of the view that reform of the Corporations Act should start from a principles basis informed by clear policy objectives, and be supported by detailed review of legal and practical implications. Provisions relating to information held on, and access to, member registers also intersect with privacy law obligations and community expectations of privacy and protection of personal information.

Against this backdrop, while the AICD supports the important objective of improving transparency and accountability by enhancing the permissible modes of member communication, we have significant concerns with the Bill which we highlight below.

¹ AICD Submission in response to Government's Consultation on Technology Neutrality in Distributing Meeting Notices and Materials Proposals Paper (17 June 2016), AICD Website <http://www.companydirectors.com.au/~media/resources/director-resource-centre/policy-on-director-issues/2016/subm_2016_treasury_technologyneutrality-v2.ashx>

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Our concerns follow:

- (a) The Bill does not address the wider issue of technology neutrality within the Corporations Act. It is our strong view that inadequacies in the Corporations Act relating to the use of technology must be addressed in a comprehensive and holistic way, in order to avoid undesirable inconsistencies within the law and unintended consequences. As one example, the law currently provides for electronic communication in some circumstances with specific conditions (notice of meetings, distribution of annual reports). A holistic approach to technology neutrality would reduce complexity and confusion.
- (b) While email enables low cost and efficient communication, it can also present significant security challenges. The AICD acknowledges that the Corporations Act has some protections that apply to the use of information on member registers. However, the existing prohibitions on use in s 177 will not necessarily prevent register information from being misused, or shared with or sold to third parties, including through the dark web, with little chance of detection prior to the breach, particularly given the relatively open access to member registers available under the law. We are concerned that the inclusion of email addresses on a public register will significantly exacerbate the already significant danger of misuse of information from member registers. The individual email addresses of a company's members could be an attractive asset for spammers and other cyber-criminals. It is easy to envisage an off-shore scam effectively targeting a particular company's retail shareholders with disastrous results. The Bill does not address the heightened risks associated with making members' email addresses readily available.
- (c) In addition to cyber-crime risks, the Bill ignores the potential privacy issues associated with members' names and contact details being available on a company register. While there is public benefit in providing mechanisms to enable communication between members for legitimate purposes, this benefit needs to be balanced against members' privacy concerns and expectations. The Bill does not deal with this issue.
- (d) Not all company members have an email address. Nor would all members with emails necessarily be willing to provide it to a company if asked. Given this reality, and that companies have no statutory power to compel members to provide them with this information, it would be unjust to expose companies to liability under s 169 of the Corporations Act should they be unable to obtain an email address of one or more of their members. This concern is compounded by the fact that s 169 is a strict liability offence, and a director could also be liable as an accessory under s 79 for a company's offence. The Bill does not address these difficulties.
- (e) The Bill does not consider the intersection with other related provisions (for example, s 178A) and the more transient nature of email addresses, and the unreasonable obligations this would impose on company secretaries.
- (f) The Bill does not provide for a transition process for companies to adjust to the proposed requirement. For a variety of reasons, inserting email addresses on a member register is not be as simple as it might seem. As previously mentioned, not all members have email addresses. And, in respect of those members that do, there are privacy law restrictions on the use of information already collected for another purpose. A significant period of transition would be required to enable companies to implement the required changes. There would be significant costs incurred by companies regardless of the transition timing.

The AICD believes that further consideration is required regarding whether it is ultimately in the public interest for this change to be made without additional, robust protection mechanisms.

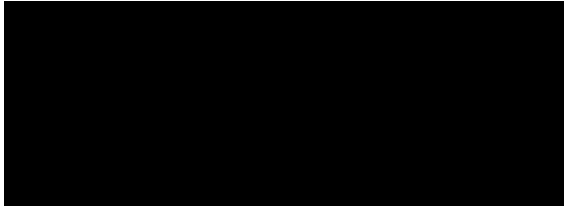
In particular, the AICD is concerned to ensure that the Bill does not inadvertently facilitate cyber-fraud or other illegal activities. We also encourage the Committee to consider whether a more

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comprehensive review of privacy expectations of members and exploration of alternative mechanisms for facilitating member communication (for example, the use of third party distribution bodies) may have a public benefit.

We hope our comments will be of assistance to the Committee. If you would like to discuss any aspect of this submission, please contact Lysarne Pelling, Senior Policy Adviser, on [REDACTED] or at [REDACTED] or Matt McGirr, Policy Adviser, on [REDACTED] or at [REDACTED]

Yours sincerely

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LOUISE PETSCHLER
General Manager, Advocacy