



**ICGN**

International Corporate Governance Network

Senate Standing Committees on Economics  
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Australia

Sent by email: [economics.sen@aph.gov.au](mailto:economics.sen@aph.gov.au)

3 March 2021

**Re: Treasury Laws Amendment (2021 Measures No.1) Bill 2021 [Provisions]**

Dear Committee,

The International Corporate Governance Network (ICGN) is pleased to respond to the Consultation by the Senate Standing Committees on Economics with regard to Treasury Laws Amendment (2021 Measures No.1) Bill 2021 [Provisions].

Led by investors responsible for assets under management in excess of US\$54 trillion, ICGN is a leading authority on global standards of corporate governance and investor stewardship. Our membership is based in more than 50 countries and includes companies, advisors and other stakeholders. ICGN's mission is to promote high standards of professionalism in governance for investors and companies alike in their mutual pursuit of long-term value creation contributing to sustainable economies world-wide.

ICGN offers an important investor perspective on corporate governance to help inform public policy development and to encourage good practices by capital market participants. Australia is an important market for ICGN, and our members include several prominent Australian institutional investors. Moreover, the vast majority of our investor members will have significant holdings of both debt and equity issued by Australian companies and governments. We refer you to our two guiding documents: the ICGN Global Governance Principles<sup>1</sup> and the ICGN Global Stewardship Principles<sup>2</sup>

We would like to respond to the two key aspects of the amendment under consultation

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<sup>1</sup> ICGN Global Governance Principles, 2017:  
[http://icgn.flpbks.com/icgn\\_global\\_governance\\_principles/#p=4](http://icgn.flpbks.com/icgn_global_governance_principles/#p=4)

<sup>2</sup> ICGN Global Stewardship Principles, 2020:  
[https://www.icgn.org/sites/default/files/ICGN%20Global%20Stewardship%20Principles%202020\\_0.pdf](https://www.icgn.org/sites/default/files/ICGN%20Global%20Stewardship%20Principles%202020_0.pdf)

1. Virtual meetings and electronic communication of documents
2. Continuous disclosure obligations

A general theme which links these two issues is that as the Covid-19 outbreak began to disrupt normal governance practices globally in 2020, most institutional investors were supportive and willing to compromise (at least temporarily) traditional governance expectations in light of, and in solidarity with, the multiple challenges faced by companies in the context of business as usual. We believe that the Covid crisis has resulted in many lessons learned about how to adapt to the systemic issues arising from the pandemic. These lessons suggest that the future in a post-Covid environment may be different than what has preceded this crisis. However, to the extent that traditional shareholder rights may have been compromised during the crisis, it is our expectation that such compromises are reversed and that investor protections are not diluted.

### **1. Virtual meetings and electronic communication of documents**

We refer you to the ICGN Viewpoint of September 2020 on the future of shareholder meeting in a post-Covid environment.<sup>3</sup>

The Annual General Meeting (AGM) is an important forum for shareholders to hold the board and management accountable for preserving and enhancing long-term corporate value. Ideally AGMs should allow for the physical presence of participants, including provision for voting electronically by proxy, and ensure that live interaction is possible between shareholders and the board and management.

During the COVID crisis, virtual-only AGMs have become the 'new normal' and has led to emergency legislation being enacted in multiple markets to allow companies to seek shareholder approval on resolutions relating to dividend proposals, share issuance authorizations, director elections and auditor appointments. Hybrid AGMs have also been popular which allows for both physical and virtual presence by participants via 'live streaming' of the AGM proceedings accessible via the internet.

While ICGN members recognise the need for hybrid and virtual-only AGMs in this current environment, we encourage regulators to ensure that shareholder rights are not infringed so as not to restrict their ability to hold companies properly to account. Certain minimum shareholder rights should be guaranteed to allow for robust challenge of boards and management through interactive and unmoderated questioning or statements made by shareholders to have meaningful dialogue on contentious proposals.

When holding a hybrid or virtual-only AGM, we strongly encourage companies to ensure interactivity with shareholders and to replicate as best as possible the in-person AGM

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<sup>3</sup> ICGN Viewpoint, 'The Future of Annual General Meetings', ICGN Viewpoint: <https://www.icgn.org/future-annual-general-meetings>

experience. In doing so companies might consider the following as an optimal format as presented below:

- Publish AGM information at least one month ahead of the meeting, including the meeting format and procedures around registration, access, participant identification, shareholding verification and voting options.
- Use video technology as well as audio technology to allow for facial expression to be shown.
- Allow participants to ask questions and make statements – in advance and during the AGM – and allow for follow up questions and statements if necessary.
- Record and respond to all questions and make such responses promptly publicly available (avoiding legalistic language).
- Enable participants to be able to cast votes live, noting all matters on the ballot should be voted by poll.
- Ensure accuracy of tracking and reconciling any advance votes received pre-AGM with any live votes cast during the AGM itself.

Companies should allow shareholders the opportunity to submit questions in advance of the shareholder meeting date and/ or during the meeting proceedings. Companies should ensure that transparent, unmoderated and interactive questioning by shareholders to the board and management is facilitated to ensure that accountability is upheld. Answers to the questions should be recorded and made available to all shareholders of the company.

Companies should ensure that shareholders have the right to place proposals on the agenda of AGMs, subject to reasonable limitations. All shareholder proposals should be voted upon and contingency provisions should be made to ensure that proponents are able to present their proposal should they have difficulties in attending an AGM, particularly a virtual AGM.

If a shareholder has failed to signify a position 'for' or 'against' either a company or a shareholder resolution (blank votes), the vote should be considered invalid. Companies should not use their discretion to execute the vote unless the proxy form explicitly states that any blank votes can be exercised at the company's discretion. Alternatively, companies might consider adding an 'abstain' vote option to allow shareholders to signify a level of discontent but not go as far to vote against.

The board should ensure that equal effect is given to votes whether cast in person or in absentia and all votes should be properly counted and recorded via ballot. The outcome of the vote, the vote instruction (reported separately for, against or abstain) and voting levels for each resolution should be published promptly after the meeting on the company website.

In the spirit of entering into constructive dialogue, ICGN encourages companies to demonstrate their accountability to shareholders by providing clarity around how shareholder

concerns are addressed, particularly when there is a significant vote against a particular resolution.

## 2. Continuous disclosure obligations

Leading into the outbreak of Covid-19 Australia has been regarded as having a robust regime for timely and mandatory disclosure by listed corporations of market-sensitive information. Under s 674 of the Corporations Act 2001 and listing rule 3.1 of the ASX Listing Rules, a listed entity has been required to immediately notify the ASX of any information that a reasonable person would expect to have a material effect on the price or value of its securities once it became aware of that information (i.e. market-sensitive information). Failure to comply was an offence and could create a civil or criminal liability. In May 2020, as the Covid pandemic began to disrupt normal business proceedings, the Australian Government introduced reforms to relax this regime.

The Treasurer issued the Corporations (Coronavirus Economic Response) Determination (No. 2) 2020. This Determination was replaced in September 2020 by the Corporations (Coronavirus Economic Response) Determination (No. 4) 2020. The Determinations had the effect of temporarily amending the requirements of s 674 of the Corporations Act by inserting a state-of-mind or fault element. Under these temporary changes, a listed entity will not contravene s 674 if it fails to immediately release market-sensitive information unless company directors and/or officers knew, or were reckless or negligent as to whether, the information was market-sensitive. permanent the temporary changes introduced in 2020. In introducing the Treasury Laws Amendment (2021 Measures No. 1) Bill (Amendment Bill) to amend the Corporations Act, the Treasurer asserted that the amendments would act to discourage the commencement of continuous disclosure class actions. Under the Amendment Bill, the following key changes to the Corporations Act are proposed:

- a) the temporary amendments introduced by the Determinations will be made permanent; and;
- b) section 1041H of the Corporations Act, which proscribes against a company engaging in misleading or deceptive conduct, will be amended to provide that entities and officers are not liable for misleading or deceptive conduct in circumstances where the continuous disclosure obligations have been contravened, unless the fault element has been proven (that is, unless knowledge, recklessness or negligence has been proven).

We believe that the weakening of obligations directed to the directors and/or officers of listed entities is inappropriate. This is particularly the case in the current economic climate where markets emerging from the Covid pandemic have proven to be volatile. The private enforcement of continuous disclosure obligations is an important mechanism to ensure that participants in the stock market are assured that the market reflects all the available information, including market-sensitive information known to the listed entities in which they invest. Importantly, Australian regulators share this view. Any weakening of the obligations is bad for markets and bad for investors. The good work achieved by private enforcement over

prior years in this space will come undone in the event that the Amendment Bill is passed into law.

Moreover, the Amendment Bill will leave all investors more vulnerable going forward. The proposed reforms do nothing to protect Australian or international investors. These individuals will bear the cost when companies and directors are protected.

The announcement to make permanent legislation changes to the Corporations Act 2001 is a blow to investor protection and shareholder rights. These measures will have a damning effect on providing investors a fair and accurate understanding of a company for valuation or other investment decisions. In an efficient capital market, investors should receive accurate and timely information. Permanently watering down disclosure obligations will allow companies and auditors to avoid responsibility when they actually control the information. This threatens the basic concept of responsible and accountable corporate governance.

The continuous disclosure rules in Australia pre-May 2020 provided a reasonable balance of accountability that facilitated the protection of shareholder rights and good governance. Accountability is paramount for good corporate governance and long-term sustainability. It is also important that no safe haven should exist between directors and auditors. When a disclosure issue arises, the parties should not be able to shift blame to the other and eliminate their own accountability. This undermines the basic principles of sound corporate governance and threatens the foundation of an efficient capital market, all the while limiting access to justice by eliminating opportunities for redress. This disadvantages shareholders, while leaving management unaccountable.

The proposed Amendment Bill will disadvantage investors by:

1. Circumventing a true and accurate valuation of the company
2. Hindering the functioning of fair and efficient capital markets
3. Fostering misleading and dishonest conduct
4. Suppressing shareholders of their right to redress for mass wrong-doing, and
5. Shielding companies, directors, advisors and auditors from accountability

We appreciate that the Covid crisis has demanded substantial adjustments on all fronts, but it is clear that the proposed changes are not entirely the result of Covid, and in effect represent a form of power grab by companies and directors. We are concerned that this will substantially weaken investor rights by reducing officer, director, auditor and adviser accountability.

## Conclusion

In our experience, when investor rights are weakened long-term market value declines. One need only point to the 1929 market collapse and subsequent depression in the United States brought on by the absence of regulation. Enacting market protections actually preserves markets as was done in 1933 and 1934 in the United States. In the current Australian case, we have the weakening of markets by reducing the level of accountability imposed on officers and directors, creating a situation where company managers will be more likely to have information that they can act and even trade on while having no duty to disclose such information to the public. This is not a good recipe for long-term sustainable capital markets.

ICGN tracks legislative and regulatory actions on a global basis but chooses to comment only when such would have a substantially adverse impact on investors. In this case, ICGN does believe that the legislation weakens investor rights while providing no corresponding benefit to investors. We fear that the desire to protect officers and directors will weaken long-term markets just as it immediately weakens investor rights.

We hope that our comments are helpful, and we look forward to engaging with you in this or other matters where we could provide meaningful input.

Yours faithfully,

**Kerrie Waring,**  
**Chief Executive Officer, ICGN**

**Copy:**  
James Andrus, Chair, ICGN Disclosure and Transparency Committee: