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Dear Sir,

## **Treasury Laws Amendment (2021 Measures No.1) Bill 2021 (Bill)**

### **Who we are**

Governance Institute of Australia is a national membership association, advocating for our network of 40,000 governance and risk management professionals from the listed, unlisted and not-for-profit sectors.

As the only Australian provider of chartered governance accreditation, we offer a range of short courses, certificates and postgraduate study. Our mission is to drive better governance in all organisations, which will in turn create a stronger, better society.

Our members have primary responsibility for developing and implementing governance frameworks in public listed, unlisted and private companies, as well as not-for-profit organisations and the public sector. They have a thorough working knowledge of the operations of the markets and the needs of investors. We regularly contribute to the formation of public policy through our interactions with Treasury, ASIC, APRA, ACCC, ASX, ACNC and the ATO.

### **Executive summary**

- Our members welcome the move to facilitating virtual meetings and electronic execution of documents and communication with shareholders or members but question the benefit of introducing legislative change for a limited period. Given the Government's stated intention to consult further **Governance Institute recommends** maintaining the current arrangements pending finalisation of this consultation.
- **Governance Institute recommends against** including the untested new subsection 253Q (2), which has not been subject to consultation, in the legislation because there are practical difficulties with including this provision for a limited time. Mandating the manner of holding virtual meetings is at odds with the stated intention of allowing 'flexibility during the Coronavirus pandemic'. The new section may deter some companies from taking advantage of technology to increase their engagement with shareholders and other stakeholders and return to traditional physical meetings, if health restrictions allow. Given the advances in using technology during 2020 and the increased levels of stakeholder engagement observed during the 2020 AGM season, this would be a retrograde step. Any interim arrangements should be as simple as possible.

- **Governance Institute recommends against** requiring all resolutions put to a virtual meeting being decided on a poll and **recommends** amending the first sentence of subsection 253J (2) to read 'Any other **substantive** resolution put to the vote at a meeting ...'.
- **Governance Institute recommends against** including the new section 1679B because it ignores the fact that many Australian investors have already expressed a preference for digital communication. Contacting them to advise they have a right to opt in to receive hard copy communications will involve considerable cost and administrative burden and is likely to be perceived unfavourably by investors particularly those who have already asked for digital communications.

### Comments on the Bill

Our submission does not address all the provisions in Schedule 1 to the Bill but concentrates on those areas of concern to our members.

Our members have no specific comments on Schedule 2 of the Bill relating to continuous disclosure. They do note that the cost of Directors' and Officers' (D&O) insurance has increased substantially over the last two years in all sectors. They understand this is mostly driven by the large number of investor class actions settled in Australia. In larger companies, board related costs frequently sit in their cost centre. They are also typically responsible for director induction and directors' letters of appointment which usually include the terms on which companies provide D&O cover for directors.

As the events of 2020 demonstrated all too clearly the Corporations Act modernisation is long overdue. While our members welcome the move to facilitating virtual meetings and electronic execution of documents and communication with shareholders, they question the benefit of introducing legislative change for a limited period. The sunset date of 16 September 2021 also falls just prior to the start of the main 2021 AGM season. This means that the bulk of Australian companies face further uncertainty just prior to the busiest period of the corporate year. They would also welcome further detail about the proposed opt-in pilot for hybrid annual general meetings (paragraph 1.7 of the Explanatory Memorandum).

### Section 253Q (2)

*To avoid doubt:*

- (a) *a reasonable opportunity to participate includes a reasonable opportunity to exercise a right to speak; and*
- (b) *a person may elect to exercise a right to speak (including a right to ask questions) orally rather than in writing.*

This new section of the Bill has not been subject to prior consultation and while our members note the intention is to amplify the meaning of 'a reasonable opportunity to participate' in virtual meetings, they consider there are some practical difficulties with the inclusion of this untested provision for a limited time.

Mandating the manner of holding virtual meetings is at odds with the stated intention of allowing 'flexibility during the Coronavirus pandemic'. The new section may deter some companies from taking advantage of technology to increase their engagement with shareholders and other stakeholders and return to traditional physical meetings, if health restrictions allow. Given the advances during 2020 and the increased levels of stakeholder engagement observed during the 2020 AGM season, this is a retrograde step. Anecdotal and other evidence indicates an increased level of stakeholder engagement during the 2020 AGM season. In its AGM Snapshot 2021 Link Group observed that ...'The statistics indicate an increase in engagement and the ability to participate in meetings irrespective of the attendee's location'.<sup>1</sup>

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<sup>1</sup> See [AGM Snapshot 2021](#), Link Group, February 2021 at page 6.

Our members also consider that while there was media commentary about ‘cherry picking’ of questions at virtual meetings during the 2020 AGM season, their experience was that companies were aware of ASIC’s clearly stated expectations around member participation during virtual and hybrid meetings.<sup>2</sup> In fact at a recent Governance Institute Chatham House Roundtable which included representatives of most interested parties, a participant observed that they had seen the ‘back end’ of more than 500 meetings and had not observed companies selectively answering questions. The main reason they noted that questions were not put to a meeting was that they had been previously answered. The evidence indicates that despite concerns about shareholders not being able to ask questions at 2020 AGMs ‘the number of clients offering questions increased in all indices’. In the past companies typically included a form for submitting questions in advance of the meeting in the annual general meeting pack. In 2020 a number of companies included a ‘button’ to enable shareholders to submit questions online in advance of the meeting on the online voting page. The types of questions were varied with a focus on ‘future direction and strategy ... sustainability and the environment were a big focus at the actual meetings but not prominent in pre-meeting questions.’<sup>3</sup>

During the 2020 AGM season a range of solutions was used to enable attendees to ‘speak’ at meetings. Smaller companies, charities and not-for-profits used video meeting platforms such as Zoom, Microsoft Teams and Webex to hold all types of company meetings. Depending on the size of the meeting these platforms provided a reasonable opportunity to participate and interact through features such as ‘Hands Up’ which enabled attendees to speak at the meeting. Part way through 2020 some of these platforms introduced additional features such as polling, and voting. While listed companies used these platforms for board and management meetings, they were not used for larger listed company annual general or scheme meetings.

For larger listed companies the most common method for shareholders to ask questions during the 2020 AGM season was to either submit them in advance or during the meeting using a keyboard to type questions into the question function of the secure online platform which were then relayed to the Chair for a response.

Some listed companies also arranged for telephone links to meetings to enable shareholders to ask questions verbally. Our members report that:

- One of the platforms used by larger listed companies does not include telephone or video facilities. These must be arranged separately at an additional cost, plus call charges. While another commonly used platform does offer a telephone facility as part of the platform service there is an additional cost.
- Telephone callers spoke to the meeting in two different ways. They either spoke to an operator who then put the call through to the meeting – due to the difference in speed between internet and telephone connections this could involve a delay (up to ten seconds, depending on the end user’s equipment). A very small number of companies used this method. The other method used was that the caller spoke to an operator who transcribed the question which was relayed to the meeting for a response.
- Verifying the identity of the caller as a shareholder was important because only shareholders have a right to speak at shareholders’ meetings, guests do not. Some companies provided a telephone number in advance of the meeting enabling shareholders to pre-register and obtain a pin to use during the meeting.
- The use of multiple technologies significantly increases the complexity of the arrangements required for shareholders’ meetings and introduces greater risks.
- The experience of our members who provided telephone lines was that they were not widely used.

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<sup>2</sup> See [Guidelines for investor meetings using virtual technology](#), ASIC, May 2020.

<sup>3</sup> See Link Group *AGM Snapshot 2021* at page 15.

*At our 2020 AGM we recorded 842 attendees online, which included 36 key management personnel, visitors and shareholders and seven shareholders on the phone. For comparison purposes, we recorded 639 people in person, and 526 via webcast in attendance at the 2019 AGM. We received a total of 42 questions in 2020, 3 less than at our 2019 AGM. We have 836,000 shareholders.*

**Top 20 listed company**

We had 589 attendees at our 2020 virtual AGM. This consisted of 132 shareholders, 18 non-voting shareholders, 14 proxyholders and 425 visitors. We had fewer than five people join by telephone. The statistics on 2019 voting compared to 2020 voting were:

- 2019 - Online 6,630, Form 9,461
- 2020 - Online 4,827, Form 6,729.

**Top 20 listed company, 356,000 shareholders**

In 2020 we had an increase in the total number of securities voted compared with 2019. We experienced an increase in the total number of attendees at our AGM in 2020 compared to 2019, 350 people in 2020 compared to 229 in 2019, although fewer attended as registered security holders, 82 in 2020 compared to 144 for 2019.

After our AGM the ASA monitor contacted me to congratulate us on a 'very well-run AGM'. He noted that 'the asking of questions...was very respectful, and clearly there was no summarising or editing of the questions. And all questions appeared to be asked even if covered by the earlier presentations.'. I note that the ASA asked seven questions at the meeting, all of which were put to the Chairman at the meeting and responded to by the Chairman during the meeting.

**Top 20 listed company**

**Governance Institute recommends against** including the untested new subsection 253Q (2), which has not been subject to consultation, in the legislation because there are practical difficulties with including this provision for a limited time. Mandating the manner of holding virtual meetings is at odds with the stated intention of allowing 'flexibility during the Coronavirus pandemic'. The new section may deter some companies from taking advantage of technology to increase their engagement with shareholders and other stakeholders and return to traditional physical meetings, if health restrictions allow. This would be a retrograde step. Any interim arrangements should be as simple as possible.

#### **Subsection 253J (2)**

As noted in our October 2020 submission on the Exposure Draft of the Bill Governance Institute's members do not support requiring all resolutions at company meetings being decided on a poll.<sup>4</sup> The ASX Corporate Governance Council's Corporate Governance Principles and Recommendations (Corporate Governance Principles and Recommendations) which apply to all

<sup>4</sup> See Submission [Corporations Amendment \(Virtual Meetings and Electronic Communications\) Bill 2020](#), Governance Institute of Australia, 30 October 2020.

listed companies recommend that all **substantive** resolutions at meetings are decided by poll.<sup>5</sup> The qualification 'substantive' was included to ensure that procedural motions, such as points of order, were not captured by the Recommendation. Listed companies are required to report against the Principles and Recommendations on an 'if not, why not' basis.

While our members consider it is good governance for all substantive resolutions to be decided on a poll, there are issues with requiring all voting at virtual meetings to be taken on a poll rather than a show of hands, particularly for smaller not-for-profit companies limited by guarantee with few resources. For some of these companies polls can present considerable challenges and our members report that for some votes a show of hands is preferable. For example, some smaller companies have used the 'hand up' function in Zoom or similar technology for votes on a show of hands.

Where a company uses a technology platform for its general meetings there is a cost to the company for each poll. For this reason, where possible many small, listed companies try to limit the number of polls.

**Governance Institute recommends against** requiring all resolutions at company meetings being decided on a poll and **recommends** amending the first sentence of subsection 253J (2) to read 'Any other **substantive** resolution put to the vote at a meeting ...'

#### **Section 253RB Elections to receive documents in hard copy only – companies**

#### **Section 1679B – Application – notifying members of rights in relation to hard copy documents**<sup>6</sup>

Our members have supported an opt in regime for hard copy documentation for shareholders for many years. In 2007, they supported the amendment to the Corporations Act to enable shareholders who do not elect to receive a hard copy of the annual report to access it on a website. When the opt in annual report provisions were introduced in 2007 electronic communication was less common than now. At the time companies contacted shareholders to advise they could opt in to receive hard copy annual reports. Now more than 90 per cent of shareholders no longer receive a hard copy annual report in the mail. This has led to major cost savings and a reduction in paper waste.

Our members also report that because of concerted campaigns they have increased the number of shareholders who have elected to receive digital communications. For many of the large listed companies they hold electronic contact details for approximately 50 per cent of their registers.<sup>7</sup> Our members support the proposed subsection 253RB (4) which requires them to notify new members of the right to opt in to receive hard copy communications. During 2020 some companies advised investors they could contact the company and ask for a hard copy notice of meeting. Several companies advised the take up was low. For example, a Top 20 listed company advised that out of its 130,000 security holders fewer than ten shareholders asked for a hard copy notice of meeting. The notice of meeting was available for download on this company's website. The postal service delivery times have increased substantially in recent years and so many shareholders prefer electronic communications.

Our members have significant concerns about section 1679B. As currently drafted, this would require companies to contact shareholders to advise of the right to opt to receive hard copy documentation under section 253RB within two months of the commencement day. Failure to comply is a strict liability offence. Given that many shareholders have expressed a preference for digital communications the section would require them to override a shareholder's previously

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<sup>5</sup> [Corporate Governance Principles and Recommendations](#), 4<sup>th</sup> edition, 2019, ASX Corporate Governance Council, Recommendation 6.4 at page 24.

<sup>6</sup> These comments also apply to the subsections relating to registered schemes.

<sup>7</sup> For newer companies this level is higher. For companies with longer histories, particularly where a demutualisation took place and policy holders received shares, the levels are lower.

stated preference. The provisions in the Bill are intended to sunset on 16 September 2021 so that these arrangements are only in force for six months and may be subject to change following further consultation. Requiring companies to take this step within two months when the provisions may only be in place for six months, imposes a significant regulatory and administrative burden.

#### **Impact of new section 1679B**

The new section would require a Top 20 listed company with a significant retail shareholder base to contact approximately 600,000 shareholders within two months of the commencement date to advise them of the right to opt in to receive hard copy documentation. This company has digital communication preferences for approximately 50 per cent of its shareholders and would need to write to the remaining shareholders at a cost of \$2 per letter (including postage, mail house and registry time) an approximate cost of \$1.2m. This would be a special mailing. The company typically tries to combine these sorts of communications with other communications such as dividend notices or annual general meeting notices to save cost and paper waste. This company has no other communications planned until August when it will contact shareholders about the annual general meeting. Again, this is more likely to be perceived by its investors as the company's inefficiency rather than welcomed as news of a new right.

**Large, listed company – 1.3M shareholders - large retail shareholder base**

A company limited by guarantee with more than 1.7million members saved more than \$420,00 in 2020 by sending annual general meetings communications electronically. It noted that in 2020 no Explanatory Memorandum, or resolutions were proposed so that it was a smaller than usual mailing. In a typical year the costs of mailing amount to approximately \$1m.

**Company limited by guarantee, 1.7m members**

In addition, the new provisions do not consider the long-standing difficulty with 'lost shareholders'. Sections 214 and 315 of the Corporations Act require companies/schemes to send materials such as financial reports and directors' reports to shareholders and members. Where companies do not have a current address by virtue of [ASIC Class Order 2016/187](#) they must continue to send these materials at least once per year for six years before they may treat them as 'uncontactable'.<sup>8</sup> This is despite the fact that mail is returned year after year with messages of varying politeness indicating the person is no longer at the address.

Governance Institute has advocated for some time that the legislation should deem companies' shareholders who fail to make an election to have received the materials, provided the company makes the meeting materials: available in the public domain and accessible, using a universal or near-universal channel of communication, and issuing an ASX announcement (if listed), noting that making the meeting materials available on the company's website meets the current definition of a near-universal channel of communication. As currently drafted the section obliges companies to write to lost shareholders to advise them of the right to opt in to receive hard copy communications.

**Governance Institute recommends against** including the new section 1679B because it ignores the fact that many Australian investors have already expressed a preference for digital communication. Contacting them to advise they have a right to opt in to receive hard copy communications will involve considerable cost and administrative burden and is likely to be

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<sup>8</sup> See our [Submission](#) Corporations Amendment (Virtual Meetings and Electronic Communication) Bill 2020.

perceived unfavourably by shareholders, particularly those who have already asked for digital communications.

If you wish to discuss any of the issues raised in this letter, please contact me or Catherine Maxwell.

Yours faithfully,

Megan Motto  
CEO