

8 November 2021

Committee Secretary  
Senate Economics Legislation Committee  
Department of the Senate  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600  
AUSTRALIA

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

Dear Sir,

## ***Corporations Amendment (Meetings and Documents) 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.

Our members were pleased to note the passage of the *Treasury Laws Amendment (2021 Measures No 1) Act 2021* (TLAB) in August 2021 which provided much needed certainty. They also note the meetings provisions of the Bill are timed to commence just following the expiry of the temporary measures, something for which they have previously advocated.

### **Executive summary**

- We broadly support the prompt passage of the Bill, subject to the comments below and consider it essential to finalise the legislation well before the current temporary relief granted by TLAB expires in March 2022.
- The Bill contains a number of non-controversial, broadly supported measures which will assist in bringing the Corporations Act into the 21<sup>st</sup> century and enhance shareholder participation and engagement. These long overdue reforms should not be further delayed.
- Our members support all forms of positive shareholder engagement with all types of shareholders and have consistently advocated for modernisation of the Corporations Act. They consider companies and registered schemes (collectively, companies) should have the flexibility to execute documents, communicate with their members and shareholders (collectively, shareholders) and hold meetings in the way best suited to their unique circumstances and which also allows for the rapid development of technologies, which the pandemic has accelerated.

- Meetings using technology increase accessibility and engagement for shareholders and members, and also protect their health and safety in emergency situations such as the current pandemic.
- Boards currently make a range of significant decisions on behalf of shareholders. They should also be able to determine the appropriate format for a shareholder meeting which provides all shareholders with a reasonable opportunity of participating in a meeting. In addition, there is a range of existing mechanisms and protections by which shareholders can make their views known to the board, such as the ability to remove directors and the right of five per cent of shareholders to requisition or call a meeting. The chair is also subject to duties around the conduct of the meeting. As noted in our previous submissions on prior drafts of the Bill, our members do not support the requirement for a constitutional amendment by way of a special resolution to permit virtual meetings.<sup>1</sup>
- The extension of the proposed section 249R to companies in the charitable sector requiring them to amend their constitutions to permit virtual meetings, also creates a potential barrier to their making use of this type of meeting which many report drove increased levels of engagement, particularly where their membership is geographically disbursed.
- The approach in the Bill 'hard wires' into legislation an assumption that hybrid meetings are the preferred format of meeting which may quickly be superseded. Our members consider that any amendments to the Corporations Act should be flexible and fit for the future and not require amendment in a relatively short space of time.
- The approach in the Bill also ignores the fact that a poorly run meeting is a poorly run meeting, regardless of the format – physical, hybrid or virtual.

### **Flexibility – member and shareholder participation**

Our members have consistently advocated for modernisation of the Corporations Act to make it flexible and fit for the future - which allows for the rapid development of technologies, accelerated by the pandemic. It is important to avoid a situation where the Corporations Act is yet again out of date within a short space of time. There are likely to be technological solutions not yet in existence which may again change the way companies interact with their shareholders as radically as technology has changed these interactions during 2020 and 2021.

Our members consider the provision requiring a constitutional amendment to hold a virtual meeting is prescriptive and inconsistent with this need for inbuilt flexibility and indicates that one form of meeting is to be preferred over another. In our members' experience amendments to the Corporations Act remain for many years. Companies want to have high quality, fit for purpose member engagement and need to have the flexibility in a non-prescriptive manner to communicate with their shareholders and hold meetings in the way best suited to their unique circumstance. Meetings using technology increase flexibility, accessibility, engagement for shareholders and members and protect their health and safety in emergency situations.

There are key benefits to holding meetings using technology without prescribing a format:

- Our members want to see Australia embrace technological change and the benefits of new ways of engaging with shareholders and do not want to see technology disrupt the core purpose of AGMs, which is to hold boards accountable. They want to see technology enable that core purpose and greater digital inclusion of shareholders and members.
- Our members see a real benefit of virtual AGMs in increasing attendance, engagement and inclusion of shareholders – regardless of age, ability or postcode – and removing regulatory uncertainty in any future pandemic or similar crises.
- What our members saw in 2020 was an increase in the level of engagement and participation at many AGMs, with technology playing a strong role as an enabler for this

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<sup>1</sup> See Governance Institute submission [Treasury Laws Amendment \(Measures for Consultation\) Bill 2021: Use of technology for meetings and related amendments](#) 16 July 2021 and [Treasury Laws Amendment \(Measures for Consultation\) Bill 2021: Use of technology for meetings and related amendments](#) 10 September 2021.

increase. This has continued during the 2021 AGM season given that a large number of meetings have been held virtually because of continuing restrictions on gatherings and movement.

- Retail shareholders are no longer the homogenous group of ‘mums and dads’ referred to in media commentary about retail investors. ‘In 2021, a higher proportion of younger investors are investing in the stock market – over three in ten of those aged below 45 years. In particular, those aged 18-29 investing in the stock market has increased from 47% in 2020 to 64% in 2021’.<sup>2</sup> For these younger shareholders, often digital natives, not necessarily resident in a capital city (or even, the same state or country), a virtual meeting enables them to participate in an annual general meeting in the way in which they participate in so many areas of their lives, by using technology.
- Meetings using technology, especially virtual meetings, are extremely helpful for charities, membership associations, not-for-profits and other companies limited by guarantee with large member bases spread widely across Australia. Virtual meetings enable members who would not normally attend meetings because of age or disability to be present at meetings.

Our members support all forms of positive shareholder engagement with all types of shareholders. They therefore support finding the most effective ways for companies which wish to continue with, or explore virtual meetings, to do so in a way that at least matches and does not diminish the opportunities for shareholder engagement, traditional at physical meetings. The level of engagement and participation at many virtual-only AGMs increased in 2020 during the first year of COVID-19 with technology playing a strong role as an enabler for this. Technology providers have made further enhancements since the 2020 season which have further improved shareholders’ experience. Many of our members report that for the most part shareholders’ ability to ask questions orally at AGMs, either through a meeting platform or using a telephone line, has worked well. The technology for asking questions orally is also likely to improve rapidly.

Prescribing one form of meeting using technology – hybrid AGMs – goes against modernising the Corporations Act and the need for flexibility. It is also at odds with the lack of ‘prescription’ about how meetings should be held referred to in the Explanatory Memorandum to the Bill - paragraph 1.84. Hybrid meetings will suit some types of entities and not others. While State-based public health restrictions are gradually easing, as we have seen from overseas experience, the return to ‘normal’ is unlikely to be linear and companies may again need to hold virtual members’ meetings as they have in 2020 and 2021. If virtual meetings are not permitted by companies’ constitutions, they will need to pass constitutional amendments to enable them to hold virtual meetings, absent an ASIC Class Order. This runs counter to our members’ belief that there should be maximum optionality and flexibility for meetings using technology to accommodate the broad spectrum of entities regulated by the Corporations Act and all types of shareholders.

Prescribing hybrid or physical meetings for shareholder meetings presupposes that only these two formats will prevent poor practices. The format of a meeting does not prevent companies from providing poor shareholder experiences at a meeting. A poorly run meeting is a poorly run meeting, regardless of the format – physical, hybrid or virtual. This is where organisations such as Governance Institute play a key role in educating our members and other stakeholders about good practice. For this reason, we have jointly with other bodies issued several sets of guidance to assist members and others over the last eighteen months.<sup>3</sup>

Our members also acknowledge that hybrid or virtual meetings will not be the preferred ongoing, post-pandemic, option for many companies such as smaller listed companies or unlisted companies, which will revert to physical meetings when permitted. For this reason, the format of

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<sup>2</sup> See [2021 Australian Retail Investor Confidence Survey](#), Chartered Accountants Australia and New Zealand, 13 September 2021 at slide 19.

<sup>3</sup> See for example, [Guidance: Further update on online AGMs, electronic document execution and digital shareholder communications](#), Governance Institute of Australia, Australian Institute of Company Directors, Australasian Investor Relations Association and The Business Law Section of the Law Council of Australia, 7 September 2021.

a shareholders' meeting should not be prescribed. It should be open to companies to adopt the format most suited to them and their shareholders and to the broader environment, as seen during 2020 and 2021.

### Existing shareholder protection mechanisms

Boards currently make a range of significant decisions on behalf of shareholders. They should also be able to determine the appropriate format for a shareholder meeting which provides all shareholders with a reasonable opportunity of participating in a meeting.

Where shareholders consider that companies are holding meetings in a way that reduces rather than increases their ability to participate in these meetings, there is an existing range of mechanisms and protections by which they can make their views known to the board and express dissatisfaction. These include:

- The ability to remove directors – section 203D
- The right of five per cent of shareholders to requisition a meeting – section 249D, and
- The right of five per cent of shareholders to call a meeting – section 249FD.

The chair of a meeting is also subject to duties including a duty to act 'with probity and in a bona fide way on every issue'<sup>4</sup>. The chair of a meeting is therefore responsible for ensuring that those present can participate in a meeting.

Given these existing rights and protections our members do not support the proposed requirement for a constitutional amendment by way of a special resolution to permit virtual meetings.

The extension of the proposed section 249R to companies in the charitable sector requiring them to amend their constitutions to permit virtual meetings, also creates a potential barrier to their making use of this type of meeting which many report drove increased levels of engagement during 2020 and 2021, particularly where their membership is geographically disbursed or prevented from attending because of disability or circumstances from travelling to a meeting. In addition, many companies in this sector will not have yet had the opportunity to amend their constitutions to permit virtual meetings during 2020 and 2021 which creates a further hurdle.

Our members also understand that at least one investor group representative and several proxy advisory firms are currently recommending institutional investors vote against any Top 300 listed company proposals to amend constitutions to allow virtual meetings. As noted in our submission, *Greater transparency of proxy advice*, these groups play a significant role in the outcome of resolutions.<sup>5</sup> The other point to note is that institutional investors do not typically attend and actively participate in annual general meetings. They generally lodge their votes in advance of the meeting. While their staff members sometimes watch webcasts of meetings or since meetings using technology have become more common, log in as guests to watch meetings, they rarely participate actively.

**Governance Institute continues to recommend** against requiring companies to amend their constitutions to allow virtual meetings on the basis that this is inconsistent with a lack of prescription. Flexibility enables companies to hold meetings in the way best suited to their unique circumstances and shareholder/member base. Meetings using technology also increase accessibility and engagement for shareholders and members and protects their health and safety, where required, in emergency situations. In addition, shareholders have an existing range of mechanisms and protections by which they can make their views known to the board and express dissatisfaction. The proposal also creates a potential barrier to companies in the charitable sector making use of this type of meeting which many report drove increased levels of engagement during 2020 and 2021, particularly where their membership is geographically disbursed or prevented from attending because of disability or circumstances from travelling to a meeting

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<sup>4</sup> For a fuller discussion of these duties see *Horsley's Meetings Procedure, Law and Practice*, 7<sup>th</sup> edition at para 6.10.

<sup>5</sup> See Governance Institute's Submission [Greater transparency of proxy advice](#), June 2021.

If you wish to discuss any of the issues raised in this letter, please contact me or [REDACTED]  
[REDACTED]

Yours faithfully,

A large black rectangular redaction box covering the signature area.

Megan Motto  
CEO