Australian Institute of Company Directors

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28 May 2021

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

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

Dear Committee Secretary

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

Thank you for the opportunity to provide a submission to the Senate Standing Committee on Economics on the provisions of the *Treasury Laws Amendment (2021 Measures No.1) Bill 2021* (**the Bill**).

The Australian Institute of Company Directors' (**AICD**) mission is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society. The AICD's membership reflects the diversity of Australia's director community, with our membership of more than 45,000 being drawn from directors and leaders of not-for-profits, large and small businesses, and the government sector.

Our submission focuses on the proposed amendments to continuous disclosure laws and the amendments to the rules relating to virtual meetings and electronic communication of documents.

1. Executive Summary

(a) Continuous disclosure

- The AICD strongly supports permanent changes to Australia's continuous disclosure laws introduced by the Bill in line with *Corporations (Coronavirus Economic Response) Determination (No. 2) 2020* (Cth) (**Determination No.2**).
- These changes will improve the effectiveness of the current securities class action regime whilst discouraging opportunistic claims. They do not in any way change what needs to be disclosed, or by when.
- Contrary to some predictions, there has been no evidence that Determination No.2 led to poorer quality disclosures nor a collapse in confidence of our capital markets. High amounts of capital continued to be raised during the duration of the Treasurer's temporary relief.
- There are compelling arguments to set a fault threshold on disclosure as proposed by the Bill. The current regime leads to adverse outcomes for Australian businesses and shareholders and is out of step with comparable jurisdictions.

(b) Virtual meetings and electronic communication of documents

- The AICD also supports proposals in the Bill to extend the temporary relief measures to enable companies to hold virtual meetings, such as Annual General Meetings (**AGM**), as well as distribute meeting related materials and validly execute documents electronically. Given the effluxion of time since the Bill was introduced and delays associated with the COVID-19 vaccination roll-out, we suggest that the relief measures continue until the end of the 2021 calendar year. This will also provide some certainty for the upcoming 2021 AGM season.

- We continue to believe that permanent reform is necessary. In our view, organisations should have the flexibility to adopt the best meeting format for their circumstances, shareholders/members and stakeholders.

- However, it is critically important that legislation not be overly prescriptive and create an unnecessary compliance burden for smaller and not-for-profit organisations, given the risk of legislation becoming outdated as technology evolves.

2. Continuous disclosure

Last year, the AICD welcomed the introduction of Determination No. 2, which was intended to enable companies and their officers to more confidently provide guidance to the market during the coronavirus pandemic. In particular, the AICD welcomed the provisions that temporarily modified the *Corporations Act 2001* (Cth) (**Corporations Act**) to ensure that a breach of the civil penalty provisions under continuous disclosure obligations occurs only where information is withheld from disclosure with knowledge that it would, or recklessness or negligence as to whether it would, have a material effect on the price or value of an entity's securities.

The AICD also endorsed the recommendations in the majority report of the Parliamentary Joint Committee on Corporations and Financial Services that proposed substantial reform of Australia's securities class action settings, including the permanent introduction of a fault element in continuous disclosure laws and the extension to misleading and deceptive conduct provisions.[1]

We also provided a submission to the Senate Economics Legislation Committee when it examined the Bill.[2]

The AICD supported the temporary changes to continuous disclosure obligations because of concerns that the current settings:

- have led to major problems in the D&O insurance market, include unsustainable premium rises and restricted availability;

- limit information released to the market;

- drive a risk-averse culture on Australian boards;

- mean that excessive time is spent on liability risk; and

- are an ineffective method to compensate shareholders.

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[1] The AICD's submission to the Inquiry into the regulation of the class actions regime is available here.
[2] The AICD's submission to the Senate Economics Legislation Committee is available here.

(a) Changes align with peer jurisdictions and do not diminish obligations

The AICD strongly supports the Bill which seeks to make the now lapsed temporary amendments introduced in 2020 permanent and broaden their application to misleading and deceptive conduct provisions.

The proposed amendments do not, in any way, diminish continuous disclosure obligations. Information that will have a material effect on the price or value of a company's share price will still need to be disclosed. The AICD supports continuous disclosure obligations as a vital component of robust disclosure and governance practices. They are important to delivering market integrity and investor confidence.

The Bill does not weaken these important provisions. Rather, it simply requires that any proceeding brought against an entity or its officers must establish some wrongdoing. It is incongruous that, until the recent temporary amendments to the Corporations Act re-introduced a fault element to the continuous disclosure rules, directors and companies could be held liable without even negligence being established. Now that the temporary amendments have lapsed, directors and companies once more find themselves in that position.

We agree with Treasury that the changes bring Australia more into line with overseas' jurisdictions that already incorporate an element of fault or culpability into their disclosure rules. In particular:

- in England and Wales, not only is mere negligence insufficient to ground liability in the context of private enforcement, but the claimant must establish that the conduct of the directing mind of the issuer was reckless or dishonest;[3] and
- under US securities laws, in order to establish a contravention, a failure to disclose relevant information, or the disclosure of misleading or false information, must be wilful.[4]

The position overseas was discussed in some detail in the final report of the ALRC's class actions inquiry, highlighting the difference with Australia's regulatory approach. It is important to note that although the Government's proposals, if legislated, will bring Australia more in line with these jurisdictions, the threshold for liability in Australia will still remain lower than in the US and UK (at least as it relates to private actions).

The AICD also strongly supports the related amendments to the misleading and deceptive conduct provisions (section 1014H of the Corporations Act). The effect of those amendments is that if an alleged contravention is connected to a failure to comply with a continuous disclosure obligation, the person will need to establish the contravention of the relevant new continuous disclosure civil penalty provision, including the fault element of knowledge, recklessness, or negligence. This is a sensible change which ensures that continuous disclosure cases cannot be re-cast as misleading and deceptive conduct cases so as to circumvent the requirement that fault be established.

This change does not weaken the misleading and deceptive conduct provisions that generally apply to corporate of individual behaviour. In so far as the amendments create a different regime for misleading and deceptive conduct, the legislation narrowly confines it to alleged breaches of the continuous disclosure obligations. Any alleged misleading or deceptive conduct unconnected to an alleged failure to comply with continuous disclosure obligations will be untouched by this amendment. Additionally, where there is an allegation of misleading and deceptive conduct connected to an alleged breach of

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[3] See ALRC Report, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report 134, 2018), para 9.33.

[4] 15 U.S. Code § 78ff. The US does not have strictly analogous continuous disclosure law, see part (e) below for more information.

the continuous disclosure obligations and there is the requisite mental element of knowledge, recklessness or negligence, then that entity or officer will be liable, as they should be. This should not present additional unreasonable difficulties to claimants.

(b) Permanent change is required to limit adverse legal and economic consequences

The AICD believes that the interaction between our substantive disclosure laws and class action regime has created a uniquely facilitative environment for securities class actions with adverse legal and economic consequences.[5] We are of the view that the changes proposed by the Bill will go some way to address the following challenges:

- **D&O insurance market crisis:** Insurance is a critical risk mitigation tool with appropriate cover being crucial to attracting and retaining the most skilled and dedicated directors to Australian boards - a need all the more acute given the impact of the pandemic. The D&O insurance market continues to deteriorate, with premiums increasing rapidly. Public companies saw average D&O insurance cost increases of 229 per cent and deductibles climbing as high as $250m in 2020.[6] Of greater concern, insurers are increasingly unwilling to provide D&O cover, with six insurers effectively exiting from the Australian D&O insurance market.[7] Insurers and brokers consistently cite securities class actions as the most significant driver for the increased cost and restricted availability of D&O insurance in Australia. The negative impact of class actions on D&O cover extends well beyond the listed sector. Given the limited pool of insurance capital in this class of insurance, private and not-for-profit entities are also bearing cost increases. On average, Marsh's private and not-for-profit clients experienced premium increases of between 70 and 100 per cent.[8] The two major D&O brokers in the Australian market, via whom most cover is purchased, have each publicly stated that the reforms, if passed, would help alleviate market pressures. Specifically, Marsh welcomed the government's proposal and said it "represents an important and positive step forward for directors, corporations, and their insurers"[9], while Aon has commented that "these changes, if implemented, will provide the seeds necessary to drive increased sustainability in the D&O market".[10]

- **Limitations on information released to the market:** Australia is out of step with other comparable jurisdictions, such as the United States and Canada, which provide a 'safe harbour' for companies to be able to disclose forward-looking information (recognising the important role this plays in informing the market).[11] The current continuous disclosure laws further discourages the making of forward-

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[5] The AICD extensively addressed this issue in its submission to the Parliamentary Joint Committee on Corporations and Financial Services inquiry into Litigation funding and the regulation of the class action industry. You can read a copy of our submission here.

[6] Marsh, Directors and Officers Liability (D&O) Insurance Market Recap 2020, pg 1. https://www.marsh.com/au/insights/research/directors-and-officers-insurance-market-recap-2020.html

[7] Ibid, pg 2.

[8] Ibid, pg 2.

[9] Gangcuangco, T. Permanent changes to continuous disclosure laws – what do they mean for D&O insurance? https://www.insurancebusinessmag.com/au/news/professional-liability/permanent-changes-to-continuous-disclosure-laws--what-do-they-mean-for-dando-insurance-246896.aspx

[10] E Fletcher, "Changes to continuous disclosure rules – the impact on the D&O market in Australia", Aon Insights, https://aoninsights.com.au/continuous-disclosure-changes/, accessed 24 May 2021.

[11] In the US, a safe harbour exemption may be secured through identifying a statement as forward-looking and using meaningful cautionary statements which identify important factors that could cause the actual results to differ materially from those in the forward-looking statement. The safe harbour only applies to private civil suits and does not apply to civil and criminal enforcement actions brought by the S.E.C or other regulatory agencies, among other

looking statements because they increase the risk that a plaintiff law firm will allege that statement should have been corrected or updated through further disclosure, even when there was no fault.

- **Driving risk-aversion:** Australia's regulatory environment creates a strong incentive for conservatism and risk-aversion in boardrooms. Notably, the AICD's latest Director Sentiment Index for the first half of 2021 shows that 73 per cent of directors agree there is a risk-averse decision-making culture on Australian boards. The main reason given for this is the excessive focus on compliance over performance.[12] This constrains innovation and productivity, which is particularly problematic given the need to foster economic growth.

- **Excessive time spent on liability risk:** Listed company directors regularly cite securities class action risks as a significant concern that consumes board and company resources. The current regime has led to excessive focus on continuous disclosure liability and securities class action risks issues at the expense of broader strategic considerations. This is especially important in the context of Australia's ongoing recovery from the COVID-19 pandemic, where calculated risk-taking will be critical to accelerating growth and job creation.

- **Ineffective mechanism to compensate shareholders:** Continuing shareholders will ultimately be the most impacted when settlements are reached with companies – it is their investments that will suffer as a result of legal and settlement expenses incurred and the increases in D&O insurance premiums, not those shareholders who are alleged to have sold their stock at the inflated prices. This issue has been referred to as the 'circularity problem' or a 'pocket-shifting exercise'. Further, as the ALRC has highlighted, almost half of the proceeds of such actions flows through to plaintiff lawyers and litigation funders (see further below).

(c) At-fault directors still subject to liability and penalties

The AICD strongly supports robust market disclosure and believes that these amendments should support entities to provide timely and accurate information to investors, including forward-looking statements.

Importantly, if legislated, entities, directors and officers who are reckless, negligent, or knowingly fail to disclose will rightly be subject to the full force of the law. Claimants will still be able to bring cases in Australia's facilitative class actions regime. ASIC will still be able to bring regulatory actions against companies, directors and officers, including no-fault infringement notices.[13] Arguments that these changes will "foster misleading and dishonest conduct" or "dangerously suppress shareholders of their right to seek redress for mass wrongdoing" are without substance.

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specific exceptions that apply. In Canada, a person or company is not liable for a misrepresentation if the document or public oral statement containing the forward-looking information contained, proximate to that information:

- reasonable cautionary language identifying the forward-looking information as such, and identifying material factors that could cause actual results to differ materially from a conclusion, forecast or projection in the forward-looking information; and

- a statement of the material factors or assumptions that were applied in drawing a conclusion or making a forecast or projection set out in the forward-looking information.

[12] See slides 66 and 67, AICD Director Sentiment Index First Half 2021 at https://aicd.companydirectors.com.au/advocacy/research/directors-upbeat-about-economic-outlook-as-sentiment-soars

[13] See part (e) below for more details.

(d) Temporary amendments have not resulted in adverse consequences

It is important to note that the period in which the temporary amendments were in place formed somewhat of a 'natural experiment' about whether they would lead to a decline in the quality of disclosures or a chilling effect on market confidence, as their detractors claim. We are unaware of any evidence that this occurred. In fact, we continued to see entities provide timely and robust information to the market and there have been no suggestions by the ASX, investors or other market participants that disclosure quality has fallen since the temporary relief. Indeed, if there was such evidence, we would expect the Bill's opponents to be able to identify it.

There was no capital flight either; for example, the ASX stated the number of new listings increased 23 per cent year-on-year to 113 from 2019 to 2020, three-quarters of which arrived in the second half of the 2020 calendar year when the relief was in force.[14] There was also very strong secondary capital raisings, with December 2020 and June 2020 recording respectively the second and third largest monthly capital raisings for the last decade. In the first 3 months of 2021 when the temporary relief was still in place (at least until 23 March) there was $10.1 billion raised on the ASX compared to $6.2 billion in the same period in 2020.[15] The hypothesis that changes to the disclosure laws would erode faith in our capital markets was not supported by any evidence.

The ASX in its submission to the Parliamentary Joint Committee inquiry into the class action regime, concluded:

> For the reasons outlined above, we would not regard this type of change [reintroducing a fault element for private proceedings] as inconsistent with strong and effective continuous disclosure or the continued integrity of our market. That integrity continues to be underpinned by the enforcement tools available to ASIC, as well as ASX's own work in monitoring and enforcing our rules.[16]

(e) Regulatory action still available

Were the Bill to be passed and a fault element introduced for ASIC civil penalty proceedings against directors and listed entities, the regulator would continue to have a range of (untouched) complementary enforcement options available to it including:

- prosecuting an entity for criminal offences related to continuous disclosure breaches;
- issuing infringement notices to companies for failure to comply with continuous disclosure obligations (without fault needing to be established);
- pursuing directors under the continuous disclosure accessorial liability provisions (see section 674 (2A), Corporations Act); and
- commencing actions against directors under the general duty of care and diligence (see section 180, Corporations Act).[17]

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[14] ASX, Market statistics. https://www2.asx.com.au/blog/investor-update/2021/asx-ipo-review
[15] ASX, Market statistics. https://www2.asx.com.au/about/market-statistics
[16] ASX submission, Litigation funding and the regulation of the class action industry, 17 June 2020, p3. Available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Litigationfunding/Submissions
[17] It is worth noting that officers are unable to insure against or be indemnified for a civil penalty arising from a breach of section 180 of the Corporations Act (see section 199A(2), Corporations Act). This means that the risk must be borne personally.

Therefore, it is clear that there remains multiple complementary avenues by which ASIC can enforce disclosure laws. Private litigants also retain the right to bring claims, as set out above.

It is noteworthy that, according to ASIC enforcement reports, over the five-year period to December 2019, with regards to continuous disclosure matters, ASIC only concluded:

- 5 civil matters;
- 2 criminal matters;
- 1 enforceable undertaking; and
- 16 administrative remedies (infringement notices).[18]

Based on ASIC enforcement reports, we are not aware of further cases having been brought in the first half of 2020. This appears to be a relatively limited number of cases when compared with the volume of securities class actions commenced over the same period. In the AICD's view, ASIC should more vigorously enforce alleged breaches of the law given the centrality of disclosure laws to Australian public markets. This would allow public interest rather than the commercial considerations of funders and lawyers to drive activity. Further, ASIC's position has been strengthened by the significant increase in corporate and individual penalties legislated by Parliament in 2019.[19]

International comparison

We note that some submissions to the Senate Economics Legislation Committee's inquiry into the Bill stated that ASIC would be at a disadvantage compared to international securities regulators because those international regulators, particularly in the US, did not have to prove the same "at fault" element when dealing with breaches of continuous disclosure laws.[20] The AICD has sought specific advice on this topic from the international legal firm Herbert Smith Freehills who have utilised the expertise of their lawyers in both the US and the UK . Based on our advice, we think that these submissions misrepresent the US position and over-simplify the UK regime.

In the US, listed companies are required, among other things, to file annual and quarterly reports that describe their financial condition and results of operations. These reports must be certified as true and accurate by the CEO and the CFO. If a company subsequently discovers that there are inaccuracies in the report, there is a legal obligation to correct prior inaccurate disclosures. This is similar but not strictly analogous to Australia's continuous disclosure laws, but for the purposes of this submission we have assumed this is the provision being referred to by other parties.

Where the SEC, the US equivalent of ASIC, brings an enforcement action under this provision they need to show that the person acted with *scienter*, meaning that they acted with an intent to defraud.[21] This standard can be satisfied by demonstrating that the defendant intentionally or recklessly made false statements. Mere negligence does not satisfy that standard and demonstrating that a corporate officer

[18] ASIC enforcement outcomes January 2015 to December 2019: https://asic.gov.au/about-asic/asicinvestigations-and-enforcement/asic-enforcement-outcomes/
[19] Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019 (Cth).
[20] Economics Legislation Committee report on the Treasury Laws Amendment (2021 Measures No.1) Bill 2021, March 2021 at paragraph 2.120.
[21] This is the usual US securities fraud claim, which is under Section 10(b) of the Securities Exchange Act of 1934.

acted negligently would not lead to a finding of wrongdoing under the anti-fraud provisions of the US federal securities law. This is a higher test than proposed in the Bill.

There is, however, a separate right of action under ss. 17(a)(2) or (3) of the Securities Act, which permits the SEC to bring a negligence-based claim in respect of that conduct, which would be similar to the test proposed in the Bill. Accordingly, contrary to any suggestion otherwise, an at-fault element must still be established by the US regulator.

The US position contrasts with the UK where there is no requirement for the Financial Conduct Authority (ASIC's equivalent) to show fault or recklessness on the part of an issuer in relation to enforcement of the ongoing disclosure provisions.

However, it is important to highlight that in both the UK and US, directors' fiduciary duties are generally not enforced by regulators. It is left to private litigants. In Australia, where ASIC has pursued directors for their involvement in an alleged continuous disclosure breach, it has often been under directors' duty of care and diligence in accordance with s.180 of the Corporations Act – a duty which remains untouched by the Bill.

Complementary enforcement role of the ASX

Further, as has been lost in some of the public debate, there is additional regulatory protection from the ASX who oversees compliance with the Listing Rules and has a range of powers available to it (such as censure, ordering withdrawal of announcements, and suspension of trading). Notably, during the recent COVID-19 period, we understand that the ASX took urgent action in a number of cases to prevent misleading or inaccurate releases from being made (or remaining in the market). Therefore, there are not one, but two, regulators in the Australian market capable of taking enforcement action with respect to continuous disclosure.

(f) Lawyers and funders' financial motivations

We note that the Bill is opposed by some plaintiff class action law firms and litigation funders. Independent ALRC analysis has highlighted that during the period 2013 to October 2018, funders and legal advisers in Federal Court securities class action proceedings received a median return of 49 per cent of the proceeds of litigation (with the remaining 51 per cent going to class members).[22] More recent analysis from the Law Council of Australia found that across the period 2001 to 2020, the portion of the gross settlement of funded class actions going to lawyers and litigation funders was 41.4 per cent.[23]

The high percentage of litigation proceeds being taken by funders and lawyers calls into question whether justice is truly being served.

3. Virtual meetings and electronic communication of documents

The AICD also welcomes the proposal to allow companies to hold virtual meetings, such as AGMs, as well as distribute meeting related materials and validly execute documents electronically.

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[22] ALRC Final Report. Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders, pg 85.

[23] Law Council of Australia Submission - Litigation funding and the regulation of the class action industry, 16 June 2020, pg 8. https://www.lawcouncil.asn.au/publicassets/e8a8ce0e-35b0-ea11-9434-005056be13b5/3832%20-%20Litigation%20funding%20and%20the%20regulation%20of%20the%20class%20action%20industry.pdf

(a) Benefits of allowing virtual meetings

We strongly support the proposals in the Bill that will enable organisations to hold virtual meetings.

AGMs are one of the primary events in an organisation's governance calendar. The AICD considers AGMS to be a critical forum for shareholders/members to: hold companies, board and management accountable for their performance and reporting; to hear directly from senior leaders; and to vote on the composition of the board and key governance resolutions.

However, there are clearly opportunities to reinvigorate the format. A 2015 Computershare survey found fewer than one per cent of shareholders attended AGMs (with a declining trend of attendance over a decade) and less than five per cent voted. The AICD's most recent Director Sentiment Index survey found that over a third (36 per cent) of directors consider the current AGM system to be dysfunctional.[24] Computershare data shows that overall attendance at AGMs has increased by 36 per cent when comparing attendance from 2019 to 2020, suggesting that the virtual and hybrid platforms have not inhibited shareholder and member attendance or engagement.[25]

The AICD supports proposals to allow companies to hold virtual meetings on a permanent basis. We believe that this could contribute to reinvigorating company meetings, providing companies with flexibility to use the best format for their circumstances and stakeholders, without diminishing accountability. There could be a range of drivers for companies to adopt hybrid or virtual meeting formats, including removing geographic and physical barriers to attendance by retail shareholders and members; as well as increasing engagement and the opportunity for shareholders/members to ask questions.

Permanent change would also bring us into line with other countries such as the US, Canada, Spain, South Africa, Denmark, Ireland and New Zealand.

Given the effluxion of time since the Bill was introduced and delays associated with the COVID-19 vaccination roll-out, we suggest that the relief measures extend until the end of the 2021 calendar year. There remain ongoing disruptions in the Australian community due to the COVID-19 pandemic and the ever-present threat of abrupt outbreaks and lockdowns. These relief measures allow for more certainty in planning by entities and better communication and engagement with shareholders, members and stakeholders.

(b) Ensuring accountability and engagement in virtual meetings

We recognise the concerns of some stakeholders regarding the transparency and quality of shareholder/member engagement in a virtual AGM format. The participation of shareholders, as the collective owners of a company, in general meetings is a crucial component of good governance.

In the AICD's view, virtual AGMs must not be used by organisations to reduce corporate accountability or disenfranchise shareholders/members. Whatever the format, whether that be physical, hybrid or virtual, there is a clear expectation and protection under the law that shareholders and members are given a

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[24] See slide 71, Director Sentiment Index: Research Findings First Half 2021, available at: https://aicd.companydirectors.com.au/advocacy/research/directors-upbeat-about-economic-outlook-as-sentiment-soars

[25] Computershare, Virtual AGM Report: Insights from online meetings in April & May 2020, available at: http://images.info.computershare.com/Web/CMPTSHR1/%7B6d3e4edc-c243-4d5b-8ae0-b7898bf1d9ac%7D_VIRTUAL_AGM_SEASON_INSIGHTS_FINAL.pdf

reasonable opportunity as a whole to ask questions or make comments on the management of the company. This is a strict liability offence under section 250S of the Corporations Act.

Clearly, some of the meeting practices reported by investor groups around the 2020 AGM season did not meet these objectives. At the same time, during 2020 many listed companies *have* shown that it is possible to hold virtual meetings in a way that increases, rather than decreases, shareholder participation. However, as with any new technology or alterations to established governance practices, there will inevitability be a period of evolution as stakeholders work through the practical changes to processes and practice. It is important that all stakeholders work together to improve the experience for all participants and ensure that virtual AGMs are not used as a means to reduce board accountability to shareholders/members.

In April, the AICD together with the Governance Institute of Australia, the Law Council of Australia and the Australasian Investor Relations Association released joint guidance to help organisations navigate the ongoing uncertainty around holding AGMs.[26] Importantly, this guide addresses investor concerns and captures key learnings from the 2020 AGM season, including safeguards to ensure effective shareholder participation at meetings. This demonstrates that industry can learn from the experience and develop good practice without the need for prescriptive arrangements in legislation.

Accordingly, we have concerns with the Bill's proposal to include a new requirement in section 253Q that, for those entitled to attend a meeting, a 'reasonable opportunity to participate' includes a 'right to speak' orally rather in writing.

Our member feedback suggests that facilitating telephone dial-in options that enable participants to speak during a meeting, in addition to webcasting, is less commonly used by organisations and their virtual meeting platform providers due to logistical and technical complications. We understand that it is difficult for organisations and platform providers to securely verify the identity of those dialling-in as shareholders seeking to put questions orally to the meeting. By contrast, the ability to submit questions online to the webcast meeting is more securely monitored by the platform provider requiring shareholders to provide a passcode to verify identity. This still allows general access for interested stakeholders (for example, media, employees and other stakeholders) to view the webcast.

Given the legislation will cover a broad range of organisations, from not-for-profit organisations and small companies limited by guarantee, to large listed organisations, we consider it appropriate for the legislation to set the principles and framework that are appropriate for all organisations to comply with. Given the risk of legislation becoming outdated as technology evolves, it is important that the legislation does not impose minimum expectations that are overly prescriptive or unduly burdensome to comply with, particularly for smaller, not-for-profit entities.

Instead, we would encourage the Government and stakeholder community to take steps to address listed company investor concerns around meaningful shareholder engagement without embedding unnecessary prescription in legislation. This could be achieved via ASIC regulatory guidance supplemented by industry-agreed best practice principles, similar to the guide released by AICD and others referred to above.

While ASIC guidance is not legally binding it would create a clear expectation of practice and provide guidance on how the corporate regulator will enforce companies' pre-existing legal obligation to

[26] Available at https://aicd.companydirectors.com.au/membership/membership-update/new-joint-guidance-for-navigating-virtual-agms-electronic-signatures-and-electronic-shareholder

provide members as a whole with a 'reasonable opportunity to participate' at meetings. Where companies circumvent their obligations, ASIC can (and should) draw on its existing and continuing enforcement powers.

(c) Flexibility in format of meetings

In terms of permanent reform going forward, we reiterate our strong view that the Government should not hard-wire a particular format of an AGM into legislation. We are concerned, for example, that if a hybrid format for AGMs were mandated for virtual participation it could lead some entities to default to physical-only meetings where there may otherwise be opportunities to increase shareholder access and participation in a virtual format. This could be driven by the additional complexity and cost of managing full hybrid meetings, compared to a virtual or physical-only format.

It is important that organisations have the flexibility to adopt the best meeting format for their circumstances, shareholders/members, and stakeholders. Regulation should focus on the outcomes and purpose of meetings, while enabling flexibility in delivery and technological neutrality.

We look forward to Government providing further information about the 12-month opt-in pilot for companies to hold hybrid AGMs. However, we note that not all organisations' constitutions will currently contemplate the conduct of a hybrid AGM and in some cases, will require organisations to amend their constitution to permit this format. For example, in the absence of provisions to displace the requirement for constitutional change (such as the Treasurer's temporary modifications to the Corporations Act under his emergency instrument-making power which expired on 21 March 2021), some organisations will first be required to seek shareholder approval either at their AGM or via an extraordinary general meeting (in a physical format) to amend their constitution to permit a hybrid AGM.

To avoid this added complexity, we encourage the Government to consider including similar provisions to that provided in the Treasurer's temporary relief that would displace the requirement for constitutional change, where it may be required for companies to participate in the 12-month opt-in hybrid AGM pilot.

(d) Notices of meeting

We strongly support the amendments that would allow organisations to send documents, including notices of meetings, via electronic means. In our view, allowing organisations to provide notices of meetings to shareholders/members electronically will produce significant cost savings and reduce postal delay for shareholders/members in rural and regional communities, as well as have a positive environmental impact. Again, we are of the view that these reforms should become permanent and ensure technological neutrality given the risk of legislation becoming outdated as technology and methods of communication evolve.

4. Next steps

We hope our submission will be of assistance to the Committee.

Yours sincerely,

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