

30 October 2020

Manager
Market Conduct Division
The Treasury
Langton Crescent
Parkes ACT 2600

By email: businesscomms@treasury.gov.au

Dear colleague,

Corporations Amendment (Virtual Meetings and Electronic Communications) Bill 2020 (Bill): Proposed Permanent Reforms in Respect of Virtual Meetings and Electronic Document Execution

The Australasian Centre for Corporate Responsibility (ACCR) is pleased to comment as follows on the Bill, in response to your invitation.

About ACCR

ACCR is a research, corporate engagement and shareholder advocacy organisation. We publish research and analysis on the environmental, social and governance practices of corporate Australia. We have a small portfolio of shares that we hold for the purpose of engaging with companies, including through the filing of shareholder resolutions and attendance at company meetings.

We are philanthropically funded, not-for-profit, and independent. We are a member of both the UN Principles for Responsible Investment (UNPRI) and the Responsible Investment Association of Australasia (RIAA).

Summary

2020 has been an extraordinary year. The temporary waiver of existing rules to enable virtual Annual General Meetings (AGMs) for ASX-listed companies could be regarded as an extraordinary though necessary and pragmatic step to facilitate business and some level of shareholder-board interaction during the pandemic, and was welcomed by ACCR as an interim proposal.

We have observed a wide range of corporate behaviour in 'virtual' AGMs as companies and registry providers have experimented with various formats and technologies. Given that the AGM season is ongoing, much remains to be analysed.

In summary, we believe that the provisions of the Bill relating to electronic service and execution of documents make practical sense, provided that adequate safeguards are in place. However, the Bill's objective to make permanent the virtual meeting provisions that were temporarily introduced in response to extraordinary circumstances, are ill-conceived and poorly developed. The Bill's virtual meeting proposals do not take into account the rights and interests of shareholders, and are inconsistent with the corporate governance objectives of the *Corporations Act*.

The interpersonal element of physical shareholder meetings is an important component of the corporate governance environment. This is widely recognised and, anecdotally speaking, is a rare point of consensus in the shareholder community.

The proposed amendments would permit companies to adopt virtual-only proceedings, thereby avoiding any in-person, transparent interactions with shareholders. This is not in the interests of shareholders or public companies, and is not supported by ACCR.

It is too soon to identify all of the implications of virtual meetings. There is certainly no obvious case to justify allowing companies to do away with physical meetings (like AGMs) altogether.

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Advantages of a virtual access component to meetings

Hybrid physical-virtual meetings have the potential to improve access to meetings for those not living in major cities, who are less able to travel, or who have mobility issues.

As we all move to limit our carbon footprints, the possibility of virtually attending the AGM of an ASX-listed company being held on the other side of the continent is a welcome development.

ACCR would support changes to promote the practice of hybrid physical-virtual meetings so that further observation, testing and analysis of virtual meetings can be undertaken, including testing of various technology options.

Importance of an in-person component to meetings

The often-quoted dictum of Bowen CJ in *Re Compaction Systems Pty Ltd* [1976] 2 NSWLR 477, 485 is a succinct summation of the value to shareholders of physical AGMs and EGMs:

The right to receive notice of a meeting, and to attend, and to be heard, is not an insubstantial right. The right to advance arguments and to influence the course of discussion may in some circumstances have an effect, even a decisive effect, on the decision reached.

The asking of questions in person affords shareholders a right of reply. If shareholders feel a question has not been sufficiently answered they are able to respond or follow up. What is said may influence the questions or voting decisions of other participants. They are able to assess the entire board’s non-verbal communication and body language. The subtlety and nuance of this dynamic has been lost in the virtual meetings conducted so far in 2020. When questions are submitted in writing and placed in a queue, there is no genuine opportunity for back and forth or the elaboration of information and experience.

In the various cases of corporate misconduct that have transpired over the last several years, boards have been held to account at their AGM in a way that simply would not have been possible in a virtual-only setting. The clearest

examples of this were the AGMs of our four major banks and AMP following the Banking Royal Commission, which saw shareholders interrogate the boards of those companies for their mismanagement. That important interaction has proved to be of value not only to shareholders, but to the whole financial services industry.

It is well understood that institutional investors have greater access to boards and executives than retail shareholders. The physical AGM is possibly the only opportunity for retail shareholders to interact with the board and management. In some cases, retail shareholders have been able to glean commitments from the board of a company, where they have previously been frustrated by investor relations teams.

Experience of 'virtual' 2020 AGM season

ACCR has attended a number of virtual meetings in 2020 and they have varied widely from company to company. From the ability to access the meeting through to the general conduct of the meeting, companies and their registries have been more concerned with the performative optics of a virtual meeting than in providing shareholders with a reasonable opportunity to question the board.

In our experience, registries have sometimes been inattentive to the task of facilitating attendance at virtual meetings, particularly for proxy holders. In early meetings in the season, proxy holders were not able to access a virtual meeting without the confidential shareholder identification number of the shareholder, information that the shareholder traditionally does not have to disclose to their proxy. As the virtual season progressed, provisions for proxy holders improved, and multiple companies made provisions for proxy holders to call the registry in advance for a unique access code. Some, however, advised that proxy holders would receive their code via email despite not asking for the email address of the proxy holder.

We have summarised the user experience with each of the major shareholder registry providers below.

Shareholder registry	Companies represented	Technology platform	Access
Boardroom	Origin Energy Santos	Lumi	To access the meeting shareholders required an S number located on the proxy form and their postcode The proxy summary form did not provide information to access the meeting. Proxy holders had to contact the share registry in advance of the meeting for login information. Proxy holders were asked for the shareholders HIN or SRN which is confidential information unique to the shareholder.
Computershare	Adelaide Brighton BHP Group Macquarie Group QBE Insurance Group Rio Tinto South32 Woodside Petroleum	Lumi	Shareholders required their HIN/SRN number and postcode to access the meeting. Proxy holders either received their login details in advance via email or were required to call Computershare 1 hour before the meeting to receive an access code and password. The facility was able to distinguish between shareholders and proxies.
Link Market Services	AGL Energy APA Group Boral Coca-Cola Amatil	Link-specific software	Shareholders required their HIN number and postcode to access the meeting

	Dexus Qantas		<p>Proxy holders received a proxy login code via email 24 hours before the meeting</p> <p>If they didn't receive a proxy code, proxy holders had to contact the registry</p> <p>The facility was able to distinguish between shareholders, proxy holders and guests.</p>
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In ACCR's opinion, best practice allows shareholders and proxy holders to ask questions directly to the board in their own voice and to have an opportunity for live interaction. Of the many virtual AGMs that ACCR has attended throughout 2020, only Rio Tinto and Macquarie Group provided a facility for shareholders to ask their questions in person over the phone, in addition to the online platform.

ACCR experienced several recurring issues with virtual AGMs, which can be summarised as follows:

1. Unstable technology with poor audio and/or video
2. Most companies only accepted questions submitted online, preventing interaction with the Board (with the exception of Rio Tinto and Macquarie)
3. No company displayed questions submitted by shareholders
4. Many companies simply ignored certain questions, or aggregated questions on a similar subject
5. Other than Rio Tinto and Macquarie Group, shareholders had no way of interrogating the response provided or to ask follow up questions
6. Questions were not asked at the relevant item of business, even if the item number was included in the question
7. Proponents of shareholder resolutions were not permitted to address the resolution
8. Voting results were not published during the meeting

We have summarised our experience with asking questions at each of the companies' AGMs below.

Company	AGM date	Process/issues with asking questions
Santos	3 April 2020	<ul style="list-style-type: none"> • Questions submitted via web browser only. • Questions were read out by an intermediary. • ACCR asked several questions in relation to four separate items of business, many were not read out. • ACCR's questions to individual directors were not asked.
Woodside Petroleum	30 April 2020	<ul style="list-style-type: none"> • Questions submitted via web browser only. • Questions were read out by the Chair. • Multiple questions were asked in relation to four separate items of business, most of which were asked and addressed. • Shareholder questions directed to individual directors were not posed or answered at all by those controlling the meeting.
QBE Insurance Group	7 May 2020	<ul style="list-style-type: none"> • Questions submitted via phone and web browser.

		<ul style="list-style-type: none"> • Questions were read out by the Chair, phone questions were read out by an intermediary. • The chairman advised that similar questions would be amalgamated and this was the case. • Questions submitted by the online platform were not read out word for word but were summarised • Online questions were screened by the chair. Some shareholders felt that their questions were not answered and submitted a question to that effect. • Voting results were not displayed at the end of the meeting.
Rio Tinto	7 May 2020	<ul style="list-style-type: none"> • Questions submitted via phone and web browser. • Questions were read out by the Chair, shareholders on the phone asked their own questions.
Adelaide Brighton	19 May 2020	<ul style="list-style-type: none"> • Questions submitted via web browser only. • Significant issues with the technology, very poor quality video and audio, meaning shareholders missed much of the meeting.
Coca Cola Amatil	26 May 2020	<ul style="list-style-type: none"> • Questions submitted via web browser only. • Questions were read out by a company representative.
Macquarie Group	30 July 2020	<ul style="list-style-type: none"> • Questions submitted via phone and web browser. • Questions were read out by the Chair, shareholders on the phone asked their own questions. • Of three questions asked on behalf of one shareholder, only one was addressed.
AGL Energy	7 October 2020	<ul style="list-style-type: none"> • Questions submitted via web browser only. • Questions were read out by a company representative. • After answering over 20 questions the Chair advised that he would only answer questions that were different in subject matter to those already answered. • There was a significant technical issue that prevented the CFO from delivering the financial report so the Chairman read it instead.
BHP Group	14 October 2020	<ul style="list-style-type: none"> • Questions submitted via web browser only. • Questions were read out by a company representative • Questions were aggregated by subject area, many questions were not asked. • ACCR asked multiple questions at different agenda items, only some of which were addressed. • Those controlling the meeting did not pose shareholders' questions to individual directors.
Origin Energy	20 October 2020	<ul style="list-style-type: none"> • Questions submitted via web browser only. • Questions were read out by a company representative.
APA Group	22 October 2020	<ul style="list-style-type: none"> • Questions submitted via web browser only. • Questions were read out by a company representative. • Those controlling the meeting did not pose all questions asked on behalf of shareholders.
Qantas	23 October 2020	<ul style="list-style-type: none"> • Questions submitted via web browser only. • Questions were read out by a company representative. • The chairman advised that similar questions would be amalgamated and this was the case.
Dexus	23 October 2020	<ul style="list-style-type: none"> • Questions submitted via web browser only. • Questions were read out by a company representative.

		<ul style="list-style-type: none"> The chairman advised that similar questions would be amalgamated and this was the case. All names were read out for amalgamated questions.
Boral	27 October 2020	<ul style="list-style-type: none"> Questions submitted via web browser only. Questions were read out by a company representative. Those controlling the meeting did not pose all questions asked on behalf of shareholders.
South32	29 October 2020	<ul style="list-style-type: none"> Questions submitted via web browser only. Questions were read out by a company representative. Those controlling the meeting did not pose all questions asked on behalf of shareholders.

Following the above AGMs, not all companies have made a recording of the meeting available online. Very few companies have published transcripts of their AGM.

Proposal to publish all questions put to the meeting

The Bill proposes that all questions asked during a meeting must be recorded in the minutes (Schedule 1, items 25 and 36, paragraphs 251A(1)(aa) and 253M(1)(c) of the *Corporations Act*).

The proposed amendment addresses only one part of the problem experienced by those asking questions in a virtual meeting context.

In our experience, ACCR representatives have submitted questions to a company that have not been answered. Current virtual meeting facilities only allow participants to see the questions they themselves submitted, and not those of other shareholders. It is therefore impossible to gauge the volume of questions submitted as compared to those being answered. ACCR agrees with the proposal to publish all questions submitted to the meeting. This would provide a layer of accountability, by allowing shareholders to assess how many questions are submitted, on what subjects, and to draw their own conclusions about what questions were answered and why.

This proposal however does not address shareholders' and proxies' loss of opportunity in a virtual meeting to interact with a board in real time and to ask a follow up question when they feel a question has not been adequately addressed.

Virtual meetings should operate a phone line to allow participants to ask a question in their own voice and to allow them to follow up if they feel their question requires further response. All questions submitted in writing should be read in full and properly attributed.

Proposed changes to facilitate electronic signing and transmission of documents

ACCR supports these changes as facilitative of expedient and efficient communications in the modern corporate environment.

Shortcomings in Policy/ Legislation Review Methodology

This section of our submission refers to the Bill's *Explanatory Memorandum* (EM) and to the *Australian Government Guide to Regulatory Impact Analysis* (the Guide), Australian Government, Department of PMC, 2nd edition.

As detailed below, it is our view that principles 1, 2 & 4 of the Guide have been ignored in this EM, insofar as it deals with meetings of shareholders. As a result, the amendments contained in the Bill are not those most attractive to Australia.

Principle 1 states: *Policy makers should clearly demonstrate a public policy problem necessitating Australian Government intervention, and should examine a range of genuine and viable options, including non-regulatory options, to address the problem.*

At paragraph 2.3 the EM claims temporary relief to allow for virtual meetings “has provided an opportunity to test with stakeholders how technology can support companies to meet their obligations in ways that meet the changing needs of their shareholders”. The EM fails to acknowledge that individual companies can and are already experimenting with changing their Constitution to provide for virtual or hybrid meetings, allowing shareholders of that company to vote on proposals and ensuring that companies adopt arrangements satisfactory to their particular circumstances. This is a genuine, viable non-regulatory or minimal regulatory change option which is not canvassed in this EM.

Principle 2 states: *Regulation should not be the default option: the policy option offering the greatest net benefit — regulatory or non-regulatory — should always be the recommended option.*

At paragraphs 2.27 to 2.32 the EM purports to canvass the likely net benefit of various options. Insofar as it deals with meeting arrangements the discussion is flawed. It focuses on the logistical cost of organising meetings. Even that evaluation fails to explore the possibility of hybrid meetings which could maintain the positives of physical meetings and potentially, simultaneously, allow for some of the potential benefits of virtual meetings. The EM discussion is premised on the view the various options it canvasses will have no impact on:

- the confidence local and foreign shareholders have in the integrity and accountability of Australian boards;
- the cost of capital to all Australian companies which reflects international appraisal of the quality of our corporate governance arrangements;
- the possibility that corporate problems become apparent later or not until after substantial losses have been incurred by shareholders, as a consequence of the absence of the revelations which sometimes arise from sequential, partially impromptu questioning by various shareholders on the same topic at physical only or hybrid meetings.

Consequently, the premise of the EM is inaccurate and no attempt is made in the EM to justify it. The policy option proposed is not the policy option with the greatest net benefit. The net benefit to Australia of ensuring a healthy, well-functioning corporate democracy is not even addressed. The paradigm of the EM envisages the appropriate way to address the possibility of moving to virtual meetings of the Australian houses of parliament is to focus on the logistical and travel bill saved rather than the extent to which decisions are taken in the interests of the peace, order and good government of Australia.

Principle 4 states: *Policy makers should consult in a genuine and timely way with affected businesses, community organisations and individuals, as well as other policy makers to avoid creating cumulative or overlapping regulatory burdens.*

The Commonwealth has proposed a 10-day consultation period for these changes. In our view such a consultation period is not timely. Nor is it an indicator of genuine consultation.

ACCR would welcome the opportunity to discuss these matters further.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Brynn O'Brien', with a stylized flourish at the end.

Brynn O'Brien
Executive Director