

Submission to the Treasury on exposure draft legislation that makes permanent changes to the Corporations Act 2001 in relation to virtual meetings and electronic document execution

October 2020

ABOUT THIS SUBMISSION

This is the Business Council's submission to Federal Treasury on exposure draft legislation that makes permanent changes to the *Corporations Act 2001* (Cth) (the **Corporations Act**) in relation to virtual meetings and electronic document execution.

KEY RECOMMENDATIONS

The Business Council recommends that the Parliament accept proposed amendments to the Corporations Act in relation to virtual meetings and electronic document execution.

Specific comments and recommendations with respect to the amendments are set out below.

KEY ISSUES

The case for permanent reform

The Business Council supports making permanent changes to the Corporations Act in relation to virtual meetings and electronic document execution and welcomes the opportunity to comment on the draft legislation.

We fully supported the Treasurer's Determination to authorise these temporary changes during the COVID-19 pandemic and agree they should now be made permanent.

The COVID-19 period has provided an opportunity to trial the changes to electronic execution of documents and virtual meetings. We have received a great deal of positive feedback from member companies, with few if any problems reported.

Allowing the electronic execution of documents means that company officers need not be physically located in the same place which removes unnecessary costs and delays on doing business. It reflects the reality that many parties are increasingly entering into transactions and contracts electronically. It removes current requirements for counterparties and their legal advisers to require proof of the technical and procedural matters that the Corporations Act would otherwise allow them to assume.

Virtual meetings reforms will provide flexibility to Australian companies in the way that meetings are held, including during further periods of disruption, and enhance shareholder participation in the process. Virtual meetings can also be more cost-effective, including by removing costs such as venue hire, travel, catering and security.

The Business Council supports the notion that a company should be able to determine that a meeting of members may be held in part or in full through the use of technology, so long as the manner in which the meeting is held gives members as a whole a reasonable opportunity to participate and that accountability is not diminished. The reforms recognise the current and potential future capabilities of technology, and bring Australia in line with other prominent jurisdictions, including the United Kingdom, Canada and parts of the United States.

The electronic distribution of documents will also reduce costs, administrative burdens and minimise environmental impact.

Making the changes to virtual meetings and electronic document execution permanent will be a significant deregulation initiative that will allow businesses to use technology to fulfil their regulatory obligations. They will deliver ongoing cost savings and make it easier to do business in Australia which in turn will support Australia's economic recovery and job creation. The Regulation Impact Statement estimates that the changes will deliver over \$1 billion of savings annually.

Most importantly, these changes are another major step forward in the shift to a digital economy. Australia needs to adapt and embrace change if we are to unlock the significant productivity and participation benefits that will flow from the use of digital technology. Accelerating this shift is even more important if we're going to achieve the ambition of being a leading digital economy by 2030.

Specific comments and recommendations

Electronic signatures

- The requirement in subsection (3B)(a)(ii) – that a signer receive a document by electronic communication – should be removed. It is not clear as a policy matter why this requirement exists. If a person is signing a document it should not matter how the signer has received the document.
- Similarly, the requirement in subsection (3B)(c) for a signer separately to indicate that the signer signed the document is significantly restrictive, and makes reliance by outside parties under section 129(5) difficult. Signing of the document itself should be sufficient.

The above two requirements of additional communications for electronic signing are not required with physical documents, nor with documents signed electronically by individuals, and were not required by the Determination. They may increase transaction costs and will reduce the benefit of the reform to the economy. They will also affect the ability of counterparties dealing with companies to rely on execution in this form. The counterparties would need to satisfy themselves as to the occurrence of the steps which will, in turn, adversely affect the ability of companies large and small to transact.

- Subsection (3A), expressly allowing 'split execution', is very welcome. However, subsection (3A)(b) requires that the document signed includes the entire contents of the document. We suggest that this requirement be reconsidered. Documents can run to hundreds of pages, and in some cases, in relation to construction and infrastructure, they can be over one thousand pages. Where an agreement is being signed (as opposed to a deed), it is common practice, both internationally and in Australia, for the signers to print out and sign just the signature pages, and not to print out the entire document.
- The reforms should extend the ability to execute deeds electronically to foreign corporations and statutory corporations.
- It would be useful to take the opportunity to fix up one common practical problem that occurs in relation to section 127(1). Many small companies have a sole director who is not also secretary. The subsection and subsection (2) should extend to the sole director.

Virtual meetings

- The standard under new section 253Q(1) requires that "all persons entitled to attend the meeting [have] a reasonable opportunity to participate" in the meeting. This fundamentally alters the existing standard under sections 249S and 249Q, for which legal precedent and meeting procedure has developed over a number of years, that "members as a whole" should have a reasonable opportunity to participate in the meeting. The BCA submits that the existing standard should be maintained and expects that a clearly higher and judicially uncertain standard would mean companies may be unwilling to utilise virtual meeting technology going forward, and revert to entirely physical meetings.
- The Corporations Act should not be amended to require questions or comments submitted by members before or at a meeting involving virtual meeting technology to be recorded in the minutes, as has been proposed under section 253M. It is the BCA's submission that this is a disproportionate response to the perceived risk of a member's contributions to a meeting via technology being moderated in a selective manner. It would oblige, without the ability to apply discretion, companies to make public information which, in some instances, may be irrelevant, misleading or defamatory. There are already protections available to members to seek relief under section 1322 and for regulatory intervention by ASIC.

The BCA considers that Treasury's concerns could be addressed by further strengthening the role of the regulator to conduct inquiries where they consider there are grounds to do so, and potentially requiring companies to keep records of questions and comments made at or before a meeting which may be provided where ASIC deems there is a need to inquire further. In any event, the BCA also notes that a similar obligation which exists under the Corporations Act at present which requires disclosure of questions submitted to the auditor in advance of meetings are caveated by reasonableness and allow discretion where there is repetition (250PA). At a minimum such principles should be reflected here.

- References to members being "entitled to physically attend the meeting" is used throughout various proposed amendments (eg 249L(1)(a), 249R etc). This is problematic as it could be read to imply that there is an entitlement of members to elect the manner in which they will participate in meeting, rather than there being a discretion of the company to determine the most appropriate format for the meeting. Instead, the BCA proposes language to the effect of (using 249L(a) as an example):
 - (i) if the company's meeting is to be held at one location – the date, time and place for the meeting; and
 - (ii) if the company's meeting is to be held at 2 or more locations – the date and time for the meeting at each...
- To table a document at a virtual meeting it is proposed that it needs to be "given to the persons entitled to attend the meeting before or at the meeting". This is not current law or practice for physical meetings. In order for members to have an opportunity to meaningfully engage with the materials to be considered at a meeting, a document tabled at *any meeting* (be it virtual, physical or hybrid) should be made available to shareholders at least by electronic means (including on the company's website) prior to the meeting.
- The BCA supports the inclusion of 253S(1) and considers that it is most efficient, cost-effective and environmentally friendly for companies to have discretion to provide

documents through electronic means. On its face, the provision would extend to an explanatory statement, scheme booklet or remuneration report given these are all documents which form the basis of matters to be discussed at a meeting. It is less clear as to whether the provision would extend to annual reports. The BCA submits the provision should extend to annual reports, and suggests this could be achieved by referring to as much in the accompanying explanatory memorandum for the amendments.

- The explanatory memorandum makes clear that, consistent with the position under the Treasurer's Determination, a company may make a document available to a member for whom they do not have a nominated electronic address by sending them a physical communication (such as a card) which directs them to where they may access the document electronically. The BCA notes this achieves the same efficiency, cost and environmental benefits described above.

However, the drafting under 253S(4)(b) restricts a company from using any form of electronic communication for particular recipients unless they have a nominated electronic address. The implication is that the company would be required to revert to the full physical mail out for those particular recipients, rather than being able to send them a shorter document such as a card containing details of how to access the materials. This limb of the proposed amendments should be removed to allow the provision to function as described in the explanatory memorandum.

- The addition of 253Q(4)(b) allows members to record a vote in advance of a meeting. In doing so, it enshrines direct voting in the Corporations Act, where it was previously silent on the matter. Given the absence of legislative authority until now, many companies have already adopted prescriptive terms in their constituent documents to allow direct voting. To preserve existing practices in relation to direct voting, the section should also state that a company's constitution may provide for the manner and process under which such votes will be recorded in advance of a meeting.
- In anticipation of future developments in technology, the Corporations Act should be technology-neutral in the way that it describes types of technology and participation in meetings. To this end, phrases such as "in real time" (253Q) could be replaced with "during the meeting" and references to "speaking" at a meeting (249V, 249Y, 252T, 252W) could be replaced with "participate".

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