CGI GLASS LEWIS

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Via email: businesscomms@treasury.gov.au

Manager
Market Conduct Division
The Treasury

Submission – Making permanent reforms in respect of virtual meetings and electronic document execution

CGI Glass Lewis Pty. Limited ("CGI Glass Lewis") appreciates the opportunity to comment on the Australian Government's exposure draft legislation *Corporations Amendment (virtual meetings and electronic communications) bill 2020*.

CGI Glass Lewis has been providing in-depth corporate governance research and analysis on ASX-listed companies from its Sydney headquarters since 1994. CGI Glass Lewis is a subsidiary of Glass, Lewis & Co. ("Glass Lewis"), a leading independent governance services firm that provides proxy research services to a global client base of over 1,300 institutional investors that collectively manage more than US$35 trillion in assets. Our clients use our research to assist them with their proxy voting decisions and to engage with companies before and after shareholder meetings.

Through Glass Lewis' web-based vote management system, Viewpoint, Glass Lewis also provides investor clients with the means to receive, reconcile and vote ballots according to custom voting guidelines and record-keep, audit, report and disclose their proxy votes.

Glass Lewis is a portfolio company of the Ontario Teachers' Pension Plan Board ("OTPP") and Alberta Investment Management Corp. ("AIMCo"). Glass Lewis operates as an independent company separate from OTPP and AIMCo. Neither OTPP nor AIMCo is involved in the day-to-day management of Glass Lewis' business. Moreover, Glass Lewis excludes OTPP and AIMCo from any involvement in the formulation and implementation of its proxy voting policies and guidelines, and in the determination of voting recommendations for specific shareholder meetings.

The responses provided below are not meant to be exhaustive but are designed to address what CGI Glass Lewis sees as the main issues and concerns raised in the Exposure Draft Bill, being the provisions relating to holding virtual-only shareholder meetings. Thank you in advance for your consideration and please do not hesitate to contact us if you would like to discuss any aspect of our submission in more detail.

Respectfully submitted,

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Pros and cons of virtual-only meetings

For investors, the cost of attending an in-person meeting can be prohibitive. This is especially true for retail investors should they require to travel interstate, as the travel and accommodation costs could easily exceed expected annual returns, depending on the size of their shareholding. For institutional investors, although the travel and accommodation costs may represent a much smaller percentage of their overall investment in a company, the opportunity costs relating to travelling to attend an in-person meeting create a disincentive. In that respect, companies giving shareholders the option to attend a shareholder meeting virtually can be attractive to shareholders.

The advantages of holding virtual-only meetings are clear from a company perspective. Hosting virtual-only meetings can cut out some of the standard costs of holding annual in-person shareholder meetings, as online meetings are typically less expensive and time-consuming. Meeting room fees and catering costs are among some of the expense factors that would be eliminated. It also gives the company more control over the proceedings, potentially reducing the chances that the board or management will be embarrassed by a tough shareholder query.

And that's where investor concerns come in. While an online meeting may increase the number of attendees, it can also serve to reduce those attendees' level of participation. For example, a trend in virtual-only meetings is for shareholders to submit their questions to the company prior to convening the meeting. There is a fear that this allows the company the discretion to filter shareholder questions to its own taste, resulting in some of the more difficult or controversial questions getting bumped down the priority list or even ignored. Even if fair play were guaranteed, for the less tech-savvy shareholder, removing the opportunity to voice concerns in a public, in-person, forum, where that individual is more at ease, could be construed by some as an infringement on shareholder rights.

CGI Glass Lewis' general view on virtual-only meetings

CGI Glass Lewis believes that virtual meeting technology can be a useful complement to a traditional, in-person shareholder meeting by expanding participation of shareholders who are unable to attend a shareholder meeting in person (i.e. a "hybrid meeting"). However, we also believe that virtual-only meetings have the potential to curb the ability of a company's shareholders to meaningfully communicate with the company's management.

Prominent shareholder rights advocates, including the Council of Institutional Investors in the United States, have expressed concerns that such virtual-only meetings do not approximate an in-person experience and may serve to reduce the board's accountability to shareholders.

Pre-COVID-19, CGI Glass Lewis did not have a formal policy with respect to Australian companies attempting to hold virtual-only meetings as such formats were prohibited by law.

However, when analysing the governance profile of companies that choose to hold virtual-only meetings in other jurisdictions such as the United States where such formats may be permissible, our colleagues in those jurisdictions look for robust disclosure in a company's notice of meeting (or proxy statement, as applicable) which assures shareholders that they will be afforded the same rights and opportunities to participate as they would at an in-person meeting.

Examples of effective disclosure include:

(i) addressing the ability of shareholders to ask questions during the meeting, including time guidelines for shareholder questions, rules around what types of questions are allowed, and rules for how questions and comments will be recognised and disclosed to meeting participants;
(ii) procedures, if any, for posting appropriate questions received during the meeting and the company's answers, on the investor page of their website as soon as is practical after the meeting;
(iii) addressing technical and logistical issues related to accessing the virtual meeting platform; and
(iv) procedures for accessing technical support to assist in the event of any difficulties accessing the virtual meeting.

We will generally recommend voting against members of the governance committee (or equivalent board committee) where the board is planning to hold a virtual-only shareholder meeting and the company does not provide such disclosure.

COVID-19 impact on CGI Glass Lewis' virtual-only shareholder meeting policy

We appreciated the circumstances that led the Treasurer to make a determination on 5 May 2020 under the temporary instrument-making power that was inserted in the *Corporations Act 2001* as part of the Government's COVID-19 economic response package, which allowed companies to hold virtual-only meetings, among other changes. Without this relief, Australian companies would have been required to choose between compliance with the *Corporations Act 2001* in respect of holding shareholder meetings, and compliance with social distancing requirements designed to thwart the spread of COVID-19.

At the time, we were supportive of the relief, given that it was temporary, and we supported the Treasurer's subsequent extension of this relief to 21 March 2021, given the ongoing lockdown in Victoria and continued border closures throughout Australia. This was consistent with our overall pragmatic approach to assessing corporate governance practices. Put differently, corporate governance principles need to be applied within the real-world constraints in which companies operate.

In other jurisdictions where virtual-only meetings were already permissible under local law, we took into account the extenuating circumstance of the COVID-19 pandemic when applying our policy on virtual-only shareholder meetings. We reviewed these on a case-by-case basis and noted whether companies stated their intention to resume holding in-person or hybrid meetings under normal circumstances. For companies that held a virtual-only shareholder meeting due to COVID-19 between 1 March 2020 and 30 June 2020, we generally refrained from recommending to vote against members of the governance committee on this basis, provided that the company discloses, at a minimum, its rationale for doing so, including citing COVID-19. Additionally, should these companies opt to continue holding virtual-only shareholder meetings in subsequent years, we expect future notices of meeting (or proxy statements as applicable) to include the robust disclosure concerning shareholder participation described above and our standard policy on Virtual Shareholder Meetings will apply in those future years. Finally, for all shareholder meetings occurring after 30 June 2020, our standard policy on virtual shareholder meetings applies, and we expect robust disclosure in the notice of meeting/proxy statement concerning shareholder participation.

We note that some Australian companies have sought to amend their constitution at their 2020 AGM to insert rules relating to holding virtual meetings. We have largely supported these

amendments, primarily on the basis that the temporary relief provided by the Treasurer was, in fact, temporary, and that companies would be required to hold in-person meetings following the expiry of the relief.

CGI Glass Lewis' views on making temporary relief permanent

We have significant reservations relating to the Exposure Draft Bill in relation to virtual-only meetings, primarily relating to the lack of protections afforded to shareholders that virtual-only meetings will sufficiently approximate an in-person experience and otherwise preserve the same level of transparency and director and management accountability that in-person meetings afford.

Indeed, in *Option 3 – Allowing the use of technology to meet legal requirements in respect of meetings and document execution with enhancements*, laid out on page 23 of the Explanatory Memorandum, paragraph 2.24 states, "In relation to the requirements in respect of meetings, the permanent reforms will differ from the temporary relief as follows: - to improve transparency, companies choosing to hold a meeting virtually, will be required to record and give members' access to all questions and comments submitted before and during a meeting *that are intended to be covered during the meeting* [emphasis added]…" In our reading, Option 3 would explicitly give companies the right to screen out shareholder questions the company does not intend to be covered during the meeting, for any reason, but does not require the company to disclose which questions have been screened out. We would caution that poor behaviour or treatment towards shareholders in this matter would likely only encourage activist attention and would certainly be reflected in future shareholder votes on directors and recommendations from proxy advisors.

More broadly, Option 3 does not include specific disclosure requirements for companies to assure shareholders that they will be afforded the same rights and opportunities to participate as they would at an in-person meeting, including the examples we provided above.

Should the Exposure Draft Bill be adopted as drafted, without preserving the requirement to hold in-person meetings or, at a minimum adding further enhancements to preserve the rights of shareholders, we will consider adopting our policy approach used in other jurisdictions (described above) for Australian companies. This would mean that we would consider recommending shareholders vote against the election of members of the governance committee (or equivalent board committee) where the board is planning to hold a virtual-only shareholder meeting and the company does not provide sufficient disclosure to assure shareholders' rights would be preserved.

Where to from here?

Given our reservations on giving companies the right to hold virtual-only meetings, we believe there is a better way forward. We believe enshrining in law the ability for companies to hold hybrid meeting formats, with clear protections for investors participating virtually, would promote corporate transparency and accountability whilst increasing investor participation. We acknowledge this approach would not reduce costs for companies. However, we note there is another provision in the exposure draft bill that, by Treasury's projections, would result even larger projected cost savings: a proposal to allow companies to send meeting materials to investors electronically. We are supportive of this proposal which would more meaningfully reduce costs without the associated negative impacts on transparency and accountability.