Erebor Pty Ltd
8 Malvern Road
Mont Albert VIC 3127

30 October 2020

Manager
Market Conduct Division
The Treasury
Langton Crescent
Parkes ACT 2600 Secretariat

Via email: businesscomms@treasury.gov.au

Dear Sir/Madam,

Re: Making permanent reforms in respect of virtual meetings and electronic document execution

On 19 October 2020 the Treasury issued Explanatory Materials and exposure draft legislation that makes permanent changes to the *Corporations Act 2001* in relation to virtual meetings and electronic document execution.

The Government has invited stakeholder views on this draft legislation and in particular the preference expressed in the explanatory materials for allowing the use of technology to meet legal requirements in respect of meetings and document execution with enhancements (Option 3).

The directors of Erebor Pty Ltd (Erebor) appreciate the opportunity to provide comments on the draft legislation. Erebor is a small family investment company, like many across Australia.

We support the intention of the draft legislation to enable corporate governance requirements to operate effectively in a digital economy. The proposed initiatives are an important step in preparing Australia for the emerging digital and data economy.

However we have been concerned with the gradual erosion of the rights of retail investors over the last decade. It is important that the changes proposed in the draft legislation go further to support shareholder democracy and embrace principles of open data.

In this submission, we have outlined our viewpoints on how the draft legislation could be amended to support this.

Execution of company documents

In principle, we support the proposals in relation to execution of company documents and electronic meetings of directors.

However recent inquiries and court cases have highlighted challenges in record keeping and minute taking in both the public and private sector which have undermined clear accountability and good corporate governance.

It will be important that there are clear requirements set out in the legislation or guidance provided on how information should be recorded at electronic meetings, and indisputable evidence of who has authorised decisions and the minutes, with meaningful penalties for breaches of the law.

Virtual annual general meetings

The draft legislation proposes that virtual meeting technology can be used for a range of meetings including annual general meetings (Option 3).

It is concerning that so many boards seem to approach AGMs as an anachronistic nuisance, rather than embracing them as a core element of corporate democracy.

We do not support the proposals in relation to the use of virtual meeting technology for annual general meetings.

We do support the comments of Mr Wilson of Wilson Asset Management who has noted that the Treasury's plan to make permanent the temporary allowance for virtual AGMs introduced for COVID-19 is 'undemocratic and grossly unfair to millions of Australian retail investors'.[1] Concern with these proposals is also reported to have been raised by Gary Weiss, Sandon Capital and ISS.

The explanatory memorandum includes a caveat that virtual shareholder meanings must give 'all persons have a reasonable opportunity to participate'. However it is not clear how this caveat would be applied practically.

The explanatory memorandum does not clearly state:

- who determines when an opportunity is 'reasonable'
- how an assessment that an opportunity to participate is unreasonable is enforced
- what the consequences are for decisions made at meetings at which it is subsequently determined that all shareholders were not provided with 'a reasonable opportunity to participate'; or
- what the penalties are for directors who fail to provide all shareholders with 'a reasonable opportunity to participate'.

The introduction of subjective standards such as 'reasonable opportunity to participate' is likely to be ineffective without guidance on what constitutes reasonableness in this context, and without meaningful methods of enforcing, or consequences for breaching, these requirements.

Electronic communication of documents relating to meetings

The draft legislation proposes to allow documents relating to a meeting to be given electronically.

It is important that these proposals are balanced with consideration of users' experience of the proposed changes, and particularly the experience of retail shareholders.

With most annual reports now comprising 75 to 100 pages and with some annual reports running to over 300 pages, such as BHP's 2020 annual report (353 pages) and CBA's 2020 annual report (300 pages), it is not realistic to expect a shareholder to read this electronically or to print this out themselves. Other company documents can run far longer, including for example, scheme booklets, such as NAB's 2016 Scheme Booklet for the demerger of CYBG Plc (579 pages).

[1] Thomas James, Geoff Wilson to lead investor army against virtual AGMs, The Australian Financial Review, 26 October 2020, accessed 30 October 2020

While some shareholders may prefer to receive electronic documents, shareholders should continue to be able to choose to receive printed documents.

Disturbingly, some share registries, after requiring shareholders to lodge a communication preference, have repeatedly overwritten a preference a shareholder has made for written communication, replaced it with a default preference for electronic communication and then required a shareholder to go online to reinstate the preference for written communication. In an Orwellian twist, the shareholder can only access the online site by providing an email address.

Such practices ought not to be legal. In implementing reforms to allow companies to issue electronic documents, the government should increase the penalties for share registries or companies which engage in practices such as those which have been experienced by the directors of Erebor, and provide clarity on which regulator is responsible for overseeing this conduct.

Conduct of virtual meetings

Like many such companies Erebor has been required to participate in virtual AGMs during the last few months. This experience has highlighted a number of limitations of virtual AGMs:

- A share registry had no record of questions submitted online which required the questions to be re-drafted and lodged again.
- Once questions are lodged, there is no confirmation of acknowledgement of this provided to the shareholder.
- Shareholders are unable to access the questions that they have lodged once they have been submitted
- Company representatives are grouping questions when answering them, resulting in some questions being reframed and simplified into general statements. This also means that the specific question put by the shareholder is not actually the one asked to the board.
- The Chairs of some companies have called a premature end to question time with the result that legitimate questions are not raised.

The consultation paper notes that other retail shareholders have experienced similar limitations. It acknowledges that 'virtual meetings can make it easier for a board to avoid difficult questions, such as combining questions which may lose the meaning of certain questions, or cherry-picking questions.' It adds that some boards have skipped difficult questions, or questions are being edited and not properly retold.'

These are concerning issues and suggest that there are inadequate penalties in the existing legislation to discourage these practices which undermine shareholder democracy. Further safeguards are required.

The proposal for hybrid AGMs may partially address the concerns associated with purely virtual AGMs. However any proposal for solely virtual AGMs should be accompanied by stronger requirements for directors to respond to questions as they have been asked by shareholders and meaningful penalties for directors and boards exhibiting practices designed to suppress board accountability to shareholders.

Such provisions would need to be balanced by reasonable protections for board members who encounter shareholders whose aims are merely to disrupt the shareholder meeting rather than meaningfully contribute to it.

In principle, we support the proposal that the minutes for virtual meetings of shareholders and members of registered schemes must include any questions or comments submitted by a shareholder or member (before or during the meeting). This is an important element of accountability of boards to shareholders.

Shareholder access to information – open data

If the Government intends to introduce this legislation, it will be important to strengthen the framework in which information is conveyed, votes are provided and questions are asked.

These proposed steps could be based on some of the principles of open data.

Share registries should be required to provide a corporate governance dashboard to shareholders, and in particular retail shareholders.

The dashboard should include:

- The names of the companies owned by the shareholder
- The date and time of the AGM for a company, and the ability to record this in an electronic calendar
- the date by which voting and questions need to be lodged
- details of the votes a shareholder has lodged for each company and an ability to change them up until the time that the Chairperson for the AGM declares a poll closed
- details of questions asked to the directors and the responses
- details of questions asked to the auditors and the responses.

In addition, to enable a shareholder to see an aggregated view of their investments the dashboard provided by a share registrar should be able to accept data feeds from other share registrars using APIs.

This will improve the ability of shareholders, and particularly retail shareholders, to actively participate in and contribute to the governance of public companies.

In addition, companies could be required to provide an update of questions that have been received from shareholders as they are received, with shareholders able to choose to be updated as additional questions are added.

Consumer protection

Electronic communication with shareholders has been in operation for some time. These proposals potentially amplify its use across Australia.

As a result, the proposed changes have the potential to result in a substantial increase in emails being sent to shareholders. These emails will include information on shareholdings, dividends, and other personal information.

However, for some shareholders, the last thing they need is more emails.

A recent article by FINSIA has highlighted that an estimated six billion fake emails are sent each day.[2] Despite this ISPs seem to have been unwilling or unable to adequately address this issue. Too many spam emails are released, and genuine emails are captured in spam filters.

Anecdotally, there has also been a significant increase in spam phone calls. In the US, a survey by Google found that half of respondents received at least one spam call per day, and one third received two or more per day.[3]

[2] Panther, Lewis, Cyber criminals adopt corrupt corporate strategy to launch more sophisticated attacks, 30 October 2020
[3] Crothers, Brooke, Google Expert Explains Why You Get So Many Robocalls -- And Future Tech To Stop Spam Calls, Forbes, 23 Mar 2019

There is a significant risk that an increase in electronic communications to retail shareholders will see the evolution of targeted email and phone scams.

Despite the growth in spam, governments appear to have been reluctant to address this. If the government wishes to enable a digital economy, it will be important that steps are also taken to improve the screening of spam emails and phone calls by ISPs and telcos.

Without these supporting changes, there is a risk that shareholders, and particularly retail shareholders, at best fail to receive relevant documentation as it is caught in a spam filter, and at worst are the victims of well implemented but fraudulent scams.

The consultation paper also notes the importance of ensuring that the proposals for virtual meetings do not disenfranchise those who are not able to access or use technology. This would not appear to be addressed by the adoption of option 3.

Shareholder democracy – other considerations

These proposals form part of what has been a growing movement to disenfranchise retail shareholders in favour of institutional investors.

Companies increasingly appear to be using share placements to raise capital. These placements are typically made at a discount to the market price. Retail shareholders are not able to participate in them with the result that the wealth of a retail shareholder is, through dilution of the value of their investment, transferred to an institutional shareholder for no consideration.

These share placements to institutional shareholders are often accompanied by a fixed dollar share purchase plan for retail shareholders. While for some very small shareholders, this enables them to acquire shares at a discount to the market value that is greater than their proportionate entitlement, for medium sized retail shareholders, like Erebor, the fixed dollar cap on the share purchase plan results in their investment being diluted.

This is wrong in principle, is anti-democratic and is not good corporate governance. Institutional investors support it, because they benefit from the dilution of retail shareholders. Corporate Boards support it, because they are able to raise funds quickly. Retail shareholders are the ones who lose, but as one bank CEO noted, they are too small in number for companies or regulators to care.

We appreciate the opportunity to provide our views in response to Treasury's proposed regulatory reforms for virtual meetings and electronic document execution.

Yours sincerely

Paul Wiebusch

Director

Erebor Pty Ltd