

Submission

Exposure Draft Legislation - Making Permanent Reforms in Respect of Virtual Meetings and Electronic Document Execution

Dr Lloyd Freeburn and Professor Ian Ramsay
Melbourne Law School
University of Melbourne

1. Introduction

This submission on the exposure draft legislation that makes permanent changes to the Corporations Act 2001 in relation to virtual meetings and electronic document draws on research conducted by the authors on the issue of virtual shareholder meetings. That research evaluated the corporate governance arguments associated with a move to virtual meetings. It is to be published in an article in the *International Company and Commercial Law Review* in December 2020. A copy of a pre-publication version of that article is attached. Issues dealt with in summary form in this submission are dealt with in more detail in the attached article.

The focus of the article, and of this submission, is on the corporate governance implications of permitting virtual shareholder meetings on a permanent basis. In relation to the exposure draft legislation, this principally relates to the proposed repeal of sections 249S and 252Q of the Corporations Act in Items 15 and 32 of the Exposure Draft Legislation and the enactment of a new section 253Q as part of Item 37.

In summary, the right to participate in general shareholder meetings, principally annual general meetings ('AGMs'), is a fundamental shareholder right. Indeed, in most jurisdictions around the world, shareholders have a right to attend the AGMs of companies in person.¹ This right reflects the important accountability function performed by physical meetings, a function that is not replicated in virtual meetings. Virtual meetings should therefore only be permitted on a permanent basis where the

¹ Dirk A Zetzsche, et al, 'COVID-19 Crisis and Company Law - Towards Virtual Shareholder Meetings', University of Luxembourg, Faculty of Law, Economics and Finance, Law Working Paper Series, Paper no. 2020-007, 17 April 2020, 12.

benefits can be shown to outweigh the disadvantage of the loss of this board and management accountability function.

The advantages of online meeting technologies such as improved accessibility for shareholders are benefits that are also delivered by hybrid meetings (meetings held in a physical location with the addition of online facilities that allow participation remotely). It is not necessary to move to virtual meetings to access these benefits. The only advantage of virtual meetings over hybrid meetings is the cost saving for corporations of the direct costs of a physical meeting. Other cost savings for companies that would be delivered by the Exposure Draft Bill ('Draft Bill'), such as providing for electronic execution of documentation, can be achieved without moving to virtual meetings. The cost savings of allowing virtual shareholder meetings on a permanent basis are outweighed by the disadvantages of virtual meetings. In addition, contrary to claims made in the Regulation Impact Statement accompanying the Draft Bill, information currently available does not demonstrate that allowing virtual AGMs on a temporary basis has improved levels of shareholder attendance or participation at AGMs.

Accordingly, we submit that allowing hybrid shareholder meetings on a permanent basis should be supported. However, the disadvantage of virtual meetings in reducing board and management accountability means that virtual meetings should not be made permanent at this stage.

2. Justifications for Hybrid Meetings

There are two principal reasons for holding meetings in a physical location, including hybrid meetings. This type of meeting operates as a forum for face-to-face accountability and as a forum for deliberation and debate of motions.² Both justifications are particularly valuable for retail shareholders.

As a mechanism of accountability, both directors and shareholders perceive that the AGM can be a powerful motivator and influencer of a company's approach to

² Elizabeth Boros, 'Corporate governance in cyberspace: who stands to gain what from the virtual meeting?' (2003) 3(1) *Journal of Corporate Law Studies* 149, 168, summarising submissions to The Company Law Review Steering Group, Modern Company Law for a Competitive Economy: Company General Meetings and Shareholder Communication (URN 99/1144, DTI, October 1999. See also: Jennifer Stafford, *Engaging with Shareholders* (Australian Institute of Company Directors, 2011) at 83: AGMs keep boards mindful of their accountability to shareholders and the need for transparency in the execution of their responsibilities.

governance.³ For many shareholders, the AGM is the only opportunity they have to see and hear directors personally and the AGM provides them with the opportunity to make an assessment of the chairperson and the directors of the companies in which they invest.⁴ The physical AGM has been described as a means of demonstrating respect for the retail shareholders of the company or those shareholders of the company with small holdings.⁵ The role of AGMs as a pillar of good governance is a reason why proxy advisors and others have historically opposed virtual-only meetings.⁶

The second justification of the AGM as an important forum for two-way communication between companies and shareholders is broadly endorsed. Again, this justification of the AGM assumes particular importance for retail shareholders. Unlike institutional shareholders, retail shareholders do not typically receive briefings from companies between AGMs, nor are company directors and senior management as accessible to retail shareholders as they are to institutional shareholders.

There are both judicial observations⁷ and scholarly support⁸ for the importance of this interactive communication justification for AGMs. Indeed, the opportunity for

³ CSA/Blake Dawson (now Ashurst Australia), 'Rethinking the AGM', Discussion Paper, 2008, section 2.2.

⁴ Ibid.

⁵ Ibid.

⁶ Dottie Schindlinger, 'Virtual Annual Shareholder Meetings: Will the 2020 Proxy Season Lead to Watershed Adoption?', *Diligent Insights*, 22 May 2020. See also: Australian Shareholders' Association, 'Good Practice Guideline for Retail Shareholder Engagement', May 2019, https://www.australianshareholders.com.au/common/Uploaded%20files/Advocacy/ASA_AGM_practice_guidelines_May_2019-FINAL.pdf: 'We are not supportive of a move to a full virtual AGM as we believe the physical AGM is an important event and in most cases, the only opportunity for shareholders to meet board members and key executives in a face to face environment.' While it supports hybrid meetings, the US Council of Institutional Investors is opposed to virtual AGMs on the basis that they do not approximate an in-person experience and may serve to reduce the board's accountability to shareholders: Council of Institutional Investors, 'CII Statement on Virtual Meetings During Public Health Emergency', 16 March 2020, <https://www.cii.org/march2020virtualmeetings>. The California Public Employees' Retirement System ('CalPERS'), New York City Retirement Systems and other institutional investors are similarly opposed to virtual meetings: Tony Featherstone, 'Hybrid AGMs welcome, but the future is virtual', Australian Institute of Company Directors, 17 November 2017; Lisa A. Fontenot, 'Public Company Virtual-Only Annual Meetings' (2017–2018) 73 *The Business Lawyer* 35, 44. See also 'Virtual Shareholder Meetings rising in Popularity, Skeptics Remain', Fredrikson & Byron, PA, 30 June 2017.

⁷ See for example *Re Compaction Systems Pty Ltd* [1976] 2 NSWLR 477, 485 (Bowen CJ); *Re Duomatic Ltd* [1969] 2 Ch 365; *Hoschett v TSI International Software Ltd* 683 A 2d 43, 45-6 (Del Ch, 1996) (Chancellor Allen).

⁸ Boros, 'Corporate governance in cyberspace', above n 2, 177, citing Ralph Simmonds, 'Why must we meet? Thinking about why shareholders meetings are required' (2001) 19 *Company & Securities Law Journal* 506, especially at 518; and also citing Stephen Bottomley, 'From Contractualism to Constitutionalism: A Framework for Corporate Governance' (1997) 19 *Sydney Law Review* 277, 304–7. Simmonds (at 512) refers to the opportunities for confrontation of candidates or proponents of issues

shareholders to discuss corporate affairs in a meeting is described as ‘a right and not a privilege to be accorded at the pleasure of management.’⁹

3. Hybrid Meetings Retain Accountability; Virtual Meetings Lose It

Virtual meetings are not a sufficient substitute for the face-to-face accountability of directors and management to shareholders offered by the physical part of hybrid meetings.¹⁰

There are two aspects to this accountability concern.

First, it is argued that virtual meetings ‘fail to provide a quality of interaction comparable to that (sic) the face-to-face experience provided by a physical meeting’.¹¹ ‘The accountability that is a feature of a face-to-face real-time meeting is difficult to replicate in the electronic environment.’¹² This must be particularly the case where ‘the primary method for interaction at [virtual] meetings is through emailed questions’, where emailed questions may be more easily ignored or answered by management with scripted responses.¹³ Something is lost when shareholders do not see directors in person and have an opportunity to gauge their body language and responses.¹⁴ Physical meetings mean that shareholders can see how boards are reacting to shareholders, for example by ignoring other dissatisfied investors.¹⁵

that are available where voters deliberate together as plausibly enhancing voting decisions: ‘Providing such opportunities can explain why meetings might be valuable even where the outcome is highly predictable’.

⁹ Robert WV Dickerson et al, *Proposals for a Business Corporations Law for Canada*, http://publications.gc.ca/collections/collection_2011/ic/RG35-1-1971-I-eng.pdf, [276].

¹⁰ For discussion, see Australian Government, Corporations and Markets Advisory Committee (‘CAMAC’), ‘The AGM and Shareholder Engagement Discussion Paper’, September 2012, 111; ‘Online annual meetings may favour managers over shareholders’, *The Economist*, 2 May 2020. See further the discussion in the attached article ‘Virtual Shareholder Meetings in Australia’, under the heading ‘Can Virtual Meetings Offer Shareholders an Equivalent Right of Participation to a Physical Meeting?’.

¹¹ Fontenot, above n 6, 36, citing Robert Steyer, ‘NYC Comptroller Petitions Against Corporate “Virtual-Only” Annual Meetings’, *Pensions and Investments*, 3 April 2017. This is supported by several online comments made in response to Maryellen Andersen, ‘Broadridge Virtual Shareholder Meetings (“VSMs”) Preliminary Statistics’, *Harvard Law School Forum on Corporate Governance*, 3 June 2020.

¹² Boros, ‘Corporate governance in cyberspace’, above n 2, 168.

¹³ Lisa M Fairfax, ‘Virtual Shareholder Meetings Reconsidered’ (2010) 40 *Seton Hall Law Review* 1367, 1392.

¹⁴ Featherstone, above n 6.

¹⁵ ‘Online annual meetings may favour managers over shareholders’, *The Economist*, 2 May 2020, quoting Francesca Odell and Helena Grannis of law firm Cleary Gottlieb. See also Bruce Goldfarb, ‘Are Virtual Annual Meetings Good for Shareholder Democracy?’, *Forbes*, 5 May 2020: ‘The problem is that, while virtual annual meetings work reasonably well for most plain vanilla, uncontested situations, they are not designed for corporate battles involving activist investors or for dissident

This concept of the accountability function of AGMs assumes greater significance having regard to the limited accountability mechanisms available to shareholders, particularly small shareholders.

The second aspect to this accountability concern is the perception that virtual AGMs could help boards avoid tough questions in physical meetings. There may also be a lack of transparency from companies relating to questions from shareholders. Management can filter questions, avoid difficult questions and select only favourable ones.¹⁶ Shareholders' questions can also be hidden from each other, hindering shareholder participation and interaction. It becomes more difficult for shareholders to interact with and question management.¹⁷ 'Ensuring that there is sufficient opportunity for shareholders to ask questions and follow them up, or register objections, is one of the most obvious difficulties. Questions may be invited in advance, but a mechanism for follow-up questions is hard to devise, even with the technology options available.'¹⁸

Neither of these accountability concerns are satisfactorily addressed by the Draft Bill.

3.1. Accountability and the Reasonable Opportunity for Shareholders to Participate in Virtual Meetings Under the Draft Bill

The only measure that appears capable of being related to the first accountability concern regarding the inadequacies of virtual meetings is the part of the proposed new section 253Q which would permit virtual only meetings 'provided the technology gives all persons entitled to attend the meeting a reasonable opportunity to participate without being physically present in the same place'.

In relation to this issue, it is significant to note that, to coincide with the commencement of the federal government's Determination that allowed, on a

shareholders who want to see and hear an accountable management and board. ... a proposal presented remotely is far less impactful than one presented "from the floor" at an in-person annual meeting. Unless the virtual process enables it, shareholders won't have the benefit of hearing the "give and take" between the company and the dissidents. Even though most investors have already voted by proxy, less is not more from the perspective of giving investors an annual forum to see and hear from the managers and boards at the companies they own.'

¹⁶ Germany's temporary COVID-19 emergency law has been criticised as unacceptably infringing shareholder rights by giving companies the discretion to decide what to answer or ignore: see Olaf Storbeck, et al, 'Investors fear virtual AGMs will shift the balance of power', *Financial Times*, 12 April 2020.

¹⁷ Tammy Lim, 'Reinvigorating the AGM: Is hybrid the answer?' (2017) 69(11) *Governance Directions* 676; Fontenot, above n 6, 45-6.

¹⁸ Schindlinger, above n 6.

temporary basis, virtual AGM's and other meetings, ASIC published guidelines for investor meetings using virtual technology.¹⁹ The guidelines are not legally enforceable. An overall guiding principle of the ASIC guidelines is that shareholders are to be given an opportunity to participate in the meeting that is equivalent to the one they would have had if attending in person. Guidelines developed in the United States adopt the same principle.²⁰ This principle is not reflected in the Draft Bill however.

While the wording of the proposed new section 253Q adopts the 'reasonable opportunity to participate' wording used in the existing section 249S of the Corporations Act which is applicable to hybrid meetings (on-line meetings held in conjunction with a physical meeting), this existing statutory permission for hybrid meetings is counterbalanced by the option for shareholders to attend the physical part of a hybrid meeting. The Corporation Act's possible sanctioning of any lessening of the governance role of physical AGMs is therefore of less of a concern in that context. To the extent that virtual only meetings do not provide an equivalent form of participation as physical meetings, the replication of this legislative standard for virtual meetings will pose problems for the protection of good governance and shareholders' rights of participation, particularly retail shareholders.

Moreover, the formulation of the 'reasonable opportunity to participate' in the proposed section 253Q appears to inherently involve a lessening of shareholders' rights of participation as compared with physical meetings. This new reasonable opportunity to participate is not required to be equivalent to or even drawn in comparison with the nature of participation available at physical meetings, but is to be reasonable having regard to the fact that participants are not 'physically present in the same place'.

¹⁹ Australian Securities and Investments Commission, 'ASIC guidelines for investor meetings using virtual technology', 6 May 2020.

²⁰ According to ASIC, an equivalent right of participation, having regard to the fundamental elements and purpose of meetings, means that those who participate remotely have the ability to follow the meeting uninterrupted; that the conduct of the meeting should, as far as possible, preserve and promote genuine and effective interaction between shareholders and the board; both remote and in-person attendees should have a reasonable opportunity to ask questions live during the course of the meeting; where a company chooses which questions to answer, the selection process is to be balanced and representative, with transparency about the number and nature of questions asked and not answered; and shareholders entitled to vote on resolutions put at the meeting should have the opportunity to consider responses to questions and debate before doing so, with the ability to vote live during the meeting; *ibid*, '1. Member participation during hybrid and virtual meetings'.

3.2. Accountability, Shareholder Questions and the Draft Bill

The Exposure Draft Explanatory Materials purport to address part of the second accountability concern regarding directors and management avoiding difficult questions in physical meetings. The Bill does this by requiring ‘companies to record in full and provide members’ access to all questions and comments submitted before or during a meeting, that are intended to be covered during the meetings’.²¹ Were this proposal to be enacted as described in the explanatory materials, it would fall short of addressing the accountability concern. For example, the important ability to ask follow-up questions is not addressed. Even where companies permit follow up questions to be submitted online, the dynamics involved in the process of submitting questions online and having them answered will militate against the type of contemporaneous discussion between participants, observable by others, that is characteristic of physical meetings.

However, the Draft Bill falls short even of the description of the proposal in the Exposure Draft Explanatory Materials. The Draft Bill only appears to require questions and comments to be recorded in the minutes of a virtual meeting.²² Meeting minutes only become available after the completion of a meeting and this proposal wholly fails to address the concerns relating to the adequacy of virtual meetings as a forum for accountability.

4. Hybrid Meetings Provide Most of the Benefits of Virtual Meetings Without the Accountability Disadvantage

In considering whether the accountability deficits of virtual only meetings are outweighed by their benefits, it is important to note that the principal advantages of virtual meetings, other than the cost of avoiding a physical meeting, are not exclusive to virtual meetings but are also applicable to hybrid meetings.

4.1. Virtual Meetings and Improved Shareholder Accessibility

The chief benefit attributed to virtual meetings is improved accessibility for shareholders.²³ The basis of the accessibility benefit is the difficulty and cost

²¹ Parliament of the Commonwealth of Australia, Corporations Amendment (Virtual Meetings and Electronic Communications) Bill 2020, Exposure Draft Explanatory Materials, Regulation Impact Statement, [2.55]. Exposure Draft, Items 25, 36;

²² Parliament of the Commonwealth of Australia, Corporations Amendment (Virtual Meetings and Electronic Communications) Bill 2020, Exposure Draft Bill, Items 25, 36.

²³ Fontenot, above n 6, 36. See also Boros, ‘Corporate governance in cyberspace’, *ibid*, 171.

experienced by some investors attending AGMs in person. However, all types of AGMs that offer online participation deliver cost savings to shareholders and remove geographical and physical barriers to attendance. Any increase in attendance at a virtual shareholder meeting would also be obtained with a hybrid shareholder meeting.²⁴

Further, the findings of a study by share registry operator Computershare have been misinterpreted and do not support claims made in the Regulation Impact Statement ('RIS') that virtual meetings held in Australia have increased shareholder attendance at AGMs.²⁵

4.2. No Evidence that Virtual Meetings Improve Shareholder Engagement

Improved accessibility can potentially lead to another benefit – enhanced engagement by shareholders. However, while it is not possible to be definitive in the absence of a detailed comparative analysis of attendance figures for physical and virtual AGMs held in Australia in 2020, there has been no obvious indication of increased shareholder participation in the virtual meetings. In relation to the 23 online AGMs held by Australian listed companies up until the end of May 2020, notwithstanding that protest votes from shareholders were recorded at thirteen of the AGMs,²⁶ there is no evidence that the move to online meetings increased shareholder participation.²⁷

The RIS states:

²⁴ There are also questions as to the efficacy of attempts to increase shareholder attendance at AGMs by improving accessibility: see attached article: Lloyd Freeburn and Ian Ramsay, 'Virtual Shareholder Meetings in Australia', *International Company and Commercial Law Review* (forthcoming, December 2020), [3.3.3].

²⁵ The RIS claims that a study by Computershare 'indicated that shareholder attendance increased by 36 per cent in 2020 compared to 2019': Australian Government, The Treasury, Corporations Amendment (Virtual Meetings and Electronic Communications) Bill 2020, Exposure Draft Explanatory Materials, Regulation Impact Statement, <https://treasury.gov.au/sites/default/files/2020-10/c2020-119106-dem.pdf>, [2.29]. This incorrect interpretation of the Computershare report is repeated: see [2.37], [2.74]. In fact, the Computershare report is ambiguous. The report does not identify how the increase in attendance observed in the 2020 meetings was experienced as between the six hybrid and 19 virtual meetings held in 2020. In addition, the report includes attendees such as 'employees, interested onlookers, regulatory bodies and more', rather than only shareholders. In fact, while overall attendance at the AGMs in 2020 was up, the report states that shareholder attendance was down: Computershare, 'Virtual AGM Report: Insights from online meetings in April and May 2020', http://images.info.computershare.com/Web/CMPTSHR1/%7B6d3e4edc-c243-4d5b-8ae0-b7898bfl1d9ac%7D_VIRTUAL_AGM_SEASON_INSIGHTS_FINAL.pdf, 9.

²⁶ Shareholder support for positions contrary to the position recommended by company management ranged from votes of 5.36% to over 50%. The companies involved were: Santos, Woodside, Oil Search, QBE Insurance, Rio Tinto, WPP Australia NZ, AMP, Invocare, Atlas Alteria, Coca Cola Amatil, Moelis Australia, Freelancer and Appen. The protest votes included protests against the adoption of remuneration reports, the appointment of directors, and climate change issues.

²⁷ Computershare, 'above n 25.

Computershare data indicates that there has been more or about the same engagement at virtual meetings relative to physical meetings. For example, they indicate that the three major ASX 50 companies that held AGMs during April and May 2020 received an average of 33 written questions, which is a lot more questions than normal in a physical meeting.²⁸

In fact, the Computershare study noted that there has been no indication ‘that the shift to online meetings has impacted the number or nature of questions being asked by shareholders’, and that ‘[f]or most meetings four or less questions were asked and for some issuers, no questions were received at all.’²⁹ As the Computershare study notes, the three ASX 50 companies that received an average of 33 written questions were in the atypical situation in which shareholder requisitioned resolutions were put forward at the AGMs. It is not clear whether the number of questions received by these companies at their 2020 AGMs was the same, more or less than could be expected in the same circumstances at a physical meeting.³⁰

One observation in the Australian context that has been made is that a key flag of problems would be if virtual meetings became extremely short as compared with a comparable typically longer physical meeting.³¹ While it is not possible to be definitive, there are examples of short virtual meetings that appear to reflect this concern.³²

These Australian examples also reflect experience in the United States, which does not indicate that virtual meetings have inspired a revival in shareholder participation in AGMs. For example, while the average duration of equivalent physical or hybrid meetings is not known, the average duration of the 860 virtual meetings facilitated by the Broadridge company and held between 1 January and 22 May 2020, was a mere 22 minutes. The brevity of these meetings is more notable in a jurisdiction where shareholder proposals are far more prevalent than in Australia (e.g. 132 of the 860 virtual meetings had one or more shareholder proposals). Reliable attendance figures

²⁸ Australian Government, The Treasury, Corporations Amendment (Virtual Meetings and Electronic Communications) Bill 2020, Exposure Draft Explanatory Materials, Regulation Impact Statement, <https://treasury.gov.au/sites/default/files/2020-10/c2020-119106-dem.pdf>, [2.37].

²⁹ Computershare, above n 25, 7.

³⁰ Nor is it clear whether the meetings at these three companies were virtual or hybrid meetings.

³¹ Fiona Balzer, policy manager of ASA, cited in Liam Walsh and Patrick Durkin, ‘Rule relaxation opens door to virtual AGMs’, *Financial Review*, 5 May 2020.

³² See attached article: Lloyd Freeburn and Ian Ramsay, ‘Virtual Shareholder Meetings in Australia’, *International Company and Commercial Law Review*, (forthcoming, December 2020), [3.5.2] and examples cited.

are not given for these virtual meetings,³³ however the average number of shareholders voting ‘live’ at the meetings was only four,³⁴ and the average number of questions from shareholders was six.³⁵ It might be argued that these statistics are consistent with AGMs that are conducted more as mere compliance exercises than as forums for meaningful dialogue and deliberation and which serve as an important accountability mechanism.

On 6 July 2020, the Council of Institutional Investors, which represents US institutional investors with more than US\$45 trillion under management, co-authored a letter, with several other shareholder representative groups, to the US Securities and Exchange Commission expressing concerns about virtual shareholder meetings held during 2020.³⁶ It is stated in the letter that generally the meetings ‘were a poor substitute for in-person shareholder meetings’, that many shareholders faced obstacles participating in the meetings in a meaningful way, and that the optimal format for future meetings may be hybrid meetings.³⁷

A recent study of virtual shareholder meetings of US companies held during COVID-19 supports these concerns.³⁸ The author examined the transcripts and audio recordings for 94 companies included in the S&P500 that held an in-person or hybrid shareholder meeting in 2019 and a virtual shareholder meeting in 2020. The author found significant differences. The move to virtual meetings shortened the average meeting by 18 percent, decreased by 40 percent the time dedicated to providing a business update, and decreased by 14 percent the average time spent on answering questions. The author states that her findings ‘may suggest that not having visibly present shareholders, and perhaps not observing shareholders’ responses throughout

³³ Average attendance is said to be 59 but this includes both shareholders and guests and is also distorted by the average including multiple log ins due to factors such as browsers being refreshed and attendees temporarily leaving a meeting and then re-joining: Maryellen Andersen, ‘Broadridge Virtual Shareholder Meetings (“VSMs”) Preliminary Statistics’, *Harvard Law School Forum on Corporate Governance*, 3 June 2020.

³⁴ An average distorted by one meeting recording 178 live voters: *ibid.*

³⁵ Again, the average number of questions is distorted by the fact that one meeting recorded 316 questions: *ibid.*

³⁶ Council of Institutional Investors, et al, ‘Virtual and Hybrid Meetings: Concerns from 2020 Proxy Season’, Letter to the Chairman of the US Securities and Exchange Commission, 6 July 2020, https://www.cii.org/files/issues_and_advocacy/correspondence/2020/Virtual%20Meetings%20Letter%20-%20Corrected%20Copy_.pdf.

³⁷ *Ibid.*

³⁸ Miriam Schwartz-Ziv, ‘How Shifting from In-Person to Virtual Shareholder Meetings Affects Shareholders’ Voice’, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3674998. See also Marie Clara Buellingen, ‘Virtual Shareholder Meetings in the U.S.’, *Harvard Law School Forum on Corporate Governance*, 10 October 2019.

the meeting, ultimately leads to less information communicated by the company to the shareholders'.³⁹ The author also identified tactics used by some companies to evade answering shareholder questions at virtual meetings. These tactics included company management incorrectly claiming a lack of additional questions and limiting questions to those related to resolutions to be voted on at the meeting. The conclusion of the author for this part of her research is that the findings indicate that 'it can be challenging for shareholders to communicate their concerns at virtual meetings'.⁴⁰

4.3. Virtual Meetings and Cost Savings for Companies

Because hybrid meetings offer the same potential shareholder attendance and engagement benefits as virtual meetings, the principal benefit that is exclusive to virtual meetings is that they are cheaper for companies in that they do away with the cost of staging a physical meeting. Hybrid meetings on the other hand incur the costs of a physical meeting in addition to the costs of the online format of the meeting.

In relation to cost savings, it is therefore important to distinguish between the costs that are estimated to be delivered by measures proposed such as allowing the electronic execution of documents and voting from the costs directly associated with a physical meeting. It would appear from the analysis in the RIS that significant cost savings would be achieved by allowing electronic delivery of documentation. Moving to virtual only meetings is not necessary to deliver these cost savings.

It follows that the only cost benefit to be set off against the accountability problems associated with virtual only meetings is direct meeting costs. The option of allowing electronic documentation and voting but continuing to require physical meetings (including hybrid meetings) would deliver a significant proportion of the estimated cost savings of making virtual shareholder meetings permanent but would avoid the governance problems associated with virtual only meetings.

5. Conclusion

While there is merit in permitting hybrid shareholder meetings, the reduction in board and management accountability associated with virtual shareholder meetings means

³⁹ Schwartz, *ibid*, 2.

⁴⁰ *Ibid*, 7.

that allowing virtual meetings on a permanent basis should not be permitted at this stage.

The government's Determination allowing virtual meetings expires on 22 March 2021 and therefore covers the period of time (October and November 2020) when most AGMs of listed companies are held. This means there would be extensive experience with virtual shareholder meetings by the time the Determination expires that would inform a detailed analysis of virtual shareholder meetings. The suggested analysis would be of particular value if it obtained, and evaluated, not only data on shareholder attendance and voting at virtual AGMs but also the views of shareholders, directors, company secretaries and others with experience of virtual AGMs. This would allow a much more informed decision to be made regarding the merits of virtual shareholder meetings.

Virtual Shareholder Meetings in Australia

Lloyd Freeburn and Ian Ramsay*

Abstract: The COVID-19 pandemic has led to some countries, including Australia, enacting temporary changes to their corporate laws to allow virtual meetings of shareholders to be conducted. The purpose of this article is to identify and evaluate the corporate governance arguments arising with a move to virtual meetings. These arguments include whether virtual meetings increase shareholder accessibility and engagement or reduce the accountability of directors and management.

6. Introduction

Australian public companies are required to hold an Annual General Meeting ('AGM').⁴¹ Notwithstanding this, the role of the AGM is being questioned.⁴² One longstanding issue is whether physical AGMs need to be held at all.⁴³ Instead, some argue, modern technology makes it possible for a virtual AGM to be held, where no shareholders or company representatives need meet by gathering together in one place at all, but instead can meet online. This questioning of the role of AGMs has been reinvigorated by the impact of the COVID-19 crisis.

The risk of infection arising from the COVID-19 pandemic has created an obstacle to companies holding their AGMs. In 2020, almost over-night, convening large, in-person meetings of shareholders, including at-risk elderly shareholders, became

* Lloyd Freeburn is a Research Fellow, Centre for Corporate Law, Melbourne Law School, University of Melbourne. Ian Ramsay is the Harold Ford Professor of Commercial Law, Redmond Barry Distinguished Professor and Director of the Centre for Corporate Law, Melbourne Law School, University of Melbourne.

⁴¹ See Part 2.2 of this article.

⁴² In particular, in 2011, the Australian Government commissioned the Corporations and Markets Advisory Committee ('CAMAC') to inform it on, amongst other things, 'the future of the annual general meeting in Australia, including how documents and meeting forms should change to meet the needs of shareholders in the future; the risks and opportunities presented by advancements in technology, in the context of maintaining the ongoing relevance and efficacy of the AGM; the challenges posed to the structure of the AGM by globalisation, including potential increases in international share ownership and dual-listing.': Australian Government, Corporations and Markets Advisory Committee ('CAMAC'), 'The AGM and Shareholder Engagement Discussion Paper', September 2012, 2. See also: Companies and Securities Advisory Committee, 'Shareholder Participation in the Modern Listed Company: Final Report', June 2000.

⁴³ Computershare, 'Solving the problem of the empty room', 2020, <https://www.computershare.com/au/article-the-problem-of-the-empty-room>: 'The virtual AGM debate has raged for years'.

impossible. Accordingly, temporary regulatory and practice changes were introduced by the Australian Securities and Investments Commission ('ASIC') and the federal government during the first half of 2020 to assist companies deal with the COVID-19-related disruptions, including by dispensing with the need to hold physical meetings. This has led to renewed calls for a debate about the future of AGMs, with the temporary regulatory changes being claimed to:

highlight the need for a wholesale review of outdated Corporations Act requirements post the COVID-19 period. The capacity for technology to improve accountability through visibility and accessibility, and to improve efficiency and manage costs at the same time has been demonstrated across the economy.⁴⁴

Others have similarly identified a need to 'modernise' the Corporations Act 2001 (Cth) ('Corporations Act') to facilitate virtual meetings.⁴⁵

In times of crisis such as the current COVID-19 experience, there is inadequate time for lengthy policy debates. It follows that the introduction of temporary measures in 2020 to facilitate AGMs when physical meetings are not reasonably possible can be rationally justified in the absence of substantial policy deliberation.⁴⁶ Nevertheless, for virtual AGMs to be allowed as an on-going measure in Australia, it is necessary to reflect on the corporate governance implications of a move to dispense with physical meetings in favour of virtual AGMs to clearly identify the issues at stake.

One issue that arises from these calls to permit virtual AGMs is that the right to participate in general shareholder meetings is considered to be a fundamental shareholder right. Indeed, in most jurisdictions around the world, shareholders have a right to attend the AGMs of companies in person.⁴⁷ Accordingly, it becomes

⁴⁴ Australian Institute of Company Directors' CEO and managing director Angus Armour, quoted in Australian Institute of Company Directors, 'AICD welcomes announcement from Treasurer to allow fully virtual AGMs', Media Release, 6 May 2020. See also Andrew Lumsden, 'COVID-19 Virtual member meetings', Australian Institute of Company Directors, 12 June 2020.

⁴⁵ Eli Greenblat, 'Call to make virtual AGMs a regular option', *The Australian*, 27 April 2020; Joseph Muraca, Will Heath, and Miriam Kleiner, 'Shareholder meetings and COVID-19: unhappy bedfellows', King & Wood Mallesons, 13 March 2020; Flood and Mooney, 'Coronavirus casts doubt on future of AGMs', *Financial Times*, 11 June 2020.

⁴⁶ See Aaron Bertinetti, 'Immediate Glass Lewis Guidelines Update on Virtual-Only Meetings Due to COVID-19 (Coronavirus)', 19 March 2020, <https://www.glasslewis.com/immediate-glass-lewis-guidelines-update-on-virtual-only-meetings-due-to-covid-19-coronavirus/>; 'We do not believe discouraging virtual-only meetings during this time serves the interests of shareholders or companies'.

⁴⁷ Dirk A Zetzsche, et al, 'COVID-19 Crisis and Company Law - Towards Virtual Shareholder Meetings', University of Luxembourg, Faculty of Law, Economics and Finance, Law Working Paper Series, Paper no. 2020-007, 17 April 2020, 12.

important to consider the corporate governance implications that arise if no physical meeting is required to be held at all and AGMs are virtual. In particular, does the requirement to hold physical meetings perform a governance function that is not replicated in virtual meetings? If so, are the advantages of virtual meetings sufficient to compensate for the loss of this governance function of physical AGMs?

The purpose of this article is to identify and analyse the corporate governance issues arising with a move to virtual meetings and to consider whether the governance functions of the AGM can be fully achieved with virtual meetings. On the basis of this analysis, the authors endorse the use of hybrid AGMs in which online opportunities are extended to shareholders to participate in meetings in conjunction with a physical meeting. Beyond this, there is enough substance in the issues identified in this article for caution to be justified. In particular, it would be important to review the experience of virtual AGMs held as part of the government's response to COVID-19 before making the currently temporary changes which allow virtual meetings permanent.

The issues discussed in this article are particularly relevant to Australia given that Australian shareholders have more voting rights than shareholders in many other countries. For example, shareholders of Australian public companies have greater rights under the Corporations Act, when compared to shareholders of companies incorporated in the US, to call meetings of shareholders, remove directors, disapprove of transactions whereby directors receive financial benefits from the corporation, and disapprove of certain share capital transactions (such as reductions in share capital).⁴⁸ It is important to know if these rights are as effective when exercised in virtual shareholder meetings as they are when exercised in physical shareholder meetings.

It is to be noted that the main focus of the article is on AGMs. Nevertheless, the same issues are relevant to other meetings companies hold. Further, while the role of AGMs may have relevance beyond shareholders, to include other stakeholders in corporations such as employees, customers, suppliers and communities,⁴⁹ the focus here is on the governance implications of AGMs in the relationship between companies and shareholders.

⁴⁸ Robert Austin and Ian Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law* (online edition, current to February 2020) [1.390.9].

⁴⁹ Flood and Mooney, above n 45.

The next part of the article discusses the background and recent developments relating to virtual AGMs. There is then an evaluation of the advantages and disadvantages of virtual AGMs.

7. Background and Recent Developments

AGMs were originally developed when a physical meeting at a designated location was the only means for shareholders to interact and discuss issues relevant to their company. Developments since then have led to questions about the role of AGMs.⁵⁰ These developments include the increased size of many modern public companies, the growth in participation amongst the community in share ownership in listed public companies together with a growth in institutional share ownership, the availability of methods of electronic communication, the introduction of continuous disclosure requirements, and the utilisation of other avenues for shareholder interaction with companies. For example, listed public companies now give briefings to institutional shareholders, they directly communicate with institutional investors between AGMs, and institutional investors vote by proxy in advance of AGMs. All of this means that the AGM is now only one means for companies to inform and engage with shareholders. In addition, attendance at AGMs is often limited, predominantly consisting of retail shareholders. Average rates of attendance are also declining, adding to the debate about the utility of AGMs.⁵¹ In fact, it has been argued that traditional AGMs are outmoded and ineffectual.⁵²

7.1. Terminology: ‘Physical’, ‘Webcast’, ‘Hybrid’ and ‘Virtual’ Meetings

In considering the implications of a change in Australian company law to allow virtual AGMs, it is necessary to define the different types of meeting that are possible, and which are referred to in the current debate. Terms used here have the following meanings.

⁵⁰ These questions include whether the requirement to hold AGMs should be abolished and whether greater flexibility in the format of AGMs should be introduced: Australian Government, Corporations and Markets Advisory Committee, ‘The AGM and Shareholder Engagement Discussion Paper’, September 2012, 103.

⁵¹ Australian Government, Corporations and Markets Advisory Committee, ‘The AGM and Shareholder Engagement Discussion Paper’, September 2012, 14-15.

⁵² Tammy Lim, ‘Reinvigorating the AGM: Is hybrid the answer?’ (2017) 69(11) *Governance Directions* 676.

A ‘physical’ AGM takes place where company representatives and shareholders gather in a location. Remote attendance is not provided for.

A ‘webcast’ AGM involves a physical meeting with the addition of the broadcasting of the proceedings online or by telecommunications. Participants taking part from locations away from the physical meeting may not have the same opportunities of participation from their remote location as those in attendance (e.g. voting, asking questions) but are able to see and hear the meeting as it takes place.

A ‘hybrid’ AGM is where a meeting is held in a physical location with the addition of online facilities that allow participation remotely. Participants who are not at the physical meeting can ask questions and vote using electronic communication methods.

A ‘virtual’ AGM is one that is conducted solely online. Physical or in-person attendance is not permitted. Participants are afforded opportunities to ask questions and to vote.⁵³ The meeting is conducted solely through electronic presentations, discussions and voting procedures, according to an agenda published and operated electronically.⁵⁴

With this categorisation in mind, it becomes clear that there are two substantive distinctions between these types of AGM. The first distinction is between a physical meeting and meetings that allow for online participation. This raises the issue of the advantages of permitting some form of online participation for shareholders in AGMs.

The second distinction is between virtual AGMs and the other three types of AGM, all of which involve a physical meeting. This becomes significant in weighing the relative merits of the different options. In particular, the principal advantages of virtual meetings, other than the cost of avoiding a physical meeting, are not exclusive to virtual meetings. When debating the merits of virtual meetings, it is necessary therefore to guard against conflating the advantages of online meetings with virtual

⁵³ See Marie Clara Buellingen, ‘Virtual Shareholder Meetings in the U.S.’, *Harvard Law School Forum on Corporate Governance*, 10 October 2019; Australian Government, Corporations and Markets Advisory Committee, ‘The AGM and Shareholder Engagement Discussion Paper’, September 2012, 111.

⁵⁴ Australian Government, Corporations and Markets Advisory Committee, above n 51, 111.

meetings.⁵⁵ Other than cost, the advantages of online meetings are largely equally applicable to hybrid AGMs as they are to virtual meetings. Conversely, any disadvantage associated with not holding a physical meeting is exclusively a characteristic of virtual meetings. Put this way, a move to allow virtual meetings reduces to an assessment of whether the benefits of doing so outweigh those benefits of physical AGMs that are not also delivered by virtual AGMs. The role of physical AGMs in corporate governance then becomes essential to understand.

Before considering online participation in AGMs and the governance implications of providing for virtual AGMs, it is necessary to outline the existing legal framework attaching to public company AGMs in Australia.

7.2. Existing Legal Framework

Each public company must hold an AGM at least once in each calendar year, and within five months after the end of its financial year.⁵⁶ The AGM process for listed public companies is regulated through:

- the Corporations Act and regulations;
- the ASX Listing Rules;⁵⁷
- the ASX Corporate Governance Principles and Recommendations;⁵⁸
- the company constitution;⁵⁹ and

⁵⁵ See for example: Lisa A. Fontenot, 'Public Company Virtual-Only Annual Meetings' (2017–2018) 73 *The Business Lawyer* 35, 42-3; Elizabeth Boros, 'Corporate governance in cyberspace: who stands to gain what from the virtual meeting?' (2003) 3(1) *Journal of Corporate Law Studies* 149, 171: the greatest advantage of virtual meetings is accessibility. In some cases, it is not entirely clear whether hybrid or virtual meetings are being considered. See for example: Huasheng Gao, Jun Huang, and Tianshu Zhang, 'Can online annual general meetings increase shareholders' participation in corporate governance?' (2020) *Financial Management* 1, note 2, which contains a definition that does not distinguish between hybrid and virtual meetings - 'Throughout this article, online AGMs refer to the AGMs in which shareholders can attend meetings and cast a vote online (not just a webstream).'

⁵⁶ Corporations Act, s 250N. ASIC has the power to grant an extension of time: s 250P.

⁵⁷ The Australian Securities Exchange, 'ASX Listing Rules', <https://www.asx.com.au/regulation/rules/asx-listing-rules.htm>, regulate meetings for listed entities, including the convening of and voting at meetings, and voting exclusions: ASX Listing Rules, Chapter 14. The Listing Rules also impose various voting requirements (see, for example, ASX Listing Rules 6.8–6.9), and require disclosure to the ASX of the outcome of each resolution put to a meeting of shareholders: ASX Listing Rule 3.13.2.

⁵⁸ Principle 6 of the ASX Corporate Governance Council Principles and Recommendations refers to the use of company meetings as a means to promote effective communication with shareholders: ASX Corporate Governance Council, 'Corporate Governance Principles and Recommendations', 4th edn, February 2019. Listed companies must provide a statement in their annual report disclosing on an 'if not, why not' basis the extent to which these principles and recommendations have been followed: ASX Listing Rule 4.10.3 and ASX Listing Rules Guidance Note 9.

⁵⁹ Company constitutions may include additional provisions that regulate the voting process at AGMs.

- general law principles.⁶⁰

In addition, various industry bodies provide guidance on the procedures for conducting an AGM.⁶¹

Most relevant in the current discussion is s 249S of the Corporations Act. That section provides that: ‘A company may hold a meeting of its members at 2 or more venues using any technology that gives the members as a whole a reasonable opportunity to participate.’⁶²

Two points arise from s 249S. First, the language used by the provision appears to contemplate a meeting taking place at more than one physical venue where shareholders are in attendance. The technology involved is to be used to link those venues and holding AGMs only online (i.e., a virtual meeting) appears beyond the contemplation of the provision.⁶³

Second, it is important to understand what is meant by a ‘reasonable opportunity to participate’. The requirements of ‘reasonable opportunity’ are not defined and whether a ‘reasonable opportunity to participate’ has been given will depend upon the circumstances of the particular meeting. Moreover, the requirement does not entail that each individual member is required to have an opportunity to participate. The provision does not state that each member attending the meeting must have a reasonable opportunity to participate. The reference is to members “as a whole” having a reasonable opportunity to participate. What is a reasonable opportunity will depend upon the circumstances of the particular meeting as stated above and the legal rights of shareholders. For example, the provision would not require every member

⁶⁰ Common law principles largely regulate various procedural matters concerning an AGM, in particular, the powers and duties of the chair in conducting the meeting. For discussion of these principles, see Austin and Ramsay, above n 48, [7.510.6].

⁶¹ See for example Australian Institute of Company Directors, *Annual General Meetings: A Guide for Directors*, Second Edn, 2013; Governance Institute of Australia, *Effective AGMs*, 2014.

⁶² Corporations Act. A note to s 249S cross refers to s 1322 for the consequences of a member not being given a reasonable opportunity to participate. Consequences include invalidation of a meeting, subject to a declaration of the court. The general principle is that the court can ensure that procedural irregularities will not invalidate proceedings at the AGM, unless the court considers that substantial injustice has occurred: s 1322. See *Chalet Nominees (1999) Pty Ltd v Murray* [2012] WASC 147 at [17] ff; *Woolworths Limited v GetUp Limited* [2012] FCA 726 at [18]ff; *Northwest Capital Management v Westate Capital Ltd* [2012] WASC 121; *Scullion v Family Planning Assn of Queensland* (1985) 10 ACLR 249; *Talbot v NRMA Holdings Ltd* (1996) 139 ALR 755; *Cordiant Communications (Australia) Pty Ltd v Communications Group Holdings Pty Ltd* [2005] NSWSC 1005 at [87].

⁶³ CAMAC, above n 42, at 14.

attending an AGM of a large listed company to be allowed the opportunity to ask a question. However, where voting occurs at a meeting then, to satisfy the provision, every shareholder who has a legal right to vote must have the opportunity to vote and, in relation to communication at a meeting, it has been said that '[f]or most companies, a reasonable opportunity to participate would mean that each member is able to communicate with the chairman and be heard by other members attending the meeting, including those at the other venues.'⁶⁴

7.3. COVID-19 Temporary Regulatory Changes

Temporary changes to this regulatory framework for public company AGMs to enable companies to deal with the disruptions to AGMs wrought by the COVID-19 pandemic were introduced in two stages.

First, in March 2020, recognising the difficulties posed by the COVID-19 crisis, ASIC announced that it would not take action against companies that were due to hold AGMs by 31 May 2020, and which instead held virtual AGMs, notwithstanding the operation of s 249S of the Corporations Act.⁶⁵ ASIC's position was informed by its view that hybrid AGMs are permitted under the Corporations Act,⁶⁶ but there is doubt as to whether the Corporations Act permits virtual AGMs and there may be doubt as to the validity of resolutions passed at a virtual AGM.⁶⁷

Importantly, ASIC's 'no action' position was conditional on companies utilising technology that allows the companies' members as a whole a reasonable opportunity to participate.⁶⁸ Subsequently expanding on this point, ASIC's view is that virtual technology is a valuable tool for addressing the challenges of COVID-19 and to

⁶⁴ Explanatory Memorandum to the *Company Law Review Bill 1997* (Cth) at [10.43]-[10.44]. Where meetings are held in more than one place, companies need to have procedures in place to count members' votes from all venues and persons at the meeting must be able to communicate with the chairman and follow the proceedings.

⁶⁵ Australian Securities and Investments Commission, '20-068MR Guidelines for meeting upcoming AGM and financial reporting requirements', 20 March 2020.

⁶⁶ Where permitted under the company's constitution. See also Minter Ellison, 'Online participation in shareholder meetings – how could it work?', Corporate HQ Advisory Newsletter, September 2011, who raise the application of s 33B of the Acts Interpretation Act 1901 (Cth), which permits participation in meetings by telephone or closed-circuit television or 'any other means of communication'.

⁶⁷ ASIC advises entities that are concerned about the legality of virtual meetings to seek advice on s 1322 of the Corporations Act. Some meeting irregularities are not invalidated unless declared so by the court. Applications may be made to the court to address some irregularities. The questionable validity of online only meetings is also a concern in other jurisdictions: Attracta Mooney, 'Companies urged to hold virtual AGMs to give shareholders a say', *Financial Times*, 20 April 2020, referring to the position in the United Kingdom.

⁶⁸ ASIC, '20-068MR Guidelines', above n 65.

ensure continued investor engagement in meetings.⁶⁹ Referring to ss 249S and 252Q of the Corporations Act and paragraph 5(1)(a) of the Corporations (Coronavirus Economic Response) Determination (No. 1) 2020 made by the Federal Treasurer,⁷⁰ ASIC noted that it is important that hybrid and virtual meetings are facilitated and conducted in a way that provides a reasonable opportunity for members to participate by allowing questions to be asked and votes to be cast. As a matter of overall guiding principle, the opportunity to participate is to be equivalent to the one that investors would have had if attending in person. Meetings held where a reasonable opportunity to participate is not provided risk breaching ss 249R or 252P of the Corporations Act or the terms of the Determination.

Where adequate technology is not available, ASIC recommends that companies defer their AGMs, even if this may cause significant cost and inconvenience: holding an AGM where few members can participate either in person or online might not comply with the Corporations Act and produce an unsatisfactory outcome'.⁷¹

The second part of the Australian government's COVID-19 inspired changes to regulations governing company AGMs occurred on 5 May 2020. Federal Treasurer, the Hon Josh Frydenberg MP, announced a six-month long temporary reform to the Corporations Act effective from 6 May 2020, allowing companies to hold virtual AGMs. This was done by the Corporations (Coronavirus Economic Response) Determination (No. 1) 2020. The six-month reform was later extended until 22 March 2021 by the Corporations (Coronavirus Economic Response) Determination (No. 3) 2020.⁷² In addition to virtual AGMs, the Determination allows any other meeting to be held virtually when the Corporations Act, the Corporations Regulations and certain Corporations Act Rules require or permit a meeting to be held or regulate the giving of notice of a meeting or the conduct of a meeting.⁷³ The Determination can therefore

⁶⁹ Australian Securities and Investments Commission, 'ASIC guidelines for investor meetings using virtual technology', 6 May 2020.

⁷⁰ See nn 32-35 below and accompanying text.

⁷¹ ASIC, '20-068MR Guidelines', above n 65.

⁷² In the remainder of the article, for convenience, the two Determinations are collectively referred to as the 'Determination'.

⁷³ The Determination also allows virtual meetings where the Corporations Act, the Corporations Regulations and certain Corporations Act Rules give effect to, or provide a means of enforcing, a provision in the constitution of a company or registered scheme, or in any other arrangement, that requires or permits a meeting to be held, or regulates giving notice of a meeting or the conduct of a meeting.

potentially apply to meetings of shareholders other than AGMs, meetings of creditors and meetings of directors.

The temporary modifications to the Corporations Act were made by the Determination.⁷⁴ The Determination implemented modifications to facilitate the holding of meetings including AGMs by virtual technology. The Determination deems persons participating by virtual technology to be present at the meeting, confirms the use of virtual technology to provide the reasonable opportunity to speak at meetings, and allows notices of meetings and other meeting information to be provided in an electronic communication.⁷⁵

The Determination imposes requirements on companies that want to use virtual technology to hold meetings. First, the notice of meeting must include information about how those entitled to attend can participate in the meeting (including how they can participate in a vote taken at the meeting, and speak at the meeting, to the extent they are entitled to do so). Second, the technology that is used must give all persons entitled to attend a reasonable opportunity to participate without being physically present in the same place. Third, a vote taken at the meeting must be taken on a poll, and not on a show of hands, by using one or more technologies to give each person entitled to vote the opportunity to participate in the vote in real time and, where practicable, by recording their vote in advance of the meeting.

Australia's COVID-19 AGM measures are not unique. Other jurisdictions have made similar temporary accommodations.⁷⁶

⁷⁴ The Determination was made pursuant to the Treasurer's emergency powers under s 1362A of the Corporations Act, a special power introduced in March 2020 by the Coronavirus Economic Response Package Omnibus Act 2020 (Cth).

⁷⁵ See also: Explanatory Statement, 'Corporations (Coronavirus Economic Response) Determination (No. 3) 2020'.

⁷⁶ Dirk A Zetzsche, et al, above n 47, Table 1, which lists 16 countries that have adopted crisis legislation: Australia, Austria, Belgium, Canada (some provinces), Denmark, Germany, Hong Kong, India, Italy, Luxembourg, Malaysia, Portugal, Singapore, Spain, Switzerland, Norway and the United States. For specific information on some of these jurisdictions, see re: **Delaware, United States:** Andrew Freedman, et al, 'Delaware Emergency Order: Remote Shareholder Communication Meetings', Harvard Law School Forum on Corporate Governance, 18 April 2020; **California, United States:** Jones Day, 'California Issues Executive Order Facilitating Virtual Shareholder Meetings', April 2020; **Germany:** Mooney, above n 67; Sullivan & Cromwell LLP, 'Germany Introduces Online Only Shareholder Meetings in Response to COVID-19', 25 March 2020; **Malaysia:** Securities Commission Malaysia, 'SC issues guidance on virtual meetings for listed issuers', 18 April 2020; **Canada:** Lucie Kroumova, 'Canada: Electronic Corporate Filings and Virtual Shareholder Meetings for Ontario Corporations', Dickinson Wright PLLC, 9 June 2020; Mitchell Smith, et al, 'Virtual shareholder meetings and COVID-19 – a primer (Canada)', DLA Piper, 19 March 2020. The **United Kingdom** has enacted temporary COVID-19 measures for AGMs: see Corporate Insolvency and

7.4. Virtual AGMs - Prevalence

Virtual AGMs in Other Jurisdictions

Prior to the COVID-19 crisis, some jurisdictions made provision for companies to hold virtual meetings. Virtual meetings are permitted in Canada, Denmark, Hong Kong, Ireland, Lichtenstein, Luxembourg, New Zealand, Norway, Portugal, South Africa, Spain, the United Kingdom, and the United States.⁷⁷ While virtual meetings are permitted in all of these jurisdictions, that does not mean that virtual meetings are commonly held, at least in normal circumstances unaffected by the COVID-19 crisis.

Virtual meetings have been relatively commonplace in the United States and held by companies such as Microsoft and Ford. The first virtual AGM was held in the United States in 2001.⁷⁸ Subsequent technology failures stifled demand for virtual meetings.⁷⁹ Whilst virtual meetings are popular with recently listed and technology companies and their incidence is increasing in the United States, the number of virtual meetings represents only a small minority of total annual shareholder meetings.⁸⁰ Virtual meetings comprised only 7.7 percent of annual meetings held by United States Russell 3000 companies from July 2018 to June 2019, albeit that this represents a tripling of the number of virtual meetings since 2014.⁸¹

Hybrid meetings on the other hand only account for about 1 percent of meetings in the United States and the rate of growth of hybrid meetings is slow.⁸² Significantly, prior to 2020, the pace of adoption of virtual meetings in the United States had also slowed:

This may suggest that companies value in-person interaction to communicate their vision for the company and the company's progress. Engagement on a wider range of issues including social and environmental concerns across sectors is growing and many companies already have an ongoing dialog with a wider range of their

Governance Act 2020 (UK). On **Japan**, where companies are required to have a physical AGM, see Jada Nagumo, 'Coronavirus pushes corporate Japan into a "virtual" AGM season', *Nikkei Asian Review*, 3 June 2020. On developments in **Nigeria**, see: AO2 Law, 'Nigeria: NSE's guidance on Virtual Meetings – What Listed Companies Should Know', 18 May 2020 (where virtual meetings appear to be permitted).

⁷⁷ Zetzsche, et al, above n 47, 12-13; Tony Featherstone, 'Hybrid AGMs welcome, but the future is virtual', Australian Institute of Company Directors, 17 November 2017.

⁷⁸ Featherstone, *ibid*. This virtual AGM was held by technology consultant Inforte Corp: Ben Power, 'Two Places at Once', *Listed@ASX*, Winter 2018, 39.

⁷⁹ Power, 'ibid', 39. For an analysis of online meetings in the United States (up to 2010), see: Lisa M Fairfax, 'Virtual Shareholder Meetings Reconsidered' (2010) 40 *Seton Hall Law Review* 1367.

⁸⁰ Fontenot, above n 55; Buellingen, above n 53.

⁸¹ Fontenot, *ibid*.

⁸² Fontenot, *ibid*.

shareholder base over the course of the year. As such virtual meetings may provide an alternative to physical meetings for a subset of companies. At present, they appear unlikely to become the norm.⁸³

Outside the United States, there had not been a great uptake in the utilisation of virtual meetings prior to the onset of COVID-19.⁸⁴ Companies across Europe have typically held traditional, in-person meetings.⁸⁵ Jimmy Choo was the first UK company to hold a virtual AGM, in 2016, but virtual meetings remained uncommon in the UK, in the rest of Europe,⁸⁶ and in the Asia-Pacific.⁸⁷ Indeed, in the UK, when some companies recently sought to amend their articles of association to provide for virtual AGMs, these changes were voted down when it was thought that meetings would become fully virtual.⁸⁸

The advent of the COVID-19 crisis has dramatically altered the landscape. International Shareholder Services ('ISS') estimates that the total number of virtual AGMs was only 286 worldwide for all of 2019, as compared with 2,240 planned virtual AGMs as at 22 April 2020.⁸⁹ A significant increase in the number of virtual meetings was experienced in the United States due to coronavirus restrictions on physical meetings.⁹⁰ Broadridge, an investor communications company, is reported to have organised 326 virtual meetings in the United States last year, with the number to quadruple in 2020.⁹¹

⁸³ Buellingen, above n 53.

⁸⁴ Oliver Bampffield, 'Chartered secretary: Global AGM trends in 2018' (2018) 70(7) *Governance Directions* 379. The first virtual meeting was not held in South Africa until 31 March 2020, as a consequence of the COVID-19 pandemic: Phillipa Larkin, 'JSA launches virtual AGMs – historic first for SA', IOL, 31 March 2020. See also Sarah Coenraad, 'Virtual AGMs in the Wake of COVID-19', Werksmans Attorneys, 19 June 2020, <https://www.werksmans.com/legal-updates-and-opinions/virtual-agms-in-the-wake-of-covid-19/>. The virtual format in South Africa is criticised: see Tracey Davies, 'Virtual AGMs: a nice idea but ...', *BL Financial Mail*, 28 May 2020, <https://www.businesslive.co.za/fm/opinion/on-my-mind/2020-05-28-tracey-davies-virtual-agms-a-nice-idea-but-/>.

⁸⁵ Olaf Storbeck, et al, 'Investors fear virtual AGMs will shift the balance of power', *Financial Times*, 12 April 2020.

⁸⁶ Power, 'above n 78, 39.

⁸⁷ Dottie Schindlinger, 'Virtual Annual Shareholder Meetings: Will the 2020 Proxy Season Lead to Watershed Adoption?', *Diligent Insights*, 22 May 2020.

⁸⁸ Bampffield, above n 84, 381.

⁸⁹ 'Online annual meetings may favour managers over shareholders', *The Economist*, 2 May 2020.

⁹⁰ Maryellen Andersen, 'Broadridge Virtual Shareholder Meetings ("VSMs") Preliminary Statistics', *Harvard Law School Forum on Corporate Governance*, 3 June 2020: Between 1 January and 22 May 2020, Broadridge hosted 860 VSMs. In comparison, between 1 January and 22 May 2019, Broadridge hosted 125 VSMs. In the four days between 26 – 29 May 2020, another 500 VSMs were held.

⁹¹ Storbeck, et al, 'above n 85.

Virtual AGMs in Australia

In Australia, virtual meetings have been under consideration since at least 1999.⁹² Despite this and the advantages contended for online meeting technologies, the first hybrid AGM for an ASX 200 company incorporated in Australia (where shareholders could vote and ask questions remotely through online platforms) was not held until 2017.⁹³

Following the introduction of the temporary regulatory changes announced by ASIC, the first virtual AGM was that of Santos Ltd on 3 April 2020 – votes were sent in by proxy before the meeting and questions could be emailed in advance or submitted real-time online.⁹⁴ Subsequent to the Santos Ltd AGM, a further 23 online meetings were held by the end of May 2020.⁹⁵ Some of these meetings were hybrid meetings - shareholders being banned from attending but the board physically meeting. Two other companies held meetings in which shareholders were strongly discouraged from attending but not ‘banned’ from doing so.⁹⁶

7.5. Best Practice Guidelines for Online Meetings

To coincide with the commencement of the federal government’s Determination that facilitated virtual AGM’s and other meetings, ASIC published guidelines for investor meetings using virtual technology.⁹⁷ ASIC’s guidelines cover both hybrid and virtual meetings and include four numbered guidelines, which are:

1. Member participation during hybrid and virtual meetings;
2. Voting in a hybrid or virtual meeting;
3. Content of the notice-of-meeting; and
4. Technical problems during a hybrid or virtual meeting.

An overall guiding principle of the ASIC guidelines is that shareholders are to be given an opportunity to participate in the meeting that is equivalent to the one they

⁹² See: The Company Law Review Steering Group, ‘Modern Company Law for a Competitive Economy: Company General Meetings and Shareholder Communication’ (URN 99/1144, DTI, October 1999, [30].

⁹³ Featherstone, above n 77.

⁹⁴ See Santos Ltd, ‘Santos COVID-19 response and business update’, ASX Announcement, 23 March 2020. See also Storbeck, et al, above n 85.

⁹⁵ See *Mayne Report*, ‘How AGMs were handled in 2020 during corona virus’, 4 June 2020, <https://www.maynereport.com/articles/2020/04/03-1456-6800.html>.

⁹⁶ Oil Search in Sydney and Rio Tinto in Brisbane: *ibid*.

⁹⁷ ASIC, ‘ASIC guidelines for investor meetings using virtual technology’, above n 69.

would have had if attending in person. This guiding principle forms the substance of the first guideline.

According to ASIC, an equivalent right of participation, having regard to the fundamental elements and purpose of meetings, means that those who participate remotely have the ability to follow the meeting uninterrupted; that the conduct of the meeting should, as far as possible, preserve and promote genuine and effective interaction between shareholders and the board; both remote and in-person attendees should have a reasonable opportunity to ask questions live during the course of the meeting; where a company chooses which questions to answer, the selection process is to be balanced and representative, with transparency about the number and nature of questions asked and not answered; and shareholders entitled to vote on resolutions put at the meeting should have the opportunity to consider responses to questions and debate before doing so, with the ability to vote live during the meeting.⁹⁸

Also according to ASIC, voting at virtual or hybrid meetings should be by poll rather than by a show of hands, with online voting to be available as a matter of convenience before the meeting.⁹⁹ The notice-of-meeting is to include clear explanations of how to use the technology employed.¹⁰⁰ Because of the risk entailed with the use of technology, companies are encouraged by the guidelines to plan ahead, consider measures such as rehearsals, back-up solutions and plans, and adjourn meetings where technical issues mean that a number of members are unable to reasonably participate.¹⁰¹

Other guidelines have also been published, both in Australia and in other jurisdictions.¹⁰² Investor participation is a key principle of the US Best Practices

⁹⁸ Ibid, '1. Member participation during hybrid and virtual meetings'.

⁹⁹ Ibid, '2. Voting in a hybrid or virtual meeting'.

¹⁰⁰ Ibid, '3. Content of notice-of-meeting'.

¹⁰¹ Ibid, '4. Technical problems during a hybrid or virtual meeting'.

¹⁰² See: Best Practices Committee for Shareowner Participation in Virtual Annual Meetings, 'Principles and Best Practices for Virtual Annual Shareowner Meetings', 2018, <https://www.broadridge.com/assets/pdf/broadridge-vasm-guide.pdf>; Computershare, 'Virtual AGM Handbook', <https://www.computershare.com/au/Pages/Virtual-AGM-Handbook.aspx>; Interfaith Center on Corporate Responsibility and the Shareholder Rights Group, 'Joint Statement on Shareholder Participation and Virtual Annual Meetings During the Coronavirus Crisis', 24 March 2020, <https://www.iccr.org/joint-statement-shareholder-participation-and-virtual-annual-meetings-during-coronavirus-crisis>; Steven M Haas and Charles L Brewer, 'Virtual-only shareholder meetings: A practical guide', Ethical Boardroom, <https://ethicalboardroom.com/virtual-only-shareholder-meetings-a-practical-guide/>; Governance Institute of Australia, Australasian Investor Relations Association and Law Council of Australia, 'Guidance: Holding a virtual AGM', September 2020, <https://www.aira.org.au/Public/Tools-Resources/Best-Practice-Guidelines/Guidance---Holding-virtual->

Committee for Shareowner Participation in Virtual Annual Meetings best practice principles which predate and are more detailed than the ASIC guidelines but contain the same fundamental principle as the ASIC guidelines: ‘a virtual option, if used, should facilitate the opportunity for remote attendees to participate in the meeting to the same degree as in-person attendees’.¹⁰³ Similarly, Glass Lewis’s proxy voting guidelines require ‘robust disclosure in a company’s proxy statement which assures shareholders that they will be afforded the same rights and opportunities to participate as they would at an in-person meeting.’¹⁰⁴

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 recognized 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.¹⁰⁵

Perhaps illustrating the greater prevalence of shareholder proposals in the United States, the Best Practices Committee for Shareowner Participation in Virtual Annual Meetings principles also specifically address allowing shareholder proponents to present their proposals on a ‘virtual basis’.¹⁰⁶ These principles also state that: ‘There should be rules that promote both the reality and the perception of scrupulous fairness during the voting and question and answer period when there is a virtual component to the meeting.’¹⁰⁷

[agms/Public/Resources/Holding-Virtual_AGMs.aspx?hkey=cde5b324-a81c-42a4-a80f-2ff0f26de9d1](https://www.australiashareholders.com.au/voting-engagement-guidelines). While most of the guidelines are directed at companies, the Australian Shareholders’ Association has published a guide to assist shareholders participate in online meeting: Australian Shareholders’ Association, ‘Guide to Online Meetings’, July 2020, <https://www.australiashareholders.com.au/voting-engagement-guidelines>. See also: Minter Ellison, ‘Online participation in shareholder meetings – how could it work?’, Corporate HQ Advisory Newsletter, September 2011, https://www.webagm.com/wp-content/uploads/2015/11/quotes_minter_ellison.pdf.

¹⁰³ Best Practices Committee for Shareowner Participation in Virtual Annual Meetings, above n 102, 4.

¹⁰⁴ Glass Lewis, ‘2020 Proxy Paper Guidelines: An Overview of the Glass Lewis Approach to Proxy Advice, United States’, https://www.glasslewis.com/wp-content/uploads/2016/11/Guidelines_US.pdf, 48-9.

¹⁰⁵ Ibid, 49.

¹⁰⁶ Best Practices Committee for Shareowner Participation in Virtual Annual Meetings, above n 102, 5.

¹⁰⁷ Ibid.

8. Evaluating the Advantages and Disadvantages of Virtual Meetings

Views differ on whether the reforms introduced on a temporary basis to allow virtual shareholder meetings in Australia and other countries should be made permanent or whether they should remain temporary. The Governance Institute of Australia has called for the Australian changes to be made permanent.¹⁰⁸ However, *The Economist* has argued that while the reforms have been accepted as a temporary COVID-19 measure, ‘AGMs should be held in person as soon as it is safe to do so’.¹⁰⁹ In support of this position, the Australian Shareholders’ Association (‘ASA’) welcomed the reforms as a temporary solution, but expressed its desire to return to in-person or hybrid meetings after the pandemic.¹¹⁰ ASA supports ASIC’s guidelines and guidance from the Governance Institute of Australia on AGMs. It does not support virtual AGMs, preferring hybrid AGMs: ‘We will not tolerate shareholder rights being trampled by companies exploiting loopholes to reduce engagement with retail shareholders’.¹¹¹

This difference in views leads to consideration of the governance implications of replacing physical AGMs with virtual meetings. It is first necessary to outline the rationales for holding AGMs.

¹⁰⁸ Governance Institute of Australia, “‘Mired in the 19th century’: Governance Institute call for COVID-19 changes to Corporations Act to be made permanent”, Media Release, 4 June 2020.

¹⁰⁹ ‘Online annual meetings may favour managers over shareholders’, *The Economist*, 2 May 2020. See also Interfaith Center on Corporate Responsibility and the Shareholder Rights Group, ‘Joint Statement on Shareholder Participation and Virtual Annual Meetings During the Coronavirus Crisis’, 24 March 2020: ‘Each company should commit that the virtual-only format is a one-time accommodation due to the COVID-19 crisis, and that it will return to an in-person or hybrid format when public health advisories allow’; Storbeck, et al, ‘above n 85, citing the view of Union Investment, Germany’s third largest asset manager and Kay Bommer, director of the German Investor Relations Association.

¹¹⁰ Liam Walsh and Patrick Durkin, ‘Rule relaxation opens door to virtual AGMs’ *Financial Review*, 5 May 2020.

¹¹¹ Australian Shareholders’ Association Chair Allan Goldin, quoted in Australian Shareholders’ Association, ‘ASA’s formal statement on company general meetings during COVID-19 pandemic’, Media Release, 25 March 2020. See also Australian Shareholders’ Association, ‘Good Practice Guideline for Retail Shareholder Engagement’, May 2019, https://www.australianshareholders.com.au/common/Uploaded%20files/Advocacy/ASA_AGM_practice_guidelines_May_2019-FINAL.pdf, ‘4. Virtual and hybrid AGMs’.

8.1. Rationales for AGMs

The AGM has been described as performing four principal functions:¹¹² as a forum for reporting;¹¹³ questioning;¹¹⁴ deliberating;¹¹⁵ and decision-making.¹¹⁶ Importantly, the AGM is more than a mere compliance exercise. Together with other forms of dialogue between companies and shareholders, the AGM ‘is a means of achieving informational and governance goals that are also integral to a company’s investor relations activities, for retail as well as institutional shareholders.’¹¹⁷ AGMs are not just about decision-making but about ‘the dialogue between the company and shareholders’.¹¹⁸

More specifically, courts and commentators have identified two justifications for holding physical gatherings: as a forum for face-to-face accountability for stewardship; and as a forum for deliberation and debate of motions.¹¹⁹ Both justifications are particularly valuable for retail shareholders.

The first justification is an issue of accountability: both directors and shareholders perceive that the AGM can be a powerful motivator and influencer of a company’s approach to governance.¹²⁰ The AGM provides shareholders, particularly retail shareholders, with the opportunity to make an assessment of the chairperson and the directors of the companies in which they invest.¹²¹ For many shareholders, the AGM

¹¹² Australian Government, Corporations and Markets Advisory Committee, above n 51, 12-13. See also 104.

¹¹³ Companies inform shareholders about financial and other matters relating to the company, including through presentation of the annual report: Corporations Act, s 317.

¹¹⁴ Shareholders have an opportunity to ask questions or make comments on various matters, including the management of the company, the remuneration of directors and other senior corporate officers and the conduct of the company’s audit: Corporations Act, ss 250PA-250T.

¹¹⁵ Shareholders have an opportunity to discuss the matters on which they will be called to vote at the meeting.

¹¹⁶ Shareholders may vote on a limited range of matters, including the remuneration report (s 250R(2), (3)), the annual financial report, directors’ report and auditor’s report (s 250R(1)(a)), the election of directors (s 250R(1)(b)), the appointment and remuneration of the auditor (s 250R(1)(c), (d)), other permissible resolutions such as resolutions to amend the company’s constitution (s 136), adjust the share capital (Chapter 2J), or remove one or more directors (s 203D).

¹¹⁷ Australian Government, Corporations and Markets Advisory Committee, above n 51, 104.

¹¹⁸ Storbeck, et al, above n 85, quoting German asset manager Union Investment.

¹¹⁹ Boros, ‘Corporate governance in cyberspace’, above n 55, 168, summarising submissions to The Company Law Review Steering Group, Modern Company Law for a Competitive Economy: Company General Meetings and Shareholder Communication (URN 99/1144, DTI, October 1999. See also: Jennifer Stafford, *Engaging with Shareholders* (Australian Institute of Company Directors, 2011) at 83: AGMs keep boards mindful of their accountability to shareholders and the need for transparency in the execution of their responsibilities.

¹²⁰ CSA/Blake Dawson (now Ashurst Australia), ‘Rethinking the AGM’, Discussion Paper, 2008, section 2.2.

¹²¹ *Ibid.*

is the only opportunity they have to see and hear directors personally and it has been described as a means of demonstrating respect for the retail shareholders of the company or those shareholders of the company with small holdings.¹²² It is said that the role of AGMs as a pillar of good governance is a reason why proxy advisors and others have historically opposed virtual-only meetings.¹²³

The second justification of the AGM as an important forum for two-way communication between companies and shareholders is broadly endorsed. For example, the ASX Corporate Governance Council Principles and Recommendations describe meetings of security holders as important forums for two-way communication between a listed entity and its security holders.¹²⁴ The chairperson of the ASA has described the annual general meeting as ‘an important and essential part of the corporate governance process. It allows shareholders to hear Directors outline how the company is taking measures in an uncertain time, ask questions and make an informed vote’.¹²⁵

Again, this justification of the AGM assumes particular importance for retail shareholders. Unlike institutional shareholders, retail shareholders do not typically receive briefings from companies between AGMs, nor are company directors and senior management as accessible to retail shareholders as they are to institutional shareholders.

¹²² Ibid.

¹²³ Schindlinger, above n 87. See also: Australian Shareholders’ Association, ‘Good Practice Guideline for Retail Shareholder Engagement’, May 2019, https://www.australianshareholders.com.au/common/Uploaded%20files/Advocacy/ASA_AGM_practice_guidelines_May_2019-FINAL.pdf: ‘We are not supportive of a move to a full virtual AGM as we believe the physical AGM is an important event and in most cases, the only opportunity for shareholders to meet board members and key executives in a face to face environment.’ While it supports hybrid meetings, the US Council of Institutional Investors is opposed to virtual AGMs on the basis that they do not approximate an in-person experience and may serve to reduce the board’s accountability to shareholders: Council of Institutional Investors, ‘CII Statement on Virtual Meetings During Public Health Emergency’, 16 March 2020, <https://www.cii.org/march2020virtualmeetings>. The California Public Employees’ Retirement System (‘CalPERS’), New York City Retirement Systems and other institutional investors are similarly opposed to virtual meetings: Featherstone, above n 77; Fontenot, above n 55, 44. See also ‘Virtual Shareholder Meetings rising in Popularity, Skeptics Remain’, Fredrikson & Byron, PA, 30 June 2017.

¹²⁴ ASX Corporate Governance Council, ‘Corporate Governance Principles and Recommendations’, 4th edn, February 2019, 24.

¹²⁵ Australian Shareholders’ Association Chair Allan Goldin, quoted in Australian Shareholders’ Association, ‘ASA’s formal statement on company general meetings during COVID-19 pandemic’, Media Release, 25 March 2020.

There are judicial observations that support the importance of the interactive communication justification for AGMs:

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.¹²⁶

‘The opportunity provided by a deliberative assembly to confront management and to influence and learn from others is also valued by commentators’,¹²⁷ with the opportunity for shareholders to discuss corporate affairs in a meeting also being described as ‘a right and not a privilege to be accorded at the pleasure of management.’¹²⁸

These functions of, and justifications for, company AGMs form the basis for considering the benefits and disadvantages of virtual AGMs. An important question is the extent to which these functions and justifications can be achieved in a virtual meeting.

8.2. Conflicting Rationales for Virtual Meetings

Two diametrically opposed objectives in moving to virtual meetings have been proposed. Companies may seek to isolate themselves from the scrutiny of a face-to-face meeting. Alternatively, companies that seek to adopt leading governance practices may believe that virtual meetings facilitate ease of access for shareholders.¹²⁹ On the basis of these opposing positions, it is said that ‘virtual shareholder meetings could herald either the elimination of the last vestige of director accountability to shareholders or the revival of a moribund forum by offering

¹²⁶ *Re Compaction Systems Pty Ltd* [1976] 2 NSWLR 477, 485 (Bowen CJ). See also *Re Duomatic Ltd* [1969] 2 Ch 365; *Hoschett v TSI International Software Ltd* 683 A 2d 43, 45-6 (Del Ch, 1996) (Chancellor Allen).

¹²⁷ Boros, ‘Corporate governance in cyberspace’, above n 55, 177, citing Ralph Simmonds, ‘Why must we meet? Thinking about why shareholders meetings are required’ (2001) 19 *Company & Securities Law Journal* 506, especially at 518; and also citing Stephen Bottomley, ‘From Contractualism to Constitutionalism: A Framework for Corporate Governance’ (1997) 19 *Sydney Law Review* 277, 304–7. Simmonds (at 512) refers to the opportunities for confrontation of candidates or proponents of issues that are available where voters deliberate together as plausibly enhancing voting decisions: ‘Providing such opportunities can explain why meetings might be valuable even where the outcome is highly predictable’.

¹²⁸ Robert WV Dickerson et al, *Proposals for a Business Corporations Law for Canada*, http://publications.gc.ca/collections/collection_2011/ic/RG35-1-1971-I-eng.pdf, [276].

¹²⁹ Matthew Josefy and Amanda Bree Josefy, ‘Opening up the Gates or Building Virtual Fences? The Conflicting Rationales Leading to Adoption of Virtual Shareholder Meetings’, *Academy of Management Global Proceedings*, Vol. Surrey, No. 2018, 15 June 2018.

shareholders the prospect of a low-cost and geographically limitless means of participation.¹³⁰

While the issues involved do not reduce to a simple binary choice, these opposing objectives highlight the principal risks and benefits associated with virtual AGMs.

8.3. Increasing Shareholder Accessibility and Engagement

The Accessibility of AGMs to Shareholders

Noting that it is a benefit shared with hybrid AGMs, the chief benefit attributed to virtual meetings is improved accessibility, including ‘broader accessibility in an increasingly globalized corporate world’.¹³¹

There has been a long-term decline in shareholder attendance at AGMs.¹³² According to share registry operator Computershare, attendance at AGMs of listed companies in Australia has steadily declined.¹³³ A trend of declining shareholder attendance is also being experienced elsewhere around the world.¹³⁴

Table 1 sets out the proportion of shareholders who attended AGMs of listed Australian companies held in 2019. It also sets out the proportion of shareholders who voted within the companies, the proportion of issued capital that was thereby voted, the proportion of votes exercised using digital voting methods, and the proportion of capital voted prior to the physical meeting. These figures are provided for companies in the ASX50 and ASX300, those beyond the ASX300, and overall.

¹³⁰ Elizabeth Boros, ‘Virtual Shareholder Meetings: Who Decides How Companies Make Decisions?’ (2004) 28(2) *Melbourne University Law Review* 265.

¹³¹ Fontenot, above n 55, 36. See also Boros, ‘Corporate governance in cyberspace’, above 55, 171.

¹³² Featherstone, above n 77.

¹³³ Computershare, ‘AGM Intelligence’, 2020, https://www.computershare.com/News/AGM%20Intelligence%202020_interactive.pdf, 7. In 2019, only 0.2 percent of shareholders attended AGM’s and only 3.7 percent of investors voted, the lowest level recorded. Shareholder attendance was 0.16 percent in 2017, slightly less than in 2019, but shareholder attendance fell ten percent over the five years prior to 2017. See: Tammy Lim, ‘Reinvigorating the AGM: Is hybrid the answer?’ (2017) 69(11) *Governance Directions* 676, citing Computershare, ‘Insights from Annual General Meetings held in 2016’, Intelligence Report, 2017; Ben Power, ‘Two Places at Once’, *Listed@ASX*, Winter 2018, 39.

¹³⁴ Bampfield, above n 84.

Table 1: 2019 Australian Shareholder Attendance and Voting at Listed Companies' AGMs¹³⁵

	Shareholder Attendance at AGM	Shareholders Who Voted	Issued Capital Voted	Capital Voted Digitally	Issued Capital Voted Prior to AGM
ASX50 companies	0.1%	3.5%	65.5%	54%	99%
ASX300 companies	0.1%	3.5%	61.7%	60%	94.7%
Beyond ASX300	0.4%	4.7%	39%	64%	90.5%
Overall	0.2%	3.7%	44.6%	55.2%	92%

In comparison to the very low proportion of shareholders who attend AGMs (0.2 percent), the proportion of issued capital that was voted is relatively high (44.6 percent overall and 65.5 percent in the ASX50 companies), the vast proportion of this being voted prior to the AGM itself (92 percent overall and 99 percent in ASX50 companies). The very low attendance by shareholders at AGMs and the very low percentage of shareholders who voted may reflect the observation that ‘widely dispersed shareholdings make shareholders rationally apathetic, since the outcome of the meeting will generally be determined by proxy votes lodged in advance of the meeting by institutional shareholders’.¹³⁶ The basis of the accessibility benefit advanced in support of virtual meetings, and one of the reasons given for low attendance rates at AGMs, is the difficulty experienced by investors attending AGMs in person. Travel is often required, and meetings are usually held during working hours. In contrast, meetings that utilise online technologies allow investors who would otherwise find it difficult to attend an AGM to ‘attend’ online, including from their own homes.¹³⁷ AGMs that offer online participation therefore offer cost savings to shareholders and remove geographical and physical barriers to attendance. With many AGMs occurring within a short time of each other, online facilities also enable

¹³⁵ Source: Computershare, ‘AGM Intelligence’, above n 133, 8, 10, 14, 15.

¹³⁶ Boros, ‘Virtual Shareholder Meetings: Who Decides How Companies Make Decisions?’ above n 130 267.

¹³⁷ See Wachtell, Lipton, Rosen & Katz, ‘Lessons from the Future: The First Contested Virtual Annual Meeting’, 12 May 2020, citing the example of the 2020 TEGNA annual virtual meeting that had over 100 ‘attendees’.

shareholders to attend more meetings than they would otherwise be able to do if required to attend in person.¹³⁸ Online participation in AGMs is also claimed to be better for the environment and less time consuming than physical attendance, once travel is taken into account.¹³⁹

Conversely, it is also claimed that virtual meetings may not suit retail investors who lack the technical resources or skills to participate in online meetings or who prefer traditional meetings.¹⁴⁰ It may be that some shareholders prefer a physical meeting. However, it is unlikely that many shareholders lack the technical resources to participate in an online meeting. According to the Australian Bureau of Statistics, as of 2017, 86 percent of Australian households had access to the internet at home,¹⁴¹ and it is likely that this percentage has increased since then. It is also unlikely that many shareholders lack the technical skills to participate in an online meeting. The incidence of share ownership by Australians increases with the level of education, especially post-school education.¹⁴²

Improved Shareholder Engagement

Improved accessibility can lead to another advantage – enhanced engagement by shareholders. It has been argued that the main driver of hybrid meetings is the desire to improve stakeholder engagement.¹⁴³ Consistent with this, meetings with online participation options are claimed to encourage shareholders to ask more questions.¹⁴⁴ Enabling shareholders to submit questions online may ‘potentially broaden the scope of the issues that can be discussed at the meeting as well as the depth of the discussion’.¹⁴⁵ Online meetings may encourage participation because ‘[s]ome shareholders may feel empowered by the ability to ask questions through a virtual platform’, with virtual meetings streamlining the question and answer process.¹⁴⁶

¹³⁸ The concentration of AGMs over a short period of time has been identified as a barrier to effective engagement: see CAMAC, above n 42, 61.

¹³⁹ ‘Online annual meetings may favour managers over shareholders’, *The Economist*, 2 May 2020.

¹⁴⁰ CAMAC, above n 42, 111; Featherstone, above n 77.

¹⁴¹ Australian Bureau of Statistics, ‘Household Use of Information Technology, Australia 2016-17’, Release 8146.0, March 2018.

¹⁴² Australian Securities Exchange, ‘The Australian Share Ownership Study’ 2015, 18.

¹⁴³ Power, above n 78, 39.

¹⁴⁴ Featherstone, above n 77.

¹⁴⁵ Fairfax, above n 79, 1390.

¹⁴⁶ Fontenot, above n 55, 43

There is some evidence of increases in shareholder attendance at virtual meetings in US,¹⁴⁷ and some evidence of increased voting activity by shareholders in the UK.¹⁴⁸

Shareholder Attendance and Engagement Considered

However, there is no reason to associate any increase in attendance, in AGM participation (such as through asking questions online) or in voting, only with virtual meetings. Hybrid meetings offer the same opportunities for remote participation. For this reason, it is said that hybrid AGMs offer the best of both worlds.¹⁴⁹

Further, as noted above, the average attendance at AGMs of Australian listed companies has declined so that in 2019, average attendance was 0.2 percent. Clearly, this is very low. However, even if moving to virtual AGMs increases shareholder attendance at AGMs, what is the extent of the benefit of achieving this? If the objective is to increase shareholder attendance, and average attendance of 0.2 percent is considered inadequate, what level would be considered an appropriate or an effective level of shareholder attendance? Even if moving to virtual AGMs doubled, tripled or increased average attendance tenfold, the increase would nevertheless be incremental - if not marginal - in absolute terms given the existing attendance of only 0.2 percent, with the benefits provided by the increased attendance being limited and offset by the disadvantages of the lack of a physical meeting.

Next, even if it is accepted that virtual AGMs would increase shareholder attendance at AGMs, as Table 1 illustrates, the vast majority of capital in companies is voted by shareholders prior to AGMs (92 percent overall). Only in close contests will the votes of those who attend and vote at AGMs have an influence on matters determined at the meeting. Presumably, this will still be the case with virtual meetings, with

¹⁴⁷ Ibid, 42, citing the examples of Symantec and Broadridge. See also Maryellen Andersen, 'Broadridge Virtual Shareholder Meetings ("VSMs") Preliminary Statistics', *Harvard Law School Forum on Corporate Governance*, 3 June 2020, describing shareholder participation in VSMs as exceeding that experienced in physical meetings. The extent to which participation in virtual meetings exceeded that experienced meetings held only in a physical location was not specified, nor was a comparison made with hybrid meetings.

¹⁴⁸ Flood and Mooney, above n 45: reporting on an analysis that showed that 64% of shares had been voted in 2020 compared with about 50% in 2019.

¹⁴⁹ Lim, above n 52. However, one commentator identifies an increased risk with hybrid meetings and notes that, in Australia, 'there is no evidence that hybrid AGMs have sparked a big turnaround in overall meeting attendance': Featherstone, 'above n 77. Featherstone commented further that: 'Webcast technology can cause delays in AGM transmission that create uncertainty in the meeting's Q&A session and voting segments. Companies must ensure both channels for their AGM delivery are in sync, meet legal requirements to conduct the meeting, and provide reasonable access for all shareholders'. It should be noted that that this article was published in 2017 when webcasting technology was less advanced than now and when hybrid meetings were uncommon.

institutional shareholders, and many other shareholders, continuing to vote in advance of virtual meetings.¹⁵⁰ While this does not mean that permitting shareholders to attend and vote at physical AGMs is therefore unimportant, it does beg the question as to the objective of moving to virtual AGMs and forsaking physical meetings. How is it that the marginal increase in shareholder attendance at virtual meetings in comparison with the number who attend physical meetings represents a significant improvement in shareholder engagement and ‘a revival of a moribund forum’?

These observations operate to temper the purported advantages of virtual meetings in promoting greater shareholder AGM attendance and participation. They highlight that it is necessary to be clear on what the objective is in seeking to increase shareholder attendance at AGMs. This clarity is necessary for the assessment of whether achieving that objective outweighs the costs involved in doing so.

8.4. Cost Savings

Because hybrid meetings offer the same potential shareholder attendance and engagement benefits as virtual meetings, it seems clear that the principal benefit that is exclusive to virtual meetings is that they are cheaper for companies in that they do away with the cost of staging a physical meeting.¹⁵¹ Hybrid meetings on the other hand incur the costs of a physical meeting in addition to the costs of the online format of the meeting.¹⁵²

The benefit of the cost savings and convenience for companies in moving to virtual AGMs therefore needs to be weighed against any potential dilution suffered in the governance role of AGMs in holding boards to account.

8.5. Ensuring the Accountability of the Board and Management

The Effect of Virtual AGMs on Accountability

From a governance perspective, fundamental issues about director and management accountability arise when debating the merits of virtual shareholder meetings. It is

¹⁵⁰ Preliminary analysis by Computershare of a limited number of AGMs held so far in 2020 in Australia indicates that: ‘There has been no discernable (sic) change in the voting patterns of institutional investors or custodians as a result of the the (sic) shift to online meetings.’: Computershare, ‘Virtual AGM Report: Insights from online meetings in April and May 2020’, <http://images.info.computershare.com/Web/CMPTSHR1/%7B6d3e4edc-c243-4d5b-8ac0-b7898bfd9ac%7D VIRTUAL AGM SEASON INSIGHTS FINAL.pdf>, 8.

¹⁵¹ Fontenot, above n 55, 36.

¹⁵² On concerns about costs of hybrid meetings, particularly for small companies, See: Flood and Mooney, above n 45.

questioned whether virtual meetings can sufficiently substitute for the face-to-face accountability of directors and management to shareholders offered by the physical meeting.¹⁵³

There are two aspects to this accountability concern.

First, it is argued that virtual meetings ‘fail to provide a quality of interaction comparable to that (sic) the face-to-face experience provided by a physical meeting’.¹⁵⁴ ‘The accountability that is a feature of a face-to-face real-time meeting is difficult to replicate in the electronic environment.’¹⁵⁵ This must be particularly the case where ‘the primary method for interaction at [virtual] meetings is through emailed questions’, where emailed questions may be more easily ignored or answered by management with scripted responses.¹⁵⁶ Something is lost when shareholders do not see directors in person and have an opportunity to gauge their body language and responses.¹⁵⁷ Physical meetings mean that shareholders can see how boards are reacting to shareholders, for example by ignoring other dissatisfied investors. ‘It is easy to see how online meetings could dampen shareholder dissent. In a room full of people you can take the pulse of the crowd. Those on the fence about a resolution may be swayed to join a rebellion if they sense seething frustration in others ... in online meetings “people can’t see someone shaking their fists angrily or waving their hands”’.¹⁵⁸

¹⁵³ CAMAC, above n 42, 111; ‘Online annual meetings may favour managers over shareholders’, *The Economist*, 2 May 2020. See further the discussion below under the heading ‘Can Virtual Meetings Offer Shareholders an Equivalent Right of Participation to a Physical Meeting?’.

¹⁵⁴ Fontenot, above n 55, 36, citing Robert Steyer, ‘NYC Comptroller Petitions Against Corporate “Virtual-Only” Annual Meetings’, *Pensions and Investments*, 3 April 2017. This is supported by several online comments made in response to Maryellen Andersen, ‘Broadridge Virtual Shareholder Meetings (“VSMs”) Preliminary Statistics’, *Harvard Law School Forum on Corporate Governance*, 3 June 2020.

¹⁵⁵ Boros, ‘Corporate governance in cyberspace’, above n 55, 168.

¹⁵⁶ Fairfax, above n 79, 1392.

¹⁵⁷ Featherstone, above n 77.

¹⁵⁸ ‘Online annual meetings may favour managers over shareholders’, *The Economist*, 2 May 2020, quoting Francesca Odell and Helena Grannis of law firm Cleary Gottlieb. See also Bruce Goldfarb, ‘Are Virtual Annual Meetings Good for Shareholder Democracy?’, *Forbes*, 5 May 2020: ‘The problem is that, while virtual annual meetings work reasonably well for most plain vanilla, uncontested situations, they are not designed for corporate battles involving activist investors or for dissident shareholders who want to see and hear an accountable management and board. ... a proposal presented remotely is far less impactful than one presented “from the floor” at an in-person annual meeting. Unless the virtual process enables it, shareholders won’t have the benefit of hearing the “give and take” between the company and the dissidents. Even though most investors have already voted by proxy, less is not more from the perspective of giving investors an annual forum to see and hear from the managers and boards at the companies they own.’

This concept of the accountability function of AGMs assumes greater significance having regard to the limited accountability mechanisms available to shareholders.

Second, there is a perception that virtual AGMs could help boards avoid tough questions in physical meetings. ‘If it is a physical AGM, it is very hard not to give the microphone to someone who seems insistent on asking the tough questions. In a virtual AGM, it is much easier to manage that.’¹⁵⁹

There may also be a lack of transparency from companies relating to questions from shareholders. Management could filter questions, avoiding difficult questions and selecting only favourable ones.¹⁶⁰ Shareholders’ questions could also be hidden from each other, hindering shareholder participation and interaction. It becomes more difficult for shareholders to interact with and question management.¹⁶¹ ‘Ensuring that there is sufficient opportunity for shareholders to ask questions and follow them up, or register objections, is one of the most obvious difficulties. Questions may be invited in advance, but a mechanism for follow-up questions is hard to devise, even with the technology options available.’¹⁶²

The ‘concern that management is hiding behind technology to side-step public engagement remains a common theme amongst virtual meeting detractors.’¹⁶³ Indeed, there are reports in the UK that companies are seeking to use the capacity to hold virtual meetings to avoid shareholder interaction,¹⁶⁴ notwithstanding that the perception that the company is avoiding accountability by holding virtual meetings carries a risk of public relations damage for companies.¹⁶⁵

¹⁵⁹ Sebastien Thevoux-Chabuel, a portfolio manager at French asset manager Comgest, quoted in Storbeck, et al, above n 85.

¹⁶⁰ Germany’s temporary COVID-19 emergency law has been criticised as unacceptably infringing shareholder rights by giving companies the discretion to decide what to answer or ignore: see Storbeck, et al, above n 85.

¹⁶¹ Lim, above n 52; Fontenot, above n 55, 45-6.

¹⁶² Schindlinger, above n 87.

¹⁶³ Fontenot, above n 55, 46.

¹⁶⁴ Flood and Mooney, above n 45.

¹⁶⁵ Boros, ‘Corporate governance in cyberspace’, above n 55, 175. See also Chris Flood, ‘Standard life Aberdeen hit by investor backlash over virtual AGMs’, *Financial Times*, 14 May 2020, citing the example of a vote of more than 37 percent of shareholders against a proposal by UK company Standard Life Aberdeen allowing it to convene future shareholder meetings remotely. See also Flood and Mooney, above n 45. Lisa Fairfax describes the negative publicity about the potential detrimental impact of virtual meetings on shareholders’ ability to interact with management leading the U.S. state of Massachusetts to abandon an attempt to pass an online shareholder meeting statute, and then to restrict virtual meetings to non-public companies. Fairfax also describes opposition to virtual meetings in the state of Delaware by the Council of Institutional Investors and adverse experiences at the companies Siebel Systems, Inc. and Intel: Fairfax, above n 79, 1393.

The concern about management using virtual meetings to avoid scrutiny is a behaviour that is consistent with what has been described as ‘positional conflicts of interest’. Positional conflicts of interest arise when company management’s natural desire to maintain and enhance their positions leads them to avoid criticism, even where this conflicts with the interests of shareholders.¹⁶⁶

The shortcomings of virtual meetings are claimed to mean that small investors lose out. While institutional investors have access to company boards and management during the year, the AGM is the only opportunity for retail investors to ask questions.¹⁶⁷ The disadvantages of virtual meetings therefore fall most heavily on retail investors. In this respect, it has been observed that:

even though retail shareholder activism may appear unsuccessful, for example because protest votes taken on a show of hands at the meeting are overridden by proxy votes cast by institutional shareholders or because a motion proposed by dissident shareholders is not passed, heed is often taken of the sentiments expressed in these forms of activism and company practices or plans sometimes change. Part of the reason that these protests may be influential is the media attention they attract. This in turn may reflect the fact that the protests are often colourful and sometimes fiery. An exchange of views on a company bulletin board may well not excite the same degree of media interest.¹⁶⁸

Accountability and the Experience of Virtual AGMs in Australia and the United States in 2020

It is relevant to note some observations on the practice of virtual AGMs in Australia and the United States in 2020.

Empirical studies are unavailable to inform the debate in Australia. The small number of COVID-19 virtual shareholder meetings in Australia at the time of writing and the limited information about those meetings prevent much detailed analysis at this stage. One comparison by Computershare examined AGM attendance between 2019 and 2020 at 29 physical and 25 online (six hybrid and 19 virtual) meetings held in 2020. This report is ambiguous. It found that overall attendance between 2019 and 2020

¹⁶⁶ See Simmonds, above n **Error! Bookmark not defined.**, 515-16, citing M Eisenberg, ‘The Structure of Corporation Law’ (1989) 89 *Columbia Law Review* 1461, 1471-3.

¹⁶⁷ Boros, ‘Corporate governance in cyberspace’, above n 55, 171, 174. This point has also been made in relation to the United States: Fontenot, above n 55, 42.

¹⁶⁸ Boros, ‘Corporate governance in cyberspace’, above n 55, 171-2 (reference omitted).

increased by 36 percent, with this ‘suggesting that digital technology does not inhibit shareholder attendance or engagement’.¹⁶⁹ However, the report does not identify how the increase in attendance observed in the 2020 meetings was experienced as between the different types of meeting. This report also appears to include attendees such as ‘employees, interested onlookers, regulatory bodies and more’, rather than only shareholders. In addition, the report identifies a trend for some ‘passive shareholders’ with no interest in voting or otherwise participating registering their attendance as ‘guests’ rather than as shareholders. While overall attendance at the AGMs in 2020 was up, the report states that shareholder attendance was down.¹⁷⁰

While care would be needed in applying analyses from other jurisdictions, it is noted that one U.S. study found:

In general, governance structures and practices appear comparable for both virtual and physical meeting groups. ... Our analysis did not reveal significant differences in shareholder dissent as a measure of alignment of company and shareholder stances on key voting proposals—from say-on-pay to director elections.¹⁷¹

One observation in the Australian context that has been made is that a key flag of problems would be if online meetings became extremely short as compared with a comparable typically longer physical meeting.¹⁷² Having regard to this observation, it is possible that the virtual format of the 2020 Santos Ltd AGM could be regarded as having dampened dissent at that meeting. Instead of the combative, drawn out meeting that has become usual with Santos Ltd AGMs, the meeting was over in less than two hours with much less debate than normal.¹⁷³ This was in spite of significant protest votes recorded on shareholder environmental resolutions,¹⁷⁴ and the fact that 20 shareholder questions were submitted online for the meeting.¹⁷⁵ Other virtual meetings that have been held in Australia in 2020 also appear to have been much shorter than two hours.¹⁷⁶

¹⁶⁹ Computershare, ‘Virtual AGM Report’, above n 150, 4.

¹⁷⁰ Ibid, 9.

¹⁷¹ Buellingen, above n 53.

¹⁷² Fiona Balzer, policy manager of ASA, cited in Liam Walsh and Patrick Durkin, ‘Rule relaxation opens door to virtual AGMs’, *Financial Review*, 5 May 2020.

¹⁷³ Storbeck, et al, above n 85.

¹⁷⁴ Votes of approximately 43 and 46 percent were recorded in favour of two shareholder resolutions relating to climate change: Santos Ltd, ‘Santos Limited Annual General Meeting Friday, 3 April 2020 Voting Results’, 3 April 2020, <https://www.asx.com.au/asxpdf/20200403/pdf/44gp9sd6r23s11.pdf>.

¹⁷⁵ *Mayne Report*, ‘above n 95.

¹⁷⁶ Ibid.

More broadly, while it is not possible to be definitive in the absence of a detailed comparative analysis of attendance figures for physical and virtual AGMs held in Australia in 2020, there has been no obvious indication of increased shareholder participation in the virtual meetings. In relation to the 23 online AGMs held by Australian listed companies up until the end of May 2020, notwithstanding that protest votes from shareholders were recorded at thirteen of the AGMs,¹⁷⁷ there is no evidence that the move to online meetings increased shareholder participation.¹⁷⁸ In their online AGMs, companies permitted written questions from shareholders, in most cases both before and during the online meeting.¹⁷⁹ At the Santos Ltd AGM, twenty

¹⁷⁷ Shareholder support for positions contrary to the position recommended by company management ranged from votes of 5.36% to over 50%. The companies involved were: Santos, Woodside, Oil Search, QBE Insurance, Rio Tinto, WPP Australia NZ, AMP, Invocare, Atlas Alteria, Coca Cola Amatil, Moelis Australia, Freelancer and Appen. The protest votes included protests against the adoption of remuneration reports, the appointment of directors, and climate change issues.

¹⁷⁸ See the Computershare analysis (see the text accompanying note 169 above) regarding AGM attendance in 2020. The Computershare study also notes that there has been no indication ‘that the shift to online meetings has impacted the number or nature of questions being asked by shareholders’: Computershare, ‘Virtual AGM Report’, above n 150, 7: ‘For most meetings four or less questions were asked and for some issuers, no questions were received at all.’

¹⁷⁹ See for example: QBE Insurance, ‘2020 Notice of Annual General Meeting’ ASX Announcement, 1 April 2020, <file:///Users/freeburn/Downloads/ASX-Announcement---Ltr---ASX---2020-AGM-Notice-of-Meeting---FOR-ASX.pdf>; Iluka Resources, ‘Change in Iluka 2020 AGM Arrangements’, Australian Securities Exchange Notice, 2 April 2020; OZ Minerals, ‘Annual General Meeting 2020’, <https://www.ozminerals.com/media/agm/annual-general-meeting-2020/>; Bell Financial Group, ‘Updated Meeting Procedures for AGM’ ASX Release, 3 April 2020, <https://www.bellfg.com.au/wp-content/uploads/2020/04/Updated-meeting-procedures-for-AGM.pdf>; Invocare, ‘2019 Notice of Annual General Meeting’, 6 April 2020, <https://www.asx.com.au/asxpdf/20200406/pdf/44gqwks3mrrnjnf.pdf>; Atlas Arteria, ‘Atlas Arteria 2020 Annual General Meeting (AGM)’, ASX Release, 16 April 2020, <https://www.asx.com.au/asxpdf/20200416/pdf/44h06t1qzms41k.pdf>; Caltex, ‘Caltex Annual General Meeting Update’, ASX Release, 21 April 2020, <https://www.asx.com.au/asxpdf/20200421/pdf/44h3rwwtmp3s20.pdf>; Costa, ‘Notice of Annual General Meeting’, 22 April 2020, <https://www.asx.com.au/asxpdf/20200422/pdf/44h4jm5327q45s.pdf>; AMP, ‘AMP Annual General Meeting – COVID-19 update’, ASX Release, 23 April 2020, <https://www.asx.com.au/asxpdf/20200423/pdf/44h5fgd6s4fcjf.pdf>; Coca Cola Amatil, ‘ASX Release’, 23 April 2020, <https://www.asx.com.au/asxpdf/20200423/pdf/44h5lmm6hz4jy0.pdf>; Oil Search, ‘2020 Annual Meeting Update’, 24 April 2020, https://www.oilsearch.com/_data/assets/pdf_file/0003/48324/200424-2020-Annual-Meeting-Update.pdf; Freelancer Limited, ‘Freelancer Limited (ASX: FRL) Annual General Meeting - 27 May 2020, Attendance Arrangements – COVID-19 Requirements’, 24 April 2020, <https://www.asx.com.au/asxpdf/20200424/pdf/44h6rblcj8kz5c.pdf>; WPP AU NZ, ‘WPP AUNZ Annual General Meeting COVID-19 Precautions: Live Webcast and Voting by Proxy’, ASX Release, 24 April 2020, <https://www.asx.com.au/asxpdf/20200424/pdf/44h6mc6hb8hsst.pdf>; Appen, ‘Notice of AGM 2020’, 24 April 2020, <https://www.asx.com.au/asxpdf/20200424/pdf/44h71t0lz7vdf.pdf>; ERA, ‘2020 Notice of Annual General Meeting’, 29 April 2020, <https://www.asx.com.au/asxpdf/20200429/pdf/44hc0yjbzvcv8.pdf>; Iress, ‘Changes to Iress’ 2020 AGM Format – COVID-19 Restrictions’, ASX Release, 30 April 2020, <https://www.asx.com.au/asxpdf/20200430/pdf/44hd6500mx7fgq.pdf>; HT&E, ‘HT&E AGM to be Held Online’ Market Announcement, 30 April 2020, <https://www.asx.com.au/asxpdf/20200430/pdf/44hdff5x7xs87j.pdf>; The GPT Group, ‘AGM Procedure Update’, ASX Announcement, 4 May 2020, <https://www.asx.com.au/asxpdf/20200504/pdf/44hjdvtxp9wq2.pdf>; Adelaide Brighton Limited,

questions were submitted online by shareholders.¹⁸⁰ Follow up questions were not permitted, although this would normally be allowed at a physical AGM.¹⁸¹ Santos Ltd does have a recent history of shareholder activism including resolutions proposed by shareholders that are opposed by directors, and this recent history was reflected in the 2020 AGM with large protest votes on shareholder climate change resolutions.¹⁸² At the Scentre Group Ltd AGM, pre-meeting questions were asked in summary form and no live questions were asked, although a phone line was opened for that purpose. The meeting only lasted 30 minutes.¹⁸³ Two written questions were submitted by the ASA at the Iluka Resources Ltd AGM. At the Woodside Petroleum Ltd AGM on 30 April 2020, the chairperson of the company read out questions from 22 shareholders.¹⁸⁴

While there is no clear indication of increased shareholder participation in virtual AGMs of Australian companies, the recent experience indicates that some concerns with virtual meetings may be overstated. For example, concerns have been expressed that debate on an electronic format such as a bulletin board could be hijacked by activist minority shareholders to advertise their point of view to other shareholders.¹⁸⁵ Based on media reports of 2020 virtual AGMs in Australia, there is no evidence of this concern being realised. Similarly, there is no evidence of other concerns being realised, including that virtual AGMs may reduce the number of shareholders who vote by proxy in advance of a meeting and thereby increase uncertainty as to vote outcomes, that questions are more difficult to address remotely than in person, and

'Update on AGM Arrangements' 6 May 2020, <https://www.asx.com.au/asxpdf/20200506/pdf/44hm93rdwlt5dl.pdf>; Alumina Limited, 'Alumina Limited 2020 AGM', ASX Announcement, 11 May 2020, <https://www.asx.com.au/asxpdf/20200511/pdf/44hqzpy177v94c.pdf>; Sydney Airport, 'Confirmation of Virtual AGM', ASX Release, 15 May 2020, <https://www.asx.com.au/asxpdf/20200515/pdf/44hvfjwv9w5tq7.pdf>; Moelis, 'Annual General Meeting COVID-19 Update', ASX Announcement, 18 May 2020, <https://www.asx.com.au/asxpdf/20200518/pdf/44hxxh8wcfzx0v5.pdf>.

¹⁸⁰ *Mayne Report*, 'How AGMs were handled in 2020 during corona virus', 4 June 2020, <https://www.maynereport.com/articles/2020/04/03-1456-6800.html>.

¹⁸¹ Angela Macdonald-Smith, 'Santos sees "unprecedented headwinds" for 2020', *Australian Financial Review*, 3 April 2020.

¹⁸² Angela Macdonald-Smith, 'Climate shock at Santos as shareholders weigh in', *Australian Financial Review*, 3 April 2020.

¹⁸³ *Mayne Report*, above n 95.

¹⁸⁴ *Ibid*. See also Nick Toscano, "'Breakthrough moment": Woodside investors revolt on climate change', *The Age*, 30 April 2020, <https://www.theage.com.au/business/companies/breakthrough-moment-woodside-investors-revolt-on-climate-change-20200429-p54oe8.html>.

¹⁸⁵ Boros, 'Corporate governance in cyberspace', above n 55, 168, referring to submissions to The Company Law Review Steering Group, 'Modern Company Law for a Competitive Economy: Company General Meetings and Shareholder Communication' (URN 99/1144, DTI, October 1999); Fontenot, above n 55, 47-8.

that virtual AGMs may encourage more questions and therefore mean more work for a company in responding.¹⁸⁶

Experience in the United States does not appear to indicate that virtual meetings have inspired a revival in shareholder participation in AGMs. For example, while the average duration of equivalent physical or hybrid meetings is not known, the average duration of the 860 virtual meetings facilitated by the Broadridge company and held between 1 January and 22 May 2020, was a mere 22 minutes. The brevity of these meetings is more notable in a jurisdiction where shareholder proposals are far more prevalent than in Australia (e.g. 132 of the 860 virtual meetings had one or more shareholder proposals). Reliable attendance figures are not given for these virtual meetings,¹⁸⁷ however the average number of shareholders voting ‘live’ at the meetings was only four,¹⁸⁸ and the average number of questions from shareholders was six.¹⁸⁹ It might be argued that these statistics are consistent with AGMs that are conducted more as mere compliance exercises than as forums for meaningful dialogue and deliberation and which serve as an important accountability mechanism.

On 6 July 2020, the Council of Institutional Investors, which represents US institutional investors with more than US\$45 trillion under management, co-authored a letter, with several other shareholder representative groups, to the US Securities and Exchange Commission expressing concerns about virtual shareholder meetings held during 2020.¹⁹⁰ It is stated in the letter that generally the meetings ‘were a poor substitute for in-person shareholder meetings’, that many shareholders faced obstacles participating in the meetings in a meaningful way, and that the optimal format for future meetings may be hybrid meetings.¹⁹¹

¹⁸⁶ Fontenot, above n 55, 47-8; Fairfax, above n 79, 1394-5.

¹⁸⁷ Average attendance is said to be 59 but this includes both shareholders and guests and is also distorted by the average including multiple log ins due to factors such as browsers being refreshed and attendees temporarily leaving a meeting and then re-joining: Maryellen Andersen, ‘Broadridge Virtual Shareholder Meetings (“VSMs”) Preliminary Statistics’, *Harvard Law School Forum on Corporate Governance*, 3 June 2020.

¹⁸⁸ An average distorted by one meeting recording 178 live voters: *ibid.*

¹⁸⁹ Again, the average number of questions is distorted by the fact that one meeting recorded 316 questions: *ibid.*

¹⁹⁰ Council of Institutional Investors, et al, ‘Virtual and Hybrid Meetings: Concerns from 2020 Proxy Season’, Letter to the Chairman of the US Securities and Exchange Commission, 6 July 2020, https://www.cii.org/files/issues_and_advocacy/correspondence/2020/Virtual%20Meetings%20Letter%20%20Corrected%20Copy.pdf.

¹⁹¹ *Ibid.*

A recent study of virtual shareholder meetings of US companies held during COVID-19 supports these concerns.¹⁹² The author examined the transcripts and audio recordings for 94 companies included in the S&P500 that held an in-person or hybrid shareholder meeting in 2019 and a virtual shareholder meeting in 2020. The author found significant differences. The move to virtual meetings shortened the average meeting by 18 percent, decreased by 40 percent the time dedicated to providing a business update, and decreased by 14 percent the average time spent on answering questions. The author states that her findings ‘may suggest that not having visibly present shareholders, and perhaps not observing shareholders’ responses throughout the meeting, ultimately leads to less information communicated by the company to the shareholders’.¹⁹³ The author also identified tactics used by some companies to evade answering shareholder questions at virtual meetings. These tactics included company management incorrectly claiming a lack of additional questions and limiting questions to those related to resolutions to be voted on at the meeting. The conclusion of the author for this part of her research is that the findings indicate that ‘it can be challenging for shareholders to communicate their concerns at virtual meetings’.¹⁹⁴

8.6. Can Virtual Meetings Offer Shareholders an Equivalent Right of Participation to a Physical Meeting?

The final issue that arises in assessing the relative benefits of virtual meetings is whether it is possible for virtual meetings to provide a right of participation in AGMs for shareholders that is equivalent to that provided by physical meetings. The preliminary question is whether companies holding virtual meetings are legally required to provide to shareholders the same opportunities to participate as if the shareholders attended a physical meeting. The next question is whether it is possible, using technology, for companies holding virtual meetings to provide shareholders with the same opportunities to participate as if the shareholders were in attendance at a physical meeting.

In relation to the first question, the federal government’s Determination does not require companies holding virtual meetings pursuant to the changes introduced by the Determination to provide the same opportunities to shareholders attending the virtual

¹⁹² Miriam Schwartz-Ziv, ‘How Shifting from In-Person to Virtual Shareholder Meetings Affects Shareholders’ Voice’, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3674998

¹⁹³ Ibid, 2.

¹⁹⁴ Ibid, 7.

meeting as if the shareholders attended a physical meeting.¹⁹⁵ What the Determination requires is that all shareholders attending a virtual meeting have a reasonable opportunity to participate in the meeting. ASIC goes further. In its guidance, ASIC states that ‘As an overall guiding principle, members at a hybrid or virtual meeting should be given an opportunity to participate in the meeting that is equivalent to the one they would have had if attending in person.’¹⁹⁶ However, ASIC guidance is not legally binding.¹⁹⁷

It is also relevant to note that the Corporations Act only requires companies that stage hybrid meetings to give ‘the members as a whole a reasonable opportunity to participate’.¹⁹⁸ However, this statutory permission for hybrid meetings is counterbalanced by the option for shareholders to attend the physical part of a hybrid meeting. Its possible sanctioning of any lessening of the governance role of physical AGMs is therefore of less of a concern in that context. To the extent that virtual meetings do not provide an equivalent form of participation as physical meetings, if such a legislative standard was simply replicated for virtual meetings, this may pose problems for the protection of good governance and shareholders’ rights of participation, particularly retail shareholders.

This leads to the second question: whether it is in fact possible, using technology, for companies holding virtual meetings to provide shareholders with the same opportunities to participate as if the shareholders were in attendance at a physical meeting. As has been discussed, an important feature of physical meetings from a governance perspective is the face-to-face interaction between shareholders and company directors in an open forum. While the formal procedures and mechanics of a virtual meeting may be made to closely resemble the procedure of a physical meeting, with shareholders being able to ask questions and vote remotely, virtual meetings appear to lack the capacity to fully replicate the nature of the accountability mechanism which is inherent in physical meetings. Even in terms of the formal procedures and mechanics of virtual meetings, there are recognised difficulties in replicating the processes experienced at physical meetings. The capacity for

¹⁹⁵ The Corporations (Coronavirus Economic Response) Determination (No. 3) 2020: see nn 32-35 above and accompanying text.

¹⁹⁶ ASIC, ‘ASIC guidelines for investor meetings using virtual technology’, above n 69.

¹⁹⁷ *Re Green (as voluntary administrators of Beville Pty Ltd)* (2011) 84 ACSR 215; [2011] NSWSC 417 at [29].

¹⁹⁸ Section 249S of the Corporations Act. Section 249S is discussed in Part 2.2 of this article.

shareholders to ask follow-up questions is one example. Even where companies permit follow up questions to be submitted online, the dynamics involved in the process of submitting questions online and having them answered will militate against the type of contemporaneous discussion between participants, observable by others, that is characteristic of physical meetings.

There is room therefore to doubt whether virtual meetings can offer an equivalent right of participation to that inherent in physical meetings. In particular, virtual meetings fall short to the extent that meetings of shareholders are important for the shareholders to deliberate together, where this collective deliberation involves opportunities for confrontation of the candidates or proponents of issues, including ‘the ability to see the candidates or proponents, including their reactions to questions or arguments’.¹⁹⁹ Certainly this is consistent with the value attached by institutional investors to one-on-one meetings with management and directors, albeit that this engagement occurs outside AGMs,²⁰⁰ and it explains why some organisations do not think that virtual meetings can be the equivalent of physical meetings.²⁰¹

If this is accepted, it means that best practice for virtual meetings can only truly aim for virtual meetings that resemble physical AGMs as closely as possible. Equivalent rights of participation for shareholders in virtual meetings are not possible, at least within the limits of current technology. In relation to a statutory requirement on companies to hold annual meetings of shareholders, it has been observed that ‘a keen realization of the reality of the degree of deliberation that is possible, should make the preservation of residual mechanisms of corporate democracy more, not less, important.’²⁰²

9. Conclusion

The principal benefits associated with virtual AGMs are their potential to increase shareholder attendance and engagement. It has been observed in this article that the extent to which these benefits are being achieved with virtual meetings may be limited. In any event, this benefit is not an exclusive property of virtual meetings,

¹⁹⁹ Simmonds, above n **Error! Bookmark not defined.**, 512, note 64. Collective deliberation also includes ‘attempts to persuade, to respond to persuasion, to put up resolutions for alternative decisions and to observe the effects of all of this on the others present’: note 63.

²⁰⁰ Ibid.

²⁰¹ See note 6 above.

²⁰² *Hoschett v TSI International Software Ltd*, 683 A 2d 43 (Del Ch, Allen Chancellor, 1996).

with hybrid AGMs offering the same opportunities to take advantage of online technologies to facilitate attendance and participation by shareholders. The principal benefit that is exclusive to virtual AGMs is their relative cost advantage. It is this cost advantage that must be offset against the disadvantages of virtual AGMs.

The governance concern of a reduction in board and management accountability that has been articulated in relation to a move to virtual meetings cannot be easily dismissed. While there is merit in permitting hybrid shareholder meetings as these allow shareholders the option of attending the physical part of the meeting or attending online, caution is justified before making the currently temporary changes which allow virtual meetings permanent. Consideration of the issues involved would benefit from a detailed analysis of the experience of virtual AGMs held as a result of the government's response to the COVID-19 crisis. The government's Determination allowing virtual meetings expires on 22 March 2021 and therefore covers the period of time (October and November) when most AGMs of listed companies are held. This means there would be extensive experience with virtual shareholder meetings by the time the Determination expires. The suggested analysis would be of particular value if it obtained, and evaluated, not only data on shareholder attendance and voting at virtual AGMs but also the views of shareholders, directors, company secretaries and others with experience of virtual AGMs.