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6 November 2020

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Submission in relation to "Making permanent reforms in respect of virtual meetings and electronic document execution"

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As an academic with research interests in this area, I am grateful for the opportunity to make a submission.[1] This submission responds only on the question of Virtual Meetings and, there, largely on a fairly narrow point regarding the participation of members within the general meeting.

Virtual Meetings

The members in the general meeting are an organ of the company, placed in contraposition to the board of directors – each organ with its own respective powers and responsibilities.[2] There has been much written on the modern utility of the general meeting,[3] or lack thereof,[4] which provides useful background to a consideration of the virtual meeting, but no particular practical solution. Any mechanism which is offered as the alternative, or replacement, to the in-person general meeting should provide similar, or preferably better, modes of engagement for the members. Virtual meetings may provide better access for remote and overseas shareholders, who may otherwise be unable to participate in an in-person meeting other than by proxy.[5] They will also potentially deliver cost benefits to the company, although those cost benefits may be more substantial for a larger company, whereas engaging the software and hardware solutions necessary for a virtual meeting may be more expensive for a smaller company than an in-person meeting.[6] As such, the decision to provide for not

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[2] *Corporations Act 2001* (Cth) s 198A, or similar provision in the company Constitution. This, as much of the Act, ignores the role of management of the company, which can be particularly impactful in large listed companies.

[3] Australian Securities and Investment Commission, Report 564, 'Annual General Meeting Season 2017' and Report 609, 'Annual General Meeting Season 2018'; ASX Corporate Governance Council, 'Corporate Governance Principles and Recommendations' (4th ed, 2019), Recommendation 6.3.

[4] See, eg, Companies and Securities Advisory Committee,' Shareholder Participation in the Modern Listed Public Company' (Final Report, 2000); Hill and Yablon, 'Corporate Governance and Executive Remuneration: Rediscovering Managerial Positional Conflict' (2002) 25 *University of New South Wales Law Journal* 294.

[5] See, eg, Australian Institute of Company Directors, Submission to "Inquiry into the Financial Technology and Regulatory Technology sector" (17 June 2020), available at: https://aicd.companydirectors.com.au/advocacy/policy/inquiry-into-the-financial-technology-and-regulatory-technology-sector (2 November 2020).

[6] There is the added practical element where a company engages with a share registry service, many of which would already be contributing to the organisation of AGMs, and consequently may also offer electronic AGM, or virtual meeting, services.

only in-person and hybrid meetings, but entirely virtual meetings, within the *Corporations Act 2001* (Cth) ('the Act') is a positive step.

'Reasonable Opportunity' to Participate – Transparency

One element of the in-person general meeting which is not currently well-provided for within the online platforms utilised for virtual meetings is the ability for all attendees to hear questions posed or comments made by other members, in response to a particular resolution or during an opportunity for general questions. The ability to put questions to the board and to the company, which are ventilated before all members, is a significant element of the in-person general meeting. The ability to design a virtual meeting in a way which limits the members' ability to engage is not a new concern,[7] and does appear to be proven valid by current experience. One very recent study, conducted across 94 shareholder meetings for firms listed in the S&P 500 in both 2019 and 2020, found that in 54.5% of the meetings, shareholders faced an obstacle when submitting questions. The same study suggested that in 32% of meetings, members were unable to pose questions at all.[8] Although the experience of members of US listed entities may not be directly comparable to the experience under Australian legislation, it is important that the benefits of virtual meetings do not interfere with the governance function of the meeting, as the primary method of engagement of the members as a general body. Companies registered in Australia will operate under the provisions of the Act, and other regulations, which do provide some context for shareholder engagement and transparency.

For in-person meetings, the members are entitled to a 'reasonable opportunity' to ask questions or make comments according to s 250S of the Act, in relation to questions and comments on company management, and s 250T in relation to questions to the auditor.[9] It may be necessary to provide further criteria for what 'reasonable opportunity' entails, in a virtual meeting, beyond what has already been proposed in the Exposure Draft in s 253Q, in order to establish best practice.

The Act does not currently provide any context for how a 'reasonable opportunity' is provided, either during an in-person, hybrid or a virtual meeting. In relation to virtual meetings, the experience of the current AGM season suggests that existing software options which enable virtual meetings do not, as a general rule, permit anyone other than the 'authorised' persons on the meeting to speak, either verbally or in writing, to the attendees as a whole. The 'authorised' persons are typically the board and the Chair, the auditor, and potentially other senior management staff. The members are not normally provided with such authorisation. Questions from the members are communicated in text, via the hosting platform, which may or may not be moderated for content and duplication, and then sent through to the Chair, who may or may not address them during the meeting. This is not

[7] Boros E, 'Virtual Shareholder meetings', (2004) 3 *Duke Law and Technology Review* 1; Bonollo F, 'Virtual Meetings', (2002) 14 *Australian Journal of Corporate Law* 1.

[8] Schwartz-Ziv M, 'How Shifting from In-Person to Virtual Shareholder Meetings Affects Shareholders' Voice' (last revised, 29 September 2020, available online (not yet subject to peer-review): https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3674998). Reported by Darybshire M, 'Private Investors left in the dark by online AGMs', Financial Times (3 September 2020, accessed online at: https://www.ft.com/content/53d9becd-9bac-4f2f-b2fa-f873bb6d385c?acc).

[9] Similarly, for hybrid AGMs, held under s 249S, a reasonable opportunity to participate must be provided to the members as a whole.

equivalent to the ability of a member, at an in-person meeting, to speak and have their question be heard, not only by the board but also by the other members.

The importance of this transparency is recognised somewhat in the current Exposure Draft of the Bill, as it inserts, in the amendments to s 251A, a requirement to record questions or comments submitted by a member prior to the meeting, and any question asked or comment made by a member at the meeting. This does not provide significant protection or transparency to members, as it would occur asynchronously.[10] Equally, it is encouraged by the proposed s 253Q(1), which incorporates the requirement for 'reasonable opportunity to participate' for entirely virtual meetings, but without providing any further direction as to what that entails.

A more directed solution as to 'reasonable opportunity to participate' should be sought for virtual meetings, via amendments to the proposed s 253Q. It should commence with a general statement that the company should provide a 'reasonable opportunity to participate' as is currently drafted in s 253Q(1). Thereafter, the provision should provide specific examples of what would constitute a 'reasonable opportunity to participate', particularly around the ability to pose questions through a mechanism visible to all members, in a closer facsimile of the in-person meeting. If such transparency is not directly required by the proposed provisions, a member whose questions go unacknowledged would bear the onus of proving that 'reasonable opportunity' has been denied to them.

It is unclear whether s 253Q would be breached by instances where a technical misadventure has prevented questions from been perceived by the company, rather than deliberate 'denial' of opportunity. Equally, for a member, proving deliberate interference or 'blocking' of questions by a moderator or Chair will be significantly more complex for virtual meetings. The capacity at an in-person meeting to ask questions audibly before an audience should be directly provided for in the legislative provisions introducing virtual meetings, in order to encourage transparency and engagement.

As a final point on s 253Q, it is not clear from the Exposure Draft whether breach of this provision would be a strict liability offence, in line with s 250T(2), or would be dealt with under a similar provision to s 1322(3A),[11] as occurs for a breach of s 249S. A consistent approach across all three meeting formats (in-person, virtual and hybrid) would be the best outcome.

Voting via a Show of Hands or a Poll

As a separate point, the limitation in s 253Q(3) that meetings held using virtual meeting technology cannot be taken on a show of hands, and must be taken by a poll,[12] suggests that perhaps a separate discussion should be had as to the utility of continuing to offer voting by way of a show of hands,

[10] This lack of transparency also exists under the current Act, for those companies engaging in the hybrid meeting option under s 249S. The consequences of breaching this provision are provided for in s 1322. By contrast, breach of s 250S is a strict liability offence. This will be addressed below.

[11] They would not be caught by the current s 1322(3A), which is clearly drafted only to apply to meetings held at 2 or more venues. See e.g. the proposed s 249L(1)(a), which delineates as different a meeting held at 2 or more venues from a virtual meeting.

[12] This is supported by the ASX Corporate Governance Principles (4th Edition, 2019), Recommendation 6.4.

outside of the insolvency context.[13] As more companies shift to offer virtual meetings, voting by show of hands may become obsolete, and careful consideration should be given as to whether that outcome is appropriate in all contexts, and whether distinction should be drawn for companies of particular type, size, or solvency.

Member Details

Finally, despite the various updates including reference to methods of electronic communication, and the value of having a link to a virtual meeting by an electronic point of contact, such as email, there does not appear currently to be any suggested amendments to s 169. It would seem logical that this section should, at the very least, if a company will provide virtual meetings, include a requirement for companies to record the member's email address in addition to their physical address.

Thank you for the opportunity to make a submission.

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[13] I note that the Exposure Draft Explanatory Memorandum notes the possibility of holding virtual meetings in the context of external administration. This may pose significant issues in regards to the current voting requirements as set out in the *Insolvency Practice Rules (Corporations) 2016*: s 75-50 on.