

16 July 2021

Market Conduct Division
Treasury
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via email: businesscomms@treasury.gov.au

Dear Treasury

Treasury Laws Amendment (Measures For A Later Sitting) Bill 2021: Use of Technology For Meetings and Related Amendments

Thank you for the opportunity to provide a submission on the provisions of the Exposure Draft *Treasury Laws Amendment (Measures For A Later Sitting) Bill 2021: Use of Technology For Meetings and Related Amendments* (**Exposure Draft**).

The Australian Institute of Company Directors' (**AICD**) mission is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society. The AICD's membership reflects the diversity of Australia's director community, with our membership of more than 45,000 being drawn from directors and leaders of not-for-profits, large and small businesses, and the government sector.

Since the onset of the COVID-19 pandemic, through what continues to be an uncertain time across the Australian community, the AICD has been advocating for urgent regulatory relief required to support organisations to continue to meet their governance requirements while navigating the impact of public health measures.

The disruption caused by the COVID-19 crisis has highlighted the need to permanently modernise Australia's *Corporations Act 2001* (Cth) (**Corporations Act**) requirements relating to company meetings, shareholder communications and document execution requirements.

Accordingly, the AICD is very pleased to see the Government moving forward on these important reforms.

1. Executive Summary

In summary, the AICD:

- strongly supports the Exposure Draft's proposed reforms to enable organisations to adopt the best meeting format for their circumstances, whether that be physical, hybrid or wholly virtual meetings, on a permanent basis;
- welcomes, in particular, provisions in the Exposure Draft that will provide appropriate safeguards to ensure effective and meaningful shareholder participation at meetings, including an opportunity for shareholders to have votes independently reviewed;

- considers it is critically important that the legislation provides flexibility in delivery and not be overly prescriptive creating an unnecessary compliance burden for smaller and not-for-profit organisations, given the risk of legislation becoming outdated as technology evolves;
- supports the Exposure Draft's proposed amendments to enable organisations to distribute meeting related materials electronically, while still enabling shareholders/members the ability to elect to receive hard copy materials on an 'opt in' basis. However, given the close proximity to the period in which organisations with a 30 June financial year end will be dispatching notices of meeting for the 2021 AGM season, we consider there is an opportunity to streamline notification requirements for shareholders to opt in to receive hard copy meeting materials;
- urges the Government to consider extending the COVID-19 temporary relief measures, proposed in *Treasury Laws Amendment (2021 Measures No.1) Bill 2021 (TLAB1)*, to continue until the end of the 2021 calendar year. Given the ongoing disruptions in the Australian community due to the COVID-19 pandemic, this will provide some certainty for the upcoming 2021 AGM season. We also encourage the Government to consider a permanent mechanism in the Exposure Draft legislation to enable emergency relief measures to be in put place in the event of future disruptions, such as via a disallowable legislative instrument or ASIC class action relief power; and
- supports the Exposure Draft's proposal to enable the electronic execution of documents (including directors' and members' meeting minutes) on a permanent basis.

2. Use of technology for meetings

(a) Benefits of allowing virtual meetings

The AICD considers the annual general meeting (**AGM**) to be a key governance and accountability mechanism for companies. They are, and should remain, a key feature in an organisation's governance calendar. AGMs are a critical forum for shareholders/members to hold companies, board and management to account for their performance, to hear directly from the Chair and management, and to vote on the composition of the board and key governance resolutions.

The AICD's most recent Director Sentiment Index survey found that over a third (36 per cent) of directors consider the current AGM system to be dysfunctional.¹ In our view, the rationale for permanent legislative reform to modernise Australia's outdated Corporations Act requirements is sound. As demonstrated by the COVID-19 pandemic and the ongoing impact of public health and travel restrictions, the use of technology has allowed organisations to hold effective hybrid and virtual general meetings, while still meeting business and shareholder needs throughout this period.

Going forward, there is capacity for technology to reinvigorate the format of company meetings by improving accountability through visibility and accessibility, removing geographic and physical barriers to attendance by retail shareholders and members; as well as increasing engagement and the opportunity for shareholders/members to ask questions.

Permanent changes to company meeting requirements to enable the use of virtual AGMs would also bring us into line with other countries such as the US, Canada, Spain, South Africa, Denmark, Ireland and New Zealand.

¹ See slide 71, Director Sentiment Index: Research Findings First Half 2021, available at: <https://aicd.companydirectors.com.au/advocacy/research/directors-upbeat-about-economic-outlook-as-sentiment-soars>

(b) Flexibility in format of meetings

The AICD strongly supports the proposals in the Exposure Draft that will enable organisations to have the flexibility to adopt the best meeting format for their circumstances (whether that be physical, hybrid or wholly virtual meetings) on a permanent basis. Regulation should focus on the outcomes and purpose of meetings, while enabling flexibility in delivery and technological neutrality.

Unlike the Treasurer's emergency COVID-19 relief measures, which temporarily overrode any restrictions in a company's constitution from holding a virtual meeting, the Exposure Draft proposes virtual meetings may only be held in this way if they are expressly permitted by the company's constitution. Many organisations will therefore be required to seek shareholder approval to amend their constitutions to realise the full effect of the Exposure Draft's proposed changes.

While there is an opportunity for the Exposure Draft to facilitate constitutional modernisation on company meetings, it is important, in our view, to protect shareholder democracy and that organisations that wish to have the option of conducting virtual meetings on a permanent basis should ensure that shareholders or members have consented.

Notwithstanding this requirement providing an important safeguard for the purposes of the permanent reforms in this Exposure Draft, we see an urgent need to provide entities certainty for the 2021 AGM season in light of the recent and continuing lockdown in NSW (and possible lockdowns elsewhere).

The combined impact of TLAB1 and this Exposure Draft is that a number of organisations will be required to update their constitutions if they wish to hold meetings using technology. However, if the lockdown continues or restrictions on gatherings remain in place into the AGM season, organisations will need to hold a virtual meeting but may be precluded unless already permitted by their constitution.²

We provide further comment in **Section 5** below regarding the immediate need for an extension to the COVID-19 relief measures in TLAB1 until the end of the 2021 calendar year, as well as permanent statutory mechanisms to enable emergency measures to apply in the event of future disruptions.

(c) Ensuring accountability and engagement in virtual meetings

We recognise the concerns of some stakeholders regarding the transparency and quality of shareholder/member engagement in a virtual meeting format. The participation of shareholders, as the collective owners of a company, in general meetings is a crucial component of good governance.

In the AICD's view, virtual AGMs must not be used by organisations to reduce corporate accountability or disenfranchise shareholders/members. Whatever the format, whether that be physical, hybrid or virtual, there is a clear expectation and protection under the law that shareholders and members are given a reasonable opportunity as a whole to ask questions or make comments on the management of the company. This is a strict liability offence under section 250S of the Corporations Act.

We understand the concerns raised by investor groups about some meeting practices not meeting these objectives. At the same time, during 2020 many listed companies *have* shown that it is possible to hold virtual meetings in a way that increases, rather than decreases, shareholder participation. However, as with any new technology or alterations to established governance practices, there will inevitably be a period of evolution as stakeholders work through the practical changes to processes and practice. It is

² We suspect very few constitutions would expressly allow for virtual meetings given the general view of most legal practitioners is that the Corporations Act does not allow such a format.

important that all stakeholders work together to improve the experience for all participants and ensure that virtual AGMs are not used as a means to reduce board accountability to shareholders/members.

In April 2021, the AICD together with the Governance Institute of Australia, the Law Council of Australia and the Australasian Investor Relations Association released joint guidance to help organisations navigate the ongoing uncertainty around holding AGMs (**Joint Industry Guidance**).³ Importantly, this guide addresses investor concerns and captures key learnings from the 2020 AGM season, including safeguards to ensure effective shareholder participation at meetings. This demonstrates that industry can learn from the experience and develop good practice without the need for prescriptive arrangements in legislation.

The AICD supports the Exposure Draft's proposed amendments in section 249S that requires organisations to have in place appropriate safeguards that afford shareholders, as a whole, a reasonable opportunity to participate.

The Exposure Draft also proposes to include a new requirement in section 249S(8) that suggests shareholders or members may be able to exercise their right to speak or ask questions at a meeting orally or in writing. The AICD supports the flexibility provided in this current drafting, which would allow organisations to provide the most appropriate lines of communication with shareholders or members throughout the meeting that best suits a physical, hybrid or virtual format.

We would however caution against hardwiring any requirement for both oral and written communication from shareholders or members throughout a meeting.

We understand that facilitating voice-integrated or telephone dial-in options that enable participants to speak during a meeting, in addition to submitting questions in writing over the meeting platform, while not impossible, is less commonly used due to the increased complexity with these arrangements. We also understand that it is difficult for organisations and platform providers to securely verify the identity of those dialling-in as shareholders seeking to put questions orally to the meeting. By contrast, the ability to submit questions online to the webcast meeting is more securely monitored by the platform provider and requires shareholders to provide a passcode to verify identity. This still allows general access for interested stakeholders (for example, media, employees and other stakeholders) to view the webcast.

Given the legislation covers a broad range of organisations, from small not-for-profit organisations, limited by guarantee to large listed organisations, it is important that the legislation does not impose minimum expectations that are overly prescriptive; unduly burdensome to comply with; or otherwise at risk of becoming outdated as technology continues to evolve.

Instead, we would encourage the Government and stakeholder community to take steps to address listed company investor concerns around meaningful shareholder engagement without embedding unnecessary prescription in legislation. This could be achieved via ASIC regulatory guidance supplemented by industry-agreed best practice principles, such as the above-mentioned Joint Industry Guidance.

While ASIC guidance is not legally binding it would create a clear expectation of practice and provide guidance on how the corporate regulator will enforce companies' pre-existing legal obligation to provide members as a whole with a 'reasonable opportunity to participate' at meetings. Where

³ Available at <https://aicd.companydirectors.com.au/membership/membership-update/new-joint-guidance-for-navigating-virtual-agms-electronic-signatures-and-electronic-shareholder>

companies circumvent their obligations, ASIC can (and should) draw on its existing and continuing enforcement powers.

3. Independent report on polls

We support the Exposure Draft's reform proposal to allow members who hold at least 5 per cent of voting power to require a listed company or registered scheme to appoint an independent person to observe and report on whether the poll has been properly assessed and counted.⁴ As a matter of transparency, we agree this is an important safeguard.

In the absence of an existing statutory requirement for independent verification, we understand that many organisations appoint their share registry or online meeting platform provider to collate votes and provide independent reports on polls. To this end, we consider that the Exposure Draft's explanatory memorandum could helpfully clarify that an 'independent person' can include a company's share registry or meeting platform provider.

4. Electronic communication of documents

The AICD strongly supports the amendments that would allow organisations to send documents, including notices of meetings, via electronic means on a permanent basis. In our view, allowing organisations to provide notices of meetings to shareholders/members electronically will produce significant cost savings and reduce postal delay for shareholders/members in rural and regional communities, as well as have a positive environmental impact.

While we support electronic communications as the 'default' method of communication, we consider that shareholders/members who wish to receive hard copy materials should have the option to make a standing election to do so, as proposed in TLAB1.

However, in respect of notifying shareholders/members of a right to opt in to receive hard copy materials, we note that TLAB1 proposes requirements for organisations to notify:

- existing members of their ability to opt in to receiving hard copies within two months of TLAB1 commencing; and
- new members of their ability to opt in to receive hard copies within two months of becoming a member.

The Exposure Draft does not however propose these same notification requirements, as it is drafted to be read in conjunction with TLAB1 on the basis that TLAB1 would have been legislated before the Exposure Draft is enacted.

We understand that the passage of both TLAB1 and the Exposure Draft are anticipated in close proximity to the period in which organisations with a 30 June financial year end will be required to dispatch their notices of meeting for their AGM. This will result in administrative complications for those organisations having to then also meet the TLAB1 requirements to notify shareholders of their right to receive hard copy materials in that same short timeframe.

The AICD would welcome an opportunity to streamline these requirements in the Exposure Draft. For example, by requiring organisations to notify members of their ability to opt in to receive hard copy

⁴ See media release: Angus Armour, AICD CEO & MD, <http://aicd.companydirectors.com.au/media/media-releases/aicd-welcomes-draft-legislation-to-support-companies-to-use-technology-to-hold-meetings>

materials at the time they are required to communicate that electronic copies of the notice of meeting are available (such as on the company's website). In our view, this would reduce administrative and regulatory burden on organisations by avoiding unnecessary duplication in notifications to shareholders.

5. Permanent mechanism for emergency relief

The ongoing disruptions in the Australian community due to the COVID-19 pandemic and continued lockdowns in recent weeks, demonstrates how critical it is for the extension of the temporary COVID-19 relief in TLAB1 to pass Parliament as a matter of urgency.

Given the passage of time since the TLAB1 was introduced and ongoing disruption from the pandemic, we suggest that the relief measures extend until the end of the 2021 calendar year. These relief measures allow for more certainty in planning by entities and better communication and engagement with shareholders, members and stakeholders as the 2021 AGM season continues.

Going forward, for the purposes of the reform measures the subject of the Exposure Draft, we strongly encourage Treasury to consider a permanent statutory mechanism to enable emergency relief measures to be invoked in circumstances (such as snap lockdowns, social distancing requirements and travel restrictions) where organisations may not be able to facilitate physical or hybrid meetings or send meeting materials to shareholders in hard-copy. Critically these measures would, similar to the Treasurer's COVID-19 emergency relief, need to displace constitutional requirements that may otherwise prohibit virtual meetings or sending notices of meeting electronically.

This could be achieved, for example, by embedding into the legislation both:

- an ability for the Treasurer to make an emergency relief order via a disallowable legislative instrument; and
- a power for ASIC to provide class order relief to modify the application of, or exempt entities from, provisions of the Corporations Act relating to the use of technology for meetings and related amendments in the Exposure Draft.

In our view, these discretionary powers would avoid the need for ASIC to provide a 'no action' position in relation to holding virtual meetings and sending electronic notices of meeting (which does not necessarily remove the risk of legal action from third parties, for example, challenging the validity of a resolution passed at a virtual meeting) each time temporary measures, such as a 'lockdown', are put in place.

6. Electronic signatures

We strongly support the Exposure Draft's proposal to provide a permanent statutory mechanism for organisations to execute documents (including directors' and members' meeting minutes) electronically. We further support the Exposure Draft's proposed amendments that will permit:

- the electronic witnessing of the fixing of a seal;
- separate copies and counterparts of a document to be signed, rather than the original (in other words, split execution); and
- the valid execution of a document by a sole director of a proprietary company without a company secretary.

While these measures may seem minor in nature, they will improve efficiency and reduce costs which will ultimately benefit shareholders/members and consumers. They also go to the overarching need of the Australian economy to utilise technology more effectively and keep up with our global counterparts. The less time and expense spent on mechanical technical requirements, the more that can be spent on charting a path to a COVID-safe economic recovery.

7. Next steps

We hope our submission will be of assistance as you undertake this important consultation. If you would like to discuss any aspects further, please contact Christian Gergis, Head of Policy, at cgergis@aicd.com.au or Laura Bacon, Senior Policy Adviser, at lbacon@aicd.com.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Louise', with a long horizontal flourish extending to the right.

Louise Petschler GAICD

General Manager, Advocacy