



OWNERSHIP MATTERS

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Market Conduct Division
The Treasury
Parkes ACT

Email: businesscomms@treasury.gov.au

Using technology to hold meetings and sign and send documents

Dear Manager,

Thank you for the opportunity to make a submission on the Exposure Draft of the Treasury Laws Amendment (Measures for a Later Sitting) Bill 2021. Ownership Matters (OM), formed in 2011, is an Australian owned governance advisory firm serving institutional investors. This submission represents the views of OM and not those of its clients.

In relation to the Exposure Draft OM has four issues on which it would like to comment:

- **Proposed s.249R(c):** The proposed change allowing companies whose constitutions permit the holding of a solely virtual meeting to hold such a meeting should be amended to exclude listed companies. The *Corporations Act* necessarily applies to a wide range of companies but listed companies are unique in that ownership of their shares is spread across a large number of shareholders who are able to acquire their shareholdings more easily than, for example, shareholders in an unlisted public company and so can reasonably be assumed to have had less input and influence into the company's constitutional provisions than shareholders in unlisted entities.
- Virtual-only meetings are therefore fraught with potential problems in the case of listed companies. A virtual-only meeting by its nature gives the chairperson of the meeting more power than that they presently enjoy at physical meetings: For example, the chairperson of a physical company meeting can at least be observed by other attendees failing to permit a potentially 'troublesome' shareholder from asking a question but in a virtual setting this is less likely to occur (OM also understands that some company chairpersons who are committed to ensuring a meeting where shareholders are given a fair opportunity to raise and debate issues find virtual-only meetings more challenging given their inability to assess the 'mood' of the meeting).
- This will lead some listed company management teams that may wish to evade scrutiny for past failings or current controversies opting for virtual AGMs where proceedings and questions can be more tightly controlled. It is less likely, for example, that the shareholder question at the 2019 Crown Resorts AGM concerning information sharing protocols between Crown and its largest shareholder CPH (controlled by James Packer) would have been asked had that meeting occurred in a virtual format. This question, and the response by Crown Resorts' management to it, was certainly considered material by the NSW Commission of Inquiry into Crown's suitability to hold its Sydney casino licence.

- In addition, the risk of technical errors at critical moments of the business of the meeting may make it more difficult for those objecting to a resolution or item of business - including items such as an asset sale, placement or reverse takeover proposal with material consequences for shareholders' property rights - to be heard or to make procedural arguments.
- The proposal seems to place significant weight on the notion that shareholders will have given their informed consent to virtual meetings by limiting the capacity to hold such meetings only to those companies whose constitutions permit such meetings to be held. This argument however does not take account of the actual lack of agency shareholders have over the content of many listed company constitutions. As an example, when Woolworths shareholders voted for the demerger of the newly listed Endeavour Group, spun off in June 2021, they also accepted the constitution of the new company. This constitution allows the directors of Endeavour to hold a meeting at multiple venues "using any technology that gives members as a whole a reasonable opportunity to participate". Similarly, when shareholders of Nuix made the decision to invest in its initial public offering they assented to the Nuix constitution which allows the board to convene general meetings held at multiple venues using technology giving all shareholders a reasonable opportunity to participate.
- There does not appear to be a compelling public policy argument to permit the management of listed companies to exempt themselves from in-person shareholder scrutiny. As noted in OM's prior submission on the earlier proposal to permit virtual meetings in all circumstances the largest costs associated with physical general meetings typically relate to distribution of materials which the Government is addressing. The venue and other costs associated with a physical meeting are immaterial in the context of costs incurred by most listed companies.
- **Proposed s.252P(c):** The proposal to allow virtual meetings of registered schemes if permitted by the scheme constitution contemplated in the Exposure Draft also has potential flaws over and above those for listed companies. Section 601GC of the *Corporations Act* allows the responsible entity of a registered scheme to amend the constitution without the consent of members if it "reasonably considers the change will not adversely affect members' rights". This means responsible entities – which in many cases are also the manager of the scheme – could potentially be able to amend their constitutions to evade in-person meetings with their members including for such purposes as to seek the removal of the responsible entity. The ability for an incumbent responsible entity to conduct a meeting held to seek its removal entirely virtually seems to invite abuse.
- **Voting by show of hands:** The amendments in the Exposure Draft also reaffirm that a show of hands would be the primary method of deciding a resolution. A positive aspect of the Government's earlier proposal to allow virtual meetings of companies and registered schemes was the requirement that resolutions at virtual or hybrid meetings would need to be decided on a poll and not a show of hands. It is not clear why the Government has abandoned this earlier proposal which would have at least ensured that votes cast at a virtual or hybrid meeting would accurately reflect the will of shareholders rather than a show of hands carried out using technological means where the voting may be visible only to the chairperson of the meeting. The Exposure Draft should be amended to require that resolutions at hybrid or virtual meetings of listed companies and schemes – at minimum – should be decided on a poll and not a show of hands.

- **Ability to request independent reports on polls:** This proposed amendment is positive and the Government should be congratulated for proposing it. At present, shareholders outside the management team have no oversight of the corporate voting process. The proposal to enable shareholders or members of listed entities holding interests of 5% or more to request an independent observer of a poll and an independent report on a poll is positive as it will enable investors to have greater confidence in the outcome of resolutions that are highly contested and which can involve material changes to corporate structures and the interests of members such as asset disposals, placements, related party transactions and schemes of arrangement. The proposal requiring any report on a poll to be made "readily available" following its publication is also positive and a critical requirement for the independent observer provisions to be effective.

Our submission on the Government's 2020 proposal to allow virtual meetings for all entities noted a number of pieces of 'low hanging fruit' in relation to reforming general meeting processes that should form part of the changes contemplated in this Exposure Draft in addition to the ability for investors to appoint an independent observer of polls. The Parliamentary Joint Committee on Corporations and Financial Services' Report: *Better shareholders – Better company - Shareholder engagement and participation in Australia, June 2008* contains a number of worthwhile recommendations relating to the absence of a fully electronic audit trail for the lodgement of proxy votes and the examination of a revised record date for the purposes of determining voting entitlements.

To illustrate some of the potential risks around voting on resolutions at listed entities that may be heightened by a shift to virtual general meetings we have also attached a copy of an audit OM did for the Australian Council of Superannuation Investors in 2012 which identified multiple instances of missing votes cast on behalf of six major investor groups. The core business of general meetings is to enable investors to hold management teams accountable and to pass resolutions. Hybrid meetings for listed companies may enhance this process but it is not clear that allowing virtual meetings – outside of a global pandemic or similar emergency – would improve either the ability of management to be held accountable or the efficient and fair passing of resolutions.

If the Parliament is taking the time to reform the AGM, OM considers it should also ensure that the infrastructure is in place to ensure that investor votes are properly counted. There is widespread industry support for reforms to the "proxy vote" process and counting system.

Please feel free to contact us concerning any aspect of our submission. For the avoidance of doubt we are happy for our submission to be made public.

Yours sincerely,



Dean Paatsch & Martin Lawrence

Ownership Matters Pty Ltd