

10 September 2021

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

Dear Treasury

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

Thank you for the opportunity to provide a further submission on the provisions of the Exposure Draft *Treasury Laws Amendment (Measures For Consultation) 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 46,000 being drawn from directors and leaders of not-for-profits, large and small businesses, and the government sector.

1. Executive Summary

The AICD is very pleased to see the Government continuing to move forward on these important reforms. We also welcome the Government's efforts to address much of the industry's feedback on the previous iteration of the Exposure Draft *Treasury Laws Amendment (Measures For A Later Sitting) Bill 2021: Use of Technology For Meetings and Related Amendments (Previous Exposure Draft)*.

There are however certain aspects of the revised Exposure Draft that we have concerns about, which we have confined our comments to below.

In summary, the AICD:

- strongly supports 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. However, to avoid creating an unnecessary compliance burden for smaller and not-for-profit organisations, the legislation should provide flexibility to allow organisations to provide the most appropriate method of communication with shareholders or members that reflects their organisational type, size and meeting format. This should not mandate that both oral and written channels be provided in all instances;
- supports amendments providing companies flexibility to decide whether votes are to be conducted via a show of hands or a poll. However, we do not consider that there should be a separate legislative requirement for listed entities to conduct votes on resolutions by way of a poll. In our view, recommendation 6.4 of the ASX Corporate Governance Principles and

Recommendations (**ASX Principles**) already sets this expectation as to better practice for listed entities when conducting voting on substantive resolutions;

- strongly supports amendments to enable organisations to distribute meeting related materials electronically, while still enabling shareholders/members the ability to elect to receive hard copy materials. However, we consider that there is an opportunity to simplify the mechanics of the draft provisions in the Exposure Draft in line with similar existing provisions under the *Corporation Act 2001* (Cth) (**Corporations Act**); and
- strongly supports amendments to enable the electronic execution of documents (including directors' and members' meeting minutes) on a permanent basis as well as further clarifications made to Division 1 of the revised Exposure Draft. We also in principle support amendments to enable agents to execute documents electronically under section 126 of the Corporations Act. However, we encourage further consultation on amendments to enable agents of a company to execute deeds electronically and the specific set of assumptions which are proposed to apply to dealings of this nature. For example, this could best occur via the package of legislative reform contemplated under the separate consultation on *Modernising Business Communications* across Treasury Portfolio Laws.

2. Use of technology for meetings

The AICD supports measures in the Exposure Draft that will provide appropriate safeguards to ensure effective and meaningful shareholder participation at meetings. It is important that all stakeholders work together to improve the experience for all participants and ensure that virtual AGMs are not used to reduce board accountability to shareholders/members.

The AICD supported the drafting of the Previous Exposure Draft section 249S(8) which included a requirement for shareholders or members to be able to exercise their right to speak or ask questions at a meeting orally or in writing. In our view, this drafting provided flexibility which would allow organisations to provide the most appropriate method of communication with shareholders or members throughout the meeting that best suits a physical, hybrid or virtual format.

However, we note that the Exposure Draft has recently been amended in section 249S(7) to require that shareholders or members be able to exercise their right to speak or ask questions both orally and in writing throughout a meeting. We previously cautioned against hardwiring any requirement for both oral and written communication and would reiterate our concerns.

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, 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.

The AICD recognises 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. However, 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 applicable to a broad range of organisations.

We continue to believe this could be best achieved via ASIC regulatory guidance supplemented by industry-agreed best practice principles, such as the *Joint Industry Guidance* issued by the AICD together with the Governance Institute of Australia, the Law Council of Australia and the Australasian Investor Relations Association released in April 2021.¹ Importantly, this guide responds to 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 market's experience and develop good practice without the need for prescriptive legislative arrangements.

3. Voting on substantive resolutions

The AICD supports amendments to the Exposure Draft to remove a default method for conducting votes at a meeting and provide companies flexibility to decide whether votes are to be conducted via a show of hands or a poll.

That said, we do not consider that there should be a legislative requirement for listed entities to conduct votes on resolutions by way of a poll. In our view, recommendation 6.4 of the ASX Principles already prescribes this method of voting is better practice for listed entities and is regulated via a "if not, why not" reporting approach.

However, should the Government be minded to hardwire this requirement for listed entities, we would strongly encourage this be limited to substantive, rather than procedural, resolutions only. Although this is clarified in the Explanatory Memorandum, there is an opportunity to reference substantive resolutions explicitly in the Exposure Draft which would more closely align with recommendation 6.4 of the ASX Principles.

4. Electronic communication of documents

The AICD continues to strongly support the amendments that would allow organisations to send documents, including notices of meetings, via electronic means on a permanent basis at a recipient's election. At the same time, we consider that shareholders/members who wish to receive hard copy materials should have the option to elect that method of communication.

However, the AICD considers that there is an opportunity to simplify the mechanics of the draft provisions in Division 2 (section 110C through to section 110K) of the Exposure Draft. For example, section 314 of the Corporations Act sets out similar requirements for companies to provide shareholders or members both hard and electronic copies of documents, at their election, in a more simplified form. We encourage the adoption of a similar format for Division 2, which we understand the Government will seek to expand for the purposes of other documentation over time.

¹ Available at <https://aicd.companymdirectors.com.au/advocacy/research/updated-joint-guidance-for-navigating-virtual-agms-electronic-signatures>. This guidance was updated in September 2021 to reflect the extension of temporary relief under the *Treasury Laws Amendment (2021 Measures No. 1) Bill 2021* until March 2022 and the Government's consultation on permanent reform measures.

5. Electronic signatures

We continue to 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 also welcome the further clarifications made to Division 1 of the Exposure Draft that make clear that:

- a person is not required to sign the same form or page of the document as any other person;
- a person is not required to use the same method as any other person; and
- a document signed by a person does not need to include all the information recorded in the document.

While these measures may seem minor in nature, they will significantly improve efficiency and reduce costs which will ultimately benefit shareholders/members and consumers.

The AICD also supports, in principle, the extension of the technology neutral signing provisions to section 126 of the Corporations Act to enable agents to execute documents electronically. However, we encourage the Government to give further consideration to the proposal to enable agents of a company to execute deeds electronically and the specific set of assumptions which are proposed to apply to dealings of this nature.

An agency relationship with a company can, in some circumstances, be conferred on employees who, while they may be authorised to execute *certain* documentation on the company's behalf, may not always have the requisite authority to execute deeds. We would caution against expediting this amendment without further consultation with legal practitioners. There may be potential for unintended consequences should a rogue actor misrepresent their authority to validly execute a document on behalf of a company.

In our view, there is an opportunity for continued consideration of this amendment to ensure appropriate safeguards are embedded in the legislation as part of the Government's separate consultation on *Modernising Business Communications* across Treasury Portfolio Laws.

6. Next steps

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

Yours sincerely,



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