

# Statutory Review of the Meetings and Documents Amendments

Consultation paper

June 2024



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# Consultation Process

## Request for feedback and comments

Interested stakeholders are invited to make submissions on the issues raised in this consultation paper.

**Closing date for submissions: 19 July 2024**

Submissions may be lodged electronically (preferred) or by post to the following addresses:

<b>Email</b>	<b>meetingsanddocumentsreview@treasury.gov.au</b>
Mail	Meetings and Documents review c/- Better Business Communications Unit Market Conduct and Digital Division The Treasury Langton Crescent PARKES ACT 2600

For accessibility purposes, please provide your submissions in a Word, RTF or PDF format.

Enquiries      Enquiries can be initially directed to  
meetingsanddocumentsreview@treasury.gov.au

## Confidentiality of submissions

Submissions may be shared with other Commonwealth agencies for the purposes of the Review. All information (including name and address details) contained in submissions may be made publicly available on the Australian Treasury website unless you indicate that you would like all or part of your submission to remain in confidence. Automatically generated confidentiality statements in emails are not sufficient for this purpose.

If you would like only part of your submission to remain confidential, please provide this information clearly marked as such in a separate attachment.

Please note that legal requirements, such as those imposed by the *Freedom of Information Act 1982*, may affect the confidentiality of your submission.

For further information, please refer to Treasury's [Submission Guidelines](#).

# Purpose of this consultation

The Assistant Treasurer and Minister for Financial Services, the Hon Stephen Jones MP has appointed an independent Panel to conduct the Statutory Review of the Meetings and Documents Amendments (Review). The Panel is reviewing amendments to the *Corporations Act 2001* (Corporations Act) made by:

- Schedule 1 of the *Treasury Laws Amendment (2021 Measures No.1) Act 2021* (2021 Act); and
- the *Corporations Amendment (Meetings and Documents) Act 2022* (2022 Act).

Under the Terms of Reference, the Panel is to have regard to the effects of the above amendments in supporting the efficient and effective operation of Australian companies and capital markets, recognising the importance of shareholder participation, transparency and good corporate governance. This includes having regard to:

- the effects of the amendments relating to online meetings on the conduct of company and registered scheme meetings, including participation by and exercise of voting rights of members, and the flexibility and costs of holding meetings
- the effects of the amendments relating to electronic document execution and electronic giving and sending of meeting-related documents, including their cost and effectiveness.

The Panel is also to have regard to the experience in other countries of the use of technology and any lessons that could apply to Australia.

The Panel is to provide a final report with the outcomes of their review to the Government by 14 August 2024.

The full Terms of Reference can be found on the Treasury website.

## The Panel's approach

The Panel is seeking feedback from affected companies (including responsible entities of registered schemes) and their directors and members, relevant regulators including ASIC and the ASX, representative bodies, legal bodies, and interested members of the general public.

Comments are invited on the operation of the 2021 and 2022 Acts in accordance with the Terms of Reference for the Review. In considering the effects of the changes introduced by the 2021 and 2022 Acts, the Panel is examining the following themes:

- *Meetings:*
  - regarding meetings of members, whether (compared to physical meetings) wholly online or hybrid meetings have created difficulties for members, in terms of their participation and voting in meetings or otherwise, and if so, how those problems might be addressed, and whether the cost of convening and holding wholly online or hybrid meetings is higher or lower than physical meetings;



- regarding meetings of directors, any issues that have arisen in the conduct of directors’ meetings after the commencement of the 2021 and 2022 Acts.
- *The treatment of documents:*
  - whether the 2021 and 2022 amendments have succeeded in facilitating simple and efficient operation of technology neutral giving, signing and execution of documents
  - whether, after the 2021 and 2022 amendments, there are greater risks of fraudulent or other misuse of the law regarding signing and execution of documents.

Questions for stakeholders’ consideration are at the end of each theme. Stakeholders may also wish to provide feedback on other aspects of the changes relevant to the Terms of Reference.

# Background

In 2020, the ensuing health risks, lockdowns and border closures arising from the COVID-19 pandemic affected the ability of companies and registered schemes to comply with their legal obligations to hold meetings and execute documents under the Corporations Act. To facilitate the continuation of business and mitigate the economic impact of COVID-19, temporary determinations were made that allowed companies and registered schemes to fulfil these obligations in a more flexible manner.<sup>1</sup>

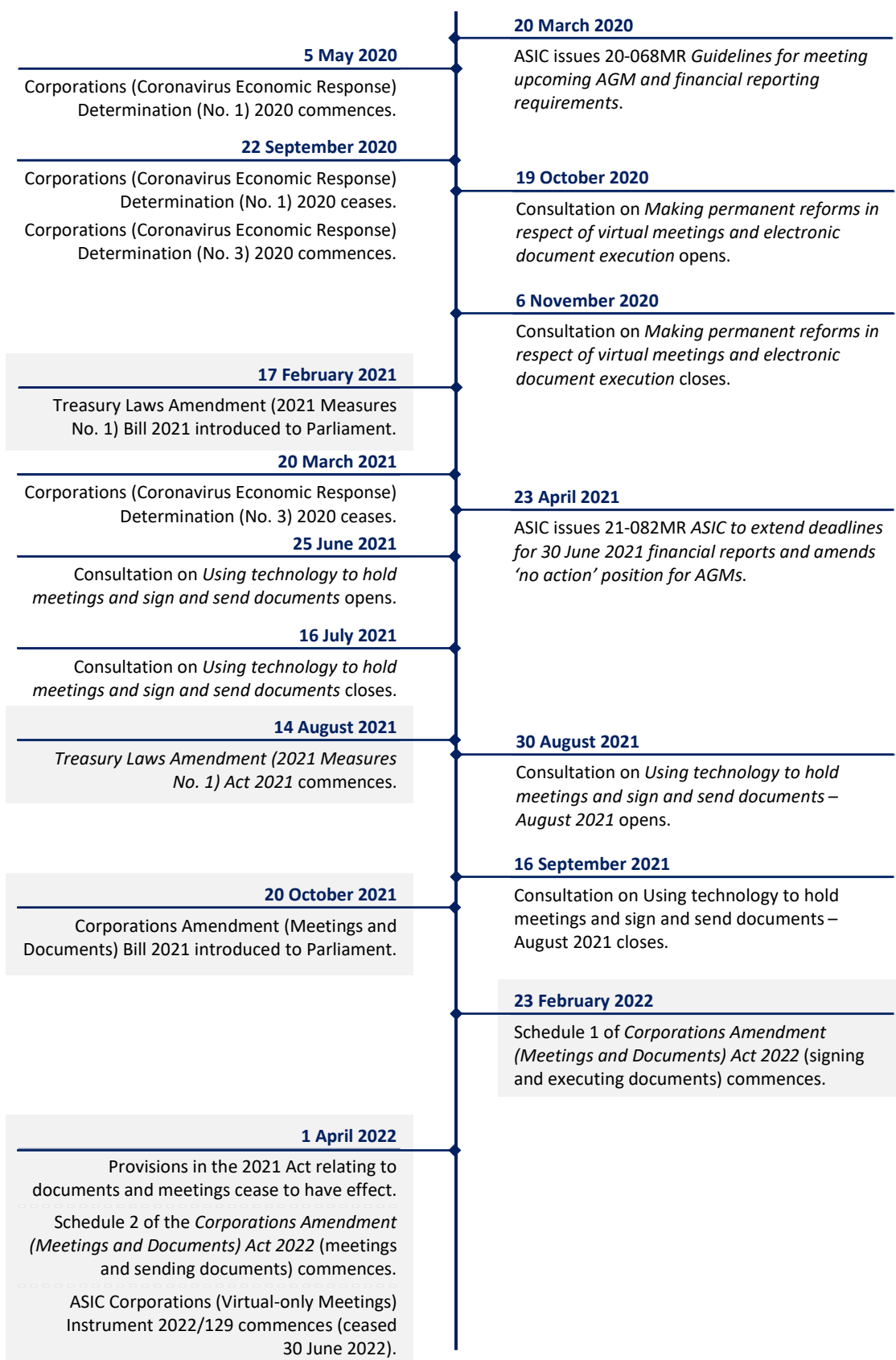
The application of these temporary changes was extended until 31 March 2022 through amendments made by the 2021 Act (which commenced on 14 August 2021).<sup>2</sup> The 2021 Act allowed the electronic execution of company documents, and for companies and registered schemes to hold meetings, provide notices and other documents relating to meetings and keep minutes using electronic means or other alternative technologies.

Many businesses and industry groups called for this more flexible approach to be made permanent.<sup>3</sup> Submissions to consultations in 2021 on drafts of the 2022 Act were also supportive of the reforms in respect of meetings, meeting-related materials and modernising document execution laws.<sup>4</sup>

The more flexible approach was made permanent and further expanded by the amendments in the 2022 Act, which commenced on 23 February 2022 (in relation to signing and executing documents) and 1 April 2022 (in relation to meetings and sending documents). The amendments in the 2022 Act created a permanent statutory mechanism for the electronic execution of company documents and permanently allowed companies and registered schemes to provide meeting-related documents electronically. In respect of meetings, the amendments allowed companies and registered schemes to use technology to hold meetings and made additional amendments to facilitate the conduct of meetings, including to put the way wholly online and hybrid meetings are conducted on par with physical meetings.

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- 1 The former Treasurer's determinations were the [Corporations \(Coronavirus Economic Response\) Determination \(No. 1\) 2020](#) [webpage] (Determination No. 1) on 5 May 2020 and [Corporations \(Coronavirus Economic Response\) Determination \(No.3\) 2020](#) [webpage] (Determination No. 3) on 21 September 2020. Determination No. 1 ceased on commencement of Determination No. 3, which expired on 20 March 2021. Prior to the determinations, the Australian Securities and Investments Commission (ASIC) announced on 20 March 2020 a 'no action' position on delays to meetings and the use of technology (Australian Securities and Investments Commission, [Guidelines for meeting upcoming AGM and financial reporting requirements](#) [webpage], ASIC media release 20-068MR, accessed 21 June 2024).
  - 2 In 2021 while the Bill for the 2022 Act was being considered ASIC announced another 'no action' position in relation to online meetings to provide the market with certainty. See Australian Securities and Investments Commission, [ASIC adopts 'no-action' position and re-issues guidelines for virtual meetings](#) [webpage], ASIC media release 21-061MR, accessed 21 June 2024.
  - 3 See the Senate Economics References Committee [Treasury Laws Amendment \(2021 Measures No.1\) Bill 2021 \[Provisions\]](#) [webpage] (2021), para 1.24, and the Senate Economics Legislation Committee [Corporations Amendment \(Meetings and Documents\) Bill 2021 \[Provisions\]](#) [webpage] (2021), para 2.10.
  - 4 Treasury, [Using technology to hold meetings and sign and send documents](#) [webpage], and Treasury, [Using technology to hold meetings and sign and send documents – August 2021](#) [webpage], both accessed 21 June 2024.

# Timeline of events





# Meetings

## Meetings of members

Meetings of the members of a company or registered scheme are a fundamental aspect of Australia's corporate governance regime, and fall under the purview of the Corporations Act.<sup>5</sup> The Corporations Act creates obligations such as statutory directors' duties (i.e. obligations to act in the interests of the company), reporting requirements and meeting requirements to manage the 'principal-agent' problem that arises due to the differing interests between the company and its owners.

The annual general meeting (AGM) is the key meeting of members.<sup>6</sup> AGMs provide an opportunity for members to collectively deliberate and engage with directors and auditors, to operate as an accountability mechanism for the board and the auditor and for the board to report on the company's performance. The statutory business of an AGM includes consideration of the annual financial report, directors' report and auditor's report (the directors of a public company that is required to hold an AGM must lay these reports before the AGM) and voting by members on decisions, such as the election of board members, appointment of auditors and approval of remuneration reports.<sup>7</sup> The AGM is also a key forum for information sharing and members must be given a reasonable opportunity as a whole to ask questions of senior management and the auditor.<sup>8</sup>

Retail investors are likely to view AGMs differently to institutional investors. Institutional investors (such as superannuation funds, other managed funds and life insurance companies) have other avenues of communication and can raise matters directly with the company's leadership and management. In comparison, retail investors are likely to rely more heavily on the AGM to obtain information and express views directly to those responsible for running the company.

Public companies with more than one member must hold an AGM at least once in each calendar year and within 5 months after the end of its financial year.<sup>9</sup> Proprietary companies and registered schemes are not required to hold AGMs, but they may decide to do so. The AGM process for a company or registered scheme may be regulated through the company or registered scheme constitution and, for a company listed on the Australian Securities Exchange (ASX), through the ASX Listing Rules and the ASX Corporate Governance Principles.

Prior to the amendments, members' meetings were required to be held at a physical location.<sup>10</sup> While technology could be used to connect people at one or more other locations to the main one,

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5 In the case of a company, members are also called shareholders.

6 Other meetings may also be called by directors or the membership. Other meetings include extraordinary general meetings which deal with issues such as removal of a director, approval of a significant transaction or matters that cannot be left for the next AGM.

7 See Corporations Act, ss 250R and 317.

8 See Corporations Act, ss 250S and 250T.

9 See Corporations Act, s 250N.

10 'Pre-amendments Corporations Act' is used throughout this paper to refer to the Corporations Act as at 13 August 2021, immediately prior to the amendments in the 2021 Act taking effect. For example, the provisions dealing with the use of technology for members meetings of a company at that time are the pre-amendments Corporations Act, s 249S. A consolidated version of the [pre-amendments Corporations Act](#) [webpage] is available on the Federal Register of Legislation.

wholly online meetings were not permitted and it was unclear whether online attendance from an undesignated physical location at a physical meeting was permitted.<sup>11</sup>

The 2021 amendments temporarily allowed companies and registered schemes to use technology to hold a wholly online meeting or allow online attendance from an undesignated physical location at a physical meeting (a form of hybrid meeting).<sup>12</sup> Companies and registered schemes could use these as alternatives to a physical meeting or a meeting in one or more physical locations using technology (another form of hybrid meeting). The technology used in these meetings must have given persons entitled to attend the meeting, as a whole, a reasonable opportunity to participate without being physically present in the same place.<sup>13</sup>

The 2022 amendments made permanent the ability for companies and registered schemes to either hold a meeting:

- at one or more physical venues
- at one or more physical locations and using virtual meeting technology (a hybrid meeting)
- using virtual meeting technology only if they are expressly required or permitted by a company or registered scheme's constitution.<sup>14</sup>

The amendments do not specify or require a particular format for the conduct of a meeting. They recognise the meeting rules apply to a broad range of companies, from small not-for-profit companies to large, publicly listed companies. The amendments also clarify that hybrid meetings could be held with those attending online being in an undesignated physical location.<sup>15</sup>

The 2022 amendments also clarify that companies registered as bodies corporate under the *Australian Charities and Not-for-profits Commission Act 2012* may hold physical, hybrid or wholly online meetings.<sup>16</sup>

## Observations on the impact of the amendments

Prior to the COVID-19 pandemic most AGMs were held in-person. The pandemic led to a sudden shift to online and hybrid meetings, although not all companies ceased holding physical meetings. The shifts in meeting format partly reflect the limitations on individuals' movements and ability to congregate in the various jurisdictions within Australia. For the Australian companies in the 50 largest

11 Pre-amendments Corporations Act ss 249S and 252Q allowed companies and registered schemes to hold a meeting of its members at two or more venues using any technology that gives the members as a whole a reasonable opportunity to participate. Pre-amendments Corporations Act ss 249R and 252P required the meeting to be held at a reasonable time and place and ss 249L and 252J required the meeting notice to set out the technology used to facilitate the meeting if it was to be held in two or more places.

12 See ss 253P, 253Q and 253QA as inserted by item 31 of Schedule 1 to the 2021 Act.

13 See subs 253Q(1) as inserted by item 31 of Schedule 1 to the 2021 Act.

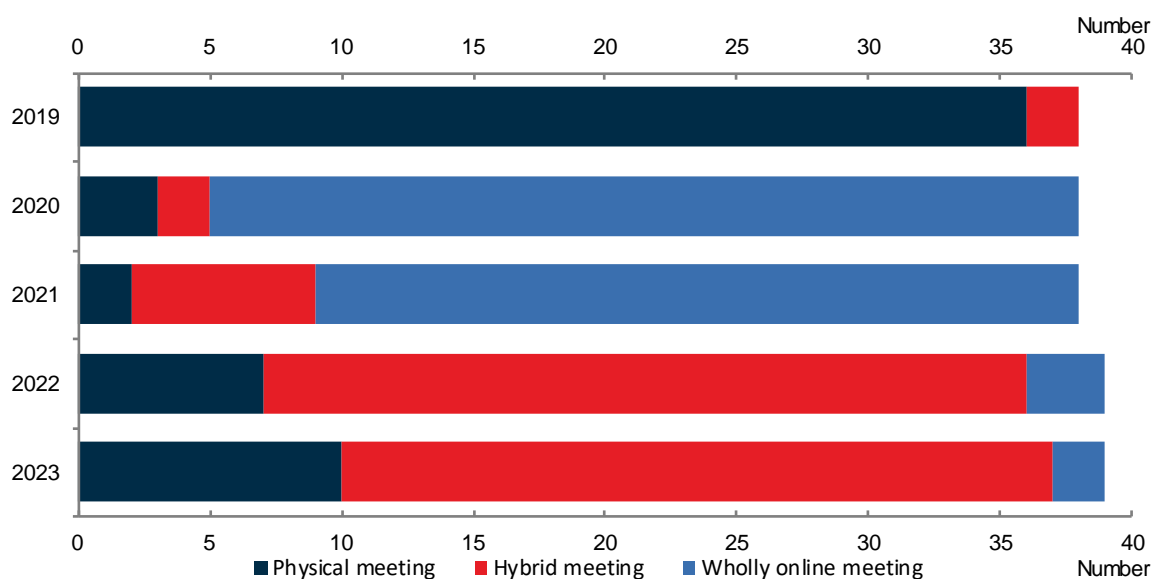
14 See Corporations Act, ss 249R and 252P.

15 Corporations Act paras 249R(b) and 252P(b) provide for members' meetings to be held at one or more physical venues and using virtual meeting technology, and Corporations Act, paras 249L(1)(a) and 252J(a) provide that a notice of a meeting of members must set out sufficient information to allow the members to participate via technology if virtual meeting technology is used to hold the meeting.

16 See Corporations Act, subs 111L(1).

entities listed on the ASX (based on capitalisation at June 2024), 86.8 per cent held their AGMs wholly online in 2020 compared to zero the year before. This was the peak of wholly online AGMs. Since then, online meetings for this group have declined and have been surpassed by hybrid meetings, which have increased from 5.3 per cent of meetings in 2020 to 69.2 per cent in 2023 and have become the most common format. Since 2022, physical meetings have been more common than wholly online meetings. These changes in format over the last 5 years are shown in Figure 1. As at the end of the 2023 AGMs, only 6 of the Australian companies in the 50 largest ASX entities have constitutions that permit virtual meetings.

**Figure 1: Annual General Meeting formats of Australian companies in the 50 largest ASX entities**



**Source:** Treasury analysis of company AGM announcements.

**Notes:** Data on the largest companies obtained from ASX website on 21 June 2024. Analysis is based on the top 50 entities on the ASX with the greatest market capitalisation as at that date. The 2019 to 2022 data does not necessarily reflect the largest companies in each of those years. Registered foreign companies in the top 50 are excluded from the analysis. Companies not registered or listed in particular years are excluded from those years. .

Analysis by King & Wood Mallesons (KWM) shows a similar experience in the broader market. In 2023, 61 per cent of the ASX200 held hybrid meetings while physical meetings accounted for 34 per cent. Only 5 per cent of the ASX200 held wholly online meetings in 2023, down from 80 per cent in 2021.<sup>17</sup> KWM also noted that few companies are pursuing constitutional amendments to allow online meetings.<sup>18</sup>

Outside of Australia, the use of online and hybrid meetings has become increasingly common, with a number of jurisdictions allowing companies to hold wholly online and hybrid meetings. Of the 49 jurisdictions surveyed in the *OECD Corporate Governance Factbook 2023*, wholly online meetings are

17 Newnham E, Hill J, Muraca J, Nicholson D, Dinh H & Su S (2023) *Deep Dive into ASX200 AGMs in 2023* [webpage], King & Wood Mallesons, page 5, accessed on 21 June 2024.

18 Newnham E et al (2023), page 7 and Muraca J, Heath W, Hill, J, Newnham E & Kininmonth C (2022) *Deep Dive into ASX200 AGMs in 2022* [webpage], King & Wood Mallesons, page 7, accessed on 21 June 2024.

allowed in 37 jurisdictions and hybrid meetings are allowed in 40 jurisdictions.<sup>19</sup> These outcomes are likely influenced by differing international frameworks.

## Holding a wholly online members' meeting

The amendments allowed companies and registered schemes to hold wholly online members' meetings only if they are expressly required or permitted via their constitution.<sup>20</sup> Companies and registered schemes may amend their constitution by passing a special resolution, which must be passed by at least 75 per cent of voting entitlements.<sup>21</sup>

In the event of exceptional circumstances such as another pandemic, ASIC could allow an entity to hold a wholly online meeting without constitutional approval.<sup>22</sup>

Companies making initial public offerings (IPOs) following the amendments in the 2022 could be presented to the market with a constitution that already permitted wholly online meetings, without such changes being subject to a vote by those who became shareholders after the company became public.

## Conduct of a members' meeting

It had been the case for some time that members' meetings were required to be held at a reasonable time and place. If the company or registered scheme meeting used technology, including being held at two or more venues, then that technology needed to provide members as a whole a reasonable opportunity to participate.<sup>23</sup>

The amendments expanded and clarified these provisions, ensuring that companies and registered schemes must give the members as a whole a reasonable opportunity to participate in the meeting regardless of the meeting format, including having the meeting in a reasonable venue, at a reasonable time and with reasonable technology. After initial changes first inserted by the 2021 Act,

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19 See Table 3.5 in Organisation for Economic Cooperation and Development, *OECD Corporate Governance Factbook 2023* [webpage], OECD Publishing, Paris, accessed 21 June 2024.

20 See Corporations Act, paras 249R(c) and 252P(c).

21 See Corporations Act, ss 136 and 250MA for companies, and Corporations Act, s 253LA and 601GC for registered schemes.

22 See Corporations Act, s 253TA. ASIC used this power to issue [ASIC Corporations \(Virtual-only Meetings\) Instrument 2022/129](#) [webpage], which commenced on 1 April 2022. This extended the deadline for listed companies and listed and unlisted registered schemes to hold online only meetings for an additional two months until 31 May 2022, and for unlisted companies an additional three months until 30 June 2022.

23 See pre-amendments Corporations Act ss 249R, 249S, 252P and 252Q. Giving the 'members as a whole an opportunity to participate' was first introduced into Australia's corporate law in 1998. It was intended to mean that it is not required that each *individual* member have an opportunity to participate but that the vast majority of members can contribute and no member is intentionally excluded. For most companies a reasonable opportunity to participate would mean that each member is able to communicate with the chairperson and be heard by other members attending the meeting, including those at other venues. Other provisions of the Corporations Act already required that members as a whole be allowed a reasonable opportunity to ask questions or make comments on company management and to ask questions to the auditor or the auditor's representative.

the 2022 Act consolidated and clarified that the conditions for members' reasonable opportunity to participate applied to all meetings of members, regardless of the format.<sup>24</sup>

'A reasonable opportunity to participate' includes, but is not limited to, the following:

- the physical venue for physical or hybrid format meetings must be reasonable which could be determined by a combination of factors, including where the entity is physically registered, where members reside or where the directors are located.<sup>25</sup>
- technology used to connect more than one physical venue or facilitate online attendance and participation must be reasonable, including allowing members as a whole to vote and exercise any pre-existing rights they have to ask questions and make comments both verbally and in writing.<sup>26</sup>
- the time of the meeting must be reasonable at the place the meeting is being held for a physical or hybrid meeting, or where it would be appropriate to hold an online meeting. The time does not necessarily need to be convenient for all members, whether it is physical, hybrid or online.<sup>27</sup>

The amendments included progressive adjustments to the conduct of meetings following consultations on the earlier determinations and on draft legislation. In these consultations stakeholders had expressed concerns about:

- the quality of shareholder participation under virtual technology
- ability to access meetings due to technological issues
- transparency of online meetings.

#### Quality of online shareholder participation

The amendments did not alter the pre-existing rights of members to ask questions or make comments at the meeting. The Explanatory Memorandum to the Bill for the 2022 Act states:

The new law ... makes explicit that the technology used to facilitate virtual attendance must allow members to exercise any pre-existing right that they may have to ask questions or make comments (such as under section 250S and 250T) both verbally and in writing. For example, the company could satisfy this requirement by offering members both the opportunity to ask questions orally by dialling into a phone hook-up and the opportunity to type their questions into a chat function. To avoid doubt, this provision does not create any

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24 See Corporations Act, ss 249S and 252Q.

25 See Corporations Act, subss 249S(4) to (5) and 252Q(4) to (5), and paragraph 1.90 of the Revised Explanatory Memorandum to the Corporations Amendment (Meetings and Documents) Bill 2021.

26 See Corporations Act, subss 249S(6) to (7) and 252Q(6) to (7), and paragraphs 1.92 and 1.93 of the Revised Explanatory Memorandum to the Corporations Amendment (Meetings and Documents) Bill 2021.

27 See Corporations Act, subss 249S(3) and 252Q(3), and paragraph 1.91 of the Revised Explanatory Memorandum to the Corporations Amendment (Meetings and Documents) Bill 2021. Additional explanation is provided in paragraph 1.30 of the [Explanatory Memorandum to the Treasury Laws Amendment \(2021 Measures No. 1\) Bill 2021](#) [pdf] (accessed 21 June 2024).

new right for members to ask questions or comments, but simply relates to the manner in which any pre-existing rights can be exercised.<sup>28</sup>

This approach followed concerns raised by some stakeholders (largely representing shareholders) about the potential for the quality of shareholder participation to decline in an online setting. Concerns included the potential for:

- directors to take advantage of the physical disconnect to disregard or avoid questions
- directors grouping and filtering multiple questions to answer them with a single, broad and generic response
- lack of knowledge of whether all shareholder questions were asked and answered since they were not necessarily linked to a specific shareholder
- online attendees being provided insufficient time to vote.

### Managing technological faults

As noted above, the Corporations Act sets out clear guidance on the degree of access that companies must provide shareholders. The issue of technology faults was identified in the report of the Senate Economics Legislation Committee.<sup>29</sup> In response to the growth in the use of technology to facilitate AGMs, some companies are providing more detailed guides to shareholders about the use of online environments and how to manage technical difficulties in their annual meeting materials.<sup>30</sup>

### Transparency of meetings

The pre-amendments Corporations Act required companies to keep minute books of AGMs and allow members to inspect these books.<sup>31</sup> Some stakeholders had suggested that transparency in online AGMs could be improved if companies provided transcripts of their AGMs. There is no legal requirement for companies to either record or provide a transcript of their AGM to their members. However, there are a growing number of large, listed companies that are now livestreaming their AGMs via webcast for interested observers or have undertaken the practice of transcribing AGMs and publishing these reports online for free.<sup>32</sup>

28 Paragraph 1.93 of the Revised Explanatory Memorandum to the Corporations Amendment (Meetings and Documents) Bill 2021.

29 Senate Economics Legislation Committee *Corporations Amendment (Meetings and Documents) Bill 2021 [Provisions]* (2021), para 2.30 and paras 1.2 to 1.6 of the Additional comments – Labor Senators to the report. The Committee also referred to Senate Select Committee on Australia as a Technology and Financial Centre, *Select Committee on Financial Technology and Regulatory Technology – Interim Report* [webpage] (2020) which examined the experience under Determination No. 1 (accessed 21 June 2024).

30 See, for example, Wesfarmers' *2023 Notice of Meeting* [pdf] p. 14-16 and the REA Group *2023 Notice of Meeting's* [pdf] reference to Link Group's *Virtual Meeting Online Guide* [pdf], all accessed 21 June 2024.

31 See Corporations Act, ss 251A and 251B.

32 See for example, the webcast on the ANZ *2023 Annual General Meeting* webpage and the webcast and transcript of the 2023 AGM on Woolworths' *Annual General Meetings* webpage (both accessed 21 June 2024).



## Voting in a meeting

Voting on resolutions at the meeting is the conclusive way for members to express their view of the propositions put to them by the company, registered scheme or other members. Changes to these arrangements introduced by the amendments include:

- Requiring certain resolutions to be voted on by a poll rather than a show of hands.
- Allowing certain members of companies and registered schemes to request the company or registered scheme to appoint an independent person to observe and/or scrutinise and prepare a report on the outcome of a poll at a members' meeting.

### Voting via a poll

Prior to the amendments, the default method to vote on company member resolutions was a show of hands, unless a poll was demanded.<sup>33</sup> For registered schemes, the law prior to the amendments required special or extraordinary resolutions to be voted on via a poll and for other resolutions to be decided by a show of hands, unless a poll was demanded.<sup>34</sup>

Following the amendments, the default method essentially remained the same, except the 2022 Act introduced a new requirement for listed companies (which is not a replaceable rule and could not be replaced in the constitution) that votes on certain resolutions of a meeting of members must be decided by poll, provided that certain information is set out in the notice.<sup>35</sup> It was envisaged that these resolutions would be substantive rather than procedural in nature.<sup>36</sup>

Similarly, for registered schemes, following amendments in the 2021 Act and the 2022 Act, the rules essentially remained the same, except new requirements for voting by poll were also introduced for listed registered schemes, provided that certain information is set out in the notice.<sup>37</sup>

These changes were consistent with recommendation 6.4 of the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations* which specifies that all substantive resolutions of ASX listed entities be decided by poll rather than a show of hands.<sup>38</sup> The commentary on the recommendation notes that when 'ascertain[ing] the true will of the security holders attending and voting at the meeting ... [i]n most cases, this can only be achieved with certainty by conducting a poll.'<sup>39</sup> According to Computershare, in 2020, around 80.7 per cent of their issuers decided resolutions using a poll, a significant increase on previous years, following the introduction of recommendation 6.4 in 2019.<sup>40</sup>

33 The Corporations Act provides for 'replaceable rules' in s 135 for companies which specify a set of default features of companies unless otherwise specified in the company constitution. Registered schemes do not have replaceable rules. Section 250J of the pre-amendments Corporations Act was a replaceable rule setting out the default arrangements for voting.

34 See the pre-amendments Corporations Act, s 253J.

35 See Corporations Act, subs 250J(1) and s 250JA.

36 See paragraphs 1.114 to 1.116 of the Revised Explanatory Memorandum to the Corporations Amendment (Meetings and Documents) Bill 2021.

37 See Corporations Act, subss 253J(1A) and 253J(2).

38 ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations 4th Edition* [pdf], 2019, accessed 21 June 2024.

39 *Corporate Governance Principles and Recommendations*, page 25.

40 Computershare, *2021 AGM Intelligence Report* [pdf], p 9, accessed 21 June 2024.

## Independent reports on polls

The 2022 Act introduced a new requirement to allow members of a company or registered scheme with at least 5 per cent of the votes to request to have an independent person appointed to scrutinise the outcome and/or observe the conduct and prepare a report on a poll conducted at a members' meeting.<sup>41</sup> The independent person appointed under this requirement must be independent of the company or registered scheme but may be an auditor or a registry service provider (including an auditor or a registry service provider of the company or registered scheme concerned). This attracted criticism from some stakeholders representing institutional investors, who believed share registries were not independent for the purposes of providing an independent report.

Under the ASX Listing Rules, the ASX has the power to request the auditor or a person that the ASX has approved be appointed to scrutinise votes.<sup>42</sup> Legislating the arrangements for scrutiny provided additional certainty to stakeholders and applies to entities not bound by the ASX Listing Rules. The 5 per cent threshold for the request is consistent with other parts of the Corporations Act that stipulate a minimum threshold for shareholders to undertake various actions, such as calling a general meeting or proposing a resolution.<sup>43</sup>

## Directors' meetings

While the amendments were mainly focussed on members' meetings, some changes were made to the use of technology for directors' meetings as part of the 2021 Act. This reflected the consolidation of references to the use of technology in the 2021 Act. This change was subsequently reversed by the 2022 Act to ensure there were no ongoing changes to the requirements. These provisions allowed directors' meetings to be called or held using any technology consented to by the directors unanimously.<sup>44</sup>

The ability to have a technology flexible meeting could be frustrated by a minority disagreeing. Further changes were made in 2023 to remove the unanimity requirement for directors' meetings.<sup>45</sup>

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41 See Corporations Act, Part 2G.7.

42 Rule 14.8 in Australian Stock Exchange, *ASX Listing Rules* [website], Chapter 14, accessed 21 June 2024.

43 See, for example, Corporations Act ss 202B, 249F and 249N.

44 Section 248D as inserted by item 6 of Schedule 2 to the 2022 Act.

45 Section 248D as repealed and replaced by item 23 of Schedule 1 of the *Treasury Laws Amendment (Modernising Business Communications and Other Measures) Act 2023* [webpage], access 21 June 2024. These changes are outside the scope of this review.

## Consultation questions on meetings

1. How has the experience of running company or registered scheme members' meetings changed since the amendments?
  - What have been the effects of the amendments on the costs of holding AGMs or other meetings?
2. How have the amendments affected members' participation in meetings and has this affected the exercise of shareholder rights or corporate governance?
3. If improvements are needed to better facilitate members' participation and corporate governance, what improvements could be made to the conduct of online or hybrid meetings?
4. Is the use of wholly online meetings an objective of companies and registered schemes? Why or why not? If it is the objective, what is impeding the greater use of wholly online meetings by companies and registered schemes?
5. Have you experienced technological issues when running or attending a meeting with an online component? If yes, what were they, were they addressed, and how did this occur?
6. Have you observed any significant differences in governance, shareholder participation, meeting conduct or quality between companies that have listed after the 2022 amendments and those that listed prior to the amendments?
7. How have the mandatory poll voting requirements affected the conduct of meetings and determining the opinion of members?
8. Have there been any issues with submitting or complying with requests for independent reports on polls?
9. Are there lessons that Australia could take from other jurisdictions' experiences with online or hybrid members' meetings?
10. How have the amendments affected the effective operation of directors' meetings?

# Treatment of documents

## Giving meeting-related documents

### Documents within scope and how documents can be sent

Prior to the amendments, the Corporations Act required documents relating to a meeting be produced in hard copy and mailed unless the member had agreed to the document being sent via email or fax, and other specific requirements in the Corporations Act were met. Some documents could only be sent in physical form.

The law now allows companies the flexibility to choose whether to satisfy the relevant obligations through provision of hard copy documents or by using electronic means. Specified senders (such as a company, the responsible entity of a registered scheme or a disclosing entity) may give meeting-related documents to a person electronically or in physical form.<sup>46</sup> Meeting-related documents include (but are not limited to):

- notices of meetings
- notices of a resolution or a record of a resolution
- notices of a statement in relation to a meeting or a matter to be considered at a meeting, and
- minute books.<sup>47</sup>

The amendments also inserted regulation-making powers which allowed for the modification of the primary law to capture other entities as senders or other types of documents that could be sent electronically. These powers cannot be used to impose additional burdens on entities or alter the obligations of the primary law.<sup>48</sup>

A document may be provided either by:

- sending the document in physical form
- giving the document to the person via electronic means

46 See s 110C of Division 2 of Part 1.2AA as inserted by item 2 of Schedule 2 to the 2022 Act. Since the amendments commenced, the *Treasury Laws Amendment (Modernising Business Communications and Other Measures) Act 2023* was legislated further extending the categories of documents under the Corporations Act that may be sent electronically or in physical form.

47 Paragraph 1.45 of the Revised Explanatory Memorandum to the Corporations Amendment (Meetings and Documents) Bill 2021.

48 See paras 110C(1)(d) and (2)(d) and subss 110C(5) and 110C(6), inserted by item 2 of Schedule 2 of the 2022 Act. Since the amendments commenced, the *Treasury Laws Amendment (Modernising Business Communications and Other Measures) Act 2023* limited the regulation-making power to expanding the types of documents that could be captured by the regime. It removed the power to capture other entities as the legislation allows documents to be sent to 'another person or entity' (aside from ASIC, the Registrar or the Takeovers Panel) rather than only to specified senders.

- providing the person, in physical or electronic form, with details sufficient to allow them to access the document electronically, or
- in any other permitted way (such as a specific method relating to a particular type of document as set out in a company's constitution).<sup>49</sup>

Following the amendments, a document may only be given electronically if it is reasonable to expect at the time it is given that it would be readily accessible and useable for subsequent reference.<sup>50</sup>

The amendments also allow annual reports, and regulations to be made to prescribe documents, to be provided by making them readily available on a website.<sup>51</sup>

## Members' elections on how to receive documents

While the current law facilitates a 'digital-first' approach, members may also now elect to receive documents in their preferred manner. Public companies, the responsible entity of registered schemes and disclosing entities must notify members of their right to make an election each financial year.<sup>52</sup> Members' ability to elect to not receive annual reports or certain other documents were unchanged by the amendments.<sup>53</sup>

Members may elect to receive documents in physical form or electronically, and may make the election in respect of:

- all documents (under a standing election)
- specified classes or types of documents (under a standing election), or
- a single specified document (as an ad hoc request).<sup>54</sup>

The amendments provide senders a period of 30 days to comply with a new standing election for a hard copy document.<sup>55</sup> The former government explained that this timeframe was included to ensure the sender has adequate time to print and post documents, allow enough time for the mail to reach the member and to prevent the sender from being in a position where it cannot comply with its obligation to notify members of a meeting within a stipulated timeframe.<sup>56</sup>

The sender must take reasonable steps to comply with an election to receive documents in the requested form or to not receive elected documents.<sup>57</sup> The sender does not need to comply with a members election to receive documents in a requested form where ASIC exercises its power,

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49 See Corporations Act, subs 110D(1) and (4).

50 See Corporations Act, sub 110D(2).

51 See Corporations Act, sub 110D(3).

52 See s 110K as inserted by item 2 of Schedule 2 to the 2022 Act. This section was later amended to include corporate collective investment vehicles and the operator of a notified foreign passport fund.

53 The provisions in s 314 of the pre-amendments Corporations Act were consolidated by the amendments into the general provisions for elections in Corporations Act, s 110E and notice of rights in s 110K.

54 See Corporations Act, ss 110E and 110J.

55 See Corporations Act, sub 110E(8). The period for compliance by the sender was originally 10 business days as inserted by item 31 of Schedule 1 of the 2021 Act and was extended by the 2022 Act.

56 Paragraph 1.61 of the Revised Explanatory Memorandum to the Corporations Amendment (Meetings and Documents) Bill 2021.

57 See Corporations Act, s 110F.

introduced in the 2021 Act, to allow the sender to not provide a document in the requested form or to extend the time to provide the document. ASIC may allow this for up to 12 months where ASIC considers it would be unreasonable for the sender to comply due to a situation beyond the sender's control.<sup>58</sup>

Failure to provide a document in the form elected by the member does not invalidate the giving of the document by the sender if the document is otherwise sent in compliance with the law.<sup>59</sup> This means there is no additional penalty for senders beyond that for the failure to comply with a member's election. The former government stated that 'there are serious consequences that attach to failing to provide some of the documents covered by the regime and these severe penalties are not appropriate in circumstances where the document was provided (but in the incorrect form).'<sup>60</sup>

## Technology neutral signing and execution of documents

Prior to the amendments, executing a company or registered scheme document, such as a contract, required all persons to physically sign the same hard copy. Meeting-related documents executed under a provision of the pre-amendments Corporations Act were generally required to be signed in hard copy.

The 2021 Act allowed company documents executed both with or without a seal to be executed using electronic means. If the document was executed by fixing a company seal, electronic means could also be used to witness the fixing of the seal.<sup>61</sup> The 2021 Act also allowed company and registered scheme meeting-related documents to be signed electronically by using a method to identify the signatory and indicate the signatory's intention.<sup>62</sup>

The 2022 Act permanently allowed companies and registered schemes to execute documents and to sign certain corporate documents, including meeting-related documents, in a flexible manner.<sup>63</sup>

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58 See Corporations Act, s 1345. The former government explained that this power exists for exceptional circumstances similar to that for AGMs discussed on page 9.

59 See Corporations Act, subs 110F(5).

60 Paragraph 1.58 of the Revised Explanatory Memorandum to the Corporations Amendment (Meetings and Documents) Bill 2021.

61 See Corporations Act, s 127.

62 Section 253RD as inserted by item 31 of Schedule 1 to the 2021 Act.

63 See Division 1 of Part 1.2AA as inserted by item 1 of Schedule 1 to the 2022 Act, and Corporations Act, s 127. Part 1.2AA of the Corporations Act was further amended by the *Treasury Laws Amendment (Modernising Business Communications and Other Measures) Act 2023*.



The 2022 Act also allowed agents to execute documents including deeds on behalf of companies.<sup>64</sup> Prior to the 2022 Act, an agent of a company could only make, vary, ratify or discharge contracts on behalf of companies. The 2022 Act allowed agents to use the new flexible arrangements when exercising their authority.

The 2022 Act also allowed sole directors of proprietary companies with no company secretary to validly execute a document if they signed the document or witnessed the fixing of the company's common seal.<sup>65</sup> Prior to the 2022 Act, proprietary companies with a sole director and no company secretary could not use the statutory document execution mechanisms.

In 2023, the *Treasury Laws Amendment (Modernising Business Communications and Other Measures) Act 2023* expanded the scope of changes to allow electronic signing of documents introduced by the amendments to all documents under the Corporations Act. Documents lodged electronically with ASIC are subject to ASIC's Electronic Lodgement Protocol which outlines requirements for digital signatures. The Act also expanded the range of documents that could be sent electronically beyond meeting-related documents. The expanded signing and sending of documents introduced in 2023 are outside the scope of this review.

## Consultation questions on the treatment of documents

11. What, if any, issues have been experienced with the giving and sending or receipt of electronic meeting-related documents? How could these be addressed?
12. What, if any, issues have there been with the process for making elections or with entities following the elections of members regarding meeting-related documents? If yes, how could this be improved?
13. What, if any, issues have been experienced with the electronic signing of documents? If yes, how could these be improved?

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64 See Corporations Act, s 126. Agents are individuals acting with a company's express or implied authority on behalf of the company.

65 See Corporations Act, para 127(1)(c).

# Appendix: Summary of the changes

Table 1. Legislative arrangements for meetings

Prior to the amendments	After Schedule 1 to the <i>Treasury Laws Amendment (2021 Measures No. 1) Act 2021</i>	After <i>Corporations Amendment (Meetings and Documents) Act 2022</i>
<p>Meetings must be held at a physical location. While technology can be used to connect people at one or more other locations, wholly online meetings were not permitted.</p> <p>Determinations No. 1 and No. 3 temporarily allowed meetings to be held online.</p>	<p>Companies and registered schemes can hold wholly online meetings of members, regardless of requirements in the constitution, until 31 March 2022.</p> <p>ASIC may allow (for 12 months) companies and registered schemes to hold a wholly online meeting if ASIC considers it may be unreasonable for them to hold a physical or hybrid meeting.</p>	<p>Companies and registered schemes can hold meetings of members at one or more physical locations (a physical meeting), at one or more physical locations and using technology (a hybrid meeting), or if permitted by an entity's constitution, as a wholly online meeting.</p> <p>No changes to ASIC's ability to allow companies to hold a wholly online meeting.</p>
<p>Votes on company resolutions are decided by a show of hands unless a poll is demanded. A company's constitution can provide otherwise. For registered schemes, special or extraordinary resolutions are decided via poll, with other resolutions decided by a show of hands, unless a poll was demanded.</p> <p>Determinations No. 1 and 3. temporarily required a vote to be taken on a poll.</p>	<p>Votes on all resolutions at a physical meeting of a company or registered scheme's members are decided on by show of hands, unless a company's constitution provides otherwise. If the meeting is held using technology, the default method for voting is generally a poll.</p> <p>This sunset on 31 March 2022.</p>	<p>Votes on resolutions which are set out in the notice of a meeting of members of a listed company or listed registered scheme must be decided on by poll. A listed company's constitution cannot provide otherwise.</p> <p>Other resolutions may be decided on a show of hands if a poll has not been demanded, unless a company's constitution provides otherwise.</p>
<p>No equivalent.</p>	<p>No equivalent.</p>	<p>A member or group of members of a company or registered scheme with at least 5 per cent of the votes can request to have an independent person appointed to observe and/or prepare a report on a poll conducted at a members meeting.</p>

Prior to the amendments	After Schedule 1 to the <i>Treasury Laws Amendment (2021 Measures No. 1) Act 2021</i>	After <i>Corporations Amendment (Meetings and Documents) Act 2022</i>
In general, minutes must be kept in hard copy.	The minutes for meetings of shareholders and members of registered schemes may be taken electronically and the minute book may be provided to shareholders and members and kept electronically. This sunset on 31 March 2022.	It is permanent that the minutes for meetings of shareholders and members of registered schemes may be taken electronically and the minute book may be provided to shareholders and members and kept electronically.
Directors' meeting may be called or held using any technology consented to by the directors unanimously.  Determinations No. 1 and 3. temporarily allowed online meetings.	Directors' meetings may be held using electronic means. This sunset on 31 March 2022.	Directors' meeting may be called or held using any technology consented to by the directors unanimously. <sup>66</sup>

66 The *Treasury Laws Amendment (Modernising Business Communications and Other Measures) Act 2023* removed the unanimity requirement.

Table 2. Legislative arrangements for the treatment of documents

Prior to the amendments	After Schedule 1 to the <i>Treasury Laws Amendment (2021 Measures No. 1) Act 2021</i>	After <i>Corporations Amendment (Meetings and Documents) Act 2022</i>
<p>Documents relating to a meeting must be posted unless the member has agreed to the document being sent via email or fax and the specific requirements in the Corporations Act are met. Some documents may only be provided via post.</p> <p>Determinations No. 1 and 3. Temporarily allowed a flexible approach.</p>	<p>Documents relating to a meeting may be given electronically until 31 March 2022. Members of companies and registered schemes can elect to receive hard copy documents.</p> <p>ASIC may determine that documents may be given in electronic form if ASIC considers it may be unreasonable for the document to be given in physical form.</p>	<p>It is permanent that documents relating to a meeting may be given electronically. Members of companies and registered schemes can elect to receive meeting-related documents electronically or in hard copy.</p> <p>The power was extended to allow ASIC to make a determination that documents may be given in physical form if ASIC considers it may be unreasonable for the document to be given in electronic form.</p>
<p>Documents relating to a meeting must generally be signed in hard copy.</p> <p>Determinations No. 1 and 3. temporarily allowed a flexible approach.</p>	<p>Documents relating to a meeting may be signed electronically by using a method to identify the signatory and indicate the signatory's intention until 31 March 2022.</p>	<p>Certain corporate documents, including documents which relate to meetings of members, can be signed in a flexible manner.<sup>67</sup></p>
<p>To execute a company document, all persons must physically sign the same hard copy.</p> <p>Determinations No. 1 and No. 3. temporarily allowed a flexible approach for documents executed without a company seal.</p>	<p>Company documents executed both with and without a seal may be executed using electronic means. If the document is executed by fixing a company seal, electronic means may be used to witness the fixing of the seal.</p> <p>This sunset on 31 March 2022.</p>	<p>Companies can execute documents in a flexible manner.</p>
<p>Agents can make, vary, ratify or discharge contracts on behalf of companies.</p>	<p>No change.</p>	<p>Agents can make, vary, ratify or discharge contracts and execute documents (including deeds) on behalf of companies.</p>

<sup>67</sup> The *Treasury Laws Amendment (Modernising Business Communications and Other Measures) Act 2023* expanded the scope of technology-neutral reforms to permanently allow all documents under the Corporations Act to be signed or executed electronically.

Prior to the amendments	After Schedule 1 to the <i>Treasury Laws Amendment (2021 Measures No. 1) Act 2021</i>	After <i>Corporations Amendment (Meetings and Documents) Act 2022</i>
Proprietary companies with a sole director and no company secretary cannot use the statutory document execution mechanisms.	No change.	Proprietary companies with a sole director and no company secretary can use the statutory document execution mechanisms.