

**Clayton Utz's Submission to the Statutory
Review of the Meetings and Documents
Amendments Panel**

Dated 19 July 2024

This submission is lodged by Clayton Utz.

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1. Chapter 1 – Opening Comments

This Submission provides an in-depth analysis and opinions on the significant changes brought about by the *Treasury Laws Amendment (2021 Measures No.1) Act 2021* (Cth) and the *Corporations Amendment (Meetings and Documents) Act 2022* (Cth) (together referred to as the “**Amending Acts**”). The submission is structured to focus on the primary areas affected by these amendments, as follows:

- (i) **Chapter 2 - Core Submissions:** Discusses the positive effects of the amendments on the conduct of member meetings and the technology-neutral approach to the giving, signing, and execution of documents.
- (ii) **Chapter 3 - Learnings from Clayton Utz’s research concerning Meetings of Members:** Presents the key findings from Clayton Utz’s research relating to annual general meetings in 2022 and 2023.
- (iii) **Chapter 4 - Response to Consultation Questions on Meetings**
- (iv) **Chapter 5 - Response to Consultation Questions on the Treatment of Documents**

We have not sought to address the history of the Amending Acts, as that is adequately addressed in the Background in the Review Panel's consultation paper.

2. Core Submissions

The changes introduced by the Amending Acts have brought significant and positive developments to how companies conduct their business. These amendments provide companies with the choice to embrace the technological advancements of recent times. The progress made by the amendments allows companies to increase the efficiency of business conduct, reduce costs, and increase accessibility. Repealing the amendments would be retrogressive with respect to the same.

The shift towards digital business processes has led to an increase in the adoption of electronic communications that has outlasted the COVID-19 pandemic. The COVID-19 pandemic served to accelerate this transition, forcing companies to move their operations online and digitalising their business operations. In this context, the amendments allowing for general meetings to be held as hybrid meetings or virtually are aligned with the prevailing trend of digital transformation.

By providing companies with the choice to hold hybrid member meetings, the Amending Acts enable companies to reap the benefits of virtual meeting technology. Hybrid meetings can increase shareholder participation by offering greater accessibility for members unable to attend in-person. Hybrid meetings also offer practical benefits in the administration of member meetings such as reduced costs, and scalability particularly an increase in the number of attendees. The ability to hold hybrid member meetings should remain available for companies to ensure that these benefits can continue to be realised.

Although some challenges remain in the wholly online format of member meetings, the evolution of technology platforms has significantly addressed early concerns regarding the inability of shareholders to participate effectively. Modern virtual meeting platforms are equipped with features that facilitate seamless interaction, such as real-time voting, real-time participation, and reliable video conferencing. These platforms are improving to assist participants in engaging adequately and without interruption. The Amending Acts crucially provide companies with the choice to adopt those technologies which they consider appropriate to achieving their aims.

By modernising the way meeting-related documents are distributed and handled, the Amending Acts mark a pivotal step towards embracing digital communication in corporate governance. The Amending Acts not only acknowledge the growing reliance on digital platforms for corporate operations but also seeks to streamline the processes associated with members' meetings.

A key aspect of the legislation is its focus on flexibility, allowing companies to choose the most appropriate means—whether electronic or physical—for distributing meeting-related documents. Furthermore, the legislation underscores the importance of technology neutrality and shareholder inclusivity by ensuring that members can elect how they receive documents. This provision not only empowers shareholders but also promotes greater engagement by facilitating access to corporate communications in formats that are most convenient and

accessible to each member. This adaptability is crucial in today's rapidly evolving technological environment, where the needs and capabilities of entities and their members can vary widely.

3. Learnings from Clayton Utz's Research Concerning Meetings of Members

On pages 7 and 8 of the Background material in the Review Panel's paper, reference is made to research undertaken by the Treasury and King & Wood Mallesons in relation to the nature of annual general meetings held between 2020 and 2023.

In 2022, Clayton Utz undertook a survey of ASX-listed companies to determine those companies whose Constitutions permitted the holding of 'virtual technology only' meetings. This research indicated that:

- the proportion of ASX listed entities in the ASX All Ords that have Constitutions which permit the use of 'virtual technology only' meetings of members increased as their market capitalisation decreased.
- the number of ASX listed entities in the ASX All Ords with constitutions which permit the use of virtual technology only meetings of members still represent a minority of the entities in the ASX All Ords.

The above is reflected in the pie charts in Annexure 'A'.

At that time, Clayton Utz also surveyed the method by which annual general meetings (**AGMs**) were held in 2022. The outcome of that research was as follows:

- A very small proportion of 2022 AGMs were virtual only. Virtual only meetings generally increased as market capitalisation decreased. This reflects the increasing proportion of entities with constitutions which expressly authorise the meeting of Members using virtual meeting technology as market capitalisation decreased.
- A majority of 2022 AGMs held were hybrid meetings. The ASX 100 had a greater proportion of hybrid meetings. This may reflect the time and cost involved in conducting both physical and virtual meetings together. It may also reflect larger shareholder numbers in ASX 100 listed entities.
- The proportion of physical-only meetings increased as market capitalisation decreased. However, a majority of 2022 AGMs used virtual meeting technology (being hybrid and virtual only, combined), regardless of market capitalisation.

The above is reflected in the pie charts in Annexure 'B'.

In 2023, Clayton Utz undertook further research, this time focusing on the entities whose Constitutions permitted the holding of virtual meetings. This research demonstrated that less than one-third of the entities in the ASX100, and ASX101-200 have Constitutions that permitted meetings to be held virtually only. This increased to one-third in relation to ASX201-300 entities, and constituted more than one-half for ASX-301-500 entities. Please see the pie charts in Annexure 'C'.

Clayton Utz also reviewed new listings on the ASX during the period 2020-23 and observed a significant increase in the number of entities whose Constitutions permitted virtual only general meetings. The increase was from 23% in 2020 to 80% in 2023. See the pie charts in Annexure 'D'.

4. Response to Consultation Questions on Meetings

Question 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?*

Changing Experience

The amendments introduced by the Amending Acts have fundamentally reshaped the landscape of how company and registered scheme members' meetings are conducted. While initially originating as a response to the COVID-19 pandemic to ensure continuity in governance amid unprecedented restrictions on physical gatherings, the consequences of these amendments have proven to extend well beyond their initial scope.

The Amending Acts have catalysed a market-wide shift towards digital platforms that support the efficient and flexible conduct of meetings, aligning with broader trends towards "digitisation", as seen through recent shifts in the landscape of remote work and digital collaboration across industries.

One of the prominent arguments raised by early critics of virtual meetings was that it could lead to a loss of participation (discussed below in question 2). Yet, the experience of running company and registered scheme meeting members' meetings has shown that adoption of these formats can improve attendance rates when they are implemented with robust technological support and clear communication protocols.

Importantly, the shift towards "technology neutrality" and hybrid AGM formats has broadened accessibility, enabling investors to participate from their current locations and reducing disruptions associated with physical attendance. This has been particularly beneficial for both retail and institutional investors who are not in close proximity to the physical meeting location,

including those based internationally, as well as for individuals with disabilities or other circumstances preventing physical attendance.

Costs

The impact on the costs of holding hybrid or virtual meetings must take into account the amendments related to communication, specifically those concerning the “giving and sending or receipt of electronic meeting-related documents”. Thus, for example, for entities in the ASX100, which typically have a large number of shareholders, the amendments relating to the method of holding meetings and electronic communications have shifted company expenses from traditional paper-based communications (such as paper acquisition, printing, and distribution), towards costs investing in technologies necessary for conducting meetings online. Even though the effects of the Amending Acts may not have had an overall net change in the total costs for entities in conducting members’ meetings, they have facilitated a significant reallocation of resources that supports a more modern, inclusive, and responsive corporate governance environment

The costly allocation of funds towards technology required to conduct members’ meetings can be perceived by *smaller* companies to be excessive or somewhat unnecessary. This is reflected in the increased number of physical meetings seen in 2022 by entities in the ASX 201-300 and 301-500 - see Annexure ‘B’. Those entities with a smaller number of shareholders may still find it appropriate to use paper-based communications and to hold physical meetings. However, the overriding importance of these amendments is the flexibility they have provided, allowing entities to choose the most suitable meeting format—be it physical, hybrid, or virtual—based on their specific operational needs and the preferences of their shareholders.

Question 2 - How have the amendments affected members’ participation in meetings and has this affected the exercise of shareholder rights or corporate governance?

One of the most significant outcomes of the Amending Acts has been the observable increase in accessibility and participation in meetings. With the adoption of online and hybrid formats, members who otherwise would not have been capable of actively participating in a traditional, wholly physical meeting, have since the adoption of the Amending Acts, had the opportunity to participate actively. This shift has improved access to corporate decision-making processes, allowing a broader base of members to exercise their rights in real time, regardless of their location.

During the height of the COVID-19 pandemic, the rapid transition to wholly virtual meetings highlighted significant technological shortcomings as members experienced difficulties in participating in meetings. Reports from this period indicated that shareholders were often unable to ask questions freely or interact effectively with board members during meetings, which raised concerns about the integrity of corporate governance under virtual conditions.

In an attempt to address the criticisms regarding the efficacy of member participation in virtual and hybrid formats, section 253Q of the Corporations Act 2001 (Cth) was enacted by the Treasury Laws Amendment (2021 Measures No.1) Act 2021 (Cth). This legislative change has required companies holding wholly virtual meetings to ensure that appropriate technological measures are in place that provide members with a “reasonable opportunity to participate”.

In response to both the legislative requirements and the initial feedback from shareholders, the majority of ASX200 companies have now moved to adopt hybrid meeting formats, see Annexure ‘B’. Hybrid meetings have generally been well-received amongst Australian entities, particularly for those companies with the largest market capitalisations, as they retain the benefits of in-person interaction while extending the accessibility and convenience of virtual participation.

Despite the increasing shift to hybrid formats, challenges with outdated webinar technologies have continued to persist, prompting companies to increasingly adopt more user-friendly webinar technologies that enhance member participation. These platforms typically feature capabilities for either logging questions electronically, both prior to and during AGMs, or alternatively, allowing for verbal questions and comments during the meetings, ensuring that shareholder inquiries are addressed more systematically and transparently. This evolution in technology and its increased utilisation for meetings signifies a broader commitment to enhancing shareholder engagement and maintaining high standards of corporate governance.

Question 3 - 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?

The use of wholly online meetings as a primary objective among companies and registered schemes is not uniformly embraced, largely due to the critical support a significant proportion of entities have for direct, face-to-face interactions in effective governance. Central to the facilitation of effective participation in general meetings is the ability to allow as many members as possible to interact directly with the Board and management. Rod Halstead of Clayton Utz recalls his experience on the board of an ASX-listed company, where the Chairman emphasised to directors that the AGM should be considered by the Board to be “their day”, that is the shareholder’s day.

However, challenges remain with some wholly online formats, which can sometimes reduce the richness of interactions between shareholders and the company's leadership. Concerns about the effectiveness of online meetings in fostering genuine dialogue and decision-making can deter their full adoption particularly amongst smaller entities. Moreover, technological reliability, security concerns, and the stringent requirements of regulatory compliance add layers of complexity for such entities.

We believe that the use of wholly online meetings generally should not be a pursued objective of entities unless an entity specifically prefers this format for its potential to streamline

interactions between members and the Board. Importantly, a key benefit derived from the effect of the Amending Acts on the current statutory regime is that entities are provided with a great deal of flexibility to choose the meeting format—whether physical, hybrid, or virtual—that best suits their needs, those of their shareholders, and their financial capabilities.

While online meetings can serve specific needs and offer logistical benefits, the overarching objective for many companies remains to facilitate meaningful participation and ensure robust governance. Thus, the choice of meeting format should be strategically aligned with the goal of enhancing shareholder engagement and governance quality, rather than merely simplifying administrative processes.

Question 4 - 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?

To better facilitate members' participation and enhance corporate governance in the context of online and hybrid meetings, the improvements most recognised as necessary are advancing technology and making it more cost-effective, so as to improve accessibility.

A significant improvement would be the enhancement of user interfaces and experiences on the chosen platforms for virtual and hybrid meetings. By integrating features that are universally accessible and easy to navigate, entities can ensure that members can more easily participate in discussions and voting processes. This could be achieved by both choosing technologies with a simplified user interface and also providing comprehensive, easy-to-understand instructions and proactive technical support before and during meetings. For example, support mechanisms provided by entities could include live assistance and user-friendly FAQs and guides that are readily accessible during the meeting.

The implementation of secure and transparent electronic voting systems is important for both in-person and remote participants. Such systems must ensure that every vote is counted accurately and that results are immediately clear to all participants, maintaining trust and integrity in the corporate decision-making process.

Question 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?

We have not directly experienced any technological issues when running or attending a meeting and cannot comment.

Question 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?

As indicated in section 3 and in the pie charts shown in Annexure 'C', we have seen a significant increase in the number of entities listed after the 2022 amendments that have included in their Constitutions, provisions to permit the conduct of wholly virtual meetings. This is more likely to be attributed to the ease of introduction of these provisions when included in a Company's constitution on listing, as opposed to the introduction at a later time, and the need to provide flexibility should circumstances occur as a consequence of which virtual-only meetings becomes a necessity, rather than any specific intention to alter, or in particular, reduce governance standards, shareholder participation, or meeting conduct or quality. It should be noted that many of the new listings are of smaller companies that fall outside the ASX300, and we can therefore expect that the practices observed with respect to meetings of such entities are likely to apply to the new listings.

Question 7 - How have the mandatory poll voting requirements affected the conduct of meetings and determining the opinion of members?

The mandatory poll voting requirements, in our view, reflect the now accepted best practice for voting by members at members' meetings. This practice has accepted the views of a broad range of members who elect to exercise their right to vote, demonstrating a shift towards more inclusive and representative voting practices as introduced by the Corporations Amendment (Meetings and Documents) Act 2022. These changes align with modern corporate governance standards by ensuring that all shareholders, regardless of their physical presence at the meeting, have their opinions fairly represented.

Mandatory poll voting enables the voting outcomes to reflect the proportional interests of all relevant shareholders or unitholders, rather than disproportionately influenced by those physically present or physically represented by proxy at the meeting. This ensures that the results of votes on resolutions truly represent the views and stakes of all members within the entity and the efficient conduct of members' meetings.

Question 8 - Have there been any issues with submitting or complying with requests for independent reports on polls?

No comment.

Question 9 - Are there lessons that Australia could take from other jurisdictions' experiences with online or hybrid members' meetings?

No comment.

Question 10 - How have the amendments affected the effective operation of directors' meetings?

These amendments have had very little effect on the operation of directors' meetings because it has been established practice for entities Constitutions to permit the conduct of directors' meetings by appropriate electronic methods.

5. Response to Consultation Questions on the Treatment of Documents

Question 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?*

No comment.

Question 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?*

One of the recurring issues is the technological integration needed to manage the varied preferences of members efficiently. While the amendments to the Corporations Act allow members to choose how they receive documents (electronically or in physical form), ensuring that these preferences are accurately recorded and consistently adhered to requires robust IT systems in place. These systems must be capable of handling large volumes of data and must be flexible enough to accommodate changes in member preferences, from time to time.

Ensuring compliance with each member's chosen method of document receipt can be challenging, especially for entities with a larger shareholder base. Mistakes in compliance can lead to members not receiving important documents in their preferred format, which can affect their ability to participate in corporate decisions effectively.

Question 13 - *What, if any, issues have been experienced with the electronic signing of documents? If yes, how could these be improved?*

We have experienced an issue with the electronic signing of ASIC forms 2601, 2602, and 2205 (**ASIC Share Forms**), which ASIC requires to be signed with wet ink signatures, which we submit is inconsistent with the technology-neutral provisions of the Amending Acts.

Section 110B of the Corporations Act deals with the lodgement of documents at ASIC or the Registrar. It specifies that if a document is required or permitted to be signed under the Act, and the person signs the document in accordance with section 110A, then the document must not be refused by ASIC or the Registrar on the basis that it has not been signed.

ASIC Share Forms are typically signed by a director or secretary of a company. Section 126 (i.e. one of the sections to which ss 110A and 110B applies) allows a person who is acting with the company's express or implied authority to sign a document in a physical or electronic form. The definition of "document" in section 9 of the Act is broad and was expanded in 2020 by the

Corporations Amendment (Corporate Insolvency Reforms) Bill 2020. The Explanatory Memorandum to that Bill states:

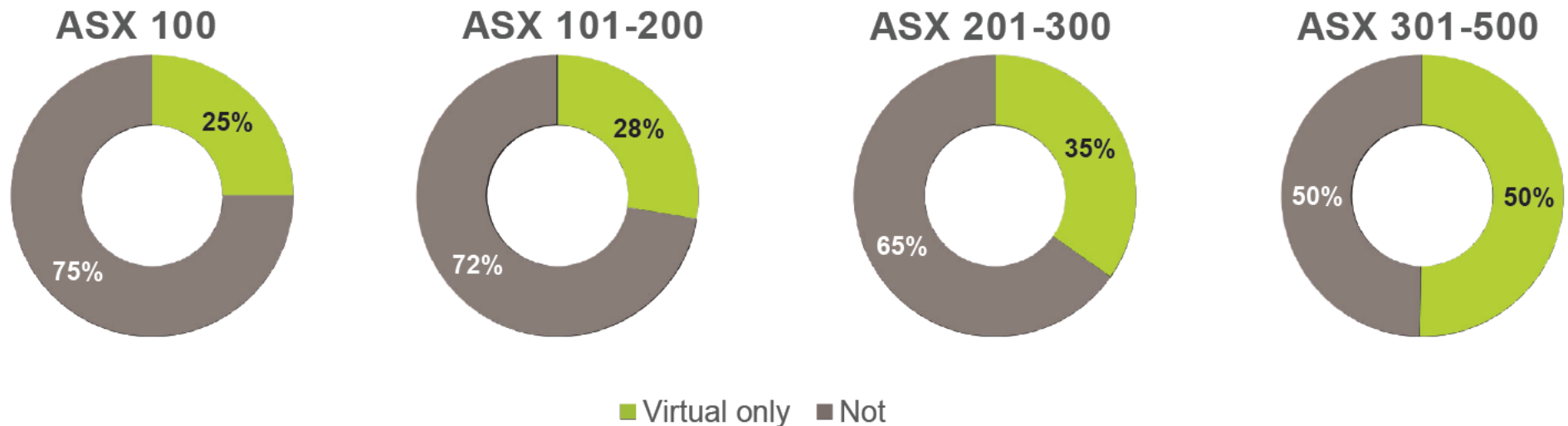
"A new definition of **document** is also inserted to ensure that the reforms apply to all information, including information that is not in a paper or material form. The new definition mirrors the definition of 'document' in the current version of the Acts Interpretation Act 2001." [emphasis added]

Despite these legislative provisions, ASIC has indicated that section 110A(1)(b) does not apply to ASIC Share Forms because they are considered to be in hard copy format. However, this description does not accurately reflect their availability as PDF documents on ASIC's website. While these forms lack interactive fields for online completion directly on the website, they can be downloaded and completed electronically using software like Adobe Acrobat. Electronic signature platforms such as Adobe Sign and DocuSign support the uploading and electronic signing of documents in various formats, including PDF.

Accordingly, we submit that ASIC should be requested to reconsider its current policy to align with the legislative intent and improve operational efficiencies for businesses.

Entities with Virtual Technology meeting constitutions

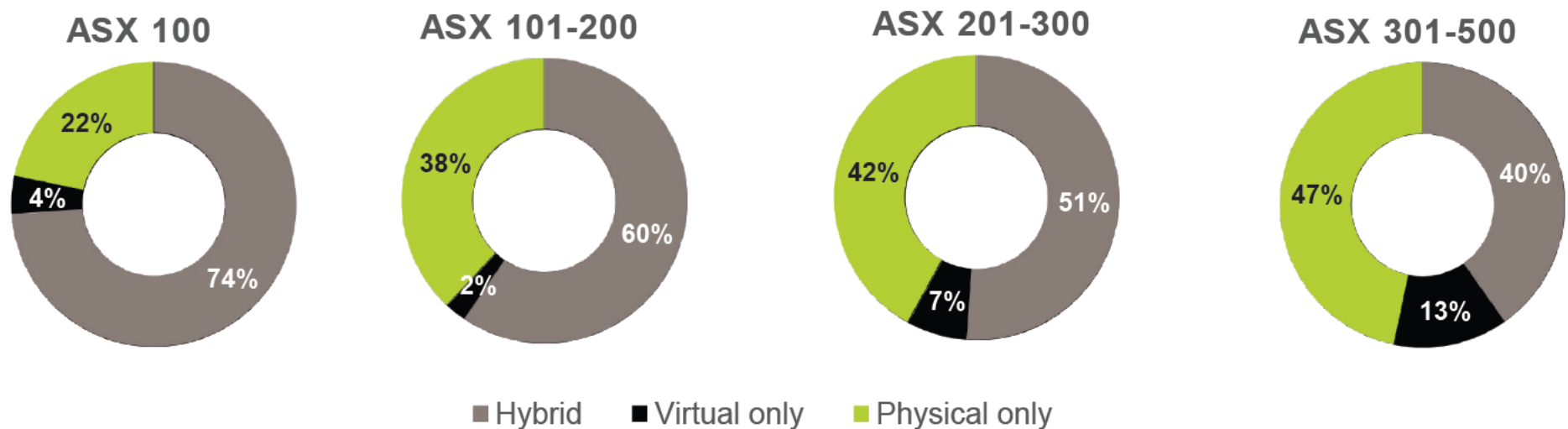
- ▶ The proportion of ASX listed entities in the ASX All Ords that have constitutions which permit the use of virtual technology only meetings of members increased as their market capitalisation decreased.
- ▶ The number of ASX listed entities in the ASX All Ords with constitutions which permit the use of virtual technology only meetings of members still represent a minority of the entities in the ASX All Ords.



Annexure "B"

2022 AGMs – Type of Meeting held (Market capitalisation)

- ▶ A very small proportion of 2022 AGMs were virtual only. Virtual only meetings generally increased as market capitalisation decreased (except in ASX 101-200). This reflects the increasing proportion of entities with Virtual Technology meeting constitutions as market capitalisation decreased.
- ▶ A majority of 2022 AGMs held were hybrid meetings. The ASX 100 had a greater proportion of hybrid meetings. This may reflect the time and cost involved in conducting both physical and virtual meetings together. It may also reflect larger shareholder numbers in ASX 100 listed entities.
- ▶ The proportion of physical only meetings increased as market capitalisation decreased. However, a majority of 2022 AGMs used virtual meeting technology (being hybrid and virtual only, combined), regardless of market capitalisation.



6. Virtual Technology Constitutions

ASX All Ords: By market capitalisation

Findings

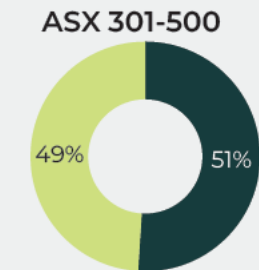
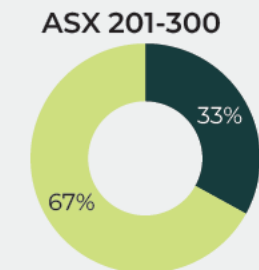
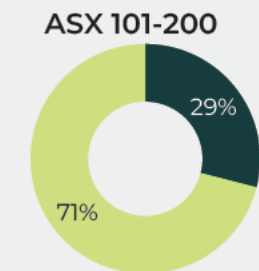
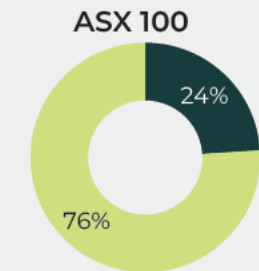
Less than one-third of the entities in the ASX 300 have Virtual Meeting Constitutions. However, more than one-half of entities in the ASX 301-500 subgroup have Virtual Meeting Constitutions.

The proportion of ASX listed entities in the ASX All Ords that have Virtual Meeting Constitutions increased as market capitalisation decreased.

The number of ASX listed entities in the ASX All Ords with Virtual Meeting Constitutions still represent a minority of the entities in the ASX All Ords.

Comments

For some ASX listed entities, the benefit of costs savings of using Virtual Meeting Technology for meetings of Members may outweigh the benefits of physical contact with those security holders at such meetings.



■ Virtual only ■ Not

16. Adoption at ASX listing

New Listings: By listing year

Findings

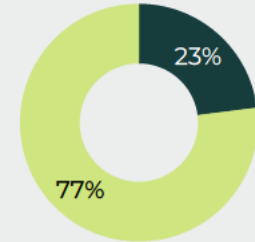
Since the 2020 early adopter year, the proportion of New Listings with Virtual Meeting Constitutions at the time of ASX listing increased year on year (and nearly doubled in each of 2022 and 2023).

In 2023 Listings group, the proportion of entities with Virtual Meeting Constitutions at the time of ASX listing represented a significant majority.

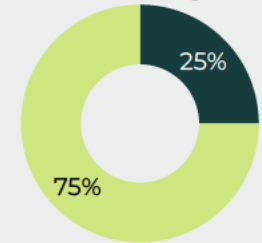
Comments

Certainty of the 2022 permanent legislation did result in an increased likelihood of entities with Virtual Meeting Constitutions at the time of ASX listing.

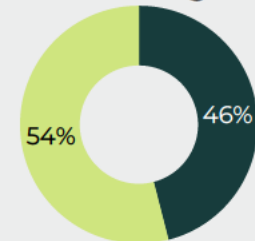
2020 Listings



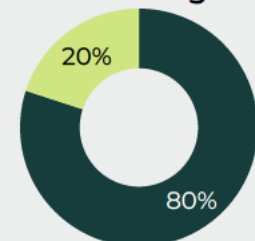
2021 Listings



2022 Listings



2023 Listings



■ Virtual only ■ Not