



Meetings and Documents review
c/- Better Business Communications Unit
Market Conduct and Digital Division
The Treasury
Langton Crescent
PARKES ACT 2600

19 July 2024

By email

meetingsanddocumentsreview@treasury.gov.au

Dear Treasury

HSF Submission on Statutory Review of the Meetings and Documents Amendments

Scope of this submission

This submission is made by Herbert Smith Freehills (**HSF**) in relation to the 'Statutory Review of the Meetings and Documents Amendments' (the **Statutory Review**).

Our submission is based on our experience acting as legal advisors to 60% of the ASX20 and approximately 50% of the ASX100 in respect to corporate governance, including the conduct of Annual General Meetings (**AGMs**). Our team attended over 50 AGMs in 2023.

Key recommendations in response to the Statutory Review

Our commentary on the specific questions in the Consultation Paper are set out in Attachment 1. However, for ease of reference, we have set out our key recommendations below:

- **Flexibility to adopt wholly online meeting format:** We recommend that section 249R(c) of the *Corporations Act 2001* (Cth) (**Act**) be amended to remove the constitutional requirement so that companies have flexibility to adopt the most appropriate meeting format for their circumstances.
- **Remove the necessity to enable oral questions:** We submit that section 249S(7)(b) of the Act be amended to:
 - remove the reference to oral questions; or alternatively
 - read "...exercise orally or in writing...".

Given shareholders have not generally used the oral question facility we consider that neither of these options would noticeably impact shareholder participation at AGMs.

- **Simplify the electronic sending of meeting related documents:** We recommend amending section 110D(3) of the Act to allow meeting related documents to be sent by way of publication on a website and removing section 110K as this provision has become redundant.
- **ASIC confirmation or guidance:** We submit that listed companies would benefit from receiving the following confirmation or guidance from ASIC (or from an appropriate government or regulatory body):
 - 1 a confirmation that section 249S of the Act does not prevent a company from imposing a reasonable question limit on shareholders attending online, particularly where one shareholder is dominating the dialogue;

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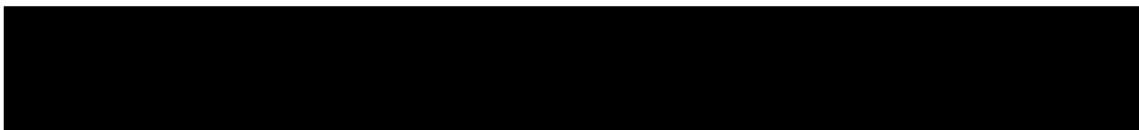


- 2 guidance on best practice in dealing with technical difficulties at virtual or hybrid AGMs in light of the requirement under section 249S of the Act to give shareholders as a whole a reasonable opportunity to participate; and
 - 3 guidance on the requirements under the Act in respect to the electronic document signing provisions (i.e. what is permissible in practice to satisfy the requirements).
- **Safety at AGMs:** We recommend amendments to the Act to provide companies with the discretionary power to prevent persons (including shareholders) from attending the AGM in person, where there are reasonable concerns for the safety and security of other AGM attendees.
 - **Impose a statutory deadline for receipt of members' statements:** We recommend that, to increase certainty for companies and shareholders alike, the deadline in section 249P of the Act should align to the statutory deadline provided for requisitioned resolutions under section 249O(1). This means that section 249P(7) would be amended to state: *"If a company has been given notice of a statement under sub-section (1), the statement is to be considered at the next general meeting that occurs more than 2 months after the notice is given."*

Further questions and clarifications

If you have any questions or comments about our submissions, please do not hesitate to contact us using the details below.

Yours sincerely



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HSF submissions on the consultation questions

Consultation question	HSF commentary and recommendations
Meetings	
<p>How has the experience of running company or registered scheme members' meetings changed since the amendments?</p> <ul style="list-style-type: none"> • What have been the effects of the amendments on the costs of holding AGMs or other meetings? 	<p>Before the amendments, and particularly prior to the Covid-19 pandemic, physical meetings were the most common AGM format used by ASX-listed companies. Since the amendments and following Covid-19, there has been a significant increase in the number of companies using virtual meeting technology to hold either a hybrid or fully virtual AGM.</p> <p>Research conducted by HSF in 2023,¹ which involved surveying 47 companies in the ASX 200, found that:</p> <ul style="list-style-type: none"> • Shareholder attendance: In 2022, most companies surveyed (33 out of 47) had less than 100 shareholders attend the AGM, and for most ASX 200 companies, the number of shareholders in attendance represented a very small proportion of their total number of shareholders; and • Costs: hybrid meetings are likely to be the most expensive AGM format. Survey respondents stated that hybrid meetings are "significantly more expensive" and "[increase] costs and logistics quite significantly". We note that running a hybrid meeting results in the company incurring costs for holding both a physical meeting and a virtual meeting; • Non-monetary costs: although management and Board time spent preparing for an AGM is almost impossible to quantify, it is likely that hybrid meetings are more demanding

¹ Lauren Selby and Stephanie Rowell, 'The future of shareholder meetings: Engagement, activism and democracy?' in T Damian and A Morgan (eds), *Bootmakers, Boards and Rogues: Issues in Australian Corporate and Securities Law* (The University of Sydney, 2023) 330, 343 and 346-347.

Consultation question

HSF commentary and recommendations

due to additional work and logistics to enable an online platform and preparing for contingencies such as technical difficulties.

There has been increased pressure to hold hybrid meetings from proxy advisors on the basis that they allow for greater accessibility and therefore increase shareholder attendance. Although HSF's research suggests that hybrid meetings may lead to greater numbers of attendees, some of this is likely attributable to the fact that companies who hold hybrid meetings are more likely to be larger ASX-listed companies that attract a higher attendance rate regardless of the format adopted for their AGMs. Further, it is an open question as to whether the significant costs involved in running a hybrid AGM are necessarily proportionate to the increase in shareholder attendance.

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

In respect to hybrid and virtual AGMs, the amendments have given shareholders access to online methods for voting, asking questions and making comments (both in writing and orally). For most large ASX listed companies, there was already an ability for shareholders who couldn't physically attend a meeting to submit questions in advance of the meeting and view the meeting proceedings on a webcast. Accordingly, the main change facilitated by the amendments is the ability to ask questions and vote in 'real time' via the online platform.

We are yet to see comprehensive studies of shareholder engagement in virtual AGMs in the Australian context. Nevertheless, early data suggests that, despite arguments that virtual meetings increase accessibility for shareholders, there have not necessarily been more shareholders attending online AGMs or asking more questions online. However, anecdotally, there has been a trend for hybrid AGMs to last longer than traditional physical meetings — in part, as questions are coming from both the floor of the meeting and from the online platform.²

The position is similar in the UK where offering the option to attend the AGM more easily through electronic means has not increased turnout or participation in meetings. Whilst overall voter turnout appears to have been broadly stable amongst the FTSE 100 for the past

² Lauren Selby and Stephanie Rowell, 'The future of shareholder meetings: Engagement, activism and democracy?' in T Damian and A Morgan (eds), *Bootmakers, Boards and Rogues: Issues in Australian Corporate and Securities Law* (The University of Sydney, 2023) 350.

Consultation question

HSF commentary and recommendations

five years and remains in line with pre-pandemic levels,³ over time fewer companies are holding hybrid meetings (from 109 hybrids amongst the FTSE 350 in 2022 to 81 in 2023).⁴ Accordingly, many companies have found it hard to justify the additional time, effort and expense associated with a hybrid AGM format if only a handful of shareholders log in on the day.

We have observed that the ability to submit written questions online has enabled certain vocal shareholders to submit large numbers of questions nearly instantaneously, which are often repeated verbatim at different AGMs. When this occurs, it means that one or two shareholders 'dominate' the meeting. This can delay timely engagement with other shareholders and causes frustration among other shareholders due to the time it takes to address the 'shopping list' of questions. Many companies have been uncertain about how to triage questions in this scenario and reach an appropriate balance between facilitating online shareholder questions whilst ensuring that shareholders as a *whole* have a reasonable opportunity to participate in the meeting (as required by section 249S of the Act). This has been particularly difficult given the concern from companies to not be seen as 'cherry picking' online questions, noting the focus on this as a potential risk area when the amendments were introduced.

Recommendation: Companies would benefit from regulatory confirmation that section 249S of the Act does not prevent a company from imposing a reasonable question limit on shareholders attending online, particularly where one shareholder is dominating the dialogue.

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?

- Please see our comments above regarding dominating shareholders.
- Please see our comments below regarding oral questions.

³ Geogeson, *2023 European AGM Season Review* (Report, 12 September 2023).

⁴ Thomson Reuters Practical Law, *Annual reporting and AGMs 2023: What's Market practice?* (Report, 2023).



Consultation question

HSF commentary and recommendations

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?

We understand from our experience advising a significant proportion of the ASX200 that companies would like the flexibility to hold wholly online meetings given the lower cost, logistical simplicity and equal access to all shareholders regardless of location. However, under section 249R(c) of the Act, companies can only hold wholly online meetings if that format is expressly required or permitted by the company's constitution.

The majority of large ASX-listed companies who have passed a special resolution under section 136(2) of the Act to amend their constitution to allow for fully online meetings, are companies with a cornerstone shareholder. Without the support of a cornerstone shareholder, passing the required special resolution is near impossible due to strong opposition from proxy advisors, who prefer hybrid meetings and recommend voting against constitutional amendments to facilitate wholly online meetings. Accordingly, the constitutional requirement is a significant barrier for companies that would consider utilising a virtual meeting format. We note that proxy advisors and institutional investors do not attend AGMs.

We note that a company, as opposed to proxy advisors, is best placed to weigh factors such as size of shareholder base, the cost of running an AGM and shareholder engagement to determine the most appropriate meeting format. This is recognised in other jurisdictions (see below). This decision-making process is currently impeded by the constitutional requirement.

Recommendation: We recommend that section 249R(c) be amended to remove the constitutional requirement so that companies have flexibility to adopt the most appropriate meeting format for their circumstances.

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?

Removing the telephone line

Under section 249S(7)(b) of the Act, companies holding virtual and hybrid meetings must enable shareholders attending online to ask both oral and written questions. For many companies this has necessitated using a telephone line to enable oral questions.

Our clients have experienced frequent challenges with the sound quality and stability of the telephone line, including difficulty hearing shareholder questions and comments. Further, shareholders often have to wait for long periods to ask their question with many 'giving up'

Consultation question

HSF commentary and recommendations

particularly where they can submit a written question which is added to a queue and does not require them to wait on the telephone line.

For these reasons, our clients have seen very low or no utilisation of the telephone line at both hybrid and virtual meetings and experience to date demonstrates that shareholders attending online prefer to ask written questions. Research from Link Group revealed that in 2022, 98% of companies that held hybrid or virtual meetings did not have any members participate on the phone line facility.⁵

Recommendation: We submit that section 249S(7)(b) of the Act be amended to:

- 1 remove the reference to oral questions; or alternatively
- 2 read "...exercise orally *or* in writing...".

Given shareholders have not generally used the oral question facility we consider that neither of these options would noticeably impact shareholder participation.

Addressing technical difficulties

There is a risk that virtual meeting technology may malfunction and prevent online shareholder participation during an AGM. There is currently no regulatory guidance on 'best practice' when this occurs. The contingency plan for many of our clients in the event they encounter severe technical difficulties is to adjourn a hybrid or virtual AGM.

However, in cases where the Chair of the meeting has reasonably formed the view that a majority of shareholders in attendance can still participate and that continuing the meeting will not significantly affect voting outcomes, it may be more sensible to continue with the meeting – noting the added costs and time required if an adjournment is necessary. In our view, this approach is a reasonable approach which allows companies to satisfy – as far as is possible in the circumstances - the requirement in section 249S(1) of the Act to give shareholders as a whole a reasonable opportunity to participate in the meeting. Further, given that a large volume of proxy votes are typically received ahead of an AGM, voting outcomes are unlikely to be swayed by votes received during the meeting.

⁵ 'AGM Meeting Format', *Link Group* (Web Page, 2023) <<https://www.mpms.mufg.com/agmsnapshot/2022-meetings/agm-meeting-format.html>>.

Consultation question	HSF commentary and recommendations
	<p>Recommendation: We encourage ASIC to issue specific guidance which addresses best practice in dealing with technical difficulties at virtual or hybrid AGMs.</p>
<p>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?</p>	<p>If a company was listed after the 2022 amendments were made, they were generally listed with wholly online meeting provisions already built into their constitution. Therefore, unlike those companies listed before the amendments, they have the option to hold wholly online meetings from the outset without needing shareholder approval to amend their constitution.</p>
<p>How have the mandatory poll voting requirements affected the conduct of meetings and determining the opinion of members?</p>	<p><i>No HSF response</i></p>
<p>Have there been any issues with submitting or complying with requests for independent reports on polls?</p>	<p>In our experience, the ability to obtain independent reports on polls is rarely used by large ASX-listed companies except in exceptional circumstances. However, in the few circumstances where we have seen an independent person appointed to scrutinise the outcome on a poll, there is uncertainty around the scope of the review and what information is to be contained in the final report.</p>
<p>Are there lessons that Australia could take from other jurisdictions' experiences with online or hybrid members' meetings?</p>	<p>We are aware that many foreign jurisdictions allow for virtual-only shareholder meetings under legislation, without changes being required to a company's constitution or articles of association. New Zealand, Singapore, India and Malaysia are all examples of countries that have a legal framework that supports fully virtual meetings.</p>

Consultation question	HSF commentary and recommendations
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While the US regime operates on a state by state basis, many of the key states in which large listed companies are incorporated allow for fully virtual meetings. We understand that the majority of the S&P 100 held their AGMs in a virtual format in 2023.⁶

How have the amendments affected the effective operation of directors' meetings?	<i>No HSF response</i>
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Treatment of documents

What, if any, issues have been experienced with the giving and sending or receipt of electronic meeting-related documents? How could these be addressed?

The provisions in the Act relating to the giving, sending or receipt of electronic meeting-related documents are complex and would benefit from simplification. Companies have often struggled to understand their options and obligations in this context. Further, whilst we appreciate that the current law facilitates a 'digital-first' approach, we see opportunities to further enhance the digital sending of documents by listed companies.

Recommendation: We recommend that:

- Section 110D(3) of the Act be amended so that Notices of Meeting and other meeting related documents can be sent by way of publication on a website. This option is currently only available in respect to annual financial reporting to members required under section 314 of the Act.

This approach would facilitate the sustainability ambitions of many large ASX-listed companies by allowing them to avoid large mailouts. It would also align with the approaches under the Act in respect to sending the Annual Report and meeting-related documents, thereby simplifying the regime.

⁶ See 'In-person AGMs dominate 2023, but companies avoid Mondays', *Computershare* (Web page, 14 September 2023) <<https://www.computershare.com/us/news/in-person-annual-meetings-preferred-2023>>.



Consultation question **HSF commentary and recommendations**

- Section 110K of the Act be removed. In practice, there are many means through which a shareholder is alerted to their right to elect how they receive documents. Although practice varies between companies, this may include a note on the Proxy Form, in the Annual Report, or on the investor section of the website. Accordingly, there is no need to mandate that companies give this notice to shareholders.

If changes are made to the technology-neutral sending of documents provisions, we request that Treasury clarify how the transition from the previous regime to the updated regime will be implemented. For example, we would advocate for a reset of all member elections so that companies may “start fresh”.

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?

Please see our response above in respect to section 110K of the Act.

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

No HSF response

Other comments

Safety at AGMs

Some listed companies have concerns around ensuring the physical safety of shareholders and company employees who attend AGMs with a physical location, particularly as certain activist groups may threaten the safety of attendees.

Recommendation: These concerns could be addressed by amending the Act to provide companies with the discretionary power to prevent persons (including shareholders) from attending the AGM in person, where there are reasonable concerns for the safety and security of AGM attendees.



Consultation question

HSF commentary and recommendations

Lack of statutory deadline for members' statements

There is currently no statutory deadline for members' statements under section 249P. Section 249P(6) and (7) provide that a company must distribute a copy of a members' statement after receiving a request at the same time, or as soon as practicable afterwards, as it gives notice of a general meeting, and the company is responsible for the costs of the distribution if the statement is received "in time to send it out to members" with the notice of meeting.

In practice, this ambiguity means that companies are having to work to highly compressed timeframes to prepare the notice of meeting and organise its distribution where a statement is received. Further, shareholders do not have certainty around the precise deadline for submitting a requisitioned statement.

Recommendation: We submit that, to increase certainty for companies and shareholders alike, the deadline in section 249P of the Act should align to the statutory deadline provided for requisitioned resolutions under section 249O(1). This means that section 249P(7) would be amended to state: "If a company has been given notice of a statement under sub-section (1), the statement is to be considered at the next general meeting that occurs more than 2 months after the notice is given."