

30 October 2020

Manager  
Market Conduct Division  
The Treasury  
Langton Crescent  
Parkes ACT 2600

via email: [businesscomms@treasury.gov.au](mailto:businesscomms@treasury.gov.au)

Dear Sir/Madam,

### **Making permanent reforms in respect of virtual meetings and electronic document execution**

Thank you for the opportunity to make a submission on the Government's exposure draft legislation to make permanent changes to the *Corporations Act 2001* (**the Act**) in relation to virtual meetings and electronic document execution (**Exposure Draft**).

The Australian Institute of Company Directors' (**AICD**) mission is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society. The AICD's membership reflects the diversity of Australia's director community: while 192 of the nation's ASX 200 companies have one or more AICD members serving on their board, our membership of more than 45,000 is drawn from directors and leaders of not-for-profits, large and small businesses and the government sector.

**The AICD strongly supports the Government's initiatives to modernise and upgrade Australia's governance and corporate law settings.** COVID-19 and the resulting need for emergency legislative relief in relation to virtual meetings and electronic signatures has revealed where regulation has become dated and inflexible. To accelerate economic recovery, Australia needs to step away from incrementally adapting to developments in technology and innovation, towards an agile, updated and fit-for-purpose regulatory environment.

Modernising Australia's corporate law is an obvious priority, with benefits to stakeholders and organisations across the community. By making regulation technology-neutral, organisations will be nimbler in adapting to business and shareholder/member needs and will encourage innovation and reinvigoration of corporate governance regulation.

Equally, we recognise the concerns of some stakeholders regarding the transparency and quality of shareholder/member engagement in a virtual Annual General Meeting (**AGM**) format. It is critical that technology is used in a way that promotes accountability, through greater visibility and accessibility, and does not disenfranchise individuals.

## Executive summary

The AICD strongly supports the Government's proposals to modernise the Act and considers this an important upgrade to our governance and corporate law settings. In particular:

- We support the proposals in the Exposure Draft that will enable organisations to hold physical, hybrid or virtual meetings;
- We strongly support the ability of organisations to have the flexibility to adopt the best meeting format for their circumstances, shareholders/members and stakeholders;
- We support the proposals in the Exposure Draft that will allow for electronic distribution of documents, including notices of meetings;
- We support the proposals in the Exposure Draft that will allow electronic execution of company documents, including electronic signing of minutes; and
- We recommend that further consideration be given to adapting the proposals so that they reflect the different size and complexity of organisations subject to the Act. In particular, we consider it appropriate for listed entities to be subject to more detailed obligations to ensure transparency and shareholder engagement in virtual meetings, compared to smaller, not-for-profit entities.

We expand on these points below.

## Virtual meetings

### Benefits of virtual meetings

We strongly support the proposals in the Exposure Draft that will enable organisations to hold physical, hybrid or virtual meetings.

AGMs are one of the primary events in an organisation's governance calendar. They are a critical forum for shareholders/members to hold companies, board and management accountable for their performance and reporting, to hear directly from the Chair and management, and to vote on the composition of the board and key governance resolutions.

However, there are clearly opportunities to reinvigorate the format. A 2015 Computershare survey found fewer than one per cent of shareholders attended AGMs (with a declining trend of attendance over a decade) and less than five per cent voted. The AICD's most recent Director Sentiment Index survey found that over a third (37%) of directors consider the current AGM system to be dysfunctional.<sup>1</sup> Computershare data shows that overall attendance at AGMs has increased by 36% when comparing attendance from 2019 to 2020, suggesting that the virtual and hybrid platforms have not inhibited shareholder and member attendance or engagement.<sup>2</sup>

The proposal to allow companies to hold virtual and hybrid meetings on a permanent basis could contribute to reinvigorating company meetings, providing companies with flexibility to use the best

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<sup>1</sup> See slide 7, Director Sentiment Index: Research Findings Second Half 2020, available at: <https://aicd.companymembers.com.au/-/media/cd2/resources/advocacy/research/director-sentiment/2020/pdf/ds2020-second-half-oct2020-fullresults>

<sup>2</sup> Computershare, Virtual AGM Report: Insights from online meetings in April & May 2020, available at: [http://images.info.computershare.com/Web/CMPTSHR1/%7B6d3e4edc-c243-4d5b-8ae0-b7898bf1d9ac%7D\\_VIRTUAL\\_AGM\\_SEASON\\_INSIGHTS\\_FINAL.pdf](http://images.info.computershare.com/Web/CMPTSHR1/%7B6d3e4edc-c243-4d5b-8ae0-b7898bf1d9ac%7D_VIRTUAL_AGM_SEASON_INSIGHTS_FINAL.pdf)

format for their circumstances and stakeholders. There could be a range of drivers for companies to adopt hybrid or virtual meeting formats, including removing geographic and physical barriers to attendance by retail shareholders and members; and increasing questioning and engagement.

The changes contemplated by the Exposure Draft would also bring us into line with other countries - such as the US, Canada, Spain, South Africa, Denmark, Ireland and New Zealand, regarding the use of hybrid or virtual meetings.

### **Flexibility in format of meetings**

We support the proposal in the Exposure draft not to hard-wire a particular format of an AGM into legislation. It is important that organisations have the flexibility to adopt the best meeting for their circumstances, shareholders/members, and stakeholders. Regulation should focus on the outcomes and purpose of meetings, while enabling flexibility in delivery and technological neutrality.

It may be helpful for the legislation or Explanatory Memorandum to explicitly recognise that a 'reasonable opportunity' under the Act does not require the adoption of a particular format, but rather is in relation to providing a reasonable opportunity within whatever format of the AGM is chosen.

By way of illustration as to the diversity of approaches taken to AGMs, a recent AICD survey reveals that there is no 'one size fits all' approach to the format of meetings; when asked whether they would hold a physical, hybrid or virtual AGM this year, surveyed members across both listed and not-for-profit organisations were essentially evenly split across all three formats.<sup>3</sup>

### **Ensuring accountability and engagement in virtual meetings**

We recognise the concerns of some stakeholders regarding the transparency and quality of shareholder/member engagement in a virtual AGM format. The participation of shareholders, as the collective owners of a company, in general meetings is a crucial component of good governance.

**In the AICD's view, virtual AGMs must not be used by organisations to reduce corporate accountability or disenfranchise shareholders/members.** Whatever the format, whether that be physical, hybrid or virtual, there is a clear expectation and protection under the law that shareholders and members are given a reasonable opportunity as a whole to ask questions or make comments on the management of the company. This is a strict liability offence under section 250S of the Act.

However, as with any new technology or alterations to established governance practices, there will inevitably be a period of evolution as stakeholders work through the practical changes to processes and practice. It is important that all stakeholders work together to improve the experience for all participants and ensure that virtual AGMs are not used as a means to reduce board accountability to shareholders/members.

Given the legislation will cover a broad range of organisations, from small not-for-profit organisations, limited by guarantee, to large listed organisations, we consider it appropriate for the Act to set the principles and framework that are appropriate for all organisations to comply with. However, it is important that the Act does not impose minimum expectations that are overly prescriptive or unduly burdensome to comply with, particularly for smaller, not-for-profit entities.

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<sup>3</sup> Survey sent to 2,900 AICD members on 9 July 2020 with 469 respondents: 36% of surveyed listed members indicated that they had held, or intended to hold, a virtual AGM in 2020, 31% a hybrid meeting, and 33% a physical AGM. This was equally reflected in our not-for-profit membership, with 34% holding, or intending to hold, a fully virtual AGM, 33% holding a hybrid AGM, and 33% holding a physical AGM. For further detail on the survey and its results, see [Governance Through a Crisis: Learning from COVID-19](#), a report by the AICD and the Governance Institute of Australia.

To this end, we consider it appropriate for listed entities to be subject to heightened expectations in relation to virtual meetings, particularly in relation to the transparency of questions and comments. We expand on this below.

### **Transparency of questions and comments**

We support a requirement for listed entities to be transparent in relation to the questions or comments that have been submitted before or during a virtual meeting.

However, there are some concerns that minutes may not be an appropriate format for these questions and comments given minutes are intended to be a record of proceedings, not a transcript. Equally, from a shareholder/member perspective, there may be concerns that there could be a significant delay between the meeting and its minutes becoming available to shareholders/members (possibly up to one month). It is also unclear in the Exposure Draft whether organisations would be required to record every question and comment verbatim.

The AICD would support consideration of requirements that would:

- Require listed entities to keep a record of questions and comments received before and during the meeting and for this to be available/published within a short timeframe of the meeting occurring (for example, within three business days). This record should not form part of the minutes of a meeting. Given this requirement would be specific to listed entities, it may be preferable for this to sit within the ASX Listing Rules, rather than the Act; and
- Clarify that entities would not be required to publish questions or comments that are inappropriate, practically identical or defamatory, particularly given these would be on public record.

We also support the development of further regulatory guidance to expand on how listed entities can meet their obligations to give a reasonable opportunity to shareholders to engage in a virtual meeting. This would have the advantage of being scalable to reflect the size and complexity of an organisation, and nimbler in responding to changes in technology or market practice. Such a step is particularly important given 2020 is the first year where many entities have held virtual-only meetings, and therefore practice will evolve to meet shareholder needs and to capitalise on the enhanced functionality of new technology.

### **Not-for-profit and smaller unlisted entities**

We suggest further consideration be given to whether the Exposure Draft appropriately reflects the different complexity and resources of not-for-profit and smaller unlisted entities. In particular, we consider that such entities should not be subject to the proposals regarding record-keeping of questions and comments, and live poll voting. This is likely to be unduly burdensome and overly prescriptive for these entities who are often operating under financial and workforce constraints.

## Notices of meeting

We strongly support the proposal in the Exposure Draft to allow organisations to send documents, including notices of meetings, via electronic means. In our view, allowing organisations to provide notices of meetings to shareholders/members electronically will produce significant cost savings and reduce postal delay for shareholders/members in rural and regional communities, as well as have a positive environmental impact.

The proposals in the Exposure Draft, which do not require a shareholder to 'opt in' to receive meeting materials electronically, will enable organisations to distribute meeting materials more efficiently. This is balanced by the requirement for shareholders/members to have a 'nominated electronic address', which indicates that shareholders/members have access to receiving electronic communications and requires the organisation to actively alert shareholders/members to meeting materials (as opposed to posting a general notice on the organisation's website or ASX without any further communication). Shareholders/members who wish to receive hard copy materials (despite having a nominated electronic address) should have the option to do so.

## Electronic signatures

As previously raised with Treasury, the position as to whether a wet signature is required for minutes of directors' meetings and members' meetings is currently ambiguous (with the law having been left unchanged by the Treasurer's temporary electronic documentation relief). We are therefore pleased that the proposals under the Exposure Draft extend to cover meeting minutes and clarify the position on electronic signatures and storage.

We strongly support making electronic signatures permanent, including permitting all legal documents and forms to be in electronic form and electronically signed. Again, this will improve efficiency and reduce costs, which will ultimately benefit shareholders/members and consumers.

In this regard, we endorse the submission of the Australian Banking Association, in particular that:

- Deeds should be able to be created and signed electronically by organisations and individuals;
- Electronic signatures rather than wet signatures should be able to be used for a broader range of legal and company documents; and
- Where required by law, remote witnessing should be legally valid.

## Next steps

We hope our comments on the Exposure Draft will be of assistance as you undertake this important consultation. If you would like to discuss any aspects further, please contact Sophie Stern, Senior Policy Adviser at [sstern@aicd.com.au](mailto:sstern@aicd.com.au), or Christian Gergis, Head of Policy, at [cgergis@aicd.com.au](mailto:cgergis@aicd.com.au).

Yours sincerely,



**Louise Petschler GAICD**

General Manager, Advocacy