

8 November 2021

Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

via email: economics.sen@aph.gov.au

Dear Committee Secretary

Corporations Amendment (Meetings and Documents) Bill 2021 [Provisions]

Thank you for the opportunity to provide a submission to the Senate Standing Committee on Economics on the provisions of the *Corporations Amendment (Meetings and Documents) Bill 2021* (the **Bill**).

The Australian Institute of Company Directors' (**AICD**) mission is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society. The AICD's membership reflects the diversity of Australia's director community, with our membership of more than 46,000 being drawn from directors and leaders of not-for-profits, large and small businesses, and the government sector.

Since the onset of the COVID-19 pandemic, through what has continued to be an uncertain time across 2021, the AICD advocated for urgent regulatory relief to support organisations to meet their governance requirements while navigating public health restrictions.

The disruption caused by the COVID-19 crisis has highlighted the need to permanently modernise Australia's *Corporations Act 2001* (Cth) (**Corporations Act**) requirements relating to company meetings, shareholder communications and document execution requirements.

1. Executive Summary

In summary, the AICD:

- strongly supports the Bill's proposed reforms to enable organisations to adopt the best meeting format for their circumstances, whether that be physical, hybrid or wholly virtual meetings, on a permanent basis;
- welcomes, in particular, provisions in the Bill that will provide appropriate safeguards to ensure effective and meaningful shareholder participation at meetings, including a requirement for shareholders/members to consent to a constitutional change that would enable a virtual-only meeting format on a permanent basis, as well as an opportunity for shareholders to have votes independently reviewed;
- strongly supports protection under the law that shareholders and members are given a reasonable opportunity, as a whole, to ask questions or make comments on the management of the company. However, to avoid creating an unnecessary compliance burden for smaller and not-for-profit organisations, the legislation should provide flexibility to allow organisations to

provide the most appropriate method of communication with shareholders or members that reflects their organisational type, size and meeting format. This should not mandate that both oral and written channels be provided in all instances. There is an opportunity, instead, for guidance as to better practice and minimum standards to be issued by ASIC and the ASX Corporate Governance Council in the ASX Corporate Governance Principles and Recommendations (**ASX Principles**), particularly for ASX listed companies;

- supports amendments providing companies flexibility to decide whether votes are to be conducted via a show of hands or a poll. However, we do not consider that there should be a separate legislative requirement for listed entities to conduct votes on resolutions by way of a poll. In our view, recommendation 6.4 of the ASX Principles already sets this expectation as to better practice for listed entities when conducting voting on substantive resolutions;
- strongly supports amendments to enable organisations to distribute meeting related materials electronically, while still enabling shareholders/members the ability to elect to receive hard copy materials; and
- strongly supports amendments to enable the electronic execution of documents (including directors' and members' meeting minutes) on a permanent basis.

2. Use of technology for meetings

(a) Benefits of allowing virtual meetings

The AICD considers the annual general meeting (**AGM**) to be a key governance and accountability mechanism for companies. They are, and should remain, a key feature in an organisation's governance calendar. AGMs are a critical forum for shareholders/members to hold companies, board and management to account for their performance, to hear directly from the Chair and management, and to vote on the composition of the board and key governance resolutions.

In our view, the rationale for permanent legislative reform to modernise Australia's outdated Corporations Act requirements is sound. As demonstrated by the COVID-19 pandemic and the continued impact of public health and travel restrictions throughout 2021, the use of technology has allowed organisations to hold effective hybrid and virtual general meetings, while still meeting business and shareholder needs.

Going forward, there is capacity for technology to reinvigorate the format of company meetings by removing geographic and physical barriers to attendance by retail shareholders and members; as well as increasing engagement and the opportunity for shareholders/members to ask questions.

Permanent changes to company meeting requirements to enable the use of virtual AGMs would also bring us into line with other countries such as the US, Canada, Spain, South Africa, Denmark, Ireland and New Zealand.

(b) Flexibility in format of meetings

The AICD strongly supports the proposals in the Bill that will enable organisations to have the flexibility to adopt the best meeting format for their circumstances (whether that be physical, hybrid or wholly virtual meetings) on a permanent basis. Regulation should focus on the outcomes and purpose of meetings, while enabling flexibility in delivery and technological neutrality.

Unlike the Treasurer's emergency COVID-19 relief measures, which temporarily overrode any restrictions in a company's constitution from holding a virtual meeting, the Bill proposes virtual meetings may *only* be held in this way if they are expressly permitted by the company's constitution. Many organisations will therefore be required to seek shareholder approval to amend their constitutions to realise the full effect of the Bill's proposed changes.

While there is an opportunity for the Bill to facilitate constitutional modernisation of company meetings, it is important, in our view, to protect shareholder democracy and that organisations that wish to have the option of conducting virtual meetings on a permanent basis (whether that be regularly or on an ad hoc basis) should ensure that shareholders or members have explicitly consented to this format. Effecting this constitutional amendment via special resolution requires a strong majority of 75% of the votes cast at a meeting. This is an appropriate threshold for such an important change to a company's meeting procedure and will evidence strong shareholder agreement to the step.

We understand the concerns raised by some investor groups regarding ASX listed companies amending their constitution to enable a permanent virtual AGM format. However, it is critical that the legislation is non-prescriptive and provides flexibility for this mechanism. This is particularly the case for smaller listed companies and not-for-profit organisations who have often had greater shareholder/member engagement via the virtual meeting format.

That being said, there is a very strong case for allowing listed companies to determine the format for their meetings, where they have sought and obtained explicit consent from a clear majority of members (i.e. 75% of the votes cast at a meeting) to allow meetings to be held virtually only.

It would be incongruous for the Government to pursue Corporations Act modernisation generally, but allow an obsolete and restrictive legislative requirement (i.e. that a meeting be held in person) to remain.

(c) Ensuring accountability and engagement in virtual meetings

The AICD considers that 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 long-standing strict liability offence under section 250S of the Corporations Act.

We understand the concerns raised by investor groups about some meeting practices not meeting these objectives. At the same time, during the 2020 and 2021 AGM seasons many companies have demonstrated that it is possible to hold virtual meetings in a way that increases, rather than decreases, shareholder participation. 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.

The AICD supports the Bill's proposed amendments in section 249S that requires organisations to have in place appropriate safeguards that afford shareholders, as a whole, a reasonable opportunity to participate. We note however that the Bill also proposes to include a new requirement in section 249S(8)

that shareholders or members may be able to exercise their right to speak or ask questions at a meeting orally and in writing throughout a meeting. We would caution against hardwiring any requirement for both oral and written communication from shareholders or members throughout a meeting.

While on the face it this may not appear to be an onerous requirement, we understand that facilitating voice-integrated or telephone dial-in options that enable participants to speak during a meeting, in addition to submitting questions in writing over the meeting platform, while not impossible, is less commonly used due to the increased complexity with these arrangements. We also understand that it is difficult for organisations and platform providers to securely verify the identity of those dialling-in as shareholders seeking to put questions and comments orally to the meeting. By contrast, the ability to submit questions online to the webcast meeting is more securely monitored by the platform provider and requires shareholders to provide a passcode to verify identity. This still allows general access for interested stakeholders (for example, media, employees and other stakeholders) to view the webcast.

Given the legislation covers a broad range of organisations, from small not-for-profit organisations, limited by guarantee to large ASX listed organisations, it is important that the legislation does not impose minimum expectations that are overly prescriptive; unduly burdensome or expensive to comply with; or otherwise at risk of becoming outdated as technology continues to evolve.

Instead, we would encourage the Government and stakeholder community to take steps to address listed company investor concerns around meaningful shareholder engagement without embedding unnecessary prescription in legislation.

We believe this could be best achieved via ASIC regulatory guidance and recommendations in the ASX Principles as to better practice, particularly for ASX listed companies. These would set a minimum standard and could be supplemented by industry-agreed principles, such as the *Joint Industry Guidance* issued by the AICD together with the Governance Institute of Australia, the Law Council of Australia and the Australasian Investor Relations Association released in April 2021.¹ Importantly, this guide has continued to be updated throughout 2021 in response to investor concerns and captures key learnings from the AGM season, including safeguards to ensure the protection of shareholders' rights and effective shareholder participation at meetings. This demonstrates that industry can learn from the market's experience and develop better practice without the need for prescriptive legislative arrangements.

While ASIC guidance is not legally binding it would create a clear expectation of practice and provide guidance on how the corporate regulator will enforce companies' pre-existing legal obligation to provide members as a whole with a 'reasonable opportunity to participate' at meetings. Where companies circumvent their obligations, ASIC can (and should) draw on its existing and continuing enforcement powers.

3. Voting on substantive resolutions

The AICD supports provisions in the Bill to remove a default method for conducting votes at a meeting and provide companies flexibility to decide whether votes are to be conducted via a show of hands or a

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

poll. That said, we do not consider that there should be a legislative requirement for listed entities to conduct votes on resolutions by way of a poll.

However, should the Government be minded to hardwire this requirement for listed entities into the legislation, we would support the Explanatory Memorandum clarification that this requirement be limited to substantive, rather than procedural, resolutions only. For completeness, we consider there is an opportunity to also reference substantive resolutions explicitly in the Bill which would more closely align with recommendation 6.4 of the ASX Principles, and remove the need for the many users of the Corporations Act to consult the Explanatory Memorandum.

4. Electronic communication of documents

The AICD strongly supports amendments in the Bill that would allow organisations to send meetings-related documents via electronic means on a permanent basis. 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.

At the same time, we consider that shareholders/members who wish to receive hard copy materials should have the option to do so. Accordingly, we support the drafting in the Bill which preserves a recipient's right to elect their preferred method of communication.

5. Electronic signatures

We strongly support the Bill's proposal to provide a permanent statutory mechanism for organisations to execute documents (including directors' and members' meeting minutes) electronically. We also welcome the further clarifications made to Division 1 of the Bill that make clear that:

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

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

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

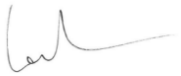
An agency relationship with a company can, in some circumstances, be conferred on employees who, while they may be authorised to execute *certain* documentation on the company's behalf, may not always have the requisite authority to execute deeds. There may be potential for unintended consequences should a rogue actor misrepresent their authority to validly execute a document on behalf of a company.

The AICD would encourage Government to seek input from legal practitioners on this amendment to ensure appropriate safeguards are embedded in the legislation

6. Next steps

We hope our further comments will be of assistance to the Committee. If you would like to discuss any aspects further, please contact Christian Gergis, Head of Policy, at cgergis@aicd.com.au or Laura Bacon, Senior Policy Adviser, at lbacon@aicd.com.au.

Yours sincerely,



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