Australian Government

Technology neutrality in distributing company meeting notices and materials

Proposal Paper
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CONSULTATION PROCESS

REQUEST FOR FEEDBACK AND COMMENTS

The Government seeks your feedback and comments on the measures outlined in this consultation. The information obtained through this process will inform Government's approach to implementation and aid it in meeting the objectives of best practice regulation.

Submissions should include the name of your organisation (or your name if you are making a submission on your own behalf) and contact details for the submission, including an email address and contact telephone number where available.

While submissions may be lodged electronically or by post, electronic lodgement is preferred. For accessibility reasons, please email responses in a Word or RTF format. An additional PDF version may also be submitted.

All information (including name and address details) contained in submissions will be made available to the public on the 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 do not suffice for this purpose. Respondents who would like part or all of their submission to remain in confidence should provide this information marked as such in a separate attachment. A request made under the *Freedom of Information Act 1982* for a submission marked 'confidential' to be made available will be determined in accordance with that Act.

Closing date for submissions: Friday, 17 June 2016

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FOREWORD

As part of its response to the Financial System Inquiry, the Government is committed to improving financial regulation by making it technology neutral.

Previous public consultation processes, as well as direct calls from industry participants, have identified facilitating company meetings as an area where improvement could be made to reduce the compliance burden on business and improve outcomes for shareholders.

Currently, all companies must give notice of upcoming meetings to shareholders in person or by sending notice by post unless an individual shareholder elects to receive notice electronically.

This requirement, harking back to a paper-based era, is technology-specific and has the effect of restricting digital services. The 'opt in' approach results in companies incurring the significant economic and environmental costs of printing and posting notices to shareholders who have not actively chosen to receive an electronic copy of the notice.

The current law does not reflect the changes in the way Australians engage with digital communications technologies and content.

Shareholders participation in general meetings plays a key role in promoting good corporate governance. The practical opportunities for shareholders, particularly at the retail level, to play this role are restricted when relevant information is not communicated in a form that is useable and timely.

To facilitate innovation and reduce costs for companies while maintaining appropriate level of shareholder engagement, the Government proposes a technology neutral mode of distributing meeting notices and materials.

It is intended that data can be provided in more usable forms in a timelier manner, through lower costs communication channels, and presented in a flexible manner that meets user preferences. Figures from 2014 show that more than one third of adult Australians were directly invested in the share market. With many more Australians indirectly exposed through their superannuation holdings, the potential savings for everyone concerned are considerable.

I encourage all those who have an interest in improving meetings communications to comment on this proposal paper. The deadline for submissions is Friday, 17 June 2016.

I look forward to working with the community and industry to ensure that the Government strikes the right balance between encouraging innovation, reducing compliance costs for business and ensuring that shareholders receive the information they need to exercise their rights.

The Hon Kelly O'Dwyer MP
Minister for Small Business and Assistant Treasurer

1. Distributing Company Meeting Notices and Materials

1.1 Shareholder participation and information

The ability to influence the direction of a corporation is a key right of a company shareholder and is recognised as critical for good corporate governance practice. A primary mechanism for exercising that right is through participation in general meetings and by voting on resolutions regarding the operation of the company.[1]

The primacy of company meetings as the mechanism for obtaining the views and agreement of members within the Corporations Act can be seen through the range of issues where a meeting is required, such as:

- the appointment and ratification of the company's board of directors;[2]
- the adoption, modification or repeal of the company's constitution;[3]
- the approval of related party transactions;[4] and
- the voluntary winding up of the company.[5]

Given the importance of company meetings to good corporate governance, the OECD Principles of Corporate Governance refer to the basic shareholder rights to participate in general meetings:

> Shareholders should be furnished with sufficient and timely information concerning the date, location and agenda of general meetings, as well as full and timely information regarding the issues to be decided at the meeting.[6]

Accordingly, notices of meetings serve an important function in the corporate governance framework by informing shareholders that a meeting is to occur, of the business that will be conducted at the meeting so they can decide whether or not to attend, as well as how to vote.

1.2 Notice of meetings of members — the current framework

The law currently provides that all companies must give notice of upcoming meetings (including annual general meetings (AGMs) and other general meetings) to shareholders personally or by sending notice by post, unless an individual shareholder elects to receive the notices via electronic means, or the company has amended its constitution to stipulate an alternative method of notice.[7]

1 OECD 'OECD Principles of Corporate Governance' (2004) page 33.
2 Sections 201G; 201H of the *Corporations Act 2001* (all further references to legislation in this paper are references to the Corporations Act).
3 Section 136.
4 Sections 217-226.
5 Section 491.
6 OECD 'OECD Principles of Corporate Governance' (2004) page 18.
7 Subsection 249J(3).

At the same time that a company sends out the notice for the meeting, it is ordinary practice for the company to also send out materials on issues to be raised at the meeting, as well as proxy appointment forms for directing the proxy on how to vote on particular resolutions.[8] Companies will ordinarily provide reply-paid envelopes (although they are not statutorily obligated to do so) to encourage shareholder responses.

The current requirements for distributing company meeting notices are technology-specific and have the effect of restricting digital services. They do not reflect the changes in the way Australians engage with digital communications technologies and content. According to the Australian Communications and Media Authority *Communications report 2014–15*:[9]

- Mobile phones are entrenched in the lives of almost all Australians with 94 per cent of adults using these portable devices to either send text messages or make calls as at May 2015.
- An overwhelming majority of Australians are internet users, with 92 per cent going online in the six months to May 2015.
- Almost 16 million Australians or 86 per cent of the population have a home internet connection as at June 2015.
- Australians continue to diversify their use of internet access devices, with mobile phones now the most popular devices used by adult Australians to access the internet (79 per cent of online Australians), followed by laptop computers (74 per cent) as at May 2015.
- Internationally, Australia was ranked 11th in terms of mobile-internet penetration and 39th in terms of fixed broadband penetration as at December 2014 (out of 189 countries).

The current requirements are also creating a cost barrier to companies using more effective and efficient means of communication (for example, a company website) as the key distribution method for company related information. The 'opt in' approach to electronic delivery results in companies (particularly those with large shareholder bodies) incurring significant economic and environmental costs for printing and posting notices to shareholders. According to Computershare:

> One of our clients spent close to $1 million on their 2015 AGM. With approximately 200,000 investors, this averages at $5 per investor. However only 100 investors, or 0.005% attended the AGM, driving the cost to $9,500 per investor.

While noting the continued importance of general meetings as a means for shareholder engagement, it is commonly recognised that the engagement of shareholders with company meetings has reduced over time.[10] In its 2016 *Intelligence Report*, Computershare figures showed that across 700 companies surveyed only 0.158 per cent of shareholders attended and 4.6 per cent of shareholders voted at company meetings.[11]

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8 A company's directors have a duty to disclose relevant information in relation to any proposal to be considered at a general meeting. See *Bulfins v Bebarfalds Ltd* (1938) 38 SR (NSW) 423 at 440; 55 WN (NSW) 136; *Devereaux Holdings Pty Ltd v Pelsart Resources NL (No 2)* (1985) 9 ACLR 956; 4 ACLC 12; BC9500703; *Chequepoint Securities Ltd v Claremont Petroleum NL* (1986) 11 ALRC 94; 4 ACLC 711; BC8600560; *ENT Pty Ltd v Sunraysia Television Ltd* (2007) 61 ACSR 626; 25 ACLC 399; [2007] NSWSC 270; BC200701989 at [20]-[21]. [25], [48] and [626].

9 Australian Communications and Media Authority *'Communications Report 2014-15'* pages 3, 42.

10 A 2016 Computershare report indicated that attendance by shareholders at company meetings had dropped by 25 per cent over the past ten years and approximately 10 per cent per year, while the number of shareholders voting had dropped by 13.1 per cent since 2010.

11 Computershare, *Intelligence Report: Insights from company meetings held in 2015, Australia,* 2016, p2. The metric given for attendance is percentage of security holders in attendance. Percentage of voting shares held by participants who attended may differ.

Accordingly, there appears to be scope to reduce compliance costs for companies by facilitating the electronic distribution of meeting notices without prejudicing the rights of shareholders to continue to receive hard copies of notices. It is expected that the low rate of shareholder engagement and high fixed costs of the current default settings for the provision of notices of company meetings provides an opportunity to reduce compliances costs for business without detrimentally impacting on the rights of shareholders to exercise their rights.

Initial industry feedback (see below) to a Corporation and Markets Advisory Committee discussion paper *The AGM and shareholder engagement*[12] indicated that it is likely that enabling companies to use their website as the default for delivering notices to their shareholders, with an option to opt in to receive hard copies of notices, would significantly reduce the amount of hard copy notices required and thereby reduce printing and postage costs.

Stakeholder submissions in response to the 2012 CAMAC discussion paper *The AGM and shareholder engagement*

Computershare submitted that nearly 80 percent of the shareholders Computershare surveyed said they would prefer to receive their AGM communications electronically (email, SMS or digital mail box). Computershare's data shows that the actual average number of shareholders who receive their notice of meeting via email is 18.5 per cent. Using the annual report experience as a guide, it estimates that physical mail packs for Computershare clients would be reduced by six million per annum.[13]

The **Law Council** submitted that the law should be amended to facilitate the despatch of a short notice to shareholders by mail or electronically, advising shareholders that information regarding the AGM has been posted on the company's website and explaining how to access the material.[14]

The **Australian Investor Relations Association** (AIRA) submitted that it is supportive of greater use of the company's website as a key distribution point for company related information. The technologies that allow each user (for example, investor, analyst, activist, employee, customer) to create their own reporting suite is very helpful. AIRA noted that the rising number of accesses to company investor relations websites through devices other than computers, including iPads and mobile phones now represents more than one fifth of all accesses.[15]

Governance Institute of Australia submitted that it supported a move to an opt in system for receiving hard copy meetings materials.[16]

AMP submitted that hard copy AGM materials should only be mailed to those shareholders who have expressed interest in receiving a copy of these materials. In 2012 AMP mailed around 700,000 copies of the notice of meeting and emailed a link to the documents to another 200,000 shareholders; yet only 322 people attended the meeting and less than 40,000 shareholders voted by proxy. AMP was required to use around 45 tonnes of paper in order to produce the notice of meeting alone for the 2012 AGM.[17]

12 CAMAC *'The AGM and shareholder engagement'* Discussion Paper September 2012.
13 Computershare's submission to CAMAC's Discussion Paper *'The AGM and shareholder engagement',* 2012, page 6.
14 The Law Council's submission to CAMAC's Discussion Paper *'The AGM and shareholder engagement'*, 2012, page 15.
15 Australian Investor Relations Association's submission to CAMAC's Discussion Paper, *The AGM and shareholder engagement*, 2012, page 4.
16 Chartered Secretaries Australia's submission to CAMAC's Discussion Paper *The AGM and shareholder engagement*, 2012, page 43.
17 AMP's submission to CAMAC's Discussion Paper 'The AGM and shareholder engagement', 2012, page 3.

1.3 INTERNATIONAL APPROACHES

Markets globally require companies to make certain communications to their shareholders. The mechanisms vary however, including as to whether companies must communicate directly with their shareholders through a website or via general public notices.

United Kingdom: Opt in for hard copy annual reports and company notices

In the United Kingdom, companies may consult their shareholders on their preferred communications method and, where no response is received, to deem the holder to consent to accessing communications via a website. When using its website as a distribution point a hard-copy notice identifying the website address where the materials are located must be sent to the shareholder's registered address at the same time material are sent to other shareholders.[18]

Canada and the United States: *'notice and access' approach*

Canada has adopted a 'notice-and-access' mechanism to streamline the process, and reduce the cost, of providing information to shareholders. The approach involves companies delivering proxy-related materials for annual and other shareholder meetings by placing the relevant information circular and other materials on a website.[19]

The company must then send a 'notice package' advising shareholders that proxy-related materials have been posted and explaining how to access the material. The notice package must be sent by mail or, if prior consent has been obtained, electronically via email or an alternative e-delivery mechanism.[20]

The Canadian approach replicates the rules for the distribution of proxies and notices of shareholder meetings adopted in the US by the Securities and Exchange Commission in 2007.[21]

Hong Kong: Shareholder agreement or constitutional amendment

Hong Kong allows companies to distribute a notice of a general meeting of a company to its members in hard copy form, in electronic form or by making the notice available on a website. A notice may be sent through posting it on a website where the company's members have agreed that notices will be provided on a website or the company's constitutions provides for it, and the company has sought the individual approval of the shareholder and 28 days has passed without any response from the shareholder.

The company must also notify the shareholder that the materials are on the website. This notification can be provided electronically if the shareholder has consented, but otherwise must be sent through traditional mail.

18 See *Companies Act 2006*, Schedule 5, Part 4.

19 See www.sedar.com is the official site that provides access to most public securities documents and information filed by public companies and investment funds with the Canadian Securities Administrators.

20 Ontario Securities Commission, *Canadian Securities Administrators adopt amendments to improve issuer communications with investors,* 29 November 2012.

21 SEC, 17 CFR Part 240, RIN3235-AJ79, Shareholder choice regarding proxy materials, 26 July 2007.

1.4 The Financial System Inquiry recommendation

The Financial System Inquiry (FSI) identified technological innovation as a major driver of efficiency in the financial system with the potential to benefit consumers. The FSI found that some regulation assumes or requires the use of certain forms of technology. For example, regulation may specify certain delivery mechanisms for products, or use terminology that assumes a paper-based environment. Technology-specific regulation can prevent the uptake of new technologies that could provide better outcomes for consumers, business and the Government.

Recommendation 39 of the FSI Final Report reads:

> Identify in consultation with the financial sector, and amend priority areas of regulation to be technology neutral.
>
> …
>
> Ensure regulation allows individuals to select alternative methods to access services to maintain fair treatment for all consumer segments.[22]

The FSI noted that generally, regulation should be principles-based and functional in design, focusing on outcomes rather than prescribing the method by which it should be achieved.

Technology-neutral regulation enables any mode of technology to be used and tends to be competitively neutral. A technology-neutral approach to regulation:

- enables regulators and government to adapt to innovative developments and manage risks;
- can reduce compliance costs by removing unnecessary regulatory impediments and improving the stability and longevity of regulation; and
- can give financial product providers greater flexibility to innovate to meet changing consumer expectations.

1.5 The Government's response to the FSI

The Government has committed to amending priority areas of existing financial regulation to ensure they are technology neutral.

While company meeting disclosures do not necessarily fall within the category of financial regulation, the benefits from removing unnecessary prescription in relation to the delivery methods for financial disclosures arguably apply equally to corporate disclosures. The view of the FSI Committee that regulations that 'use terminology that assumes a paper-based environment … can impede innovation and efficiency by preventing the uptake of new technologies that could provide better outcomes for users, businesses and government' applies equally to corporate and financial disclosures.

However, as noted above at Part 1.1, the objective of disclosure of company meeting materials is to facilitate a shareholder exercising their rights to influence the direction that the company takes on an ongoing basis. The role of a shareholder in relation to the company is not desired to be passive, unlike that of a holder of a financial product. A notice of company meeting therefore seeks to inform shareholders in a different manner then financial services disclosure documentation such as product

22 The Financial System Inquiry Committee, *Financial System Inquiry Final Report*, November 2014, page 269.

disclosure statements (PDS) or a financial services guide (FSG) does — these products are more akin to a prospectus or offer statement which the shareholder obtains before investing. While the impersonal nature of the disclosure makes it again different to the nature of a statement of advice (SOA) required to be provided when a retail client receives financial advice.

2. Proposal: A Technology-Neutral Approach

The proposal set out in this section seeks to be neutral as to the technological means by which communications must occur when companies distribute meeting notices and materials to members. This is not an end in itself but is one factor in enabling efficiency, effectiveness and tailoring communications to user preferences. Technology neutrality in communications requirements has the potential to enable the provision of data in more usable forms in a timelier manner, through lower cost communication channels, and enable flexibility in the manner in which it is presented.

The proposal seeks to respond to changing consumer preferences (with an increasing number of people transacting digitally) by accommodating the ability of companies to nominate a suitable method of distributing meeting notices for their shareholders.

The key elements of the proposal are:

Default for distributing meeting notices

A company will be able to meet the requirement to notify members of a meeting (and to make available meeting materials) by using one or more of the following methods:

- any *universally or near-universally accepted channel* as a default method (Method A);
- an alternative method of communication with the *consent* of the shareholders (Method B);
- an alternative method of communication provided it is *effective*, unless a member nominates to receive the notice by a *universally or near universally accepted channel*, or via a method that the member has previously consented to (Method C).

Notification

Notice of a meeting must be given individually to every member.

Commentary

Companies may need to consider what contact details they hold about members when choosing a communication channel, and take into account obligations they may have in collecting, using and disclosing personal information about individuals under the *Privacy Act 1988*.

The method(s) of communication that a company chooses should be consistent with allowing for the exercise of voting rights.

Method A

A universally or near-universally accepted channel is a service that is widely used, available and reliable.

For example, mail would be considered a universally accepted channel. A mobile phone would also be considered a near-universally accepted channel with 94 per cent adults in Australia using these portable devices to either send text messages or make calls as at May 2015.

With almost 16 million Australians or 86 per cent of the population have a home internet connection presently, in the near future what constitutes a universally or near-universally accepted channel may also include e-mail, website or a mobile app. Indeed, the technologies covered under this concept may change over time as new waves of innovation emerge.

There could be multiple default methods available at a given time (selected from amongst the universally or near-universally accepted channels) depending on whether the company has the necessary details to use the method.

Method B

A company could use an alternative method of communication with the consent of the shareholder. Consent can be express or implied. Express consent could be given explicitly, either orally or in writing.

Implied consent arises where consent may reasonably be inferred in the circumstances from the conduct of the shareholder and the company (see Examples 3 and 4 below). Companies should inform shareholders that they could revoke this implied consent. A shareholder could revoke this implied consent by making a positive statement to the company that they wish to receive notification via Method A (for example, in hard copy).

Consent could also be deemed via an amendment to the company's constitution or the company passing a resolution (see Example 5 below).

Method C

Lastly, a company could use an alternative method of communication provided it is determined by the company as effective. Communications should occur in a manner that promotes and balances the following objectives:

- ***Effectiveness in achieving the purpose of communication:*** transmit data in a manner that informs the enabling of timely and appropriate action by the receiver and other appropriate parties. This is influenced by: reliability, consequence of failure, persistence, usability of data, ability to access and timeliness.
- ***Efficiency:*** transmit data in a manner that minimises costs for the transmitter, receiver and third parties. This is influenced by: technology neutrality, standardisation, costs of communication channel, costs of receipt and costs of use.
- ***User preferences:*** transmit data in a manner that meets the preferences of the transmitter and receiver. This is influenced by: behavioural preferences (such as willingness to access particular channels, in contrast to ability to access), impact on other activities, level of engagement in obtaining information and affording parties' choice.

A company may adopt Method C provided that the notification offers shareholders an ability to 'opt out' and instead receive the notice of meeting via a channel covered by Methods A or B.

Example 1: A company could choose to send to shareholders the meeting notices via SMS (Method A), with a web address to the notice and meeting materials on the company website (Method C), and asking the shareholder to notify the company if they wish to receive the material via post, email or other methods (Methods A or B).

Example 2: A corporate registry service provider could develop an app for corporate actions — which provides access to notices, materials and voting facilities. A company could notify shareholders via SMS (Method A) of the availability of the app to download (Method C) and asking the shareholder to notify the company if they wish to receive the material via post, email or other methods (Methods A or B).

Example 3: A company has the electronic contact details (such as email address) on file for a shareholder. A company would be able to email rather than mail that shareholder the meeting notification/materials, without that shareholder explicitly electing to receive it via email (Method B).

Example 4: Where a shareholder has previously contacted the company via electronic means (for example, email), the company could regard this gesture as conveying implied consent for the company to respond and communicate to the shareholder via that electronic means in the future (Method B).

Example 5: A company could amend its constitution to provide for the use of electronic communications and specify the manner which it is to be used. The company could specify that shareholders will be given an opportunity to elect within a specified time whether to receive the notice or materials by way of electronic communications or as a physical copy. Hellen, a shareholder, having been given an opportunity to make this election, fails to do so within the specified time. Hellen would be deemed to have consented to electronic communications (Method B).

Regulations and ASIC guidance

It is intended that ASIC would provide guidance on these concepts, which would be updated from time to time to consider innovative developments.

It is also intended that a regulation-making power would be included to clarify what constitute a 'universally or near-universally accepted channel' and an 'effective communication', and when a shareholder may be considered to have consented to a particular method of communication. This would be a 'back pocket' power, to be used only where necessary to afford certainty as to whether specific communications were or were not covered.

Transition arrangements

A company should notify its shareholders which method(s) it wishes to adopt. Companies would only need to give this initial notification once to each shareholder using its existing method of communication with the relevant shareholder.

The movement to using an alternative method of communication may negatively impact the engagement of retail shareholders who may not have access to the nominated service, but are actively engaged as members of a company and are accustomed to receiving hard copy notices of meetings or who are not otherwise made aware of the potential change.

Providing this initial notification individually to every member seeks to minimise the potential for shareholders such as those described above to become disengaged.

It is not proposed that any further transitional process is required to inform shareholders of the change to their rights under the new law.

The proposal contemplates that this transitional notification is to be given on an individual basis. However, industry feedback indicated that this can generate high compliance burden for companies, as transpired in the 2007 reforms (that enabled companies to distribute annual reports via their websites).

When the new legislation commenced, each company wrote to their shareholders advising them of the change and that they could opt in to receive a hard copy. In effect, each company wrote what amounted to the same letter to shareholders, some of whom would have received largely identical advice of the change in legislation from a number of companies, given they held shares in more than one company.

Amount of notice

Currently, at least 21 days' notice must be given for a meeting of members of a company.[23] At least 28 days' notice must be provided for a publicly listed company.[24] The intention behind the 28 day notice period is to give shareholders sufficient time to receive, consider and respond to a notice of meeting (for example, to appoint a proxy).

The 28 day notice requirement has been perceived to be too onerous as it places greater demands on directors and company management and could increase costs without any measurable corresponding benefit to the shareholders. The Parliamentary Joint Statutory Committee on Corporations and Securities recommended that the 28 day period of notice for meetings of listed companies should be reduced to 21 days.[25]

Individual or public notice?

The proposal contemplates that notification involves notice individually directed at the member. Feedback is sought on whether a member should be able to consent to a more general public notice under Method B, and similarly, whether there are circumstances where a company should be able to determine a general public notice as effective under Method C (see Example 6).

Public notice has the potential to significantly decrease costs. However, it may be less effective in ensuring members become aware of it.

Example 6: Rather than sending individual notifications (largely by letters to all shareholders), an ASX-listed company seeks to notify its shareholder by issuing an ASX announcement and a media release, in conjunction with using its website as the default method of distributing meeting notices. It has determined that both public notification in this way and posting materials online collectively meets the requirements of Method C.

In accordance with the requirement of Method C the company would also offer its shareholders an ability to receive the meeting notices and/or materials via other means (such as hard copy).

23 Section 249H.
24 Section 249HA.
25 Report on matters arising from the *Company Law Review Act 1998*/Parliamentary Joint Statutory Committee on Corporations and Securities, 1999.

Your feedback

1. Is the proposed framework an effective mechanism for informing shareholders of their rights, and providing them with sufficient opportunity to select their preferred distribution method?

2. How would the proposed framework impact on shareholder communications and exercise of voting rights?

3. If a shareholder does not make an election of their preferred delivery method of communication when asked by the company, what other notification obligation (if any) should the company have with respect to that shareholder?

    3.1. What if there is repetitive non-response from the shareholder?

4. Should the initial notification requirement be discontinued after a period of time as the market becomes accustomed to the new rule?

5. How could the legislation facilitate the ability of companies to obtain the necessary details from shareholders to use alternative communication methods to post?

6. What further transitional arrangements (if any) are necessary?

7. The proposal contemplates that notification involves notice individually directed at the member.

    7.1. Should a member be able to consent to a more general public notice under Method B?

    7.2. Similarly, are there circumstances where a company should be able to determine general public notice as effective under Method C?

8. Is it appropriate to expand the proposal to delivery of:

    8.1. notices of all company meetings (i.e. annual general meetings, special general meetings, takeover meetings, meetings of members of scheme arrangements);

    8.2. annual reports; and

    8.3. other documents.