

30 October 2020

Manager
Market Conduct Division
The Treasury
Via: *businesscomms@treasury.gov.au*

Exposure Draft Consultation
Corporations Amendment (Virtual Meetings and Electronic Communications) Bill 2020
Submission by the Australian Custodial Services Association

Dear Sir/Madam

The Australian Custodial Services Association (ACSA) is the peak industry body representing members of Australia's custodial and investment administration sector. Our mission is to promote efficiency and international best practice for members, our clients and the market.

Collectively, the members of ACSA hold securities and investments in excess of AUD \$3 trillion in value in custody and under administration. Members of ACSA include NAB Asset Servicing, J.P. Morgan, HSBC, State Street, BNP Paribas Securities Services, Citi and Northern Trust.

Custodians provide services to financial institutions, including superannuation funds and investment managers. These institutions are in turn the guardians of a significant portion of the wealth of millions of ordinary Australians. The services provided include processing corporate action instructions, including proxy voting, on behalf of beneficial owners.

Institutions are collectively the majority owners of virtually all listed companies of material size in the Australian market. As a consequence, the majority of larger listed companies have a significant portion of their shares on issue held in the name of the custodian's nominee company. This intermediated model is a feature of the market and ACSA has focused its comments on aspects of the draft legislation that impact this important segment.

EXECUTIVE SUMMARY

- ACSA welcomes modernisation of the Corporations Act (2001 Cth) in the interests of greater efficiency and effectiveness through technology and sees the Draft Bill as an important step in this direction.
- ACSA strongly recommends an additional amendment to the Corporations Act to effect a regulated record date for voting entitlements. Such a change would materially improve transparency and efficiency of the proxy voting process and align our market with international best practice (see Annexure 1 for details).

- We recommend amendment of the current proxy voting “48 hours prior” cut-off to two (2) business days to align this market convention on reconciling settled positions, and to avoid confusions when “48 hours prior” to a meeting date is a weekend or public holiday. Details are set out in Annexure 2.
- Set out in Annexure 3 are ACSA’s specific suggestions on the Exposure Draft for further refinement in the process of voting, including use of polls and proportionate voting responses. We also suggest that reasonable obligations be put in place to ensure that shareholders have comfort that their electronic engagement is secure, and that important interactions (like lodgement of proxy votes) is robust.
- In support of the policy objectives for modernisation, given the scope of work involved and the desirability of industry engagement, ACSA recommends that consideration be given to the establishment of a body based on the former Corporations and Markets Advisory Committee.

CONTACT INFORMATION

We welcome further dialogue on Corporations Act modernisation, and would be pleased to provide additional practical insight to Treasury on market process inefficiency and comparisons.

If you have any questions in relation to this letter, please direct those questions to the Chief Executive Officer of ACSA, Robert Brown (Tel: +61 414 649 507, rob@acsa.com.au).

Yours sincerely

David Knights

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Chair

Australian Custodial Services Association

Important Note: The views expressed in this letter are prepared by ACSA for the purposes of consideration by Treasury of a response to Exposure Draft Consultation, Corporations Amendment (Virtual Meetings and Electronic Communications) Bill 2020 and should not be relied upon for any other purpose. The comments in this letter do not comprise financial, legal or taxation advice and should not be regarded as the views of any particular member of ACSA.

About ACSA

www.acsa.com.au

Custodians provide a range of institutional services, with clients typically favouring a bundled approach to custody and investment administration. Solutions may include traditional custody and safekeeping, investment administration, foreign exchange, securities lending, tax and financial reporting, investment analytics (risk, compliance and performance reporting), investment operations middle office outsourcing and ancillary banking services.

ACSA works with peer associations, regulators and other market participants on a pre-competitive basis to encourage standards, promote consistency, market reform and operating efficiency.

Annexure 1 – Voting Entitlement Record Date

Key Recommendations

1. Insert a new Section into Chapter 2G, Part 2G.3 as follows:

“The number of votes that a member may cast at a meeting is to be determined on the business day which is [5 business days] prior to the date of the meeting.”

Note: In this context, a business day is a day that settlement takes place for cash equities in the Australian market.

2. Modify Section 253C into Chapter 2G, Part 2G.4 by adding a new subsection (3) as follows:

“(3) The value of the total interests of a member of a scheme is to be determined at midnight on the business day which is [5 business days] prior to the date of the meeting.”

Note: Consider section 253F – the scheme provisions are different to companies because they actually require consideration of value on the trading day/business day before the poll is taken. In other words, the default position for a scheme is to consider the register the day before the meeting.

Consequential amendments are required to section 253F which refers to the value of interests being determined by reference to the trading day or the business day prior to the poll being taken.

Context and Rationale

Background on this issue is set out below. ACSA would be pleased to provide Treasury with additional information including practical examples.

Institutional investors

Custodians provide services to financial institutions. The key sectors supported by ACSA members include large superannuation funds and investment managers, as well as other domestic and international institutions.

Foundation services offered by custodians are safekeeping of assets and associated back office services. Safekeeping for dematerialized assets like Australian listed shares is effected by the custodian registering such assets in their name (legal ownership) through their nominee entities.

Institutions are collectively the majority owners of virtually all listed companies of material size in the Australian market (and most other developed markets).

Participation by institutions in proxy voting is an intermediated process involving the ultimate beneficial owner, their investment managers and proxy advisers, the global custodian (in the case of an off-shore based institution) and local nominee.

Problem statement

The voting entitlement date is currently not regulated in the Australian market.

Institutions typically have holdings in many hundreds of separate listed companies, with the need to assess each AGM's resolutions and determine their votes for each company they own. With no standard entitlement cut-off this process works to a different time line for each company in which the institution has a holding.

Processing the owner's instructions through the service chain requires time and precision. The application of technology to institutional asset servicing is most effective when common market practice and data standards are also in place.

The recommendation addresses the challenges of intermediated servicing by allowing sufficiently time to address processing requirements and creates a regulated standard market practice for entitlement cut-off across all listed companies.

The recommendation is based on the principle that procedural certainty is in the interests of all stakeholders, is neutral in terms of shareholder and company economic interests, is targeted at improving the administration of voting entitlements, and aligns Australia with the majority of other markets globally.

A long-standing concern

The Corporations and Markets Advisory Committee (CAMAC) conducted a review of the AGM and Shareholder Engagement in 2012. ACSA's submission to this review made the following key points at the time under topic 5.8 Voting:

Q: What changes if any should be made to the current requirements concerning:

- *the record date and the proxy appointment date*

Response

In conjunction with a move to electronic voting methods, ACSA members support the bringing forward of the record date so that it is two business days (ASX Settlement days) before the voting date.

Such a change would allow custodians and their client time to understand their voting entitlements before the votes are submitted to the company. This sequence would give the custodian complete ability to ensure that over-voting by any of their clients did not take place.

ACSA views the ability to understand entitlements and then accurately execute shareholder instructions in accordance with the event's regulations as being fundamental to good practice in investment administration. Our belief is that in respect of proxy voting this can only be achieved by having a record date 2 business days before the voting date.

Via the use of electronic voting platforms this sequence of dates could also prevent over-voting at the registered holding level. The electronic voting system would be populated with the final voting entitlement and the shareholder would be restricted to voting on that many shares.

International comparison

The following table summarises the approach to standardised voting entitlement record date in a sample of other markets.

Country	Record Date	Entitlement Calculation
Belgium	Yes, 14 calendar days before the meeting. The use of record date is compulsory for listed companies, following the adoption of the EU Shareholders rights directive which came into force on the 1st January 2012.	Settled positions as of record date.
Canada	Yes	Settled positions as of record date.
China	Yes, approximately 1 week prior to the meeting date. The period from record date to meeting date is irregular. It depends on the company's announcement	Settled positions as of record date.
France	Yes- French companies are required to set and announce a record date of 2 business days prior to the meeting	Shareholders are entitled to participate and vote on the general meeting with the number of shares registered (settled) at the opening of business on the record date, 2 business days prior to the meeting
Germany	Yes, for the bearer shares of listed companies the record date is the beginning of the 21st day prior to the general meeting.	Settled position on record date for bearer shares, or determined by the company, which is usually 7 business days prior to meeting date (often known as the 'technical record date') for registered shares.
Greece	Yes, the record date is set at the opening of the 5th calendar day prior to the date of the general meeting.	Settled position on the 5th day prior to the meeting date for meetings with record date, which technically is the 6 th BD prior to meeting date.
Hong Kong	Yes	Voting entitlement is determined on the settled positions on the record date
India	Yes , Record date applies to all meeting types	In the case of AGMs, companies use a record date which is both same for E-Voting and proxy voting to determine voting entitlement. In case of postal ballot the cut off date of holding is specified in the postal ballot forms issued by the company. In case of EGM/CCM/ Others the record date would be announced on a case to case basis.
Italy	Yes. As per article 83-section of the law 58/98 (the TUF), the eligibility to attend shareholders meetings held by Italian companies listed in the regulated market or in Italian and European multilateral trading facilities is granted by record date. The record date is set to the close of business of the seventh business day prior to the first call of the meeting.	Settled positions as of record date for listed companies.

Japan	Yes - Japanese Companies Act requires meetings to take place within 3 months of the stated record date for annual general meetings. The record date must be announced two weeks in advance unless it is declared in the company's Articles of Association.	Based on the settled positions held on the record date
Luxembourg	Yes. with implementation of the EU Shareholders Directive, record date for listed companies will be implemented 14 days before the meeting date	Settled positions as of record date.
South Korea	Yes	Settled positions held on the record date
Sweden	Yes, the re-registration deadline is used as a record date, and is usually 5 business days prior to the meeting date.	Settled position as of record date (re-registration deadline).
USA	Yes	Settled positions as of the record date

Annexure 2 – Proxy Lodgement

Recommendation

1. Amend Section **250B (1)** as follows: Delete “48 hours” and replace by “2 business days”

Note: In this context, a business day is a day that settlement takes place for cash equities in the Australian market.

Current inconsistencies –proxy lodgement

The point in time that proxy must be lodged is regulated via (current) Section 250B of the Corporations Act which says that certain documents must be received by the company “at least 48 hours before the meeting”.

This creates practical issues for processing as market settlement cycles and books of record are based on business day cut-offs. This can lead to uncertainty of whether a proxy should be accepted by a company, and confusion for shareholders in determining whether their vote will be counted. This arises in every instance where a meeting date is set so that “48 hours prior” is a weekend or public holiday.

Example:

Commonwealth Bank of Australia, Annual General Meeting, 2020. Summary of key information as announced:

Voting Entitlement Date	Meeting Date	Proxy Lodgement Date
A shareholder’s voting entitlement at the AGM will be the entitlement of that shareholder set out in the register of shareholders as at 9:30am (AEDT) Sunday, 11 October 2020	Tuesday, 13 October 2020. The Meeting will commence at 9:30am (AEDT)	Direct vote or proxy appointment must be received by the Company’s Share Registry, by 9:30am (AEDT) on Sunday, 11 October 2020 (Proxy Close) . Voting may be lodged: <ul style="list-style-type: none"> • electronically, by visiting the Share Registry website, vote.linkmarketservices.com/CBA • by post to Link Market Services Limited; or • by facsimile.

In practice, the shareholders of a company are confirmed at the end of a business day when the share sub-registers (CHESS and Issuer) are reconciled and after all settled positions are finalised.

Rebasing to a business day for proxy cut-off is also consistent with the key recommendation for entitlement date outlined in Annexure 1.

Annexure 3 – Detailed Comments

Exposure Draft Consultation

Corporations Amendment (Virtual Meetings and Electronic Communications) Bill 2020

Current Act	ED Amendment	ACSA Comment
<p>CORPORATIONS ACT 2001 - SECT 250BB Proxy vote if appointment specifies way to vote</p> <p>(1) An appointment of a proxy may specify the way the proxy is to vote on a particular resolution. If it does:</p> <p>(a) the proxy need not vote on a show of hands, but if the proxy does so, the proxy must vote that way; and</p> <p>(b) if the proxy has 2 or more appointments that specify different ways to vote on the resolution--the proxy must not vote on a show of hands; and</p> <p>(c) if the proxy is the chair of the meeting at which the resolution is voted on--the proxy must vote on a poll, and must vote that way; and</p> <p>(d) if the proxy is not the chair--the proxy need not vote on the poll, but if the proxy does so, the proxy must vote that way.</p> <p>If a proxy is also a member, this subsection does not affect the way that the person can cast any votes they hold as a member.</p>	<p>22 Paragraph 250BB(1)(b) Repeal the paragraph, substitute:</p> <p>(b) if the proxy has 2 or more appointments that specify different ways to vote on the resolution, the proxy must only vote on a poll; and</p>	<p>ACSA recommends additional clarification in the interest of ensuring efficient market practice for nominee holders voting for their underlying beneficial owner clients:</p> <p><i>(b) if the proxy has 2 or more appointments that specify different ways to vote on the resolution, the proxy must only vote on a poll, and the poll must allow for proportionate voting; and</i></p>

<p>CORPORATIONS ACT 2001 - SECT 250J How voting is carried out (replaceable rule--see section 135)</p> <p>(1) A resolution put to the vote at a meeting of a company's members must be decided on a show of hands unless a poll is demanded.</p> <p>(1A) Before a vote is taken the chair must inform the meeting whether any proxy votes have been received and how the proxy votes are to be cast.</p> <p>(2) On a show of hands, a declaration by the chair is conclusive evidence of the result, provided that the declaration reflects the show of hands and the votes of the proxies received. Neither the chair nor the minutes need to state the number or proportion of the votes recorded in favour or against.</p>	<p>23 Subsection 250J(1) Repeal the subsection, substitute:</p> <p>(1) A resolution put to the vote at a meeting of a company's members must be decided:</p> <p>(a) on a poll, if:</p> <p>(i) virtual meeting technology is used in holding the meeting; or</p> <p>(ii) a poll is demanded; or</p> <p>(b) otherwise—on a show of hands.</p>	<p>ACSA does not support voting by a show of hands.</p> <p>ACSA believes that such a voting method disadvantages shareholders who are unable to attend the meeting and that votes should be counted according to each shareholder's proportionate interest in a company. We believe that voting by a show of hands should be removed with voting on all matters by way of poll.</p>
<p>N/A</p>	<p>Division 2—Virtual meetings 253Q Virtual meetings</p> <p>(1) Virtual meeting technology may be used in holding a meeting, provided the technology gives all persons entitled to attend the meeting a reasonable opportunity to participate without being physically present in the same place.</p> <p>(2) All persons so participating in the meeting are taken for all purposes to be present in person at the meeting while so participating.</p> <p>(3) A vote taken at a meeting of the members of a company or registered scheme must be taken on a poll, and not on a show of hands.</p> <p>(4) All persons so participating in the meeting who are entitled to vote at the meeting must be given the opportunity (at the election of the voter) to:</p> <p>(a) participate in the vote in real time; or</p> <p>(b) where practicable, record a vote in advance of the meeting.</p> <p>(5) If:</p> <p>(a) virtual meeting technology is to be used in holding a meeting; and</p> <p>(b) a document is required or permitted to be tabled at the meeting;</p> <p>the document is taken to have been tabled at the meeting if the document is given to the persons entitled to attend the meeting before or at the meeting.</p>	<p>The opportunity to vote in advance of the meeting should be available (not only where practicable).</p> <p>Amend 253Q (4) (d) as follows:</p> <p><i>(d) where practicable, record a vote in advance of the meeting.</i></p>

<p>N/A</p>	<p>Division 3—Electronic communication and signatures</p> <p>253S Electronic communication of documents</p> <p>(4) However, an electronic communication or electronic access may only be used if, at the time the electronic communication is used or information about the electronic access is given:</p> <ul style="list-style-type: none"> (a) it is reasonable to expect that the document would be readily accessible so as to be useable for subsequent reference; and (b) there is a nominated electronic address in relation to the recipient. 	<p>ACSA recommend that an additional consideration be included - the reasonable expectation that electronic documents and access have appropriate security in place to prevent cyber fraud.</p> <p>Add to 253S (4):</p> <p>, and</p> <p><i>(c) reasonable measures are taken to ensure that the electronic delivery of the document and any subsequent communication by the member to the company are secure.</i></p> <p>As an alternative, could this be dealt with through ASIC regulatory guidance rather than new provisions in the Corporations Act? It could be included into any guidance ASIC release after the enactment of these new provisions and/or consideration under ASX listing rules.</p> <p>Regardless of mechanism, ACSA encourages regulatory support for the application of standards to electronic communication to promote both greater efficiency and data security. For example, EU SRD II Directive has endorsed the use of ISO 20022 standards for implementation which enables use of the SWIFT network and other secure channels.</p>
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