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|  | Manager, Market Conduct DivisionThe TreasuryLangton CrescentParkes ACT 2600businesscomms@treasury.gov.au | 30 October 2020By Email |

Dear Sir / Madam,

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|  | Submission on virtual meeting and electronic notice provisions of Exposure Draft Corporations Amendment (Virtual Meetings And Electronic Communications) Bill 2020 |

Scope of this submission

This submission is made by the Head Office Advisory Team at Herbert Smith Freehills in response to the exposure draft Corporations Amendment (Virtual Meetings And Electronic Communications Bill 2020 (**Draft Legislation**) and the proposed permanent reforms to the *Corporations Act 2001* (**the Act**) in relation to virtual meetings and electronic notices.

Herbert Smith Freehills is also participating in a separate submission made by the inter-firm Walrus Committee in relation to electronic execution of documents.

Support for Draft Legislation

We are supportive of Treasury’s objective to modernise the Act and make permanent the temporary relief provided by the *Corporations (Coronavirus Economic Response) Determination (No. 1) 2020* and *Corporations (Coronavirus Economic Response) Determination (No. 3) 2020* (the **Determinations**), which enables companies to hold meetings virtually and send meeting-related materials electronically.

Overall we consider that the proposed permanent reforms would:

* provide flexibility and greater certainty for Australian companies that they will be able to meet their statutory obligations, as well as the demands of their shareholder base, in the ordinary course and in response to external disruptions;
* facilitate and encourage greater participation of members by allowing greater flexibility for participation in meetings virtually; and
* reduce shareholder costs and the environmental impact associated with physical meetings, by removing the need for travel, venue hire, catering, and printing and postage of documents.

Based on our experience advising a large number of ASX-listed companies that have held virtual and hybrid meetings in accordance with the Determinations, we consider that a number of aspects of the proposed permanent reforms would benefit from refinement, clarification or amendment. Our detailed positions are set out in **Attachment 1**.

Further questions

Please contact Quentin Digby (quentin.digby@hsf.com), Timothy Stutt (timothy.stutt@hsf.com) or Eloise O’Brien (eloise.obrien@hsf.com) if you have any questions in relation to this submission.

Yours sincerely,

**HEAD OFFICE ADVISORY TEAM
HERBERT SMITH FREEHILLS**

Submission in response to the virtual meeting and electronic notice provisions of the
Exposure draft of the Corporations Amendment (Virtual Meetings And Electronic Communications) Bill 2020

| **Issue** | **Reference** | **Submission** |
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| *Holding virtual and hybrid meetings* | New sections 253P, 253Q | We are supportive of the new sections 253P and 253Q which would enable a meeting of shareholders, directors, or members of a registered scheme to be held, in part or in full, using ‘virtual meeting technology’. We also note, and support, the condition that the manner in which the meeting is held must give members as a whole a reasonable opportunity to participate.In our view, the Draft Legislation should make clear in relation to these proposed permanent reforms that where technology fails part-way through a meeting, the meeting or the part of the meeting affected by technical issues, will nonetheless be valid unless a court forms the view that a substantial injustice has occurred which cannot be remedied by the court. |
| *Place and time of a virtual meeting* | New sections 253R, 249R and 252P(1) and (2) | We are supportive of the new subsections 253R, 249R, and 252P which make clear that references to a “place” or “venue” of a meeting do not imply a requirement that a meeting take place at a physical location. |
| *Conduct of virtual meetings* | New subsection 253Q | We are supportive of the new subsection 253Q(2) which ensures that all members participating in a meeting via technology are taken to be ‘present’ for the purposes of determining a quorum. We are also supportive of the new subsection 253Q(4)(b) which would facilitate voting prior to the meeting, however it would be helpful to clarify whether this is intended to be proxy voting or also direct voting. If direct voting is intended to be included within the scope of this section, we would suggest the section is framed as applying “where permitted by the company” (not “where practicable”), as relatively few companies currently provide for direct voting by members due to its administrative complexity (including the need for internal procedures to regulate how and when such votes will be accepted and how they interact with conflicting proxy or ‘in person’ votes). |
| *Minutes of virtual meetings* | New subparagraphs 251A(1)(aa), 251M(1)(c) and 253S(1)(vii) | We are supportive of the proposed new subparagraph 253S(1)(vii) which would clarify that companies may keep, retain and provide meeting minutes electronically. However, we consider that the requirement that companies include in the minutes of virtual meetings, any questions or comments submitted by a member (before or during the meeting), in subsections 253M(1)(c) and 251A(1)(aa), is impracticable and should be deleted. In our view, requiring companies to record all questions asked or comments made prior to or during the meeting in the minutes is unduly onerous and disadvantages for companies that would hold meetings virtually. Under section 250S of the Act members are entitled to a reasonable opportunity to make comments and ask questions at the meeting – this provides clear protection for members as it restricts the company from cherry-picking or filtering questions at the meeting (i.e. it would be directly inconsistent with providing members a reasonable opportunity to ask questions). We consider that the proposed permanent reforms would potentially invite abuse by members who submit excessive, irrelevant, repetitive or inappropriate questions, or use the ability to have questions/comments included in the minutes as a mechanism for publishing and memorialising their viewpoints (in a way that would not be permissible in a physical meeting). In the course of a meeting, it is common (and appropriate) for the Chairman to guide conversation within the context of ensuring proper time management and ensuring a reasonable opportunity for shareholders as a whole to ask questions. The purpose of minutes is to provide an accurate record the proceedings of the meeting, not to create a transcript of the meeting. We recognise ASIC’s ‘[Guidelines for investor meetings using virtual technology’](https://asic.gov.au/about-asic/news-centre/news-items/asic-guidelines-for-investor-meetings-using-virtual-technology/), which stipulate that companies should keep appropriate records of questions, comments and responses and be transparent regarding the number and nature of questions asked and not answered. Our view is that this can be managed effectively in practice without changing the content or purpose of the minutes of meeting. Our experience over the 2020 annual general meeting season has been that a very large number of companies have complied with the guidance effectively by using a moderator to ensure questions are not “cherry picked” and keeping a record of questions asked and comments made in the online platform (in case any member raises a concern). We submit that the proposed reforms for this detail to be included in the minutes are not necessary to ensure adequate transparency and that they would increase the regulatory burden on companies and reduce the quality of shareholder engagement. |
| *Electronic notices of meeting* | New subparagraphs 249J(3)(c) and 253S(1)(a)(ii), | We are generally supportive of the proposed new subparagraphs 249J(3)(c) and 253S(1)(a)(ii) which enable companies to give a member notice of a meeting by electronic means where the company has a “nominated electronic address” in relation to the recipient. The proposed permanent reforms are sensible and would also avoid an unintended consequence of the current legislation, where members who have provided companies with their email address for various other purposes (such as receiving dividend statements), but have not specifically opted into receiving notices of meeting by email, must be given notice by post. However, we submit that the Draft Legislation should be amended to also improve processes for dealing with members who have no “nominated electronic address” (i.e. they have not provided it for any reason). In our experience, a significant number of members who receive hardcopy communications are actually ‘lost shareholders’ or unresponsive (e.g. they may have moved house without notifying the company). For this reason, we suggest that there is an “opt in” system for members to keep receiving hardcopy communications where there is no “nominated electronic address” for that person. In circumstances where there is no “nominated electronic address” (i.e. the person does not receive notice by email) and no election to receive a hardcopy communication (i.e. the person does not receive notice by hardcopy communication), then the person would be able to access the notice on the ASX market announcement platform and the company’s website.We understand there may be some potential sensitivity relating to this proposal, but in our view if a member is unable or unwilling to provide either an electronic address or opt-in to receiving hardcopy communications, then they are very likely to be unresponsive or uncontactable. In those circumstances, providing notice via company websites and the ASX platform is appropriate, as they are the principal mechanisms for distributing information about the company (including market sensitive information). |