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## TREASURY LAWS AMENDMENT (MEASURES FOR CONSULTATION) BILL 2021: USE OF TECHNOLOGY FOR MEETINGS AND RELATED AMENDMENTS

On behalf of the Australian Council of Superannuation Investors (ACSI), thank you for the opportunity to make a submission in relation to the exposure draft of the *Treasury Laws Amendment (Measures for Consultation) Bill 2021: Use of technology for meetings and related amendments*.

### About ACSI

Established in 2001, ACSI exists to provide a strong, collective voice on environmental, social and governance (ESG) issues on behalf of our members. Our members include 36 Australian and international asset owners and institutional investors. Collectively, they manage over \$1 trillion in assets and own on average 10% of every ASX200 company. Our members believe that ESG risks and opportunities have a material impact on investment outcomes. As fiduciary investors, they have a responsibility to act to enhance the long-term value of the savings entrusted to them.

### ACSI's position on the Exposure Draft

Overall, ACSI supports the objective of the proposed legislation to clarify the Corporations Act and increase certainty in how meetings can be run. We also support the ongoing review that Treasury will undertake to analyse how technology is being used and ensure that the legislation is fit-for-purpose over the long-term.<sup>1</sup>

We are supportive of the proposals to reduce cost and improve efficiency through the adoption of electronic communication to distribute meeting materials. We also support the inclusion of a new scrutineering provision in the meeting voting process.

AGMs are a fundamental accountability mechanism for listed companies. It is important that listed companies are able to hold virtual-only meetings in exceptional circumstances (such as a pandemic) without contravening their constitutions. However, we are concerned that the draft legislation opens the door for virtual-only AGMs to become the norm on an ongoing basis for publicly listed companies. Even with safeguards built into the legislation to ensure that shareholders have a 'reasonable opportunity to participate', investors maintain concerns that virtual-only meetings are less transparent and inferior to in-person or hybrid meetings.

ACSI's focus is specifically on publicly listed companies in the S&P/ASX300, for which accountability and transparency as offered by the traditional (or hybrid) meeting is particularly important. To ensure that shareholders have appropriate opportunity to effectively interact with company representatives in meetings, we propose that hybrid meetings should be the default model for listed companies. A standardised hybrid model for all listed companies would be the simplest and most efficient method to address ongoing pandemic disruptions. We recognise that virtual-only meetings may be appropriate and useful for many smaller and private entities that are regulated by the Corporations Act.

We are concerned that this legislation will allow many listed companies to hold virtual-only meetings on an ongoing basis without seeking approval from their shareholders to do so. This is because many companies have already amended their constitutions to allow for virtual-only meetings, or have constitutions that could be interpreted broadly to allow virtual-only meetings. In many cases, the relevant provisions were supported by shareholders on the basis that virtual-only meetings would be held only in exceptional circumstances (for

<sup>1</sup> Explanatory Memorandum for the *Treasury Laws Amendment (Measures for Consultation) Bill 2021: Use of technology for meetings and related amendments*, paragraph 1.6

example those presented by the COVID-19 pandemic). If the draft legislation were passed in its current form, these companies would be able to hold virtual-only meetings on an ongoing basis without having the explicit approval of shareholders for this approach.

We do not support a show of hands being the default for voting in publicly listed companies, because this does not reflect existing practice, it is impractical, and risks disenfranchising shareholders. For listed companies, voting by poll should be the default mechanism.

I trust our comments are of assistance. Please contact me or Kate Griffiths, ACSI's Executive Manager – Public Policy and Advocacy, should you require any further information on ACSI's position.

Yours faithfully



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## Concerns with virtual-only meetings

We recognise that companies need to have the option to hold virtual-only meetings when physical meetings are not possible (for example, during a pandemic), without contravening their constitutions. However, we do not support publicly listed companies holding virtual-only AGMs on an ongoing basis, which would be possible under the legislation as currently drafted.

AGMs are an important tool for shareholders to hold directors to account. If virtual-only AGMs are allowed on an ongoing basis, there is a risk that transparency and accountability can be undermined. We observe from the experience of the past months that virtual-only meetings have not generally provided the same opportunity for genuine interaction and engagement between shareholders and company representatives as physical meetings. For example, this has been due to:

- company directors being unavailable for questions during meetings,
- audio-only format being used, which has not allowed shareholders to observe company representatives address the meeting and answer questions, or to see the reactions of the audience,
- meetings that focus solely on the chair of the board with minimal or no opportunity for shareholders to interact with other directors,
- discussion time being more limited.

We acknowledge and appreciate that the draft legislation includes provisions that protect shareholders' 'reasonable opportunity to participate' (as a whole) (s249S(1)). However, similar provisions (for example, the right to ask questions and make comments) did not prevent the issues with virtual-only meetings outlined above. A hybrid meeting allows visibility over debate, with participants able to see how the Chair is managing the meeting, and this transparency promotes good practice.

We note and support the provisions in the draft legislation that provide that, if a law or the company's constitution confers on participants a 'right to speak or ask questions at the meeting...that right may be exercised orally or in writing' (s249S(8) and s252Q(8)). Given that this is expressed as a 'right', we would expect that participants themselves can elect how to exercise this right, rather than this being at a company's discretion. This should be clarified explicitly. It would also be useful for ASIC to provide further guidance on how a 'reasonable opportunity to participate' should be assessed, particularly given that the provisions in the proposed legislation are not intended to be exhaustive.<sup>2</sup>

There are some benefits to the use of technology, particularly in increasing the accessibility of AGMs when it is difficult for people to attend in-person. A hybrid model takes advantage of the benefits of technology in terms of accessibility, while at the same time allowing participants to attend physically, should that be the preferred method of participating. Virtual technology does not suit everybody, and digital tools and internet networks are not yet sufficiently advanced to ensure that virtual-only meetings can be held without technological disruptions. For many shareholders, the ability to attend in-person is important. A hybrid model allows all owners of a company to choose their preferred method of participation in an AGM each year, allowing more flexibility for all participants on an ongoing basis.

## Concerns with the draft legislation: risk of virtual-only meetings without specific shareholder approval

The draft legislation will allow many listed companies to hold virtual-only meetings on an ongoing basis, despite the fact that they have never sought approval from their shareholders to do so.

### *Ambiguous constitutions*

Many company constitutions are expressed broadly enough that they could be interpreted to allow virtual-only meetings, without the need for a specific constitutional amendment. Among the ASX20, one company's constitution explicitly allows virtual-only meetings<sup>3</sup> and 12 companies have constitutions stating that meetings can be 'held in two or more places using technology' (or similar). This could be read to allow virtual-only AGMs although it has never been the company's intention to do so. In other words, only a minority (7/20) of the ASX20 would need to actively seek shareholder approval to hold virtual-only meetings on an ongoing basis.

<sup>2</sup> As noted in the Explanatory Memorandum, para 1.37.

<sup>3</sup> Telstra Corporation Limited, Company constitution: <https://www.telstra.com.au/content/dam/tcom/about-us/investors/pdf%20F/2020-Telstra-Constitution.pdf>.

## Constitutions that have already been changed

In the past year, a number of companies passed constitutional amendments to ensure that they could hold virtual-only meetings during the pandemic without contravening their constitutions or relevant laws. In 2020, a total of 31 Australian ASX200 companies sought to amend their constitutions to allow for virtual-only meetings, either explicitly (17 companies) or by implication (14 companies). Many shareholders supported these amendments on the basis that they would prevent the relevant entity inadvertently contravening its constitution during the pandemic. These amendments should not therefore be viewed as express approval for virtual-only AGMs to be held on an ongoing basis, given that virtual-only AGMs were previously not explicitly permitted under the Corporations Act.

A clear example is Telstra, which changed its constitution in 2020 with over 99% support. Telstra stated in its Notice of Meeting for the AGM that it had 'no current intention to move permanently to wholly 'virtual' online meetings'<sup>4</sup>, however this is not reflected in the constitutional amendment itself. Investors agreed to the constitutional amendment on the premise that it was for a pandemic-type situation, with Telstra itself noting that virtual-only meetings would be considered 'particularly if the Corporations Act is amended to be more facilitative of such meetings in the future'. If the Corporations Act is revised as proposed, in future it would be possible for Telstra to depart from its commitment and seek to hold virtual-only meetings on an ongoing basis.

## Hybrid AGMs as the default for listed companies

We propose that establishing hybrid meetings as the default for listed companies is the most efficient solution. The legislation should allow listed companies to hold either hybrid or physical meetings, and a separate provision allowing for virtual-only meetings is unnecessary.

There are many areas of the Corporations Act where different rules apply to publicly listed companies compared with other entities. For example, in relation to the notice period for AGMs.<sup>5</sup>

We recognise Treasury's aim of simplicity and consistency in having a one-size-fits-all approach to the proposed rules. These are worthwhile objectives, but they should not come at the expense of achieving the most effective and appropriate legal framework for separate segments of the market with very different structures and shareholder profiles.

There is a heightened need for the shareholders of a listed company to access information, provide their views to the company, and hold directors to account. This merits a differentiated approach for publicly listed companies.

It is important to note that a hybrid model allows for virtual-only meetings to take place in any case, if all shareholders choose to attend virtually. This would provide an adequate solution for extraordinary situations in which participants cannot attend in-person (for example, in a lockdown). The important advantage of a hybrid model is that it allows shareholders to choose how they participate on a case-by-case basis, which is a more flexible and democratic approach for the long-term.

The Treasurer previously said that a hybrid system would be an opportunity to improve AGMs, and that "reforms to the regulation of AGMs should enhance the ability of shareholders to interact with the board, not diminish it."<sup>6</sup> It is not clear that the draft legislation supports this goal.

A standardised hybrid model would establish consistency across all listed companies, instead of a potential patchwork whereby some companies are able to change their constitutions and others are not. It would avoid the risk that companies are unable to obtain shareholder support for constitutional changes because shareholders are wary of virtual-only meetings becoming the norm on an ongoing basis. A hybrid model for listed companies would provide the most efficient and simple option to avoid ongoing uncertainty.

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<sup>4</sup> Telstra Notice of Annual General Meeting, 13 October 2020: [2020 Notice of Annual General Meeting \(telstra.com.au\)](https://www.telstra.com.au).

<sup>5</sup> For example, s249H and s249HA of the Corporations Act establish different rules for publicly listed companies and other entities regarding the notice period for AGMs.

<sup>6</sup> AFR, 'Treasurer open to Hybrid model for AGMs', 30 October 2020, <https://www.afr.com/politics/federal/treasurer-open-to-hybrid-model-for-virtual-agms-20201030-p56a6t>.

## Voting technology

We support the inclusion of the scrutineering provision, for added assurance of accuracy in voting. Research has demonstrated many operational weaknesses in the systems used to cast votes at company meetings, which reduces investor confidence in voting outcomes.<sup>7</sup>

We do not support voting by show of hands (unless a poll is requested) as the default mechanism for listed companies. This is not appropriate for listed companies because:

- It disenfranchises any shareholder who is not able to participate in a meeting (making the entire process of voting by proxy ahead of the meeting meaningless). This is exacerbated in an environment where technology is used during a meeting. For example, if a shareholder experiences technical difficulties during a meeting and is not able to show their hand, their vote will not count.
- It also reduces transparency where technology is used, because only the company and the chair might be able to see the result of the show of hands.
- It ignores the principle of 'one share, one vote' and radically distorts the ability for shareholders to exercise their voting rights in proportion to their ownership.

For these reasons, it was entirely appropriate for ASIC to impose a condition at the beginning of the pandemic to require that hybrid meetings be decided on a poll.<sup>8</sup> We recognise and appreciate that sectors other than listed companies may use a show of hands.

There is an opportunity to clarify now that a show of hands is not appropriate for listed companies. Ideally this would be done in the legislation, or at a minimum, in the Explanatory Memorandum. In the ASX200, standard practice is to use polls. In 2019, in the ASX200, only 5% of resolutions were passed by show of hands, across 6% of companies.<sup>9</sup> From March 2020, every single resolution was put to a poll, following ASIC's guidelines.

Voting by poll is a broadly recognised principle of good governance for listed companies. The ASX Corporate Governance Principles and Recommendations, which are created and reviewed by a wide range of market participants and others, state that 'a listed entity should ensure that all substantive resolutions at a meeting of security holders are decided by a poll rather than a show of hands'.<sup>10</sup>

To promote good practice, we therefore suggest that a poll should be the only voting mechanism available for publicly listed companies, whether for physical or hybrid meetings. This would not be a new requirement for the majority of listed companies that use poll voting (whether because it is long-standing practice, or in response to ASIC's 2020 guidance).

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<sup>7</sup> ACSI, 'Institutional Proxy voting in Australia', October 2012: <https://acsi.org.au/research-reports/institutional-proxy-voting-in-australia/>.

<sup>8</sup> ASIC Guidelines for investor meetings using virtual technology, 29 March 2021, <https://asic.gov.au/about-asic/news-centre/news-items/asic-guidelines-for-investor-meetings-using-virtual-technology/>.

<sup>9</sup> 2019 is a relevant point in time, as this was before ASIC provided guidance on March 2020 that effectively required the use of a poll.

<sup>10</sup> ASX Corporate Governance Council, Principles and Recommendations, 4<sup>th</sup> edition, 2019, Recommendation 6.4: <https://www.asx.com.au/documents/regulation/cgc-principles-and-recommendations-fourth-edn.pdf>.