

Our ref: DMS1796

16 July 2021

SUBMISSION

TREASURY LAWS AMENDMENT (MEASURES FOR CONSULTATION) BILL 2021: USE OF TECHNOLOGY FOR MEETINGS

This submission relates to the proposed legislative amendments for the holding of "virtual general meetings" contemplated by the draft legislative amendments referred to in the Treasurer's announcement of 25 June 2021 titled "*Using technology to hold meetings, sign and send documents*"¹.

Key points

We are supportive of measures that will, on a permanent basis, facilitate companies holding general meetings using virtual technology. As a matter of policy, it is submitted that the Government should be enabling members of companies to participate in the general meetings of their companies. Given ongoing and continually changing restrictions on gatherings and travel and the need to minimise close contact due to the COVID-19 pandemic, many members of companies are not able or willing to attend the general meetings of their companies. Current COVID-19 related restrictions would even prevent companies lawfully holding physical meetings in some States. Hybrid and virtual meetings allow members to participate lawfully and safely. General meetings that use virtual meeting technology (**virtual general meetings**), whether hybrid or wholly virtual, at least allow members *the opportunity* to participate, even if they cannot attend physically.

However, since the temporary measures introduced in May last year permitting Australian companies to hold virtual general meetings expired on 21 March 2021², there has been some doubt about the legal efficacy of virtual general meetings of companies. It is fair to say that the current state of the law in relation to the holding of virtual general meetings is unsatisfactory.

Therefore, new legislation that clearly authorises companies to hold virtual general meetings is much needed to remove the doubt. The legislation needs to be in place and operative as soon as possible, and in any case time for this year's AGM season. Many companies are already preparing for their AGMs to be held later this year.

Moreover, the legislation should allow companies to hold wholly virtual general meetings without them first having to amend their constitutions to permit or require the use virtual meeting technology. For a company to amend its constitution to permit or require the use of virtual meeting technology at general meetings of the company, the members would need to pass a special resolution at a general meeting. It would be inconsistent with the policy objectives of:

- minimising risk of spread of COVID-19 in the community; and
- maximising the opportunity for members to participate in general meetings

to require, as a first step, that companies hold a general meeting to amend their constitutions by passing a special resolution at a general meeting at which members need to gather physically, and others may not be able to attend or participate at all.

It is noted that ASIC has adopted a "no-action" position on non-compliance with provisions of the Corporations Act that may restrict the holding of virtual meetings where an entity elects to hold a meeting using virtual technology. This does not remove the doubt, however. ASIC's no action

¹ <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/using-technology-hold-meetings-sign-and-send>. The draft legislation is available at <https://treasury.gov.au/consultation/c2021-177098>

² [Corporations \(Coronavirus Economic Response\) Determination \(No. 3\) 2020](#)

position applies only to meetings held before 31 October 2021 (or, if earlier, the date Parliament passes any measures relating to the use of virtual technology in general meetings). Many public companies hold their annual general meetings in November. ASIC's "no-action" position also does not remove the risk of legal challenges to the validity of resolutions passed at virtual general meetings.

Why is there doubt?

It is questionable whether the Corporations Act allows virtual general meetings because the Corporations Act appears to contemplate there being a place, or venues, for the meeting. In particular:

- s 249L(1) requires that a notice of meeting of a company's members set out the place, date and time for the meeting (and, if the meeting is to be held in 2 or more places, the technology that will be used to facilitate this);
- s 249R requires that a meeting of a company's members be held at a reasonable time and place; and
- s 249S allows a company to hold a meeting of its members at 2 or more venues using any technology that gives the members as a whole a reasonable opportunity to participate.

ASIC itself acknowledges that "*There is some doubt as to whether the Corporations Act ... permits virtual AGMs and there may also be doubt as to the validity of resolutions passed at a virtual AGM*"³ Others have similarly expressed doubt.⁴

In the recent scheme case of [Re Coca-Cola Amatil Limited \[2021\] NSWSC 270](#), Black J said⁵ that he accepts "that the proposed arrangements for the scheme meeting to be held virtually are permitted by s 249S of the Corporations Act, which permits companies to hold members' meetings online provided that the technology used gives the members as a whole a reasonable opportunity to participate, which is recognised in respect of scheme meetings by rule 3.3(2) of the *Supreme Court (Corporations) Rules 1999 (NSW)*." Although this is arguably helpful authority on its face, it was said in relation to a proposed scheme meeting, not a general meeting. Where a meeting of members is convened by the court (for instance, in a scheme) the court may give directions under s 1319 of the Corporations Act as to how the meeting may be held, and can authorise a virtual or hybrid meeting. Accordingly, in scheme cases, the court may order that the scheme meeting be held by virtual means, and has done so a number of times during the COVID-19 pandemic as noted by Black J.

It is noted that the court has power under s 1322 of the Corporations Act to validate certain irregularities. However, there are difficulties for companies wishing to rely on this provision to cure irregularities resulting from the holding of virtual general meetings. The meeting would have to have been held before an application could be made to the court and the power could be exercised, as the legislation does not contemplate seeking "prior clearance" from the court for a proposed irregularity. In other words, there will continue to be doubt about the legal efficacy of the meeting and any resolution passed at it pending any court order being made. It is also not clear whether an intentionally or deliberately caused irregularity can be cured under s 1322 of the Corporations Act.⁶

³ [21-061MR ASIC adopts 'no-action' position and re-issues guidelines for virtual meetings](#)

⁴ See, for example: the joint guidance of the Governance Institute of Australia, the Australian Institute of Company Directors, the Australasian Investor Relations Association and the Law Council of Australia earlier this month (see "Guidance: Update on AGMs, electronic document execution and digital shareholder communications" dated 3 May 2021"); and Douglas Gratton's legal opinion obtained by the Governance Institute of Australia (annexed to the "Governance Institute of Australia's Statement on electronic storage and execution of documents and electronic meetings dated 24 September 2020").

⁵ at [28]

⁶ See, for example, *Ford, Austin & Ramsay's Principles of Corporations Law*, 17th Edition at [7.582.12] and *Austin & Black's Annotations to the Corporations Act* at [9.1322]

ASIC's no action position

ASIC has adopted a "no-action" position on non-compliance with provisions of the Corporations Act that may restrict the holding of virtual general meetings where an entity elects to hold a meeting using virtual technology.⁷ This position applies to meetings held before the earlier of 31 October 2021 and the date Parliament passes any measures relating to the use of virtual technology in general meetings.

This "no-action" position on virtual meetings is conditional on:

- the technology or technologies used to hold the meeting providing members as a whole a reasonable opportunity to participate. This includes ensuring that members who are participating remotely are able to ask questions and make comments at the meeting;
- voting at the meeting occurring by a poll rather than a show of hands;
- each person entitled to vote being given the opportunity to participate in the vote in real time (where practicable voting should also be available in advance of the meeting); and
- the notice of meeting including information about how those entitled to attend can participate in the meeting (including how they can vote, ask questions, make comments or otherwise speak at the meeting to the extent they are entitled to do so).

ASIC also says that in holding virtual meetings in reliance on this "no-action" position, entities should consider ASIC's guidelines⁸ on the appropriate approach to take when conducting investor meetings using virtual technology.

We support ASIC's no action position. However, the "no-action" position will expire before the end of this year's AGM season. Companies with a 30 June year end typically hold their AGMs in the latter part of October or November.

Furthermore, ASIC's "no-action" position does not remove the risk of legal challenges to the validity of resolutions passed at virtual general meetings. As ASIC says, a "no-action" position:

- provides only an indication as to the future regulatory action that ASIC might take and does not necessarily preclude third parties (including the Commonwealth DPP) from taking legal action in relation to the same conduct or conduct of that kind; and
- does not prevent a court from holding that particular conduct infringes the relevant legislation.

Furthermore, in adopting its "no-action" position, ASIC does not represent that the conduct covered by the "no-action" position will not be held to contravene the relevant legislation, and ASIC does not undertake to intervene in an action brought by third parties (e.g., an action brought by members seeking to overturn a resolution purportedly passed at a general meeting) in respect of such conduct.

Issues with the proposed legislative amendments

Given the abovementioned doubts, new legislation that clearly authorises companies to hold virtual general meetings is much needed. It is indeed required urgently: the legislation needs to be in place and operative as soon as possible, and in any case time for this year's AGM season. Many companies are already preparing for their AGMs to be held later this year and, in light of current lockdowns and travel restrictions, there is a real need for all companies to be able to plan to hold wholly virtual AGMs this year.

Earlier this year the Government introduced the [Treasury Laws Amendment \(2021 Measures No. 1\) Bill](#) (the **Bill**) into Parliament which, among other things, would enable companies to hold virtual general meetings, but only until 15 September 2021.⁹ However, as mentioned, companies with a

⁷ [21-061MR ASIC adopts 'no-action' position and re-issues guidelines for virtual meetings](#)

⁸ [ASIC guidelines for investor meetings using virtual technology](#)

⁹ Proposed new section 1679F (item 34 of Schedule 1 of the Bill)

30 June year end typically hold their AGMs in October or November. Therefore, if enacted in its current form, this Bill will not facilitate such companies holding wholly virtual AGMs during this year's forthcoming AGM season. Further legislation would still be required.

Moreover, the recently released exposure draft legislation¹⁰, which we understand is intended to support companies and their officers' use of technology to satisfy the Corporations Act requirement for general meetings, will not necessarily allow companies to hold wholly virtual general meetings this AGM season (even if enacted in time for the AGM season). If the draft legislation is enacted, the Corporations Act will expressly allow a company to hold a general meeting "using virtual meeting technology only, *if this is required or permitted by the company's constitution*" (our emphasis)¹¹. No such qualification is proposed for hybrid meetings.

Our experience is that many companies' constitutions do not expressly permit or require the holding of wholly virtual meetings. For a company to amend its constitution to permit or require the use of virtual meeting technology at general meetings of the company, the members would first need to pass a special resolution at a general meeting. Thus, the proposed legislation would not help most companies and their members for this forthcoming AGM season, even if enacted in time.

It is submitted that it would be inconsistent with the policy objectives of minimising risk of spread of COVID-19 in the community and maximising the opportunity for members to participate in general meetings to require, as a first step, that companies hold a general meeting to amend their constitutions by passing a special resolution at a general meeting at which at least some members are required to gather physically, and others may not be able to attend or participate at all.

If the convenor of a general meeting chooses a format with a view to disenfranchising minorities, ASIC and the company's members may exercise other rights under the Corporations Act to seek redress. The Act provides sufficient protection for members without the need for company constitutions to be amended to permit virtual meetings.

We therefore submit that the new legislation facilitating virtual general meetings should operate to permit companies to hold wholly virtual general meetings, *unless their constitutions provide otherwise*. Members of a company, if they choose to do so by special resolution, should be able to amend their constitutions to restrict or prohibit the use of wholly virtual meetings. However, in the meantime, companies and their boards should have the power to choose the format of a meeting — whether physical, hybrid or wholly virtual. COVID-19 lockdowns make the need for this even more urgent. In the current environment there seems to be no policy reason why hybrid and fully virtual meetings should be treated differently in the legislation.

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¹⁰ Available at <https://treasury.gov.au/consultation/c2021-177098>

¹¹ See proposed new section 249R