Governance Institute of Australia

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Market Conduct Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: businesscomms@treasury.gov.au

Dear Sirs,

Exposure Draft: *Treasury Laws Amendment (Measures for Consultation) Bill 2021: Use of technology for meetings and related amendments* (ED)

Who we are

Governance Institute of Australia is a national membership association, advocating for our network of 40,000 governance and risk management professionals from the listed, unlisted and not-for-profit sectors.

As the only Australian provider of chartered governance accreditation, we offer a range of short courses, certificates and postgraduate study. Our mission is to drive better governance in all organisations, which will in turn create a stronger, better society.

Our members have primary responsibility for developing and implementing governance frameworks in public listed, unlisted and private companies, as well as not-for-profit organisations and the public sector. They have a thorough working knowledge of the operations of the markets and the needs of investors. We regularly contribute to the formation of public policy through our interactions with Treasury, ASIC, APRA, ACCC, ASX, ACNC and the ATO.

Executive summary

- We support the prompt passage of the ED, subject to the comments below.
- Our members have consistently advocated for modernisation of the Corporations Act to make it technology neutral. Technology neutrality gives companies and registered schemes (collectively, companies) the flexibility to communicate with their members and shareholders (collectively, shareholders) and hold meetings in the way best suited to their unique circumstances. Meetings using technology increase accessibility and engagement for shareholders and members, and also protect their health and safety in emergency situations such as the current pandemic.
- Our members also consider there is a range of existing mechanisms and protections by which shareholders can make their views known to the board, such as the ability to remove directors and the right of five per cent of shareholders to requisition or call a meeting. The chair is also subject to duties around the conduct of the meeting. In addition, ASIC has already carried out surveillance of meetings and we anticipate this is likely to continue. Our members do not support the requirement for a constitutional amendment by way of a special resolution to permit virtual meetings.
- Companies large and small in **all sectors** want to be able to offer meeting options that focus on the health, safety and convenience of all attendees, especially shareholders. In a second COVID-19 year this is problematic and companies of all sizes in all sectors face uncertainty

not only about the current state of the law but also the restrictions on gatherings likely to be in force at the time of their annual general or other shareholder meetings.

- Legislative certainty about holding meetings and using technology to execute documents and communicate with members and shareholders is critical, particularly as the 2021 AGM season is fast approaching. There are also some practical difficulties in what is emerging as a second 'COVID-19' meeting season and the interaction between the *Treasury Laws Amendment (2021 Measures No 1) Bill 2021* (TLAB), the ED and ASIC's no action position about which Governance Institute will approach ASIC.
- In light of continuing lockdowns in some Australian states, which are already disrupting planning for 2021 AGMs, our members consider it would be prudent for the legislation to enable the Treasurer to make legislative instruments and/or ASIC to grant relief by way of Class Order in emergency situations such as continuing outbreaks of COVID-19.
- Our members consider the drafting of the proposed sub-section 249S (8) is unclear and needs to clarify that companies can satisfy the requirement to allow a shareholder to ask questions or make comments in writing by means of a question sent in advance of the meeting or through an online question facility during the meeting, **OR** by means of a telephone line or similar technology but companies are not necessarily required to offer both options at the same meeting and there should be flexibility, particularly when technology is evolving.
- Our members consider the permanent changes to electronic execution of documents and communication with shareholders in the ED will also assist with the long overdue modernisation of the Corporations Act. They also encourage Government to proceed with its recently announced prioritisation of modernising document execution across the Commonwealth.[1] It will also be important for the final forms of legislation in each of the states to be consistent.
- Our members support the provisions in the new Part 2G.6 in relation to independent observers of, and reports on, polls at meetings of listed companies or registered schemes, subject to clarification that where a company or scheme has already appointed an independent party such as a share registry, law firm or external auditor for a particular meeting, they may also act as an independent observer and prepare a report on a poll.
- The ED does not address some of our members' previously articulated concerns with some provisions of Schedule 1 of TLAB which they consider should be addressed before the legislation becomes permanent.[2] Further detail is provided below.
- We would also welcome further detail about the proposed Treasury AGM data collection to so that we can bring it to our members' attention with a view to their participating in collection exercise.

Technology neutrality – member and shareholder participation and existing protections

Our members have consistently advocated for modernisation of the Corporations Act to make it technology neutral. It is important to avoid a situation where the Corporations Act is out of date within a short space of time. There are likely to be technological solutions not yet in existence which may again change the way companies interact with their shareholders as radically as technology has changed these interactions in 2020. The Explanatory Memorandum to the ED refers to the new law as taking a 'technology neutral' approach – para 1.17. Our members consider most of the provisions of TLAB and the ED achieve this neutrality.

Our members welcome the specific recognition of the ability to hold hybrid members' meetings in the proposed legislation – ED section 249R(b). While some consider that the Corporations Act currently permits hybrid meetings even if they are not permitted by a company's constitution, not

[1] See the Joint Media Release the Attorney General and the Assistant Minister to the Prime Minister and Cabinet 11 June 2021.

[2] See Governance Institute's submission dated 1 March 2021 to the Senate Economics Legislation Committee *Treasury Laws Amendment (2021 Measures No 1) Bill 2021* and the submission dated 28 May 2021 to the Senate Economic References Committee *Treasury Laws Amendment (2021 Measures No 1) Bill*.

all agree with this view. The ED, if passed, will put the position beyond doubt. It will also be of assistance to companies whose constitutions do not currently permit hybrid meetings.

However, our members consider the proposal to require a constitutional amendment to hold a virtual meeting is inconsistent with technology neutrality and indicates that one form of meeting is to be preferred over others. In our members' experience amendments to the Corporations Act remain for many years. They therefore do not wish to see provisions that are at odds with the stated aim of technology neutrality become permanent features of the Corporations Act. They also consider technology neutrality gives companies the flexibility to communicate with their shareholders and hold meetings in the way best suited to their unique circumstance. Meetings using technology increase accessibility and engagement for shareholders and members and also protect their health and safety in emergency situations such as the current pandemic.

There are key benefits to holding meetings using technology:

- Our members want to see Australia embrace technological change and the benefits of new ways of engaging with shareholders and do not want to see technology disrupt the core purpose of AGMs, which is to hold boards accountable. They want to see technology enable that core purpose and greater digital inclusion of shareholders and members.
- Our members see a real benefit of virtual AGMs in increasing attendance, engagement and inclusion of shareholders – regardless of age, ability or postcode – and removing regulatory uncertainty in any future pandemic or similar crises.
- What our members saw in 2020 during COVID-19 was an increase in the level of engagement and participation at many AGMs, with technology playing a strong role as an enabler for this increase.
- Meetings using technology, especially virtual meetings, were extremely helpful for charities, membership associations, not-for-profits and other companies limited by guarantee with large member bases spread widely across Australia.

Our members also support all forms of positive shareholder engagement. They therefore support finding the most effective ways for companies which wish to continue with or explore virtual meetings to do so in a way that at least matches and does not diminish the opportunities for shareholder engagement, traditional at physical meetings. The level of engagement and participation at many virtual-only AGMs increased during COVID-19 with technology playing a strong role as an enabler for this. Wholly virtual meetings were especially helpful for charities, membership associations, not-for-profits and other companies limited by guarantee with large member bases spread widely across Australia. Any poor shareholder experiences at wholly virtual AGMs in 2020 can be addressed through education and ASIC and industry guidance.[3] Improvements in technology will also further enhance shareholders' experience.

Preferring one form of meeting using technology – hybrid AGMs – goes against modernising the Corporations Act and technology neutrality. Hybrids will suit some types of entities and not others. They also potentially run contrary to temporary State-based public health restrictions. The Corporations Act regulates a wide array of organisations, from large and small listed companies to registered schemes, charities and not-for-profits, membership organisations and other companies limited by guarantee. There should be maximum optionality and flexibility for meetings using technology to accommodate this broad spectrum of entities.[4]

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[3] See *Guidance Update on AGMs, electronic shareholder communication and digital shareholder communications*, Governance Institute of Australia, Australian Institute of Company Directors, the Business Law Section of the Law Council of Australia and Australasian Investor Relations Association, April 2021.

[4] Note while Part 2G2 does not apply to companies registered with the Australian Charities and Not-for-profits Commission consideration should be given to how this capacity should be provided to such companies without a requirement to amend their constitutions.

Our members also acknowledge that virtual meetings will not be the preferred option for many companies such as smaller listed companies or unlisted companies. For this reason, the format of a shareholders' meeting should not be prescribed, it should be open to companies to adopt the format most suited to them and their shareholders.

Like many others, companies have found the move to virtual meetings has provided increased opportunities for shareholder participation in meetings. This is because they can include shareholders located in other parts of the country or overseas who are no longer restricted to only attending meetings held in their home state or country. In addition, it provides opportunities for engagement for those with disabilities or with other personal circumstances that would otherwise preclude them from access. Governance Institute is keen to support the dialogue around how to make meetings using technology as effective as possible for those companies which choose to continue with them.

Our members consider that where shareholders consider that companies are holding meetings in a way that reduces rather than increases their ability to participate in these meetings, there is an existing range of mechanisms and protections by which shareholders can make their views known to the board and express dissatisfaction. These include:

- The ability to remove directors – section 203D
- The right of five per cent of shareholders to requisition a meeting – section 249D, and
- The right of five per cent of shareholders to call a meeting – section 249FD.

The chair of a meeting is also subject to duties including a duty to act 'with probity and in a bona fide way on every issue'[5]. The chair of a meeting is therefore responsible for ensuring that those present are able to participate in a meeting

Given these existing rights and protections our members do not support the proposed requirement for a constitutional amendment by way of a special resolution to permit virtual meetings.

The conduct of meetings was the subject of regulatory scrutiny during 2020 with ASIC visiting a number of meetings to observe how they were conducted. Given the introduction of new legislation and the current disruption we anticipate this is likely to continue in the 2021 AGM season. This should also provide comfort to shareholders that the way companies conduct meetings is the subject of regulatory scrutiny.

Our members also understand that at least one proxy advisory firm is currently recommending its clients vote against any listed company proposals to amend constitutions to allow virtual meetings. As noted in our submission, *Greater transparency of proxy advice*, proxy advisory firms can play a significant role in the outcome of resolutions. [6]

Governance Institute recommends against requiring companies to amend their constitutions to allow virtual meetings on the basis that this is inconsistent with technology neutrality. Technology neutrality gives companies the flexibility to hold meetings in the way best suited to their unique circumstance. Meetings using technology also increase accessibility and engagement for shareholders and members and protects their health and safety in emergency situations such as the current pandemic. In addition, shareholders have an existing range of mechanisms and protections by which they can make their views known to the board and express dissatisfaction. The corporate regulator is also likely to carry out observation of the 2021 meeting season which should provide additional reassurance to members and shareholders.

The need for legislative certainty and the impact of a second COVID-19 meeting season

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[5] For a fuller discussion of these duties see *Horsley's Meetings Procedure, Law and Practice*, 7th edition at para 6.10.

[6] See Governance Institute's Submission *Greater transparency of proxy advice*, June 2021.

Convening and holding meetings in a safe manner that also met the changing regulatory requirements has been a major focus for companies in all sectors since March 2020. Similarly executing documents on behalf of companies and sending communications to members and shareholders have also been major causes for concern because the position is currently uncertain. Governance Institute has received numerous requests from members for updates on the current position. We have issued four separate pieces of guidance on these issues since March 2020 to assist our members including joint guidance with other stakeholders.[7] Companies want to be in a position to offer meeting options that focus on the health and safety of all attendees, especially members and shareholders. The current state of the law, which has returned to its pre-COVID state does not currently assist them to do so.

In fact, companies find themselves in an even more difficult position in 2021 than in 2020 when they had the benefit of the Treasurer's Determination which expired in March 2021. By the time Parliament is due to consider TLAB and the ED many companies will be required to issue notices of meeting to their shareholders. They are facing a dilemma. Do they plan for physical AGMs despite COVID-19 and the potential for local state or territory restrictions? Do they plan for a virtual-only AGM to prioritise the health and safety of shareholders in reliance on ASIC's current no action position?[8] As a further complication, it is unknown how many companies' constitutions currently permit virtual or hybrid meetings. If the ED becomes law hybrid meetings will be possible health restrictions permitting, but virtual meetings will not be without a constitutional change. If physical meetings are not possible, virtual meetings are the only viable alternative.

ASIC's March 2021 no-action position has provided some assistance for companies but does not remove the risk of legal action from third parties. Even where ASIC takes no enforcement action, a shareholder may, for example, challenge the validity of a resolution passed at a virtual-only meeting or take issue with the fact that a company's constitution does not permit hybrid meetings. Due to this risk, some entities are unlikely to rely on ASIC's no-action position to hold hybrid or virtual-only meetings. On the other hand, the no action position would assist some smaller companies including not-for-profits to hold meetings. In addition, pending passage of TLAB and the ED, ASIC's no action position does not assist with electronic execution of documents, because this is outside its legislative powers. To enable certainty and assist those entities which wish to take advantage of the no action position during what is likely to be a disrupted 2021 AGM season, Governance Institute will be approaching ASIC separately to discuss the possibility of extending its no action position until the end of 2021 to assist those companies which may need to use it.

The vast majority of Australian companies have 30 June balance dates. Planning is already under way for the main AGM season October – November 2021, when it is highly likely pandemic risk will still be present. In addition, the position around electronic execution of documents will remain unclear until the ED is passed and sending notices of meeting electronically requires reliance on ASIC's no action position. This no-action position is currently scheduled to end on the earlier of 31 October 2021, and the date Parliament passes any measures relating to the use of virtual technology in meetings of companies or managed investment schemes. As noted previously, the earliest any legislation can pass is the August 2021 sittings. At this point a significant number of Corporations Act regulated entities of all sizes, in all sectors will be impacted. Sections 249H and 249HA of the Act require notices of meeting to be issued with at least 21 days' notice and 28 days for listed companies.

TLAB introduces the right to opt-in to paper notices and a requirement in section 1679 of TLAB to advise shareholders of that right within two months. Breach of section 1679 is a strict liability offence. As we understand the position TLAB is likely to be back before Parliament in the early August sittings. The ED amendments are unlikely to be introduced into Parliament until later that

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[7] See for example, *COVID-19 and the impact on AGMs*, Governance Institute, March 2020 *Guidance Update on AGMs, electronic shareholder communication and digital shareholder communications*, Governance Institute of Australia, Australian Institute of Company Directors, the Business Law Section of the Law Council of Australia and Australasian Investor Relations Association, April 2021.

[8] 21-061MR ASIC adopts 'no-action' position and re-issues guidelines for virtual meetings.

month. This is at approximately the same time that companies with 30 June balance dates will be sending out notices of meeting and that large, listed companies with significant retail shareholder bases will be planning bulk printing of meeting materials. This will particularly impact companies with AGMs in the earlier part of the season. Where meetings have been announced well in advance delay is difficult and impacts a range of other corporate activities. In a second COVID-19 meeting season it would be very helpful to extend the no action position until the end of calendar year 2021. This delay would give companies certainty and time for all the legislation to pass and for companies to update their internal processes to respond.

For these reasons our members consider, particularly in light of continuing outbreaks of COVID-19 and lockdowns in various states, that the current legislative uncertainty needs to be resolved without delay. They consider that the measures in Schedule 1 of TLAB combined with the ED, amended as recommended in this submission, will provide much needed certainty.

Governance Institute recommends the current legislative uncertainty be resolved without delay**.**

Provide for the Treasurer to make legislative instruments and/or ASIC Class order relief in emergency situations

As noted above most Australian companies have 30 June balance dates and are already planning their annual general meetings. Companies, especially large, listed companies schedule annual general meetings well in advance and have a planned annual schedule of financial and regulatory reporting. Companies which have meetings scheduled for a capital city subject to restrictions because of outbreaks of COVID-19 are now contemplating how to hold these meetings. If restrictions continue or are reintroduced, even if TLAB and the ED become law, there will be companies whose only option would be a virtual annual general meeting but which would not be permitted to offer this format because their constitutions do not allow virtual meetings.

Given that this uncertainty is likely to continue for some time and that there are likely to be other emergencies which will interfere with holding company meetings, our members consider it would be prudent for the legislation to enable the Treasurer to make legislative instruments and/or for ASIC to be able to grant class order relief in emergency situations.

Governance Institute recommends it would be prudent for the legislation to enable the Treasurer to make legislative instruments and/or for ASIC to grant relief by way of Class Order in emergency situations such as continuing outbreaks of COVID-19 or other emergency situations which prevent the holding of company meetings. Governance Institute will also be approaching ASIC separately to request that it extend its no action position until the end of 2021 to assist those companies which may need to use its provisions.

Reasonable opportunity to participate

Our members have no comments on the drafting of the proposed sub-sections 249S (1) – (7). They do however consider that the drafting of proposed sub-section 249S (8) is unclear. The Explanatory Memorandum states that 'Regardless of how a meeting is conducted, the members as a whole must be given a reasonable opportunity to participate' – paragraph 1.28 – this is reflected in sub-section 249S (1).

As a practical matter, the chair of the meeting manages participation in a meeting. ASIC has also provided useful guidance on the conduct of virtual and hybrid meetings in which it states, 'As an overall guiding principle, members at a hybrid or virtual meeting should be given an opportunity to participate in the meeting that is equivalent to the one they would have had if attending in person.'[9]

[9] See ASIC *Guidelines for investor meetings using virtual technology*, 29 March 2021.

The Explanatory Memorandum to the *Company Law Review Bill 1997* also provides some useful commentary on the role of the chair of a meeting, the meaning of a 'members as a whole' and 'reasonable opportunity' and the answering of questions:

> *What is a 'reasonable opportunity' will depend upon the circumstances of the meeting. These provisions will not affect the chairperson's power under the common law to run an orderly meeting. In particular, the chairman will not necessarily be required to allow each member who wishes to do so an opportunity to ask questions. The Bill includes the words 'as a whole' to confirm that each individual does not have the right to ask a question. The chairman will be able to move on to the next item on the agenda when they consider that there has been a reasonable time for questions, taking into account all the circumstances of the meeting.*[10]

This commentary provides a useful insight into the conduct of meetings which assists in considering the provisions of the ED. While shareholders should have an opportunity to ask questions, this does not mean every shareholder will be able to ask their particular question or that the chair has not given shareholders a reasonable opportunity to participate in a meeting if an individual's question was not answered. In the interests of an orderly meeting a chair may legitimately move to the next agenda item when they consider a there have been sufficient questions and discussion on a matter.

It is also important for the chair to have some discretion in relation to questions at meetings to facilitate the orderly conduct of the meeting. Our members have experienced instances where they consider that the right to ask questions has been abused. An example of this is a particular shareholder 'flooding' an online question portal with a large number of questions not directly related to the business of the meeting which disadvantages other shareholders who may wish to ask questions or make comments. This behaviour is more easily managed at physical meetings where the floor of the meeting can make its views of this behaviour clearly known, often by calling for the speaker to be seated or to leave the microphone.

The Explanatory Memorandum observes '...where members have a right to speak, comment or ask questions, the member must be given the opportunity to do so either orally or in writing' – paragraph 1.35. Our members consider that there may be practical difficulties with the operation of sub-section 249S(8) as currently drafted.

Feedback from our members and other stakeholders indicates that during the 2020 AGM season a range of solutions was used to enable attendees to ask question or make comments at meetings. Many smaller companies and not-for-profits successfully used video meeting platforms such as Zoom, Microsoft Teams and Webex to hold all types of meetings. Depending on the size of the meeting these platforms enabled attendees to participate and interact through features such as 'Hands Up' which enabled attendees to speak at the meeting. Part way through 2020 some of these platforms introduced additional features such as polling, and voting. While listed companies also used some of these platforms for board and management meetings, they did not use them for annual general or scheme meetings.

For larger listed companies the most common method for shareholders to ask questions during the 2020 AGM season was to either submit them in advance or during the meeting using a keyboard to type questions into the question function of a secure online platform which were then relayed to the Chair for a response.

Some listed companies also arranged for telephone links to meetings to enable shareholders to ask questions verbally. Our members report that:

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[10] See *Explanatory Memorandum Company Law Review Bill 1997* at paragraph 10.78 quoted in *Horsley's Meetings Procedure, Law and Practice* 7th edition at paragraph 21.6, page 296 and also *Company Meetings What You Need to Know*, Bateman, 2001 at paragraph 8.1.4.

- One of the platforms used by larger listed companies does not include telephone or video facilities. These must be arranged separately at an additional cost, plus call charges. While another commonly used platform does offer a telephone facility as part of the platform service there is an additional cost. We understand that meeting technology is evolving to include voice participation but is unlikely to be widely used in the 2021 Australian AGM season.
- In 2020 telephone callers spoke to the meeting in two different ways. They either spoke to an operator who then put the call through to the meeting – due to the difference in speed between internet and telephone connections this involved a delay (up to ten seconds, depending on the end user's equipment). A very small number of companies used this method. The other method used was that the caller spoke to an operator who transcribed the question which was relayed to the meeting for a response.
- Verifying the identity of the caller as a shareholder was important because only shareholders have a right to speak at shareholders' meetings, guests do not. Some companies provided a telephone number in advance of the meeting enabling shareholders to pre-register and obtain a pin to use during the meeting.
- The use of multiple technologies significantly increases the complexity of the arrangements required for shareholders' meetings and introduces greater risks.
- The experience of our members who provided telephone lines was that they were not widely used.[11]

We had 589 attendees at our 2020 virtual AGM. This consisted of 132 shareholders, 18 non-voting shareholders, 14 proxyholders and 425 visitors. **We had fewer than five people join by telephone.** The statistics on 2019 voting compared to 2020 voting were:

- 2019 - Online 6,630, Form 9,461
- 2020 - Online 4,827, Form 6,729.

Top 20 listed company, 356,000 shareholders

At our hybrid General Meeting in 2021 we had 86 shareholders attend via the online platform, 41 Shareholders attend in person. We typically have 600 shareholders attend our AGMs. There were 233 guests (approximately 50 in person and the remainder online). There were ten people who joined the meeting by telephone with an audio feed only, with no registration or access to ask a question or vote.

Top 20 listed company

The current drafting of the sub section presumably contemplates that the current practice at physical meetings of having microphones available for members to ask questions during the meeting or to submit questions in advance of the meeting in writing can continue. In the case of hybrid or virtual meetings the sub section seems to indicate companies must offer both an oral **and** a written method for asking questions or making comments at these meetings. As noted above there was a low usage of telephone lines offered by larger companies during the 2020 AGM season and it would be unduly burdensome to hard wire this type of requirement into the law while technology and practices are evolving. Some companies may wish to offer one method, while some companies may wish to offer both methods and there should be flexibility.

Our members consider that the legislation should clearly indicate that companies can satisfy the requirement to allow a member to exercise a right to ask questions or make comments:

[11] See also Computershare Submission *Treasury Laws Amendment (2021 Measures No. 1) Bill 2021 in respect of virtual meetings*, 17 June 2021 at page 2.

- either in writing by means of a question sent in advance of the meeting or through an online question facility during the meeting, **OR**
- by means of a telephone line or similar form of technology

but are not necessarily required to offer both options at the same meeting.

Given the low take up of telephone lines at listed company meetings during the 2020 AGM season and the fact that technology is evolving for the 2021 AGM season our members consider it would be unreasonable and add further complexity to meetings to require companies to offer both methods while technology and practices are still evolving.

Governance Institute recommends amending the proposed sub-section 249S (8) to clarify that companies can satisfy the requirement to allow a member to exercise a right to ask questions or make comments either in writing by means of a question sent in advance of the meeting or through an online question facility during the meeting, **OR** by means of a telephone line or similar form of technology but are not required to offer both methods at the same meeting. Some companies may wish to offer one method, some companies may wish to both methods and there should be flexibility, particularly at a time when technology is evolving.

Independent observers and reports on polls

Our members support the new ability of shareholders with five per cent of the votes that may be cast at a company meeting to request a company to appoint an independent person to observe the conduct of a poll at a meeting or request a report on a poll in the proposed Part 2G.6.

Our members consider that where a company has already appointed an independent party, such as a share registry, law firm or external auditor for a particular meeting they may also act as an independent observer and prepare a report on a poll.

Governance Institute recommends that the extrinsic material and legislation be clarified to provide that where a company has already appointed an independent party, such as a share registry, law firm or external auditor for a particular meeting they may also act as an independent observer and prepare a report on a poll.

TLAB - Section 253RB Elections to receive documents in hard copy only – companies Section 1679B – Application – notifying members of rights in relation to hard copy documents [12]

As noted in previous submissions our members have concerns about TLAB section 1679B which do not appear to have been addressed in the ED.[13] As currently drafted, this would require companies to contact shareholders to advise of the right to opt in to receive hard copy documentation under TLAB section 253RB within two months of the commencement day. Failure to comply is a strict liability offence. Given that many shareholders have expressed a preference for digital communications the section would require them to confirm a shareholder's previously stated preference. The provisions in TLAB are currently intended to sunset on 16 September 2021 but will nonetheless be in force and expose companies to a strict liability offence during a period when many companies will be sending out notices of meeting. Requiring companies to take this step within two months when the provisions may only be in place for a short period, imposes a significant regulatory and administrative burden.

The long-standing difficulty with 'lost' shareholders also remains. Sections 214 and 315 of the Corporations Act require companies to send materials such as financial reports and directors'

[12] These comments also apply to the subsections relating to registered schemes.
[13] See Governance Institute's submission dated 1 March 2021 to the Senate Economics Legislation Committee *Treasury Laws Amendment (2021 Measures No 1) Bill 2021* and the submission dated 28 May 2021 to the Senate Economic References Committee *Treasury Laws Amendment (2021 Measures No 1) Bill*.

reports to shareholders. Where companies do not have a current address by virtue of ASIC Class Order 2016/187 they must continue to send these materials at least once per year for six years before they may treat them as 'uncontactable'.[14] This is despite the fact that mail is returned year after year with messages of varying politeness indicating the person is no longer at the address. While the Government has announced it intends to address this long-standing issue, these reforms are not yet in place.[15]

Governance Institute recommends the ED amend section 1679B of TLAB because it ignores the fact that many Australian investors have already expressed a preference for digital communication. Contacting them to advise they have a right to opt in to receive hard copy communications will involve considerable cost and administrative burden and is likely to be perceived unfavourably by shareholders, particularly those who have already asked for digital communications. Breaching this requirement is a strict liability offence and companies will not want to be in breach.

If you wish to discuss any of the issues raised in this letter, please contact me or Catherine Maxwell.

Yours faithfully,

Megan Motto
CEO

[14] See our Submission *Corporations Amendment (Virtual Meetings and Electronic Communication) Bill 2020*.
[15] See the Treasurer's Media Release *Modernising Business Communications*, 21 April 2021.