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

Consultation Comments — Making permanent reforms in respect of use of technology to hold meetings and sign and send documents

Institutional Shareholder Services (ISS) thanks the Australian Government and the Treasury for the opportunity to provide our comments to the Exposure Draft materials in the above Bill (the Consultation).

ISS Introduction

ISS is the world's leading provider of corporate governance and responsible investment solutions, market intelligence and fund services, and events and editorial content for institutional investors and corporations, globally. This includes objective and impartial corporate governance and voting-related research, analysis, and voting recommendations for institutional investors. Covering more than 45,000 company meetings annually, we have over 2,000 clients globally who rely on ISS' expertise to help them make informed investment and voting decisions, and to execute their votes.

We have over 35 years of experience in corporate governance, and our team of more than 1,000 research, data, voting operations, technology, and client service professionals are located in financial centres worldwide, including in Sydney, Singapore, Tokyo, Manila, London, Paris, Brussels, Berlin, Stockholm, New York, Boston, San Francisco, Washington DC and Toronto. ISS has been a long-standing participant in the corporate governance community in Australia and we have had a physical presence in the market, with

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local market expertise and staffing, since 2005. ISS has over the years worked closely with various stakeholders, including regulators and institutional investors in Australia and around the globe.

Our comments on this Consultation represent our views in our capacity as a thought leader in the area of corporate governance and shareholder voting. They are not necessarily the views of all our clients and are not presented as such. Additionally, our comments in this submission are focused on the use of technology to hold shareholder meetings, specifically regarding a company's ability to hold a shareholder meeting using virtual meeting technology only.

ISS 2020 Global Policy Survey Results

To provide some context to our comments below, we note that ISS undertakes an annual global survey to understand the views of investors, companies and other stakeholders on topical governance and other voting-related issues. The 2020 Global Policy Survey, the results of which were released in September 2020, found that a significant majority (77 percent) of investor respondents supported the hybrid shareholder meeting format, allowing for concurrent physical and virtual participation by shareholders. Only 11 percent of investor respondents supported virtual-only meetings, except as a temporary extraordinary measure necessitated by emergency circumstances as the Covid-19 pandemic.

Having regard to this information, we believe that the hybrid meeting format overwhelmingly meets shareholder expectations for appropriate corporate governance. The hybrid format also provides optimal flexibility for all shareholders and companies, while preserving the necessary corporate governance protocols and protecting shareholder rights.

ISS Comments

ISS notes the Treasury's explanation that the changes contemplated in this Consultation regarding how a company may hold a shareholder meeting are not prescriptive, and that ultimately it will be each company's decision whether to hold a physical, hybrid or, if permitted by a company's constitution, virtual-only meeting. However, for many shareholders, the general meeting represents a unique (and typically only once a year) opportunity for shareholders to ensure the accountability of the directors and management charged with overseeing the corporations that they own. It is the only collective platform for shareholders to publicly raise relevant issues and questions with directors and management and to evaluate their responses. In our view, to enshrine in law the ability for companies to choose a virtual-only shareholder meeting format would have a negative impact on shareholder rights and corporate governance in publicly listed companies.

At the same time, ISS applauds the provisions which would allow companies to hold hybrid meetings, given that there is no present ability under the Corporations Act to use virtual meeting technology to conduct a meeting. However, as noted, we are concerned with clause 1.9 of the Exposure Draft Explanatory Material which states that,

"Wholly virtual meetings may also be used if they are expressly required or permitted by the constitution (regardless of whether the constitution was amended before or after the commencement of these reforms)."

In response to the Previous Consultation undertaken by the Treasury regarding the *Corporations Amendment (Virtual Meetings and Electronic Communications) Bill 2020* in October 2020, ISS observed

that many companies requested amendments to constitutions at their 2020 annual general meeting which allowed for virtual-only meetings. We observed that opaque explanations were given by many of these companies, including that the current law does not allow for virtual-only meetings and that the current Covid-19 restrictions in Australia meant that physical meetings were not possible. It is likely that some shareholders may have formed a mistaken understanding that the company's proposal was aimed at allowing hybrid meetings only or to accommodate irregular events, such as the Covid-19 pandemic restrictions. Most of these resolutions received the requisite special majority of shareholder votes, while the resolution at Ansell Limited failed to pass and the resolution at Newcrest Mining Limited was withdrawn on the understanding that there was likely insufficient shareholder support. Our discussions last year with certain companies confirmed that at least some intend to conduct virtual-only shareholder meetings going forward and irrespective of whether irregular circumstances exist. It is particularly concerning that none of these intentions have been explicitly communicated in the explanatory information to the companies' resolutions and drafting of the constitutional amendments, or in other publicly available disclosure of which ISS is aware.

For these reasons, we believe that there presently exist several company constitutions that incorporate ambiguous or broad wording that could be interpreted to allow virtual-only meetings under all circumstances. We consider that it is inappropriate for the Treasury to proceed with any amendments to the Corporations Act which would allow companies to use previously approved broad or ambiguous wording in amended constitutions as the basis for validly convening virtual-only shareholder meetings in the future. While, again, we do not believe that the law should be amended to allow companies to elect a virtual-only model, if the Treasury elects to move in that direction, we think it important that any legislation explicitly addresses such ambiguity in the drafting of a company constitution to infer a meaning that shareholder meetings are to be conducted as a physical meeting or under a hybrid format. Any constitutional ability to convene virtual-only meetings must in our view require shareholder approval on a fully informed basis as a special resolution after enactment of any legislation under this Consultation.

As expressed in our submission of 30 October 2020 in connection with the Previous Consultation on this topic, we reiterate that the fundamental corporate governance concern regarding virtual-only meetings is that these create a genuine risk to the transparent expression of views and all shareholders' rights to participate in a general meeting without prior vetting or "curating" of questions by corporate officials. Anecdotal claims have been expressed following certain annual general meetings in 2020 of restrictions being imposed on certain shareholders who were prevented from engaging in a robust exchange of views with directors and asking questions. Some companies asked for questions to be submitted to company representatives ahead of the meeting. The raising of such issues since the temporary relief provisions in the *Corporations (Coronavirus Economic Response) Determination (No. 1) 2020* and *Corporations (Coronavirus Economic Response) Determination (No. 3) 2020*, affirm concerns that virtual-only shareholder meetings do have the effect, whether in perception and/or reality, of diminishing shareholder participation and rights, and director accountability.

ISS notes the inclusion of provisions in the Exposure Draft Legislation which are designed to ensure shareholders are given a reasonable opportunity to participate in a virtual shareholder meeting format, including protecting the right to speak, comment or ask questions orally or in writing. We fear, however, that these mechanisms are insufficient and lack transparency in the demonstration of appropriate

corporate governance if not accompanied by a contemporaneous physical meeting which shareholders may attend. The reforms also state that a meeting can be declared invalid if a Court determines that a substantial injustice has occurred regarding a member's reasonable opportunity to participate in the meeting or in a proceeding in the meeting, and cannot be remedied by a Court order. Such provisions may be regarded as an attempt to protect shareholders' fundamental rights to fully participate in a meeting which are more at risk in a virtual-only meeting format. However, on a practical basis, pursuit of such legal remedy in proving what is a "substantial injustice", contrasted with a basic disregard of the fundamental rights of an owner to express their opinion, would involve an unreasonable time and cost burden on shareholders. Accordingly, if these risks are disregarded and companies are permitted to conduct virtual-only shareholder meetings, we believe it will be difficult for shareholders to report and seek rectification of such infractions.

ISS Conclusion

ISS urges the Treasury to reconsider any provision which would allow companies to hold virtual-only shareholder meetings, given that this meeting format represents a risk of diminution of shareholder rights and increases corporate governance risks to transparency and the public accountability of directors to the shareholders who appoint them.

ISS acknowledges the benefits of participation at shareholder meetings via electronic technology, especially for those investors who are domiciled outside Australia; however, this should not be at the expense of the permanent elimination of physical shareholder attendance at meetings. We reiterate that the information available from ISS policy surveys of investors, confirms that the hybrid meeting format, which allows for concurrent physical or virtual attendance through technology, is preferred by the majority of investors to preserve maximum flexibility in exercising shareholder rights.

We thank you again for the opportunity to provide our comments to this Consultation. Please contact the undersigned in relation to any questions or if the Treasury seeks any further information regarding these comments.

Yours sincerely



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