



ICGN

International Corporate Governance Network

DRAFT

Australian Government
The Treasury
Market Conduct Division
Langton Crescent
PARKES ACT 2600
Australia

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Sent by email: businesscomms@treasury.gov.au

Re: Revised Exposure Draft, Treasury Laws Amendment (Measures for a later sitting), Bill 2021: Use of Technology for Meetings and Related Amendments, Using technology to hold meetings and sign and send documents

Dear Treasury Administrator of the Market Conduct Division,

The International Corporate Governance Network (ICGN) is pleased to respond to the Australian Treasury's Revised Exposure Draft of its Consultation Paper - *Treasury Laws Amendment (Measures for Consultation) Bill 2021: Use of technology for meetings and related amendments*. ICGN has responded to two previous requests for comment, with the most recent comment letter provided on July 16, 2021, and an earlier letter in 2020 on the issue of technology and shareholder meetings. Our responses to the Consultation Paper demonstrate the importance of this issue to our membership.

Led by investors responsible for assets under management in excess of US\$59 trillion, the ICGN is a leading authority on global standards of corporate governance and investor stewardship. Our membership is based in more than 50 countries and includes companies, advisors and other stakeholders. ICGN's mission is to promote high standards of professionalism in governance for investors and companies alike in their mutual pursuit of long-term value creation contributing to sustainable economies world-wide.

ICGN's membership base includes several prominent Australian asset owners and asset managers, and our investor members globally hold significant investment positions, both debt and equity, in Australian companies. We recognise that the beneficiaries, for whom these funds owe a fiduciary duty, may be Australian citizens who are the ultimate investors. In our response, we have endeavoured to consider how the revised exposure draft can be utilized to enhance long-term value for companies, investors and beneficiaries.

As ICGN articulated in our previous comment letter, the global pandemic caused waves of disruption in the capital markets. The normal routines of annual general meetings (AGMs), in-person proxy voting and physical attendance of board members and shareholders together had to be quickly converted to virtual formats, all in the span of a few months.

Over the course of the first year, there was understandably limited formal guidance, leading to differing global approaches. ICGN swiftly turned to its membership and drafted a Viewpoint in March 2020 to explain how different markets were handling shareholder meetings during the COVID-19 coronavirus health emergency.¹ After the first half of proxy season had concluded in 2020, with a mix of approaches to AGMs and challenges faced by investors to utilize technology, ICGN offered a second Viewpoint in September 2020, entitled, “The Future of Annual General Meetings.”² These documents were created to lay the ground rules for the use of technology by companies when conducting AGMs.

Therefore, ICGN is appreciative of the Treasury’s objective to clarify the Corporations Act with regard to the use of technology in shareholder meetings, to execute company documents, sign meetings-related documents and provide those documents to their members. There is no doubt that we live in an increasingly virtual world, brought to a heightened intensity due to COVID-19. We trust that the Treasury will be able to clarify the Corporations Act whilst maintaining the important safeguards to shareholder rights that ICGN has identified and championed.

In Section 1.1 of the Explanatory Memorandum, the Bill provides:

This Bill creates a *permanent statutory mechanism* for the electronic execution of company documents. It also allows companies and registered schemes to sign and provide meetings-related documents electronically and use technology to hold meetings, including hybrid meetings on a permanent basis. (*italics added for emphasis*)

Due to the *permanent* statutory mechanism built into the Bill, including hybrid meetings on a permanent basis, ICGN would offer the following comments for each category.

Companies may sign and provide meeting-related documents electronically:

ICGN recognises that it is not as efficient today for companies to continue mailing out copies of annual proxy statements in anticipation of AGMs, annual reports, and company disclosures to all of its investors. The former practices were costly and subject to delivery delays. However, there are concerns with an entirely electronic process which may cause difficulty for certain investors.

In the Global Governance Principles, Principle 9, Shareholder Rights, ICGN explains, “The board should ensure that shareholders have the right to vote on major decisions which may change the nature of the company in which they have invested.” The decisions include but are not limited to the appointment or removal of directors,

¹ ICGN Viewpoint, *How different markets are handling shareholder meetings during the COVID-19 coronavirus health emergency*, March 2020: <https://www.icgn.org/how-different-markets-are-handling-shareholder-meetings-during-covid-19-coronavirus-health-emergency>

² ICGN Viewpoint, *The Future of Annual General Meetings*, September 2020: <https://www.icgn.org/future-annual-general-meetings>

amendments to governing documents of the company, share repurchases, authorization of additional shares, shareholder rights plans, proposals to change voting rights, material and extraordinary transactions such as mergers and acquisitions.

To ensure that shareholders are knowledgeable about all corporate transactions to which they are entitled to vote, ICGN has recommended a range of steps that companies should take to ensure that investors are informed. In the Global Governance Principles, Principle 10.3, Meeting Notice, ICGN recommended:

The board should ensure that the meeting agenda is posted on the company's website at least one month prior to the meeting taking place. The agenda should be clear and properly itemised and include the date, format and location of the meeting as well as information regarding the issues to be decided at the meeting. The meeting announcement should be clearly communicated in a timely way to allow for all votes executed by proxy to be counted and confirmed. Companies should ensure that relevant information, including the annual report and financial statements, are made available to investors in a timely fashion to allow them to prepare for the meeting.

While ICGN has left the mechanism for notice to investors to be decided by companies, if a company is unable to fulfil its responsibility of timely notification to investors utilising a quickly constructed, virtual-only format— without the structure of a properly noticed hybrid meeting— this could have a chilling effect on shareholder rights and voting procedures.

Finally, on this point, a company's shareholders will include a wide range of investors, from institutional investors and retail investors, who invest over the long-term, to hedge funds or private equity funds, to bond holders, financial institutions and employees, who may be part of a company-wide ownership scheme. Most investors have the use of sophisticated software and hardware platforms to monitor proxy voting and participate in virtual shareholder meeting.

This is not true of all investors. Some investors may be disabled, elderly or unable to utilise technology within their home environment to review corporate announcements, proxy materials or notifications, and vote accordingly. While the number of investors in this situation may be nominal, there should be an opportunity for an investor to "opt in" to receive a copy of a company's annual proxy statement and other important company notifications requiring a vote and cast his or her ballot through non-electronic means. The Consultation makes reference to the election by a recipient receive documents in a physical or electronic form, which should include shareholders.

Technology to hold meetings, including hybrid meetings on a permanent basis:

ICGN's revised Global Governance Principles 2021 clarify our position on this matter:

AGMs and shareholder-called meetings should allow for the physical presence of participants, including provision for voting electronically by proxy,

and ensure live interaction is possible with the board and management. Hybrid formats (allowing both physical and virtual participation) which provide a meaningful opportunity for shareholders to participate in the meeting and interact with board and management should be encouraged.

When virtual-only meetings are held, the board should explain why this format is necessary; and audio-only meetings should be discouraged. The technology chosen for virtual meetings must be reliable and allow democratic access for all participants to facilitate open dialogue, allowing shareholders to voice concerns and provide feedback without undue censorship.³

It is the view of ICGN that one of the most important votes that an investor will cast on a proxy ballot is often for the people that will serve on the Board of Directors. Investors must have confidence that the nominees of the Board, who are represented on the company ballot, will honor the long-term commitment they have to investors and to supporting a company's sustainable value creation. If an investor is not part of a hybrid meeting, then the opportunity for an investor to "meet" the directors who are qualified to seek election is of utmost importance. For fund managers who serve as fiduciaries, they must be able to "make informed and independent voting decisions, applying due care, diligence, and judgement across their entire portfolio in the interests of beneficiaries or clients."⁴

ICGN understands that the use of virtual meetings or hybrid meetings has had side effects that are challenging. While more investors may be able to "attend" a virtual shareholder meeting, a virtual-only meeting can make it more difficult for investors to *participate*. ICGN recognises that many global companies were able to pivot successfully to virtual annual meetings that had to occur during the COVID-19 pandemic. Some investors did, however, have difficulty gaining access to virtual meetings, asking questions and presenting shareholder proposals. This is why the change to a *permanent* statutory mechanism must include shareholder safeguards.

ICGN's Viewpoint on the future of AGMs as noted earlier addresses the best practices for shareholder meetings in a post-COVID environment.⁵ ICGN also commends the "Report of the 2020 Multi-Stakeholder Working Group on Practices for Virtual Shareholder Meetings", issued by the Council of Institutional Investors (CII), the Society for Corporate Governance, and the Rutgers Center for Corporate Law and Governance; this report developed a guide for virtual annual meetings.⁶ The "aspiration of the 2020 Working Group is for companies, investors, and service providers to conduct VSMS in ways that replicate the in-person annual meeting experience for the shareholder as closely as possible in order to foster effective corporate governance."⁷

³ ICGN Global Governance Principles 2021, Revised, [ICGN Global Governance Principles2021_0.pdf](#)

⁴ ICGN Comment Letter to the U.S. Securities and Exchange Commission, June 2021 on Universal Proxies, ICGN Global Stewardship Principle 5.

⁵ <https://www.icgn.org/future-annual-general-meetings>

⁶ https://cclg.rutgers.edu/wp-content/uploads/VSM-Working-Group-Report-12_10_2020.pdf

⁷ Ibid, page 4.

These lessons from the 2020 virtual AGMs must be addressed to give investors the confidence they deserve to cast their ballots and know that the votes were counted accurately. The revision to the Consultation which ensures that shareholders should have a “reasonable” opportunity to participate in AGMs is important with a caveat. ICGN believes that shareholders should be able to orally state their questions and receive responses, understanding that if there are many shareholders that wish to speak, a company may need to set a “reasonable” time parameter. For a shareholder seeking to offer a resolution or shareholder proposal, he or she should be given clear instructions how to present the proposal and address any technological glitches that could impact its formal introduction. A shareholder’s voice is important for a company to hear; it is *reasonable* to give shareholders the time on the agenda that they need to present proposals and ask questions.

One significant development that should be noted before the permanent mechanism is adopted, is the rise of stewardship for investors. ICGN issued its Global Stewardship Principles in 2016 and updated them in 2020. In the Preamble, ICGN said:

The ICGN Global Stewardship Principles (Principles) set out ICGN’s view of current best practices in relation to investor stewardship obligations, policies, and processes. These Principles provide a framework to implement stewardship practices in fulfilling an investor’s fiduciary obligations to beneficiaries or clients.

...

At an individual company level investor stewardship helps to promote high standards of corporate governance which contributes to sustainable value creation, thereby increasing the long-term risk adjusted rate of return to investors and their beneficiaries or clients. At an investor level, stewardship is about preserving and enhancing long-term value as part of a responsible investment approach. This includes the consideration of wider ethical, environmental, and social factors and the consideration of relevant systemic risks as core components of fiduciary duty.

In a broader context, stewardship enhances overall financial market stability and economic growth, and, by focusing on long-term value creation, stewardship is directly linked to sustainable benefits for the economy, environment, and society.⁸ Good stewardship practices inherently require that investors review the companies in their investment portfolios to preserve long-term value creation. Investors recognize the role that the Board of Directors plays in the long-term success of the company, its commitment to stability and sustainability in the long term. To this end, investors must be able to vote on company transactions, the election of boards of directors and related changes that could impact the investors’ ownership. Technology should serve to assist in the execution of these stewardship activities for the ultimate beneficiaries.

ICGN regards shareholder meetings as a critical forum in the corporate governance process to provide accountability for the board and executive management to a company’s shareholders. Boards should ensure that meetings are efficiently, democratically and securely facilitated to enable constructive interactivity between

⁸ [ICGN Global Stewardship Principles 2020_0.pdf](#), p. 4.

shareholders and the board. This underscores the board's accountability to shareholders for the company's strategy, performance, and sustainable value creation.

ICGN appreciates that there are wide ranging benefits for the use of technology, especially hybrid meetings. Any permanent mechanism adopted for the use of technology in meetings, to execute documents and send meeting-related materials by companies must be balanced with the rights of shareholders. Corporate decisions, particularly involving mergers and acquisitions, are conducted within a limited window of time and shareholders must be able to vote effectively. These types of transactions are not easily unwound; shareholder rights can be compromised if companies do not adopt a robust policy on the use of technology or provide investors with an effective way to cast their votes.

The Consultation references the ability of companies to use virtual meeting technology only, if this is required or permitted by the company's constitution expressly, or due to extraordinary circumstances. For the reasons stated in this letter, ICGN generally prefers that companies offer a hybrid format for meetings and would discourage virtual-only meetings becoming a permanent norm or law.

Finally, voting technology becomes even more important in a virtual or hybrid meeting environment. Shareholders may not be in the room to see the actual vote tabulations. The proxy voting plumbing, that carries votes from individual investors to the company's proxy voting tabulators, must provide the guarantee that votes are registered in a timely way for any of the corporate actions before investors. We would also like to add that a show of hands approach to voting at meetings should be discouraged, as it is not an appropriate way to take individual votes into consideration.⁹

We hope these comments are helpful with regard to your deliberations on these matters. Thank you for the opportunity to comment again on the revisions. Please contact ICGN Policy Director George Dallas if you would like to discuss this in further detail: george.dallas@icgn.org

Yours sincerely,



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Chief Executive Officer

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⁹ Global Governance Principles, Revised 2021, 10.4 Voting Procedures