Law Council
OF AUSTRALIA

Business Law Section

19 July 2024

Meetings and Documents Review
c/- Better Business Communications Unit
Market Conduct and Digital Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: meetingsanddocumentsreview@treasury.gov.au

Dear Panel

Statutory Review of the Meetings and Documents Amendments

1. This is a submission to the Meetings and Documents Review by the Corporations Committee of the Business Law Section of the Law Council of Australia (the **Committee**) with input from the Financial Services Committee of the Business Law Section.

2. At the outset, the Committee wishes to record its view that the measures contained in Schedule 1 of the *Treasury Laws (2021 Measures No.1) Act 2021* (Cth) and the *Corporations Amendment (Meetings and Documents) Act 2022* (Cth) have been overwhelmingly beneficial. However, as our submission will note below, there is a question as to whether the measures went far enough to facilitate online meetings for Australian companies and registered managed investment schemes.

3. Attached to this submission is a schedule setting out specific responses to the consultation questions posed by the Panel. Set out immediately below are comments on two specific issues raised during the Roundtable Meeting held by the Panel in Sydney on 1 July 2024.

Constitutional authorisation and the wholly virtual meeting

4. The Committee submits that the key threshold requirement for companies (and registered managed investment schemes) to hold fully online or wholly virtual meetings should be reconsidered. The need and policy basis for a constitutional authorisation for a wholly virtual meeting has never been, to our knowledge, clearly articulated. The creation of an impediment to wholly virtual meetings appears to presuppose that wholly virtual meetings are in some way more prone to abuse than hybrid or physical meetings, but the basis for such a supposition has never been clearly articulated.

5. If there was evidence of abuse of wholly virtual meetings (of which we are unaware), then, in our submission, the appropriate policy and legislative response would be to implement measures directed towards such abuses, rather than deny many companies the opportunity to use technology to facilitate the basic

Telephone +61 2 6246 3737 • ***Email*** [redacted]
PO Box 5350, Braddon ACT 2612 • Level 1, MODE3, 24 Lonsdale St, Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.au

mechanisms of corporate governance.[*]

6. It must be kept in mind that the need for a constitutional authorisation under the current provisions applies to all companies (and registered schemes), large and small, listed and unlisted. Even if there were concerns about a particular sector or type of entity, it would be an overreach to apply a restrictive rule to all entities, out of a concern that related, say, to only one sector or part of a sector. That said, we are not advocating for different rules for different companies, but rather for a uniform coherent evidence based policy that facilitates useful technological innovations.

7. In this regard, the additional cost of "hybrid" (physical plus online) meetings, and the need to implement arrangements for verbal questions and statements to be made, is a significant disincentive to holding a hybrid meeting – and in the overwhelming majority of cases such facilities are not actually utilised by members. It may be the reason that some companies are holding physical only meetings, that are also webcast, rather than a hybrid meeting as such.

8. The Committee also notes that it is overwhelmingly the case that decision making does not take place, as a matter of substance, at corporate and scheme meetings, in contrast to resolutions being decided by way of votes that are submitted prior to the meeting, such as proxies and direct votes (where applicable). While a company meeting (particularly an AGM) may be an important mechanism to achieve accountability of directors, the lack of substantive decision making at meetings, coupled with vastly increased information resources through continuous disclosure (for disclosing entities at least) must be taken into account when deciding where the balance should lie in relation facilitating online meetings. In other words, creating an effective and efficient forum for the conduct of the business of corporate and scheme meetings should be the main objective of policy.

9. In our submission, the essential question is whether a wholly virtual meeting can adequately satisfy the purposes for which a members' meeting is held – if the answer to this question is yes (which it is, in our submission), then wholly virtual meetings should be facilitated by the legislation, without the need for each entity to have an express constitutional authorisation.

Disruptions to meetings

10. During the Roundtable Meeting held by the Panel in Sydney on 1 July 2024, Dr Austin raised a question as to whether specific legislative provisions are needed to address a technological disruption to an online meeting, that is interfered with to the extent that the meeting is unable to effectively continue.

11. In our submission, while a specific legislative provision to deal with this situation may be desirable, the members contributing to the submission are not aware of any significant examples of such disruption having occurred. Moreover, in our submission the chair of a meeting with an online element would have inherent powers to adjourn the meeting if it was disrupted, to another time or date to properly facilitate member participation, provided of course that they were acting reasonably. Further, we submit that section 1322 of the *Corporations Act 2001*

[*]In this regard, it is not clear what concerns might exist about wholly virtual meetings that would not equally apply to the online component of a hybrid meeting.

(Cth) could also likely be called in aid in such a situation. We note subsection 1322(3A) could be relevant, as might an application under subsection 1322(4) to validate proceedings in the exceptional circumstances involved. In relation to inherent powers of the chair, we note the somewhat analogous case *of Byng v London Life Association Ltd* [1990] Ch 170.

12. Any specific legislative provision to address technological disruptions should not be overly prescriptive or constraint the flexibility of a chair's inherent powers at general law.

Conclusion and further contact

13. The Committee would be pleased to discuss any aspect of this submission.

14. Please contact the BLS Executive Member John Keeves on [redacted] if you would like to do so.

Yours faithfully

[redacted]

Pamela Hanrahan
Chair
Business Law Section

Schedule

Responses to Consultation Questions

Consultation questions	Committee Response
1. How has the experience of running company or registered scheme members' meetings changed since the amendments? What have been the effects of the amendments on the costs of holding AGMs or other meetings?	Our members have had a variety of experiences. Smaller companies, including not-for-profit companies, have been able to utilise "off the shelf" platforms to facilitate company meetings, in many cases increasing member participation in meetings as a result. In larger listed companies, the effective need to hold a hybrid meeting (because a constitutional authorisation was not available for a wholly virtual meeting) has resulted in increased costs and complexity. Such companies must incur the costs of both a physical meeting and an online meeting, and the combination of the two is more complex and costly. The time and resources involved in preparing for meetings has increased as a result.
2. How have the amendments affected members' participation in meetings and has this affected the exercise of shareholder rights or corporate governance?	In our members' experience, this depends on the type of company. As noted above in some smaller and not-for-profit companies, the amendment may have increased attendance, but for other companies a cause and effect relationship between the amendments and attendance levels is hard to establish. Overall attendance levels are thought to be declining slightly, but there is no way of knowing what the counterfactual position (that is, no amendments) would have been.
3. If improvements are needed to better facilitate members' participation and corporate governance, what improvements could be made to the conduct of online or hybrid meetings?	From an efficiency viewpoint at least, it is not clear that the additional cost and complexity of having to facilitate spoken questions and statements is warranted. Members can submit questions and statements in writing to a virtual or hybrid meeting and have those questions dealt with in such a way that the members, as a whole, are given a reasonable opportunity to participate in the meeting in this regard, without the need for spoken questions or statements. In the overwhelming number of cases, where companies have put in place arrangements for spoken questions or statements to be made, that

Consultation questions	Committee Response
	facility has not been utilised, so the considerable costs of such a facility have been wasted.
4. Is the use of wholly online meetings an objective of companies and registered schemes? Why or why not? If it is the objective, what is impeding the greater use of wholly online meetings by companies and registered schemes?	In our submission, many companies (and likely also registered schemes) would use wholly online meetings if that option was available to them. In many cases such meetings are not available due to a lack of constitutional authorisation. In turn, some proxy advisers have advised members against approving amendments to facilitate wholly online meetings and many listed entities are unlikely to wish to "run the gauntlet" of such opposition. As noted in the body of this submission, the Committee believes that the need for a constitutional authorisation should be reconsidered and that the legislation should facilitate wholly online meetings, and at least give companies the ready option to use a wholly online meeting where appropriate. It should be noted that in the case of companies, the directors, and in the case of managed investment schemes, the responsible entity, are already subject to duties of diligence and good faith which apply to decisions about the format of meetings, so it should not be assumed that decisions about meeting formats would readily be taken to disadvantage members, if choice was available. The Committee also suggests that the Panel should encourage ASIC to give clear guidance about when ASIC would exercise its emergency powers under section 253TA to allow virtual meetings without constitutional authorisation, and other expectations it may have about the conduct of virtual meetings given the practice that has developed in the market since the introduction of the amendments to the Corporations Act.
5. Have you experienced technological issues when running or attending a meeting with an online component? If yes, what were they, were they addressed, and how did this occur?	Our members are not aware of any significant technological disruptions.
6. Have you observed any significant differences in governance, shareholder	Our members have observed an increase in the number of questions when online meetings are

Consultation questions	Committee Response
participation, meeting conduct or quality between companies that have listed after the 2022 amendments and those that listed prior to the amendments?	held with written question facilities. In some cases, there have been examples of offensive questions or statements that would not have been experienced in a physical meeting, which is consistent with more general experience with other behaviours in the digital realm.
7. How have the mandatory poll voting requirements affected the conduct of meetings and determining the opinion of members?	No. As a general rule, most entities subject to the mandatory poll requirements in section 250JA or section 253J(1A) already had such a practice for substantive resolutions reflecting the ASX Corporate Governance Council Principles and Recommendations (Recommendation 6.4) and the statement in ASX Guidance Note 35 (at page 10) to the effect that a poll is required for all resolutions under the ASX Listing Rules.
8. Have there been any issues with submitting or complying with requests for independent reports on polls?	No.
9. Are there lessons that Australia could take from other jurisdictions' experiences with online or hybrid members' meetings?	As a general rule, Australia's regime is more prescriptive than overseas jurisdictions. Most US States (including importantly Delaware) allow fully virtual meetings and it is a matter for the company to determine how a meeting is held, having regard to the views of stakeholders such as shareholders and proxy advisers.
10. How have the amendments affected the effective operation of directors' meetings?	In our submission, the amendments have had no practical effect on the conduct of directors meetings. A settled practice has developed of holding directors meetings by various technological means.
11. What, if any, issues have been experienced with the giving and sending or receipt of electronic meeting-related documents? How could these be addressed?	Our members are not aware of issues of note. However, there have been many experiences of delays in delivery of documents sent by post, which compromises the effectiveness of paper communications as a method of informing members. Indeed, such delays underscore the importance and utility of the amendments in having electronic communications specified as the default method.

Consultation questions	Committee Response
12. What, if any, issues have there been with the process for making elections or with entities following the elections of members regarding meeting-related documents? If yes, how could this be improved?	Our members are not aware of issues of note.
13. What, if any, issues have been experienced with the electronic signing of documents? If yes, how could these be improved?	Our members are not aware of issues of note. There could be merit in having legislative provisions that provide for mechanisms for execution of documents (especially deeds) by foreign trading or financial corporations for the purposes of transaction that are subject to Australian law. This is, perhaps, outside the scope of the current review.