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Dear Sir,

Technological solutions enabling Australian businesses to survive and operate during the COVID 19 crisis period and beyond

Who we are

Governance Institute of Australia (Governance Institute) is the only independent professional association with a sole focus on whole-of-organisation governance. Our education, support and networking opportunities for directors, company secretaries, governance professionals and risk managers are unrivalled.

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. Our active membership base of more than 7,500 chartered secretaries, governance advisers and risk managers ensures that Governance Institute is at the cutting edge of knowledge of issues and support of sound practice in the continuous evolution of governance and risk management. We regularly contribute to the formation of public policy through our interactions with Treasury (Markets Group), ASIC, APRA, ACCC, ASX, ACNC and the ATO.

Bringing the Corporations Act into the 21st century

Thank you for the invitation to provide a submission outlining our views on the recent Government reforms of the Corporations Act resulting from the *Corporations (Coronavirus Economic Response) Determination (No 1) 2020* (the Determination) as well as further initiatives we consider should be implemented to assist Australia's recovery.

COVID – 19 has exposed many of the shortcomings of the current legislative environment, particularly the out-dated, paper-based state of the Corporations Act. If Australia's corporate markets are to be fit for purpose in the 21st century, the legislation governing corporations and the management of corporations needs to embrace technology. Governance Institute has consistently advocated the need to bring the Corporations Act into the 21st century and to ensure it is technology neutral.

In November 2019, Governance Institute provided a submission to the Treasury's Deregulation Taskforce asking that measures facilitating electronic or digital disclosure of information to shareholders be included as part of the taskforce's work to reduce the regulatory burden on Australian companies. The link to that submission is here -

https://www.governanceinstitute.com.au/media/884427/final_submission_deregulation.pdf

The Treasurer's recent Determination assists companies address some of the challenges created by COVID-19 impacting shareholder meetings and electronic execution of documents by modifying the relevant provisions of the Corporations Act to enable the use of technology. These changes represent important, pragmatic and sensible reforms in response to the challenges facing companies meeting their regulatory requirements during the COVID-19 pandemic. However, they are only temporary and are due to expire on 6 November 2020. We consider that these changes should form the basis for more permanent reforms that apply after the pandemic restrictions are lifted as they address longstanding issues that impact on the ability of companies to operate effectively and efficiently having regard to the wide use of technology across the business and private sectors.

The pandemic has acted as a 'step change' and we consider Government should make the most of this valuable reform opportunity to ensure Australia's corporate regulatory infrastructure is certain, coherent and fit-for-purpose.

As a first step, Governance Institute recommends that the Government amend the Corporations Act to bring about the following important reforms:

- provide companies with the option to use technology to hold virtual or hybrid meetings
- allow companies to digitally engage with their shareholders by providing that shareholders who fail to opt in to receive their notices of meeting by either mail or email are deemed to receive them if the company makes them universally available on their website
- enable companies to execute documents electronically.

We provide more detail on the following pages.

Yours sincerely,



Megan Motto
CEO

Attachment

Bringing the Corporations Act into the 21st Century

The Corporations Act was developed prior to the shift to a digital world. Currently, many aspects of the Corporations Act are mired in an assumption that the world operates in hard copy, as it did in the 19th century. While a few provisions have been updated over the years, other provisions still do not contemplate the use of technology.

If Australia's corporate markets are to be fit for purpose in the 21st century, the legislation governing corporations and the management of corporations needs to embrace a non-paper world.

Government should aim to enable transactions and business to be carried out digitally end-to-end: regulation should not make it more difficult and expensive to conduct business through purely digital channels.

However, given the speed of technological change and the uptake of technology accelerated by the impact of the pandemic, it is important that any amendments to the Corporations Act be technology-neutral. That is, they need to provide for the use of technology without specifying any particular technology. This allows for innovation as technology evolves.

Governance Institute has long advocated for Government to update the Corporations Act to make it technology-neutral and shift it from its basis in a 'hard copy' 19th century world to a 21st century one.

The impact of the COVID-19 pandemic

The COVID-19 pandemic highlighted many shortcomings of the Corporations Act.

Hybrid and virtual meetings

Social distancing, travel and meeting restrictions impacted the ability of companies to hold shareholder meetings. The 2 person meeting restriction made it impossible to hold a meeting where shareholders were physically present in the same venue.

Companies were forced to consider whether they could use technology to comply with COVID-19 restrictions to hold either:

- a 'hybrid' AGM (where there is a physical location and online facilities) or
- a 'virtual' AGM that is conducted solely online.

However, the ability of companies to use technology to overcome the pandemic restrictions were limited by the Corporations Act and the provisions of their constitutions. Many companies were unwilling to hold a hybrid AGM due to legal uncertainty as to whether their constitutions allowed them to do so. There was doubt as to whether the Corporations Act permitted virtual AGMs and there was also doubt as to the validity of resolutions passed at a virtual AGM.

This uncertainty was highlighted by ASIC in its 'no action' position issued on 20 March 2020, when it stated that while it considered that hybrid AGMs were permitted under the Corporations Act, it did not have the power to modify the Corporations Act to facilitate hybrid AGMs where they were not permitted under a company's constitution. It also confirmed that there was doubt over whether the Corporations Act permitted companies to hold meetings virtually.

ASIC however encouraged companies to hold their AGMs using technology and stated that while the no-action position remained in place, it would not take proceedings against a company

for holding an online AGM even though it did not comply with the technicalities of the Corporations Act.

While ASIC's 'no action' position was welcomed by companies, it was unable to address issues arising from shareholders expressing concern that the format of the AGM did not meet Corporations Act requirements or requirements of the company's constitution.

Further regulatory intervention by Government was therefore required to amend the Corporations Act to ensure that companies could hold meetings using virtual technology.

However, the Treasurer's Determination is only a temporary work-around and expires on 6 November 2020. Governance Institute has been advocating for Treasury to extend the Determination to the end of 2020 to provide certainty to companies that are required to hold meetings during this time. Over 900 listed public companies held their AGMs after 5 November 2019 and would be expected in the ordinary course to hold their AGMs at that time this year.

Some listed companies holding their AGMs in late May have relied on the Determination to hold online AGMs with shareholders participating online. The feedback we have received from members who have conducted their AGMs online has been positive and it appears that practices concerning virtual AGMs have developed over the May mini-AGM season.

A recent poll conducted by the Australasian Investor Relations Association on 22 May 2020 of approximately 100 ASX listed companies with a March, June or September year end found that when asked about what format they were proposing for their 2020 AGM:

0% were proposing to hold a physical AGM
22% were proposing to hold a hybrid AGM
35% were proposing to hold a virtual AGM
43% were undecided.

The poll demonstrates the increased appetite of companies to use technology to facilitate their AGMs as well as the uncertainty that exists over the ability to use technology once the Determination expires.

We consider that amending the Corporations Act to 'hard wire' the option of companies to be able to hold virtual or hybrid meetings is a timely and long-overdue reform. It will clarify the law and provide certainty for companies wanting to use technology to hold a meeting.

We do not recommend that the amendment *require* companies to hold a virtual or hybrid meeting. Some companies may still prefer to hold a physical meeting of shareholders. However, the option should be available to those companies that want shareholders to be able to attend meetings virtually to be able to do so without concerns about the validity of the meeting and the resolutions passed.

Governance Institute therefore **recommends** that the Government amend the Corporations Act to allow companies the option to use technology to hold virtual or hybrid shareholder meetings.

Communicating digitally with shareholders

Companies required to hold an AGM impacted by the COVID-19 restrictions have had to communicate changes to their meeting arrangements to their shareholders at short notice. Companies had to quickly change their AGM arrangements to enable shareholders to use technology to 'attend' meetings – in some cases after their notices of meeting had been issued – to respond to the increased level of restrictions.

Currently, shareholders must notify companies if they wish to receive their notices of meeting and meeting materials by email. If they fail to make that notification, companies are required to send the notices of meeting by post. Despite many campaigns over a number of years, listed companies only hold email addresses for about 50% of their shareholders. Each year these companies spend hundreds of thousands of dollars printing and posting meeting packs to their shareholders. Much of this material ends up in landfill.

Companies are also required to send a notice of meeting to a shareholder for 6 years when their address is noted as 'lost' or incorrect. For companies with large shareholder registers this can add significant cost in printing and posting up to 20,000 plus documents to addresses which are known to be incorrect. From a brand perspective, current residents automatically assume incompetence by the company as they have previously alerted the sender that the recipient no longer resides at the registered address. This erodes public trust in corporate institutions. It is also highlights the inefficiency of this method of communication.

Below is a typical returned mail document from these mailings. This example is one of the more polite versions returned.



This method of hard copy communication by post is not suitable to a fast-paced and fluid environment when companies need to be able to communicate with their shareholders in real time.¹

The shortcomings of using the post as a method of communicating with shareholders has been compounded by Australia Post's new delivery schedule introduced in response to the dramatic

¹ This method of communication is in contrast to the continuous disclosure regime that ensures investors in ASX listed companies receive timely disclosure of information by way of the ASX Market Announcements Platform.

increase in parcel post during the COVID-19 pandemic. Letters in metropolitan areas are only delivered every second day and the public has been told to allow five days for intrastate posting. A standard letter service now takes an extra 1-2 business days in most cases to reach its addressee.

In recognising the shortcomings of the Corporations Act notice requirements, ASIC stated that it would not take action on any contravention of the Corporations Act if a company had dispatched a notice for a meeting to be held on or before 31 May 2020 and, at least two business days before the meeting was held, it sent shareholders supplementary instructions for on-line participation by:

- electronic message (if the shareholder has provided the relevant details);
- a notice on the entity's website; and
- a market announcement if the entity is listed on a market.

The Treasurer's Determination allows companies to send notices of meeting using one or more technologies. Importantly, where a company does not hold an email address for a shareholder, the Determination allows a company to satisfy its notice requirements by sending a letter or postcard setting out where a shareholder can view the notice of meeting information online and download it.

This is a welcome change to the Corporations Act notice of meeting requirements and is a useful interim measure to facilitate more effective communication between companies and their shareholders. However, as with virtual and hybrid meetings, this is a temporary reform that expires on 6 November 2020. It also relies on companies holding email addresses for their shareholders.

Governance Institute has been advocating for a change to the Corporations Act to enable companies to communicate digitally with their shareholders for some time. We have proposed amending the Corporations Act to provide that shareholders who fail to opt in to receive their notices of meeting by either mail or electronically are deemed to receive them if the company makes them universally available on their website and issues a market announcement (if the company is listed).

We still support the rights of shareholders to 'opt in' to receive hard copy meeting materials. However, companies are 'hitting a wall' when it comes to collecting email addresses from shareholders and regulatory change is required in order to move to the next step.

Shareholders already access the annual report digitally. In 2007, the Corporations Act was changed to enable shareholders who do not elect to receive a hard copy of the annual report to access it on a website. More than 90 per cent of shareholders no longer receive a hard copy annual report in the mail. This has led to major cost savings and a reduction in paper waste.

The current requirements for distributing company meeting notices are technology-specific and have the effect of restricting digital services. They do not reflect the changes in the way Australians engage with digital communications technologies and content.

It is important that Australia's corporate regulatory regime remains competitive internationally, up-to-date and streamlined, to minimise compliance costs and facilitate shareholder engagement. We are of the view that companies and their shareholders will embrace the proposal to move to technology-neutral delivery of meeting materials as pragmatic, sensible and long overdue.

Governance Institute recommends that sections 249J (3) and (3A) of the Corporations Act be amended to enable a company to distribute meeting notices and materials to its members:

- using a universal or near-universal channel of communication nominated by the shareholder,
- while allowing a shareholder to opt in to receive them in hard copy.

A company would be required to ensure the meeting materials are:

- available in the public domain
- accessible
- using a universal or near-universal channel of communication.

We **recommend** that the legislation would deem those shareholders who, neither provide a preferred method of communication (for example, email address), nor opt to receive hard copy meeting materials to have received the materials, subject to the company making the meeting materials:

- available in the public domain
- accessible
- using a universal or near-universal channel of communication, and
- issuing an ASX announcement (if listed).

The explanatory memorandum to the legislation could clarify that making the meeting materials available on the company's website meets the current definition of a near-universal channel of communication.

Electronic execution of documents

Executing documents when people are working remotely is one of the many challenges thrown up by COVID-19. People working remotely are not available to apply a 'wet ink' signature. There are also issues with people not being able to print, execute, scan and return documents from home.

There has also been uncertainty about the legality of companies executing documents electronically under the Corporations Act.

The Treasurer's Determination enabling the companies to execute documents electronically is a welcome and long overdue development. It provides certainty that where company officers sign a document electronically (including an electronic document), the document has been validly executed under the Corporations Act.

Again, this modification of the Corporations Act will expire on 6 November 2020 and companies will be forced to revert to applying 'wet ink' signatures to documents.

Governance Institute recommends that the Government amend the Corporations Act to enable companies to execute documents electronically.