Governance Institute of Australia

T +61 2 9223 5744 **F** +61 2 9232 7174
E info@governanceinstitute.com.au
Level 10, 5 Hunter Street, Sydney NSW 2000
GPO Box 1594, Sydney NSW 2001
W governanceinstitute.com.au

28 May 2021

Committee Secretary
Senate Economics References Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600
AUSTRALIA
By email: economics.sen@aph.gov.au

Dear Sir,

Treasury Laws Amendment (2021 Measures No.1) Bill 2021 (Bill)

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

- Governance Institute has long advocated for the modernisation of the Corporations Act to make it more technology neutral. Our members welcome the move to facilitating meetings using technology and electronic execution of documents and communication with shareholders and members.
- Our members consider the final regulatory outcome should be that there is certainty around electronic execution of documents – a measure that is entirely uncontroversial; for there to be maximum flexibility for regulated entities to hold meetings using technology in the manner best suited to the organisation and their shareholders or members; and for shareholders and members to be able to receive digital shareholder or member communications with maximum efficiency and minimal inconvenience, waste and cost. The amendments proposed by the Bill are intended to be in force until September 2021 and to be replaced by permanent amendments to the Corporations Act. Our members are concerned that September 2021 is approaching rapidly and there is still uncertainty about these important issues.
- Companies want to be in a position to offer meeting options that focus on the health and safety and convenience of all attendees, especially shareholders and members. It is clear that the turbulent effects of COVID are going to continue for some time yet and they should be able to plan for certainty and safety. The current state of the law, which has returned to its pre-COVID state does not assist them to do so.

- At this stage our members' foremost concern is ensuring any amendments to the Corporations Act, temporary or permanent, are appropriately consulted on, and meet the needs of shareholders, members and regulated entities in all sectors.
- Our members' previously articulated concerns with particular provisions of Schedule 1 of the Bill, as currently drafted, remain.[1] They believe these should be addressed before the draft legislation becomes law. While the measures of *this* Bill are temporary, they may be repeated in any subsequent legislation that permanently modifies the Corporations Act for years or decades to come. Our members do not wish to see provisions that are impractical, not fit for purpose or that impose a regulatory burden become permanent features of the Corporations Act.
- Our members support Schedule 2 of the Bill relating to continuous disclosure. They consider the proposed changes will ensure a more appropriate balance between protecting the interests of shareholders and the integrity of the markets, while reducing the likelihood of class actions that do not seek to promote higher standards of market disclosure. They consider the proposed changes would bring Australia more in line with other global capital market practices. They do not consider the proposed amendments materially change the nature of disclosure obligations, specifically what needs to be disclosed and by when. They rather require that knowledge, recklessness or negligence need to be proven to establish liability against a company or its officers in civil penalty proceedings.

General comments

Impacts of legislative delay

The temporary modifications to the Corporations Act expired on 21 March 2021. It is unfortunate that the Bill did not pass in the March sittings of Parliament as anticipated as it would have extended temporary regulatory relief for Corporations Act regulated entities.

In the absence of further regulatory relief, the Corporations Act has reverted to its pre-COVID form. Several outdated and no longer fit-for-purpose provisions impacting on the holding of AGMs using technology, the execution of documents and the sending of notices of meeting are now the law. ASIC's no-action position issued on 29 March 2021, while welcome, is not sufficient to avoid the resulting negative impacts.

The unexpected delay to the Bill has created uncertainty and increased costs and regulatory burden for listed, private and not-for-profit organisations. Governance Institute has received numerous requests from members for updates on the progress of the legislation and details of the current position. Some entities with December 31 and 31 March balance dates were particularly impacted, having planned their AGMs based on the passage of the Bill they were forced to make alternative arrangements at extremely short notice. Companies want to be in a position to offer meeting options that focus on the health and safety of all attendees, especially shareholders. It is clear that the effects of COVID are going to continue for some time yet and they should be able to plan for certainty and safety. The current state of the law, which has returned to its pre-COVID state does not assist them to do so. The amendments proposed by the Bill are intended to be in force until September 2021 and to be replaced by permanent amendments. Our members are concerned that September 2021 is approaching rapidly and there is still uncertainty about these important issues.

A key concern for our members is that ASIC's no-action position 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.[2] Due to this risk,

---

[1] See Governance Institute's submission to the Senate Economic Legislation Committee *Treasury Laws Amendment (2021 Measures No.1) Bill 2021.*

[2] 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.

some entities with meetings due in the AGM mini-season March-May 2021 are unlikely to rely on ASIC's no-action position to hold virtual-only meetings.

This uncertainty also extends to hybrid AGMs. While ASIC considers that hybrid meetings are permitted by the current drafting of Corporations Act, not all agree with this view and the Bill if passed would clarify, under non-replaceable rules with mandatory effect, that virtual-only and hybrid meetings are expressly permitted. In addition, not all company constitutions permit hybrid meetings, and in any event a shareholder or member meeting is required to amend the constitution.[3]

A further concern is that most Australian companies have 30 June balance dates. These entities hold their annual general meetings in the main AGM season in October-November 2021 when pandemic risk may still be present. ASIC's no-action position is currently scheduled to end on 31 October 2021 at the latest - prior to many 2021 AGMs. This Senate Committee is not expected to report until 30 June 2021 and debate on the Bill has been adjourned until August 2021. If the Bill does not pass until the August sitting period, a significant number of Corporations Act regulated entities of all sizes, in all sectors will be impacted. Sections 249H and 249HA require notices of meeting to be issued with at least 21 days' notice and 28 days for listed companies. Entities with 30 June balance dates located in jurisdictions where there is heightened pandemic risk will be faced with 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 and hope there will be continued regulatory relief? This timing will again make it difficult for entities to plan ahead.

There is also once again uncertainty about the legality of company officers executing documents electronically. ASIC's no-action position does not extend to electronic document execution. Our members' report the temporary relief which expired on 21 March 2021 expressly allowing electronic execution and split execution (where company officers wet-ink sign different copies of the same document) was extremely helpful during the pandemic. It also represented a significant move to a modern digitally enabled workplace. With the Determination's expiry, it is safe to assume there are once again differing views about whether electronic and split execution satisfies the requirements of section 127 of the Corporations Act. Permanent reform in this area is uncontroversial and long overdue.

Amending Schedule 1

Parliament has a unique opportunity to permanently modernise the Corporations Act for the digital age. This reform opportunity should not be missed or rushed. Our members are conscious of the negative impacts of the legislative delay, described in detail above, and we acknowledge there is potential for further delay if any amendments are moved in either house of Parliament. But is our view that time should be taken to consult widely on, and to amend Schedule 1 to ensure that any amendments to the Corporations Act, temporary or permanent, are appropriate and fit-for-purpose for stakeholders in all sectors.

While the Bill under consideration by the Committee is intended to be temporary, the potential negative impacts of some of its provisions are significant enough to need amending, even if they cease to have effect in September 2021. These impacts are described in more detail below. Our members do not want to see shareholders, members and industry stakeholders subjected to poor digital experiences even in the short term.

A further concern is that the potential defects of Schedule 1 to this Bill may be replicated in any subsequent legislation that permanently modifies the Corporations Act. Explanatory Memorandum paragraph 1.6 says "the Government proposes permanent reforms that will continue to allow companies to electronically sign company documents and send meeting related materials electronically. This will be in place when the temporary extension sunsets". In our members' experience amendments to the Corporations Act remain for many years. They

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

therefore do not wish to see provisions that are impractical, not fit for purpose or that impose onerous regulatory burdens to become permanent features of the Corporations Act.

Governance Institute recommends that Schedule 1 of the Bill be amended in line with our members' concerns so that the final form of the legislation is appropriate and fit for purpose and are carried through as permanent changes to the Corporations Act.

Wholly virtual AGMs

Of particular concern to our members is Explanatory Memorandum paragraph 1.97 that implies the Government intends to propose legislation to allow hybrid AGMs only. This would be a significant missed reform opportunity.

Virtual AGMs should be an option if they suit the individual needs and unique circumstances of an entity and its shareholders or members. On the whole, good virtual-only AGM practice was observed across most sectors in the 2020 AGM season. 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.[4] Improvements in technology will also further enhance shareholders' experience.

Allowing only one format of meeting using technology – hybrid AGMs – goes against modernising the Corporations Act. 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 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.

Governance Institute recommends that any permanent reforms to the Corporations Act allow maximum flexibility for regulated entities to hold AGMs using technology in the manner best suited to the organisation and its shareholders or members.

Comments on Schedule 1

Section 253Q (2)

To avoid doubt:

(a) a reasonable opportunity to participate includes a reasonable opportunity to exercise a right to speak; and

(b) a person may elect to exercise a right to speak (including a right to ask questions) orally rather than in writing.

This new section of the Bill has not been subject to prior consultation and while our members note the intention is to amplify the meaning of 'a reasonable opportunity to participate' in virtual meetings, they consider there are some practical difficulties with the inclusion of this untested provision.

The new section may deter some companies from taking advantage of technology to increase their engagement with shareholders and other stakeholders and return to traditional physical

[4] 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.

meetings, if health restrictions allow. Given the advances during 2020 and the increased levels of stakeholder engagement observed during the 2020 AGM season, this is a retrograde step. In its AGM Snapshot 2021 Link Group observed that …'The statistics indicate an increase in engagement and the ability to participate in meetings irrespective of the attendee's location'.[5]

Our members also consider that while there was media commentary about 'cherry picking' of questions at virtual meetings during the 2020 AGM season, their experience was that companies were aware of ASIC's clearly stated expectations around member participation during virtual and hybrid meetings.[6] At a recent Governance Institute Chatham House Roundtable which included representatives of most interested parties, a participant observed that they had seen the 'back end' of more than 500 meetings and had not observed companies selectively answering questions. The main reason they noted that questions were not put to a meeting was that they had been previously answered. The evidence indicates that despite concerns about shareholders not being able to ask questions at 2020 AGMs 'the number of clients offering questions increased in all indices'.[7] In the past companies typically included a form for submitting questions in advance of the meeting in the annual general meeting pack. In 2020 a number of companies included a 'button' to enable shareholders to submit questions online in advance of the meeting on the online voting page. The types of questions were varied … 'future direction and strategy …sustainability and the environment were a big focus at the actual meetings but not prominent in pre-meeting questions.[8]

During the 2020 AGM season a range of solutions was used to enable attendees to 'speak' at meetings. Smaller companies, charities and not-for-profits used video meeting platforms such as Zoom, Microsoft Teams and Webex to hold all types of company meetings. Depending on the size of the meeting these platforms provided a reasonable opportunity 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 used these platforms for board and management meetings, they were not used for larger listed company 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 the 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:

- 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.
- 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 could involve 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

[5] See AGM Snapshot 2021, Link Group, February 2021 at page 6.
[6] See Guidelines for investor meetings using virtual technology, ASIC, May 2020 re-released 29 March 2021.
[7] Op cit.
[8] See Link Group *AGM Snapshot 2021* at page 15.

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.

At our 2020 AGM we recorded 842 attendees online, which included 36 key management personnel, visitors and shareholders and seven shareholders on the phone. For comparison purposes, we recorded 639 people in person, and 526 via webcast in attendance at the 2019 AGM. We received a total of 42 questions in 2020, 3 less than at our 2019 AGM. We have 836,000 shareholders.

Top 20 listed company

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

In 2020 we had an increase in the total number of securities voted compared with 2019. We experienced an increase in the total number of attendees at our AGM in 2020 compared to 2019, 350 people in 2020 compared to 229 in 2019, although fewer attended as registered security holders, 82 in 2020 compared to 144 for 2019.

After our AGM the ASA monitor contacted me to congratulate us on a 'very well-run AGM'. He noted that 'the asking of questions…was very respectful, and clearly there was no summarising or editing of the questions. And all questions appeared to be asked even if covered by the earlier presentations.'. I note that the ASA asked seven questions at the meeting, all of which were put to the Chairman at the meeting and responded to by the Chairman during the meeting.

Top 20 listed company

Governance Institute recommends against including the untested new subsection 253Q (2), which has not been subject to consultation, in the final legislation because there are practical difficulties with including this provision even for a limited time. Mandating the manner of holding virtual meetings is at odds with the stated intention of allowing 'flexibility during the Coronavirus pandemic'. The new section may deter some companies from taking advantage of technology to increase their engagement with shareholders and other stakeholders and return to traditional physical meetings, if health restrictions allow. This would be a retrograde step. Any interim arrangements should be as simple as possible.

Subsection 253J (2)

As noted in our October 2020 submission on the Exposure Draft of the Bill Governance Institute's members do not support requiring all resolutions at company meetings being decided on a poll.[9] The ASX Corporate Governance Council's Corporate Governance Principles and Recommendations (Corporate Governance Principles and Recommendations) which apply to all listed companies recommend that all **substantive** resolutions at meetings are decided by poll.[10] The qualification 'substantive' was included to ensure that procedural motions, such as points of order, were not captured by the Recommendation. Listed companies are required to report against the Principles and Recommendations on an 'if not, why not' basis.

While our members consider it is good governance for all substantive resolutions to be decided on a poll, there are issues with requiring all voting at virtual meetings to be taken on a poll rather than a show of hands, particularly for smaller not-for-profit companies limited by guarantee with few resources. For some of these companies polls can present considerable challenges and our members report that for some votes a show of hands is preferable. Some smaller companies have used the 'hand up' function in Zoom or similar technology for votes on a show of hands.

Where a company uses a technology platform for its general meetings there is a cost to the company for each poll. For this reason, many small, listed companies try to limit the number of polls.

Governance Institute recommends against requiring all resolutions at company meetings being decided on a poll and **recommend**s amending the first sentence of subsection 253J (2) to read 'Any other **substantive** resolution put to the vote at a meeting …'

Section 253RB Elections to receive documents in hard copy only – companies
Section 1679B – Application – notifying members of rights in relation to hard copy documents [11]

Our members have supported an opt in regime for hard copy documentation for shareholders for many years. In 2007, they supported the amendment to the Corporations Act to enable shareholders who do not elect to receive a hard copy of the annual report to access it on a website. When the opt in annual report provisions were introduced in 2007 electronic communication was less common than now. At the time companies contacted shareholders to advise they could opt in to receive hard copy annual reports. Now more than 90 per cent of shareholders no longer receive a hard copy annual report by mail. This has led to major cost savings and a reduction in paper waste.

Our members also report that because of concerted campaigns they have increased the number of shareholders who have elected to receive digital communications. For many of the large, listed companies they hold electronic contact details for approximately 50 per cent of their registers.[12] Our members support the proposed subsection 253RB (4) which requires them to notify new members of the right to opt in to receive hard copy communications. During 2020 some companies advised investors they could contact the company and ask for a hard copy notice of meeting. Several companies advised the take up was low. For example, a Top 20 listed company advised that out of its 130,000 security holders fewer than ten shareholders asked for a hard copy notice of meeting for the 2020 AGM. The notice of meeting was available for download on this company's website. The postal service delivery times have increased substantially in recent years and many shareholders prefer electronic communications.

---

[9] See Submission *Corporations Amendment (Virtual Meetings and Electronic Communications) Bill 2020*, Governance Institute of Australia, 30 October 2020.
[10] Corporate Governance Principles and Recommendations, 4th edition, 2019, ASX Corporate Governance Council, Recommendation 6.4 at page 24.
[11] These comments also apply to the subsections relating to registered schemes.
[12] For newer companies this level is higher. For companies with longer histories, particularly where a demutualisation took place and policy holders received shares, the levels are lower.

Our members have significant concerns about section 1679B. As currently drafted, this would require companies to contact shareholders to advise of the right to opt in to receive hard copy documentation under 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 the Bill are intended to sunset on 16 September 2021 so that these arrangements are only in force for six months and may be subject to change following further consultation. 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.

Impact of new section 1679B

The new section would require a Top 20 listed company with a significant retail shareholder base to contact approximately 600,000 shareholders within two months of the commencement date to advise them of the right to opt in to receive hard copy documentation. This company has digital communication preferences for approximately 50 per cent of its shareholders and would need to write to the remaining shareholders at a cost of $2 per letter (including postage, mail house and registry time) an approximate cost of $1.2m. This would be a special mailing. The company typically tries to combine these sorts of communications with other communications such as dividend notices or annual general meeting notices to save cost and paper waste. This company has no other communications planned until August when it will contact shareholders about the annual general meeting. Again, this is more likely to be perceived by investors as the company's inefficiency than welcomed as news of a new right.

Large, listed company – 1.3M shareholders - large retail shareholder base

A company limited by guarantee with more than 1.7million members saved more than $420,000 in 2020 by sending annual general meetings communications electronically. It noted that in 2020 no Explanatory Memorandum, or resolutions were proposed so that it was a smaller than usual mailing. In a typical year their costs of mailing are approximately $1m.

Company limited by guarantee, 1.7m members

In addition, the new provisions do not consider the long-standing difficulty with 'lost' shareholders. Sections 214 and 315 of the Corporations Act require companies/schemes to send materials such as financial reports and directors' reports to shareholders and members. 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'.[13] 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 unlikely to be in place for some time.[14]

Governance Institute has advocated for some time that the legislation should deem companies' shareholders who fail to make an election to have received the materials. This is provided the company makes the meeting materials available in the public domain and accessible, using a universal or near-universal channel of communication, and also issuing an ASX announcement (if listed). It is noted that making the meeting materials available on the company's website meets

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

the current definition of a near-universal channel of communication. As currently drafted the section obliges companies to write to lost shareholders to advise them of the right to opt in to receive hard copy communications.

Governance Institute recommends against including the new section 1679B 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.

Comments on Schedule 2

Our members support Schedule 2 of the Bill relating to continuous disclosure, including changes to the law whereby companies and their officers are only liable for civil penalty proceedings in respect of continuous disclosure obligations where they have acted with 'knowledge, recklessness or negligence'. The proposed changes will ensure a more appropriate balance between protecting the interests of shareholders and the integrity of the markets, while reducing the likelihood of class actions that do not seek to promote higher standards of market disclosure.

The class action landscape in Australia is a cause of significant concern for companies and officers seeking to manage their continuous disclosure obligations. In spite of their best endeavours, the market's reaction to information is unpredictable, and determining whether information will have a material impact on the price or value of an entity's securities is not a precise science. In our members' experience continuous disclosure issues are seldom 'black and white' and most companies err on the side of over-disclosure due to concerns associated with Australia's 'class action friendly' landscape. At times, this can be commercially damaging, thereby negatively impacting shareholder value. Conversely, if information is not disclosed in spite of an appropriate assessment being undertaken by a company and its officers and there is subsequently a significant movement in the share price, a significant class action exposure may arise. In Australia, that exposure has a high likelihood of resulting in a settlement in Australian proceedings, notwithstanding fault may not have been established as a result of the full consideration of the issues by a court. They also consider the proposed changes would bring Australia more in line with other global capital market practices. Australia is a global outlier in terms of securities class actions, particularly given the liability regime under current continuous disclosure laws. This has had an impact on costs of capital and has also impacted availability and cost of insurance particularly for smaller companies.

Our members also note that the cost of Directors' and Officers' (D&O) insurance has increased substantially over the last two years in all sectors. They understand this is mostly driven by the large number of investor class actions settled in Australia. In larger companies, board related costs frequently sit in the cost centres overseen by our members. Our members are also typically responsible for director induction and directors' letters of appointment which usually include the terms on which companies provide D&O cover for directors.

Generally speaking, D&O insurance is a critical risk mitigation mechanism for both companies and their officers. The increasingly challenging D&O insurance market presents heightened risk in this regard given difficulties and associated costs in securing insurance, as well as potentially limiting the ability of companies to attract and retain talented directors, given concerns about personal liability.

In addition, the significant increase in the cost of D&O insurance has resulted in many companies seeking to reduce or altogether eliminate Side C cover, which provides protection to companies in relation to securities class actions. Our members consider this to be problematic because:

- Markets have experienced considerable uncertainty and volatility in recent times, which has resulted in significant and novel challenges in managing continuous disclosure issues. Side C cover provides protection of companies' balance sheets in respect of such issues, and

- In the event companies have reduced or eliminated Side C cover, any consequential increase in losses due to securities class actions will, in many cases, be borne by continuing shareholders. This would appear counterintuitive and potentially damaging to a key stakeholder group that applicable laws are seeking to protect, especially given the prevalence of settlements that are reached in relation to such matters, where the fault of the company has not been established by a court.

Our members do not consider the proposed changes materially change the nature of disclosure obligations, specifically what needs to be disclosed and by when. Rather, they require that knowledge, recklessness or negligence need to be proven to establish liability against a company or its officers in civil penalty proceedings. Nor do they consider the proposed amendments will undermine the frequency and quality of market disclosures. Anecdotally most companies are proceeding as they always have with the same level of diligence. The amendments rather provide that if a reasonable and considered judgement is made which with 20/20 hindsight turns out to be wrong (noting the unpredictability and volatility of the markets), the company will be less likely to be subject to a class action.

Conclusion

As the events of 2020 demonstrated all too clearly the Corporations Act modernisation is long overdue. Our members welcome the Government's proposed reforms and hope the Senate Standing Economics References Committee is persuaded to support the passage of the Bill with our proposed amendments to Schedule 1.

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

Yours faithfully,

Megan Motto
CEO