

## Online participation in shareholder meetings – how could it work?

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Shareholder participation at the AGMs of large companies is notoriously low – just 0.3 per cent in 2009, according to Chartered Secretaries Australia. So it is not surprising to see repeated calls in the media for listed companies to introduce online participation at AGMs. This would allow shareholders to take part in meetings in their offices or homes via the internet, enabling them to follow the proceedings, submit questions and, of course, vote. The result of this would be, hopefully, a significant increase in the participation rate.

Is online participation permitted by the law and, if it is, how might it be achieved and what are the technical and logistical issues?

### Some notes on the law

Intel Corporation (Intel) has led the way in the United States, adopting online participation in 2009. Intel allows members to attend its annual meeting in person or by proxy at a designated place, or 'on the internet'. Members who participate using the internet are able to place votes electronically in real time and submit questions during the meeting (see the 2011 [notice of meeting](#)). Intel had proposed to hold its 2010 meeting wholly online, but the proposal was poorly received and ultimately abandoned.

Intel's experiment was sanctioned by the law of the State of Delaware, its place of incorporation. Section 211 of the Delaware *General Corporations Law* permits stockholders and proxy holders not physically present at a meeting of stockholders to participate by remote communication, and deems them to be present in person and to vote at the meeting, provided that specified conditions are satisfied.

New Zealand's current Regulatory Reform Bill, an omnibus Bill to amend a number of New Zealand Acts, including the Companies Act 1993, proposes an amendment to make it clear that shareholders may participate at a meeting by audio, visual or electronic communications. If enacted, the reforms will commence on the day that the Bill receives Royal Assent. At the time of writing, the Bill had not reached second reading stage.

What about Australia? The Companies and Securities Advisory Committee supported an amendment to permit electronic and postal voting in its June 2000 report *Shareholder participation in the modern listed public company (company meetings)*. The commentary to recommendation 6.1 of the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations* says that '*companies should consider how best to take advantage wherever practicable of new technologies that provide opportunities for more effective communications with shareholders [and] improved access for shareholders unable to be physically present at meetings*'.

And yet there is no current proposal to amend the law to facilitate online participation at meetings. Do we need such an amendment?

The answer is 'probably not'. We have a provision in our *Corporations Act 2001* (Cth) (section 249S) that permits meetings to be held at two or more 'venues' using any

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technology that gives the members as a whole reasonable opportunity to participate. But that section probably does not envisage online participation through the internet – rather, it has in mind a meeting at several venues, linked by audio-visual facilities. In fact, there is nothing in the *Corporations Act* itself that expressly permits online participation.

Another law may help. The *Acts Interpretation Act 1901* (Cth), as in force on 1 January 2005, is expressly made to apply to the *Corporations Act* (see section 5C(2)). Section 33B of the *Acts Interpretation Act* states that where a body is established by an Act and the Act requires or permits meetings of its members, then the body may permit its members to participate in a meeting, or all meetings, by telephone or closed-circuit television or '*any other means of communication*'. A member who participates in that fashion is then taken to be present at the meeting.

While s 33B seems on its face to permit online participation at a shareholders' meeting, there is room for argument as to whether it applies in the corporate context. A specific legislative amendment to permit online participation would put the matter beyond doubt. However, the present law seems not to present any obstacle to online participation, whether section 33B can be relied upon or not, provided that there is clear authorisation in the corporate constitution.

### Implementation

Here are some issues that should be addressed if a company decides to opt for online participation at shareholders' meetings.

- **Enabling remote attendance** – the constitution should be amended to expressly enable attendance at, and participation in, the general meeting by means of the internet.
- **Attendance** – the constitution needs to provide that members and proxy holders who participate via the internet are deemed present at the place of meeting (note that the Delaware legislation has a similar provision: section 211(2)(b)).
- **Place of meeting** – the constitution should specify how the place of meeting is to be ascertained.
- **Requirements for notice of meeting** – the technological arrangements need to be explained clearly to shareholders in compliance with section 249L(1)(a).
- **Verification of membership** – a method of verification of membership for internet participants needs to be established.
- **Safeguard for technology failure where no substantial injustice** – a constitutional provision to address technology failure should be introduced.
- **Voting procedures** – an electronic equivalent for voting on a 'show of hands' and on a poll should be adopted.
- **Chair's powers in relation to speakers** – the chair should be given appropriate constitutional powers to control the electronic conduct of the meeting.
- **Quorum requirements** – the quorum requirements should allow for remote participants to be counted.

The Corporate Advisory HQ team has considered these matters in detail and can provide more specific advice and assist with the preparation of constitutional amendments.

### Technology and logistics

There are other practical and logistical considerations that will need to be kept in mind for a partially online general meeting.

- **Technological reliability** – this is crucial to ensuring the validity and effectiveness of a meeting. A technological failure could jeopardise the validity of the meeting and resolutions passed at it (at least where the failure resulted in a substantial injustice to participants and possibly even where the failure only affected participation by a small number of members).
- **Back-up systems** – the risk of technical error can be mitigated by back-up systems and procedures, such as an audio contingency link to ensure that members participating remotely can still hear the proceedings even if they cannot see them, and proceedings for the adjournment of the meeting in the event of technical failure

of a specified degree.

- **Trialling technology** – using the technology proposed for online participation in shareholder meetings first for board and internal management meetings provides a practical opportunity for trialling its stability and quality.
- **Authentication and security measures** – authentication and security measures are necessary for verification of each member's identity and to ensure the security of questions and votes. However, straightforward authentication technology is readily available.
- **Measures for ensuring reasonable opportunity to participate** – procedures should be developed to ensure each remote participant has a reasonable opportunity to participate in the meeting, including communicating with the chair and others attending the meeting. For example, this could be achieved by using a facility that allows written questions to be submitted.
- **Managing questions and comments** – handling and responding to questions and comments submitted by remote participants during the meeting is important. This is a large topic, on which we would be happy to provide further assistance.

Companies planning to introduce online participation need to make a critical assessment of the reliability of the technology available for them. As recently as June 2008, Chartered Secretaries Australia expressed concern to the Parliamentary Joint Committee on Corporations and Financial Services about the reliability of current technology to transmit meetings in real time, and the risk to the validity of resolutions if a technological failure restricted participation. The Committee agreed that online participation would be potentially unwieldy and unfair to those attending the meeting in person.

Risk to the validity of resolutions can be addressed in the corporate constitution and by procedures adopted with constitutional authority. The problem of the adequacy of available technology is being addressed by the development of new systems.

#### Conclusion

Recent changes to the remuneration laws – particularly the two strikes rule – are directing increased attention to the conduct of general meetings. Online participation in shareholder meetings is a practical way to broaden the participation base and render it more likely that votes taken at the general meeting are representative of the views of the shareholder body. Implementation has become feasible, but Australian corporations wishing to take the plunge will need to assess carefully the legal, procedural and technical issues.

We do not suggest that companies might move to wholly online meetings. That would require a change to the *Corporations Act 2001* (Cth), and would raise questions of policy about the utility of the AGM process as a whole. In the United States wholly virtual shareholder meetings remain controversial.

*This article was prepared with the assistance of Hilary Kincaid.*

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