

SAVING MILLIONS OF SHAREHOLDER DOLLARS AND FORESTS OF TREES IS EASIER THAN YOU THINK

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Legal Briefings - By **Nicole Pedler and Timothy Stutt**

How often do those of us in M&A and in-house legal and company secretariat teams have an opportunity to save trees and millions of shareholder dollars? The recent temporary changes to the Corporations Act in response to the challenges posed by COVID-19 facilitate this by allowing notices of meeting to be more easily dispatched to shareholders electronically, and shareholder meetings to be held partially or fully online.

IN BRIEF

- Until 5 November 2020, notices of meeting can be sent electronically if the company has an email for the member, including for annual general meetings and shareholders' schemes of arrangement, and meetings can be held partially or entirely online.
- Relaxing the previous position, no 'opt in' from shareholders is required to dispatch such notices by email if the company already has an email address for the person. Post cards may also be sent to shareholders setting out the details of an online location where the notice and other information can be retrieved, rather than having to send the notice and materials. This sensible and overdue change will significantly reduce printing and postage expenses and should be extended indefinitely.
- Changes to facilitate shareholder meetings being held partially or fully online similarly provide much needed flexibility for companies to manage meeting logistics in line with

social distancing requirements during the COVID-19 pandemic. While the permanent removal of legislative barriers to holding shareholder meetings online is a worthwhile reform, early indications are that certain proxy advisory and retail investor groups may not be supportive of wholly virtual meetings being continued post-pandemic.

CHANGES TO PROVIDING NOTICES OF MEETING IN RESPONSE TO COVID-19

On 5 May 2020, the Treasurer announced temporary amendments to the *Corporations Act 2001* (Cth) (**Corporations Act**) under the Corporations (Coronavirus Economic Response) Determination (No. 1) 2020 (**Determination No 1**). Under Determination No 1, a company may use one or more technologies to dispatch a meeting notice, and any other information to be provided with the notice, to shareholders. Alternatively, a company may provide the details of an online location where the notice and information can be viewed or downloaded. For example, where a company has the email addresses of some shareholders, it may send notices by email to those shareholders, and a letter or postcard to other shareholders providing the details of an online location where the notice and other details can be retrieved. The changes will be in effect for 6 months, expiring on 5 November 2020.

Absent Determination No 1, the usual position is that companies must send full hardcopy notice of meetings to shareholders by post unless the individual shareholder has specifically elected to receive such notices electronically (or if the company is permitted under its constitution to give notice by other means). This results in situations where members who have provided companies with their email address for various other purposes (such as receiving dividend statements), but have not specifically opted into receiving notices of meeting by email, must ordinarily be given notice by post.

EARLIER STEPS TOWARDS FACILITATING ELECTRONIC NOTICE

In 2016, Treasury released a proposal paper and conducted industry roundtables with a view to reforming the law to allow a “technology neutral” approach to distributing meeting materials to shareholders. Treasury identified the area as one where “where improvement could be made to reduce the compliance burden on business and improve outcomes for shareholders” and noted that “the current law does not reflect the changes in the way Australians engage with digital communications technologies and content”.¹ Despite the support for a technology neutral approach from industry stakeholders, the proposal did not proceed.

It is difficult to understate the volume of paper wasted, trees felled and shareholder dollars spent under the usual ‘opt-in’ regime. According to the proposal paper, one large Australian listed company used around 45 tonnes of paper to produce the notice of meeting alone for its annual general meeting. This amounts to roughly 1,080 trees according to an online calculator. In its submission to Treasury, the Australasian Investor Relations Association and Governance Institute of Australia noted that the average annual general meeting costs between \$250,000 and \$1,000,000 for ASX200 companies.² Similar figures are seen in the scheme meeting context.³

In the context of schemes of arrangement where sending a scheme booklet may breach foreign securities laws, sending a postcard or letter in lieu of the scheme booklet is not a new concept and has previously been approved by the Courts. For example, in 2013, DUET Group sought orders convening a scheme meeting and indicated it would not send the full scheme booklet to shareholders in certain jurisdictions for foreign security law reasons.⁴ It proposed instead to send a short letter to the shareholders explaining where they could obtain a copy of the scheme booklet. While that approach was contrary to sections 249J, 252G and 412 of the Corporations Act, DUET indicated it would apply for an order under section 1322 at the second hearing to validate this non-compliance. The Court granted DUET's application, and the scheme was subsequently approved at the second meeting. A similar order was sought and obtained by Atlantic Gold NL⁵ and iProperty Group⁶ (among others). These orders were obtained as practical solutions for a limited contingent of the respective entities' members, but there is no reason why the logic behind these decisions should not apply more broadly and indeed effectively Determination No. 1 achieves the same result.

INTERNATIONAL APPROACHES TO PROVIDING NOTICE

More electronic friendly approaches have already been adopted in the UK and Hong Kong.

In the UK, company communications can be sent in hard copy form, in electronic form or can be made available on a website. There is a specific requirement for holders to opt-in to receive documents in electronic form however, a holder can be deemed to consent to access communications via the company's website if they do not respond to a request to state their preferred method to receive company communications. A hard copy notification identifying the website address where the materials are located must be sent to the shareholder's registered address at the same time as materials are sent to other shareholders.

In Hong Kong, companies can also send communications to shareholders in hard copy, in electronic form or by means of a website. For electronic communications, a shareholder must have agreed and provided an address for such communications (and not revoked its agreement by giving at least seven days' notice). For website communications, this must be permitted by the company's articles of association or approved by a shareholders' resolution. The company must also individually request shareholders' consent, which will be deemed to have given if a shareholder fail to respond to the request within 28 days (unless the shareholder can prove that it did not receive the request). The company must notify shareholders each time any material is published on the website with details of the website address and how to access the document. The notification can either be sent in hard copy or electronically (where the shareholder has consented to that method of communication).

CALL FOR PERMANENT CHANGE

The objective sought to be achieved by the rules around the distribution of notices of meeting is to facilitate shareholders exercising their rights on an informed basis. Permitting companies to dispatch notices electronically does not take away from that objective. In the vast majority of cases we expect these aims are better achieved by electronic distribution, and this position does not fall away following the pandemic. Certainly the authors check their email more than their post boxes.

The approach taken in Determination No 1 is sensible because, in practice, a company could send a notice to each shareholder by email (or a short letter by post of where the notice can be found) while avoiding the artificial distinction between whether or not the email address was given to the company specifically for the purposes of receiving notices of meeting. It may also allow companies to more effectively engage with their shareholders, and could potentially increase participation.

This amendment represents enormous savings to both shareholders and the environment, and should be retained beyond 5 November 2020.

ADDITIONAL CHANGES TO FACILITATE ONLINE MEETINGS

Until 5 November 2020, Determination No 1 also permits companies to convene shareholder meetings partially or fully online using one or more technologies.⁷

ASIC has responded by providing guidance strongly encouraging companies to hold either partially or fully online meetings while restrictions on movement and large gatherings remain in place during the COVID-19 pandemic.⁸

Prior to Determination No 1, the Supreme Court of New South Wales also made orders on a number of occasions permitting the convening of virtual scheme meetings due to statutory limits on public gatherings imposed as a result of COVID-19.⁹

Under Determination No 1, shareholders must be given a reasonable opportunity to participate in the meeting (and information on how to do so), and votes taken at the meeting must be on a poll rather than a show of hands. Importantly, votes must be able to be recorded in 'real time' during the meeting.

There will inevitably be logistical and technological processes to refine and so far we are seeing a practical approach being taken. The Federal Court of Australia this month made orders in relation to a scheme meeting to deal with the fact that the software system by which the virtual meeting was to be conducted would allow a shareholder to vote where that shareholder had previously provided but not revoked a proxy. The solution was to provide that the shareholder had appointed a proxy and subsequently wished to attend the meeting, the proxy would retain the vote unless the shareholder had notified the registrar of the revocation of the proxy before the commencement of the meeting.¹⁰

While the risk of technology failure and meeting invalidity is not addressed in Determination No 1, the temporary provisions make the process to adjourn or postpone relatively inexpensive because everything can be done electronically (including distributing the notice of meeting as outlined above), provided it is done while the temporary amendments remain in force.

While Determination No 1 provides flexibility for holding either partially or fully online meetings, retail investor groups have provided feedback to a number of significant listed companies stating that they do not support fully virtual meetings and would prefer a combination of physical and online facilities be provided. Overseas, proxy advisory groups have also on at least one occasion failed to support constitutional changes which are directed at facilitating virtual meetings on a 'go forward' basis.

Clearly, the flexibility afforded by Determination No 1 is important for navigating shareholder meeting logistics during the COVID-19 pandemic. It would also be worthwhile revising the Corporations Act to remove traditional barriers for holding shareholder meetings online as well.¹¹ However, reflecting investor and proxy adviser feedback, it seems likely that physical venues for shareholder meetings will be expected to be retained even if online facilities are offered.

ENDNOTES

1. Australian Government, Treasury, *Technology Neutrality in Distributing Company Meeting Notices and Materials* (Proposal Paper, May 2016) 1, 1.
2. Letter from Australasian Investor Relations Association and Governance Institute of Australia to Treasury dated 28 November 2019, 4.
3. For example, *MDA National Ltd v Medical Defence Australia Ltd* [2014] FCA 954 at [96], [101].
4. *Re DUET Management Co 1 Ltd* (2013) 95 ACSR 34.
5. *Re Atlantic Gold NL* [2014] FCA 697.
6. *Re iProperty Group Ltd* [2015] FCA 1507.
7. Determination No 1 s 5.
8. ASIC, 'ASIC guidelines for investor meetings using virtual technology' (Web page, undated), <https://asic.gov.au/about-asic/news-centre/news-items/asic-guidelines-for-investor-meetings-using-virtual-technology/>.
9. See *Re Windlab Limited* [2020] NSWSC 571 (Black J); *Re Avita Medical Ltd* [2020] FCA 592 (Jagot J).
10. *Sienna Cancer Diagnostics Limited, in the matter of Sienna Cancer Diagnostics Limited* [2020] FCA 899 (Moshinsky J).
11. Companies can typically (if their constitutions allow) hold partially online shareholder

meetings under the current provisions of the Corporations Act, however legislative references to meetings being at a “place” or “venue” have historically been interpreted as requiring a physical venue and precluding fully virtual meetings: see for example, Corporations Act ss 249R and 249S.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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