

Boardrooms in the digital age

Meeting effectiveness

The ever increasing use of electronic devices such as smart phones, laptops and computer tablets (for example, Apple iPads, Windows Surface, etc.) has given rise to a number of issues and questions regarding the use of technology by directors in board meetings and more generally, that is outside the boardroom.

For example, directors reading emails or sending text messages during a board meeting is not only disrespectful to other meeting attendees, it is a dereliction of duty, since it is distracting not only to the person involved, but also to others in the boardroom who are meant to be focused on the business of the company. Outside the boardroom, for example, should directors use their company provided device for non-company business? What about security? Further, while there are numerous benefits to directors accessing their board papers electronically, one key question is whether notes and annotations made on digital board papers by directors constitute 'records' of the company, and whether the company can claim ownership of such notes and annotations.

Electronic etiquette in the boardroom

The nature of the digital age means that we all have the ability to be connected to the outside world at all times regardless of what we are doing. However, while the impulse to check our electronic devices constantly may be strong, it is not always appropriate to do so. Apart from the devices directors are using to access their board papers and related company documents necessary for the meeting, unless there is a good reason that has been communicated and approved by the chair prior to the meeting, directors should not use their electronic devices for any other reason.

The environment within which board meetings take place is an important factor in the success or failure of the meeting to promote good decision making. Electronic etiquette is just one component of general boardroom etiquette, such as not arriving late for meetings or holding private conversations, along with not being distracted by electronic devices. These situations can be dealt with by establishing a board etiquette policy, directors' code of conduct or ground rules for meetings as set out in the board charter. These are a good way to specify the type of behaviour appropriate for board and committee meetings.

For example, a board etiquette policy might tell directors to turn off their smart phones/electronic communication devices during meetings apart from any device used to access the papers for the meeting. If a device must be kept on, it should be on silent/vibrate mode and the director should excuse themselves from the meeting if they need to answer an urgent call – meeting attendees should always be forewarned that a call is expected and the chair's permission given to keep the electronic device on. Even those devices used for the board papers can be a distraction if they are not used appropriately, so any policy should also make it clear that such devices are not to be used for conducting any business or personal activities apart from those directly related to the meeting while meetings are being held.

Security

Companies are not prohibited by law from utilising technology during board meetings (*Corporations Act 2001*, s 248D). Board members also face significant time and travel demands and it is therefore common and convenient for directors to rely heavily on technology to perform their duties. However, with technology comes increased risks – such as security of hardware (from loss or theft) and also security of software, networks and cloud computing from online security risks (from hacking).

The rise in use of hardware such as laptops and tablet computers in the boardroom means an increasing amount of commercially sensitive information is accessible by portable technology. The wireless capability of this hardware means that directors can use them in public places where there is a risk that information could be accessed through an unsecured network.

Therefore, it is important that companies have a clear policy on what is acceptable use of such technology, especially on the level of personal use. In this regard, a company may impose reasonable limitations on use of technology or implement policies in relation to record-keeping as it pleases. Large companies in particular may impose strict guidelines on directors to ensure that all board documents (including annotations) are retained securely at all times. Such guidelines should be implemented either in the company's constitution or through internal company policies such as the board charter.

Electronic security measures may include the following

- Providing secure networks for the storage of data
- Encryption of any electronic copies of board documents to ensure that access to those documents and information is only restricted to board members
- Restricting access to certain documents to preconfigured computers
- Implementing hardware 'locks' so that if a director loses his or her computer, the data on the hard drive can either be wiped or cannot be accessed without a proper security code

Electronic board papers and data retention

For some, electronic board papers might involve an emailed file that mimics the paper-based format, which can, for example, be printed by the director or viewed on a tablet device. For others it will be board portal where directors can securely access board papers and other governance documentation, collaborate with their fellow directors on specific issues, and seek further information from management prior to meetings.

The issues to consider in the electronic delivery of board papers include:

- the time and investment involved in finding and establishing a secure system;
- whether to send the papers via email or a board portal, as well as the associated cost of equipping directors with iPads or laptops;
- the difficulty some directors may face in adapting to the technology and therefore may require to have the board pack printed and sent. Directors should be given a choice as to how the board papers are delivered, for example, the director may wish to receive hard copies of all the papers or just those that are difficult to read on their device's screen such as the financial statements.

Another concern is the volume of information provided to directors. Electronic delivery could be a temptation for management to include more information. But, as highlighted in the *Centro* judgment, 'it is the board's responsibility to determine the information that it requires or does not require' (*ASIC v Healey* (2011) 196 FCR 291: [2011] FCA 717 at 298).

Further, in the case of tablet devices, the formatting can be a problem. For example, spreadsheets, which are often used to display financial information, and A3 pages are not easy to read on a small screen. For financial reports, the *Centro* case makes it imperative that directors be able to read the information upon which they will make their decisions. Therefore, in presenting data in tables and graphs, the formats must be such that they can be clearly viewed on the devices board members have.

What does the law say about the use of digital technology?

As far as the *Corporations Act 2001* is concerned, there is no ‘one-size-fits-all’ approach for all organisations with respect to digital technology in the boardroom. Many of these digital technology issues are dealt with by the company’s constitution or policies (for example, information and communications technology (ICT) policy, board charter), and to date there is little case law directly dealing with these issues. However, the key matters to keep in mind are:

- minutes should provide an accurate record of board meetings;
- directors’ annotations and notes are of potential evidential value in future legal proceedings, meaning that it could be in the company’s interests to try to preserve these annotations and notes in a central location or, alternatively, request they be submitted for destruction at the end of the meeting;
- directors’ annotations and notes may assist a director in proving that s/he has fulfilled the relevant directorial obligations (in particular, that the director considered and turned his/her mind to a particular issue discussed at a board meeting).

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It is likely that the uncertain nature of the law and high profile legal decisions have made large companies particularly concerned about retaining key information relating to board decisions. Companies face considerable public scrutiny and legal backlash if they fail to retain adequate records of decision making, particularly in relation to high risk matters.

Data retention

A company’s data retention obligations are, for the most part, set out in the *Corporations Act 2001*. Compliance with these obligations ensures that the company operates transparently, and (relevantly) is able to track decisions made by the company’s directors. Companies are required to maintain registers (including registers of members, option holders and charges) and minute books of the meetings of its directors and shareholders/members for the duration of its registration. In addition to this requirement, companies must preserve their registers for five years after the date on which the last entry was made.

Section 1306 of the *Corporations Act 2001* permits companies to prepare and store their ‘books’, which includes registers and minutes, in a ‘mechanical, electronic and other device’. However, the data stored in the device must be able to be reproduced ‘at any time’ in a written form. Further, companies are required to take reasonable precautions to protect its records against damage and tampering.

A company is also obliged to keep written financial records which correctly record and explain the company’s transactions, financial position and performance, under section 286 of the *Corporations Act 2001*. These records need to be retained for seven years. Section 288 of the Act allows financial records to be kept electronically, so long as they can be converted into a hard copy on demand.

Directors and annotations to board documents

Serious consideration must also be given to the retention of any annotations made by directors on the board papers. As with notes on hard copy board papers, directors should annotate their electronic board papers carefully, in the knowledge that company documents – including those stored on a director’s personal tablet device or computer – may be discoverable in legal proceedings.

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As discussed above, there are strict rules governing the records to be kept by companies, however, there is no specified rule guiding directors on the issue of what additional records they must personally keep. Therefore, directors should exercise their own discretion and judgment in deciding whether to take notes or annotate board papers, and how much detail to take down. In particular, it is prudent to assume that when the subject matter to be discussed at a board meeting is controversial, complex or involves significant risk, then it might be important for directors to make notes as a temporary record of those discussions, as such contemporaneous records are useful as evidence in any later litigation.

However, a proper and accurate record of minutes of meeting should be the definitive record of board decisions and intent. Any substantial discussion, argument or supplementary material should be recorded in the minutes or annexed to the minutes, rather than relying on retention of notes. If such information is not noted in the draft minutes when circulated to the board following a meeting, the director making the note should make sure that it is included prior to the minutes being signed off by the chair.

Are the notes or annotation taken at board meeting a personal record or the company's record?

Similar to personal notes or diary entries, directors' notes or annotations to board papers are personal records of that particular director, and are not automatically the property or a 'record' of the company. However, the prohibition against falsification of 'books' in section 1307 of the *Corporations Act 2001* does not just relate to books owned by the company; it includes books 'affecting or relating to affairs of the company'. Therefore, while a director's notes may be owned by that director, it may still fall within some of the strictures in the Act relating to the company's books.

In addition, a company may seek to control such information for its own protection (such as when facing litigation proceedings). For example:

- if board papers are accessed by way of company-owned property (for example, a laptop or other device given to the director by the company as a tool for the director to perform his or her duties), the company may assert ownership to all material accessed on such devices; or
- the company may assert ownership over such annotated documents by way of agreement through the director's contract of employment/appointment terms or deed of access.

The question of ownership will be determined in the individual circumstances of each case. Documents kept by the company will be admissible in legal proceedings and even if documents containing annotations are not owned by the company, they may still be discoverable as documents of the company under the rules of discovery. As such, a company may seek to retain annotated board papers as a complete record of all meetings.

Validity of minutes as evidence of decisions made at a meeting

The minutes of a meeting are generally accepted by the courts as evidence that a meeting was held and that the decisions made were as recorded in those minutes (unless proved to the contrary) if the following criteria are satisfied:

- The minutes are kept in the company records within one month of a meeting taking place; and
- The minutes are signed by the chair of the meeting or of the next meeting.

With respect to signing the minutes, it should be noted that while electronic signatures have been recognised in Australian law under the *Electronic Transactions Act 1999* (Cth) (and similar state and territory legislation) provided certain requirements are met, these provisions do not apply to the *Corporations Act 2001*, as such minutes should be signed in hard copy prior to electronic storage.

Notes or annotations are also an important protection for directors personally, as they assist directors to perform their duties in a skilful and diligent manner. Firstly, a director should ensure that when draft minutes of a meeting are circulated for the directors' review, notes made by the director during the meeting are included to the extent that they are relevant. The notes can be useful in assisting that director to confirm that all material matters discussed are reflected in the official minutes.

Failing inclusion of a director's notes in the official minutes, a director may consider retaining such contemporaneous notes of the meeting for his or her own recollection of the meeting and such information may be relevant if a director's personal discharge of his or her own directors' obligations is ever questioned.

In addition to section 1305 of the *Corporations Act 2001* rendering admissible in a legal proceeding any 'book' kept by a company, any document may also be discoverable by a company in a court proceeding if (in the case of the Federal Court), such document is or has been within the company's control.

As such, director's annotated board papers may well be within the company's possession, custody or power regardless of the fact that they may not be 'owned' by the company. Such material made by a director could feasibly be relevant as supplementary evidence if a company's conduct were under scrutiny in a legal proceeding.

Based on the broad definition of 'books', the act of deleting or removing supplementary board papers (material relating to the internal management proceedings of the company) could potentially give rise to a breach of section 1307 of the *Corporations Act 2001* (destruction, removal or falsification of a 'book' relating to the affairs of the company). However, in the context of directors' use of technology, it is unlikely that any removal by a director of his or her own copies of board papers (including annotations that director may have made during a board meeting) will constitute a 'concealment' or 'removal' of such material in breach of section 1307; rather, it would merely be a removal of duplicates of official minuted records.

As discussed above, the company's motivations to retain all such annotated documents may be to assist its own case in any future legal proceedings. A director may also wish to protect his or her own position by retaining annotated documents for the following reasons:

- If he or she believes the minutes to be inadequate or incorrect (and requests to the chair/company secretary to have the official minutes amended have been denied); and/or
- If he or she believes that there is a risk that the director's own conduct may be called into question and expose him or her to risk of breach of director's duties under the *Corporations Act 2001*.

In such instances, the director's own annotated documents may assist in establishing matters which may differ from the official minuted records.

Companies concerned with the implications of directors retaining annotated papers can implement a policy whereby at the close of each meeting each director to delete their board papers from their tablet or return physical papers, although this does not discount the possibility that the director may have copies of the documents stored elsewhere (for example email folder, laptop). If a company has such a policy, each director must consider their own personal position as to whether they wish to be/continue to be a director of a company with such a policy.

Conclusion

Technology such as electronic devices can make life easier for directors, but it brings with it some concerns ranging from the disruption mobile devices can cause in the boardroom to security issues. The record keeping obligations imposed by the *Corporations Act 2001* also have the potential to encompass a large range of documents. Companies must therefore balance the large administrative burden in correctly documenting and storing all material which may or may not be required at a later time in legal proceedings against the exposure faced if such material is not obtained.

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This will be different in each company's circumstances. However, the main considerations are these:

- Have a clear policies on the use of technology by directors including electronic etiquette and private use of company owned devices
- Implement security measures wherever possible
- If there is requirement that annotations made by directors must be retained by the directors and/or the company (for example for future evidential purposes), ensure that this policy is in writing and enforced by the company secretary
- Ensure prompt circulation of board minutes for the directors' approval (by no later than one month after a board meeting, and preferably earlier), and remind directors that they should raise any additional matters to be included in the minutes and not yet incorporated
- If matters discussed at board meetings are complex, risky or likely to give rise to litigation, retain more detailed annotations of the board papers (whether at company level or, if a particular director has concerns in regard to his or her discharge of directorial duties, by that director)

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