



Companies and Intellectual
Property Commission
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**NON-BINDING LEGAL OPINION
IN TERMS OF
SECTION 188 (2)(b)(i) OF THE COMPANIES ACT 71 OF 2008 (as amended)**

INTERPRETATION AND IMPLICATION OF SECTION 61(7) & (10) OF THE COMPANIES ACT, 2008, SPECIFICALLY THE HOLDING OF AGM'S BY LISTED COMPANIES VIA ELECTRONIC MEANS

Section 188(2)(b)(i) of the Companies Act, 71 of 2008, infers on the CIPC the responsibility to provide guidance to the public of the nature and dynamics of company law, by issuing non-binding opinions on the interpretation of any provision of this Act. This non-binding legal opinion regarding the interpretation of Section 61(7) and (10) of the Companies Act, 2008 (hereinafter referred to as the Act), is as a result of several guidance enquiries on the subject matter, as well as published articles concerning shareholder rights in an annual general meeting (AGM).

During the lockdown period, the CIPC received a lot of queries from all spheres of business, searching for advice on how to ensure Companies Act compliance, while still adhering to lockdown regulations and specifically social distancing. One of the specific areas of concern was the legislative requirement to hold an AGM as described in section 61(7) of the Companies Act, and whether such meetings could be conducted virtually. A further concern was whether virtual or electronically held meetings, would be considered valid and in compliance with the Companies Act requirements.

The relevant sections read as follows:

“61(7) A public company must convene an annual general meeting of its shareholders-
(a) initially, no more than 18 months after the company’s date of incorporation; and
(b) thereafter, once in every calendar year, but no more than 15 months after the date of the previous general meeting, or within an extended time allowed by the Companies Tribunal, on good cause shown.

The crux of the issue pertaining to the holding of electronic AGM's, lies in section 61(10), read with section 63(2) which indicates as follows:

***“61(10) Every shareholders meeting of a public company must be reasonably accessible within the Republic for electronic participation by shareholders in the manner contemplated in section 63(2), irrespective of whether the meeting is held in the Republic or elsewhere.*”**

“63(2) Unless prohibited by its Memorandum of Incorporation, a company may provide for-
(a) a shareholders meeting to be conducted entirely by electronic communication; or

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(b) one or more shareholders, or proxies for shareholders, to participate by electronic communication in all or part of a shareholders meeting that is being held in person, as long as the electronic communication employed ordinarily enables all persons participating in that meeting to communicate concurrently with each other without an intermediary, and to participate reasonably effectively in the meeting.”

Unless a company’s MOI provides otherwise, a shareholders meeting (and therefore also an AGM) may be conducted entirely by electronic communication; OR one or more shareholders may participate via electronic communication.

AGM’s provide essential opportunities for shareholders to interrogate company decision-making and hold boards to account. While virtual AGM’s are a viable alternative to having fact to face meetings in a global economy, the virtual format increases the risk of infringement of shareholder rights.

Infringement of shareholder rights as a particular concern in virtual AGM’s, was raised in relation to the ability of shareholders to ask questions of the board of directors and to engage “real-time” with the board and with each other. Decisions cannot be made and consensus cannot be reached if shareholders cannot interact effectively and efficiently.

Should a company hold virtual-only AGM’s and these meetings do not allow shareholders to ask questions in “real-time”, without an intermediary, or requires all questions to be submitted in advance, that meeting will not constitute an AGM for the purposes of the Companies Act, 71 of 2008.

As a result, companies tend toward holding hybrid-AGM’s, which caters for both a physical meeting place and the means to access the AGM electronically or digitally.

The Companies Act and King IV provides clear guidelines on the conduct of AGM’s and corporate governance in general. The recommended practices for shareholder relationships under Principle 16 of King IV, include requirements of proactive engagement of shareholders with the board and the requirement that all directors should be available at the AGM of a company to respond to shareholders queries.

In an article published in 2020 by Just Share¹, best practices were highlighted when conducting a virtual-only AGM; or hybrid AGM. These practices are closely aligned with the CIPC’s interpretation of the Companies Act requirements relating to virtual AGM’s, and are aimed at ensuring that electronic AGM’s comply with the law firstly and secondly, enable and enhance shareholder participation.

1. Notify shareholders as soon as possible regarding arrangements for a virtual AGM;
2. Include clear instructions in the notice on how to access the meeting, how the meeting will be conducted, how to raise questions and engage during the meeting and how the voting on resolutions will be done;
3. Ensure sufficient time for a meaningful question and answer session, during which shareholders can ask questions in real time, engage with the board and each other on the questions and be able to ask follow-up questions where applicable;
4. Provide for a reliable and secure online platform via which to conduct the virtual AGM;

¹ Just Share – Best Practices for South African Virtual Annual General Meetings



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5. Recordings of virtual AGM's is of the utmost importance in providing a transcription of what transpired during the AGM and also provides indisputable evidence of decisions made and resolutions passed; and is conducive to transparent decision making.

Alexander Forbes held South Africa's first fully-virtual meeting by a listed company, and issued a press release stating that a total of 90.93% of voting eligible shares were represented during the virtual meeting, either "in person" or by proxy.²

Even with the severe lockdown requirements imposed on South Africa being lifted, many companies recognize the time and cost effective benefits of virtual or electronic meetings, and continue to hold such meetings online.

As technology grows and expands, it makes sense that South African companies embraces the provision in the Companies Act, 71 of 2008 for electronic or virtual shareholder meetings, while still ensuring that all requirements specifically related to transparency, engagement and accessibility, are met.

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² JSE website (30 March 2020)