

## Guidance – Covid 19 and the impact on AGMs

This guidance has been produced by Governance Institute of Australia and the Australasian Investor Relations Association, with the assistance of the Business Law Section of the Law Council of Australia. It reflects the situation as at 20 March 2020.

Companies planning their AGM (or other General Meetings, and Scheme meetings) should be considering contingency plans in light of the spread of Covid-19. Checking relevant provisions of the company's constitution and coordinating with share registries and venue providers is key, as is ensuring shareholders are kept regularly updated and are given the maximum opportunity to have their say.

Companies will need to ensure that their AGM enables shareholders a reasonable opportunity to participate in the meeting. This includes a reasonable opportunity for shareholders to ask questions, make comments and to vote.

This guidance offers suggestions reflecting the *Corporations Act 2001* (Cth) and associated regulation. Companies will need to consider their individual circumstances, including their constitutions and any other relevant matters.

If your AGM is coming up soon - what are the options?

- Adapt the basis on which you hold the AGM
- Delay convening the AGM, if notice has not yet been issued.
- Postpone the AGM, if permitted by the company constitution (constitution)
- Adjourn the AGM
- Apply to ASIC for an extension of time to hold the AGM
- Conduct a hybrid AGM, if permitted under your constitution, or
- *From 20 March 2020* – rely on an [ASIC 'no-action' position](#), to conduct an online AGM, or to hold your AGM up to two months past the prescribed deadline.

Given that the situation continues to evolve, companies may ultimately have to use more than one of these options. If the company has not already issued its meeting notice - consider including a special resolution in the notice of meeting, to update the constitution to permit hybrid and online meetings and direct voting, and other provisions to provide flexibility for holding meetings.

### **Adapt the basis on which you hold the AGM**

If you are holding the AGM in the customary way, companies should consider the following measures.

- Confirm the position with the venue provider. Ensure that the venue is still prepared to host the AGM given constraints on the size of indoor gatherings and appropriate sanitisation arrangements and consider booking a fall-back venue. If moving to another venue or if the situation otherwise changes, it may become necessary to postpone or adjourn the meeting (see below for these eventualities).
- Arrange supplemental venues in addition to the main venue. The constitution may permit the use of supplemental venues linked by technological means. The *Corporations Act* permits meetings to be held at two or more venues linked by technology. Consider this as a way of restricting numbers

in any one particular location, to take account of the limits on the size of meetings. If the notice has already been issued without referring to supplemental venues, use appropriate announcements and website updates to inform shareholders. If the company is listed also make an announcement on the ASX Market Announcements Platform (MAP).

- If your constitution allows direct voting, consider including provision for this in the notice of meeting and encourage shareholders to use this method.
- Include an insert in the AGM materials package encouraging direct or proxy voting and advising how to send questions in advance and the methods of updating shareholders as the situation evolves.
- Contact your registry and technology provider to discuss arrangements and contingency plans, including the possibility of a hybrid meeting or online meeting (see below).
- Establish a dedicated AGM area on the company website. This area would include the details of arrangements for the meeting, links for web-streaming and can be updated to reflect changes to the situation, including about attending the AGM. Where appropriate, updates can also be given by announcement.
- Encourage proxy voting. Include specific provisions in the notice of meeting encouraging shareholders to vote by proxy. Facilitate online voting and online proxy lodgement to pre-empt any disruption to postal services. Supplement this with appropriate announcements and website updates. While shareholders can choose any proxy they want – encourage them to choose the Chairman, to avoid requiring other proxies to attend in person.
- Establish an online shareholder Q&A for the AGM. Shareholders can post questions related to the business of the AGM. To the extent practicable, this should be kept up to date with answers up to the deadline for proxy voting. Questions can also be answered at the AGM, in particular, if the AGM is live streamed.
- Consider announcing a shareholder event to be held later in the year. Although this will not be the AGM, companies may wish to offer shareholders, particularly retail investors, the opportunity to engage with directors later in the year.
- Ensure the AGM will be quorate. Generally, this is likely to require a small number of attendees (2-5) and relevant provisions will be in the constitution.
- Restrict the number of non-shareholder attendees.
- Pre-register attendees. If not already part of the AGM process, establish pre-registration to attend the AGM, so as to assess the number of attendees and enable proxy cards to be collected swiftly. Speak with your share registry to see if they can issue scannable registration confirmations, to minimise queues at the registration / identification desk.
- Encourage shareholders to provide email addresses and mobile phone numbers as part of pre-registration, to facilitate shareholder communications and urgent updates.
- Indicate that the number of people able to attend will be limited and to meet government guidelines and that steps will be taken for members to sit further apart so that they can actively practise social distancing. Have arrangements in place to minimise queuing in the venue.
- Live stream the AGM. Where technologically possible, a live stream of the event and/ or a phone link could be set up. These options will not constitute formal attendance at the meeting. If the venue has a foyer area or adjacent rooms – additional screens may be able to be placed in those areas, to prevent crowding in the meeting venue.
- Introduce appropriate safety measures. The constitution may contain provisions permitting directors to introduce arrangements before and during an AGM to ensure the safety of attendees. Companies could rely on these provisions to take appropriate safety measures, including restricting the number of attendees and requiring temperature checks and self-certifications. Details of the proposed arrangements can be included on the website, and an appropriate announcement can also be made. Encourage shareholders to view the live stream or use the phone link, instead of attendance in person.
- Dispense with the provision of refreshments and any other complimentary offerings before and after the meeting. Announcing this in advance is likely to reduce the number of attendees.
- Attendance of directors. It is good practice for as many of the directors as possible to attend the AGM, but (other than the Chair) this is not a legal requirement, and it therefore does not invalidate

the meeting if some (or most) are unable to attend. If directors do not attend in person, they could be available for questioning via video link. Ordinarily, the Chair is required to be present.

- The auditor of the company is required to attend the AGM, and therefore provisions for the auditor to attend should be arranged in line with the rules of the company's constitution. Check in with your auditor in advance, around arrangements for their attendance to minimise personal risk – as they are likely to be attending numerous AGMs.
- Minutes of the AGM must be produced one month after the AGM. It is common practice for the company secretary to prepare the minutes of the AGM, and there should be appropriate arrangements for the company secretary to be able to take the minutes.

### **Delay convening the AGM**

A company that has not issued its notice can delay its despatch and potentially change the location of the AGM. This may give you time to set up arrangements for a hybrid or online meeting.

The latest date to hold an AGM is five months after the financial year end and so companies with a 31 December year end will have relatively little leeway. However – ASIC has announced a [no-action position for delays of up to 2 months](#) beyond the prescribed date (see below), or you could approach ASIC for specific relief (as long as you apply before the deadline for holding the AGM) (see below). If you miss the deadline, you can apply to Court for an extension.

Institutions are unlikely in the circumstances to object to the AGM being convened on less than 20 working days' notice and so generally, unlisted companies can convene the AGM on 21 clear days' notice, absent any longer or shorter period in the constitution. Listed companies are required to provide notice 28 clear days prior to an AGM, and the logistics of producing printed notices typically absorb a few additional days of the despatch timetable.

If adopting this approach, companies should consider the following measures.

- Update the market. If the time and date of the AGM have been publicised, an update announcement should be made.
- Review annual authorities. Check the dates on which any standing authorities approved at the previous AGM expire. Generally, authorities will be expressed to expire at the earlier of the date of the following AGM and 15 months after the AGM at which they are granted.
- Remuneration report. The business of the AGM for listed companies must include an advisory vote on their remuneration report, and accordingly, that means the deadline for holding the AGM effectively applies to those requirements as well.
- Dividend payments. Delaying the AGM may mean that the company's final dividend is not paid on the expected date. If the timing is considered important, the payment of an interim dividend in lieu could be considered.
- Liaise with ASX. For listed companies - ensure that ASX is briefed on your revised meeting arrangements, and an updated draft of the meeting notice is provided to them (if relevant).
- Consider the contract with the venue provider. It may be possible to avoid paying the costs for a booked venue if force majeure can be claimed. If you still need a venue for the deferred AGM – check you can secure a venue at the later time before you change your dates.

Each meeting must be held at a reasonable time and place. In the circumstance the time and place of the meeting proposed by the notice may cease to be reasonable by reason of the emerging threat of Covid-19.

### **Postponing the AGM**

If a company has issued an AGM notice, it can postpone its AGM if its constitution permits it to do so. Companies with the ability to postpone their AGM can opt for the flexibility of issuing their AGM notice as originally planned and relying on the ability to postpone the AGM based on the situation at the relevant time.

The constitution will govern the process to follow when postponing the AGM. Assuming the constitution does not provide otherwise, there is no statutory minimum notice period for rearranged

meetings. As a matter of good practice, the company should try to provide 28 clear days' notice, but it may be reasonable in the circumstances to have a shorter notice period. The postponed meeting must be held within five months of the company's financial year end and so companies with a 31 December year end will have relatively little leeway.

If the constitution does not include a power to postpone the AGM, there are a couple of solutions. The company can 'commence' its AGM and then adjourn it to the later date, or apply to the Court to have the AGM postponed to a later date. If postponing to a date after the AGM prescribed deadline – apply to ASIC or consider reliance on the ASIC no action position (see below) or the Court for an extension.

Similar considerations to those under '**Delay convening the AGM**' apply to companies which decide to postpone their AGM.

### **Adjourning the AGM**

A company should only consider adjournment if it has issued its AGM notice and does not have postponement provisions in its constitution. Generally, a quorate meeting is required to be held in order to enable an adjournment. However, the constitution will often permit greater flexibility, allowing, for example, for an adjournment for lack of quorum. The adjourned meeting must be held within five months of the company's financial year end and so companies with a 31 December year end will have relatively little leeway.

If it is known in advance of the meeting that it will be opened with the intention of adjourning it, an announcement to this effect should be released, and the company's website should also be updated.

If it is not possible to hold the meeting at the relevant venue because of closure, companies should make an announcement of the adjournment and also arrange for representatives to be present outside the venue at the time of the meeting to inform shareholders of the adjournment.

Similar considerations to those under 'Delay convening the AGM' apply to companies which decide to adjourn their AGM. If you adjourn to a date after the deadline for holding your AGM, you either need ASIC relief, a Court extension, or you may choose to rely on the ASIC no action position (see below). Be aware that there may be a number of applications to ASIC and any application should be made in good time.

### **Apply for an extension of time to hold the AGM**

Public companies, as defined in the Corporations Act, can apply to extend the time within which they hold their AGM under section 250P of the Act.

The procedural requirements for applying for an extension and the criteria ASIC uses to determine the application are set out in [ASIC Regulatory Guide 44 Annual General Meeting – extension of time](#). A company must apply for an extension before the end of the period within which it would otherwise be required to hold the AGM. Applications should be lodged in advance to allow ASIC time to consider the application and enable the public company to hold the AGM by the ordinary due date if the application is refused. If an application is not made within that time, the company may apply to the Court.

ASIC's policy on granting an extension is generally quite strict. ASIC usually only grants an extension if the inability of a company to hold its AGM on time is due to factors beyond its control (for example, temporary or permanent loss of key personnel including the external auditor), or ASIC is persuaded that it is in the interests of the shareholders to do so.

However, given the current climate, it is probable that ASIC will grant extensions, and ASIC has also issued a no-action position (see below). Indeed, the Council of Financial Regulators released a statement on 16 March 2020 that said that they will take a facilitative approach to relief and waivers.

This option may be more practical for smaller public companies such as companies limited by guarantee.

## **Rely on ASIC no-action position**

ASIC has published a [no-action position](#) on 20 March 2020 in relation to delays (which we expect would extend to adjourned and postponed AGMs) in holding an AGM of up to two months after the prescribed deadline. Companies do not need to apply to ASIC to take advantage of this position – it is simply a statement that ASIC will take no action against companies for a delay within that limit.

This does not prevent a breach occurring – but it is an indication that ASIC will not prosecute the breach. While we anticipate that most shareholders would understand in the current environment, it does not prevent shareholders from raising concerns about the delay beyond the prescribed period.

ASIC's media release is [here](#).

## **Conducting a hybrid AGM**

The current position in Australia is that virtual-only meetings are not viable given they may not constitute valid meetings (although see below for details of the ASIC no-action position). However, if the constitution allows it, companies may be able to conduct a hybrid AGM (a combination of a physical and electronic meeting). You would need to get legal advice on these issues – most constitutions do not yet contemplate hybrid meetings.

If a company has already issued its AGM notice for a physical-only meeting, but its constitution allows a hybrid AGM, it can change to a hybrid AGM. An announcement should be made to reflect this decision, and the website should be updated.

Companies conducting a hybrid AGM should make shareholders aware that they can participate fully in the AGM electronically. Holding a hybrid meeting in itself will not preclude the ability of shareholders to attend in person and therefore the measures under 'Adapt the basis on which you hold the AGM' should also be considered.

Registries and technology providers can assist with setting up hybrid meetings.

## **Online AGMs – ASIC no action position**

ASIC has published a [no-action position](#) in relation to companies holding online AGMs (see link above). The effect of this is that, while the no-action position remains in place, ASIC will not take proceedings against a company for holding an online AGM even though it does not comply with the technicalities of the Corporations Act.

This is not able to address issues that arise from shareholders expressing concern that the format of the AGM does not meet Corporations Act requirements or requirements of the company's constitution. Avenues to secure further regulatory relief are being investigated – but are not yet in place. However – keep monitoring our information feed, and ASIC media releases, for updates.

You may also apply to the Court to address a procedural irregularity.

## **Current legislative position**

It is understood that the Government will consider legislative options to help systems and services work more effectively in tackling the outbreak of Covid 19. Governance Institute, the Law Council of Australia and the Australasian Investor Relations Association have been actively engaging with ASIC, ASX and Treasury on these issues. We will keep our members updated. The Government has limited the size of non-essential gatherings to 100 and is encouraging individuals to reduce non-essential contact.

Companies should alter their plans as necessary as new Government advice and/or emergency legislation are announced.

The current situation exposes many of the shortcomings of the current legislative environment. Governance Institute and Australasian Investor Relations Association recently made a [submission](#) to the Treasury Deregulation Task Force advocating amendments to facilitate electronic or digital

disclosure of information to shareholders. This would reduce the burden on companies in the form of cost and paper waste that occurs when sending hard copy shareholder communications by mail.

Governance Institute has also consistently advocated for the need to bring the Corporations Act into the 21<sup>st</sup> century and to ensure it is technology neutral.

This guidance is based on guidance issued by The Chartered Governance Institute and Slaughter and May on 16 March 2020.