

Legal Alert

Corporate & Commercial

March 2020

Coronavirus (COVID-19): Corporate Governance Issues

Summary

The Australian Government's social distancing policies, in an attempt to contain the spread of the novel coronavirus (COVID-19), are creating a host of issues and implications for the corporate governance of companies and associations. As companies and associations enter Annual General Meeting (AGM) season, many are considering changing the format of their AGM from an in-person meeting to a virtual-only or hybrid meeting.

This alert provides an update of ASIC's newly released guidelines for companies meeting upcoming AGM and financial reporting requirements, and practical advice to consider for associations, in an attempt to ensure the legality of governance decisions during this pandemic.

Given social distancing efforts and changing laws with respect to public gatherings (public meetings are now generally prohibited, for the time being) many companies and associations are considering changing the format of their AGM from an in-person meeting to a virtual-only or hybrid meeting. Companies and associations looking to incorporate technology into their AGMs need to ensure that their constitutions permit the use of electronic communication devices and that their online platforms and processes are up to the task, otherwise the legality of such actions may be questionable.

What is a virtual-only AGM?

A virtual-only AGM is a meeting whereby members are given the opportunity to participate in the AGM using technology which allows members to vote, ask questions and participate electronically in real-time, rather than attend the meeting at a physical venue.

What is a hybrid AGM?

A hybrid AGM consists of characteristics of both a traditional and a virtual meeting, allowing members to opt between attending the meeting in-person at a physical venue or participating in the meeting through technology.

How can you still hold a legally acceptable AGM?

Companies under the Corporations Act 2001 (Cth)

On 20 March 2020, the Australian Securities and Investments Commission (ASIC) released [guidelines](#) for

meeting upcoming AGM and financial reporting requirements, in light of the ongoing COVID-19 pandemic.

For listed and unlisted public companies whose financial year ended on 31 December 2019 and are required to hold an AGM by 31 May 2020, ASIC have announced that it will take **no action** if they postpone their AGMs until the end of July, in consideration of the difficulties these entities may be facing due to the restrictions on large gatherings, travel restrictions, and concerns from members about attending large-group meetings during the COVID-19 pandemic.

ASIC also acknowledge that it supports the use of appropriate technology for holding AGMs. Companies may opt to hold a virtual-only or hybrid AGM by 31 May 2020 or during the two-month extension period, to comply with COVID-19 restrictions.

For companies wishing to utilise a virtual-only or hybrid AGM, it is paramount they check whether the company constitution allows such meetings and where a notice of meeting has already been dispatched to members, to provide supplementary instructions to members electronically, on the company website, and via market announcements.

Section 249S of the Corporations Act expressly allows a company to hold a meeting at two or more venues using technology that gives members as a whole a reasonable opportunity to participate in the meeting. This provision is

generally considered broad enough to accommodate hybrid meetings.

In the case of virtual-only AGMs, ASIC declared there is some doubt if these are permitted by the Corporations Act and that there is also doubt as to the validity of resolutions passed at a virtual-only AGM. However, ASIC will take a **no action** position on non-compliance with provisions of the Corporations Act that may restrict the holding of virtual-only AGMs during the extension period. This is conditional on the technology providing members as a whole reasonable opportunity to ask questions of the auditor and about management, and vote by a poll rather than a show of hands.

Deferral of AGM

Companies should make an assessment of their AGM-facilitating technologies in advance of holding of the meeting and consider whether it adequately addresses ASIC's conditions. A review of a company's constitution should also be undertaken. If there are concerns, companies could encourage proxy voting for this AGM or instead postpone the AGM and hold it later in reliance on ASIC's no-action position on deferred AGMs.

Associations under the Associations Incorporation Act 1985 (SA) (the "AIA")

As at 23 March 2020, the South Australian Government, Corporate Affairs Commission, and Attorney General are yet to provide any guidance on their stance for AGMs to be held by South Australian incorporated associations amidst the COVID-19 pandemic.

Nevertheless, it is important to seek legal advice to understand and interpret the rules that govern the association (particularly its constitution and the AIA) to determine the legality of a virtual-only or hybrid AGM.

Unless clear participation and voting procedures are stipulated in the constitution or provided to members for virtual-only or hybrid meetings, the AGM should not ideally be conducted on this basis.

For example, it may be questionable whether using technology classifies the member as being present at the meeting for the quorum, recorded in the attendance book, and being entitled to vote.

It is common for board and committee meetings to be virtual-only, but constitutions will rarely provide for members' meetings to be held on this basis.

If a constitution requires resolutions to be passed by a show of hands or by poll, unless the association has appropriate technology mechanisms in place, the association would not be able to achieve this whilst including technology.

Nonetheless, Courts are reluctant to overturn internal steps taken bona fide by Officers of an association. In

other words, a Court could find that the AGM itself was not properly held but could decide that the resolutions passed by a meeting are not to be overturned in the circumstances.

It should be acknowledged that a "special resolution" is defined in the AIA to be passed at a duly convened meeting of the members of the association if, among other things, it is passed by a majority of not less than 75% of voting member voting **in person** or, where proxies are allowed, by proxy, at the meeting. Therefore, other than for proxies, only members physically present at the meeting are entitled to vote on the special resolution. Consequently, in the case of a virtual-only or hybrid AGM, members using the technology would not be able to vote on special resolutions or actively participate. This makes voting on resolutions problematic.

Deferral of AGM

As it currently stands, for associations whose financial year ended on 31 December 2019 and are required to hold an AGM by 31 May 2020, if the association has already scheduled the AGM and the constitution permits, the AGM could be deferred and reconstituted within this required timeframe. If the AGM is deferred for 30 days or more, a further notice will need to be issued to members for the reconstitution.

Given the social distancing restrictions and ever evolving status of the law around COVID-19, an advantage from a legal perspective of reconstituting the meeting would be enabling the meeting to clearly be conducted on a basis compliant with the association's constitution.

The Corporate Affairs Commission, on the written application of the association, or on its own motion, has the ability to exempt associations from the AGM timeframe obligations. The exemption may be granted upon such conditions as the Commission thinks fit and may, at any time, be varied or revoked by the Commission. The unique reason and special circumstances of the COVID-19 pandemic will likely enliven this power of the Commission.

Office holder's tenure

If an AGM is deferred, one consequence that may arise is the status of internal governance bodies which are dependent on AGM processes. Seeking legal advice to understand and interpret the constitution and rules is recommended to determine whether the office holders will continue in their roles until the deferred AGM takes place.

Other points to remember

- Keep abreast of the updated advice from governments, regulators and public health bodies on whether or not an AGM can be held.
- Keep open communication with the board and members / shareholders so they are fully informed.
- Consider logistics of holding or deferring the AGM.
- Encourage early return of proxies (if permitted).
- Seek legal advice before acting.

For more information regarding COVID-19 legal issues and considerations please access our website [here](#).

Contact details

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This content is current as at 23 March 2020. The speed with which COVID-19 is spreading and the varied responses both internally within Australia and externally change on a daily basis. It is important that you regularly keep up to date with all relevant information and be prepared to respond as the landscape in which the virus is moving changes.

This Alert is intended as general information only. It does not purport to be comprehensive advice or legal advice. Readers must seek professional advice before acting in relation to these matters.