

CORONAVIRUS AND SHAREHOLDER MEETINGS

Impact on shareholder meetings

Listed entities are required to hold their annual general meeting (“AGM”) within five months of the end of their financial year. This means that entities with a 31 December year-end would usually be required to hold their AGM by the end of May the following year.

Listed entities may also want or need to hold shareholder meetings for various reasons, for example where they need shareholder approval to take certain actions under the ASX Listing Rules or the *Corporations Act 2001* (Cth) (“**Corporations Act**”).

Rapidly changing legal requirements surrounding the COVID-19 (“**Coronavirus**”) pandemic and the need to maintain social distancing are challenging the ability for listed entities to hold shareholder meetings as they have previously done.

In this client update, we explain:

- what entities can do generally to address the current challenges in the context of shareholder meetings;
- how they can hold shareholder meetings under their constitutions; and
- what entities can do if their constitutions do not permit these solutions of hybrid or virtual meetings.

ASIC Notice

On 20 March 2020, ASIC released an official [notice](#) (“**ASIC Notice**”) that it would allow listed entities with a 31 December year-end to delay holding their AGMs until 31 July 2020. ASIC explained that it will take a ‘no action’ position regarding the timing of AGMs and the conduct of AGMs by electronic means, if entities ultimately hold their AGMs before 31 July 2020.

Hybrid or virtual meetings

ASIC stated in the ASIC Notice that it supports the holding of AGMs using appropriate technology, but only if members are given the reasonable opportunity to participate in the meetings – so what does this entail?

Entities may be able to utilise “hybrid” or “virtual” meetings (concepts which are explained below) as a way to conduct their shareholder meetings, but only if their constitution permits a meeting of shareholders to be held in those ways.

As we recommend in this client update, we encourage entities to use the hybrid rather than virtual meeting approach for the reasons detailed below.

How does a hybrid meeting work?

A hybrid meeting contemplates that members are encouraged to participate in the meeting electronically, without the need to travel or attend in person. The meeting would still require a quorum to be present at the physical venue to ensure the validity of the meeting, but despite the most recent limitations prescribed by the Australian government in force as at the date of this alert (which limit the maximum number of attendees at physical meetings to two), the quorum requirements of

most companies' constitutions will generally permit this option by providing that a minimum of two shareholders present at a shareholder meeting will constitute a quorum.

ASIC has encouraged entities to hold their AGMs through the use of a hybrid meeting, provided their constitution allows for meetings to be held in this way. In that regard, ASIC has noted that it does not have the power to modify the Corporations Act to facilitate hybrid meetings where they are not permitted under an entity's constitution.

A hybrid meeting would still encourage active participation by members in the meeting by having:

- proxies submitted ahead of the meeting (or facilitating the use of direct voting, as explained below);
- the ability for members to ask questions of the entity's Board in real time through appropriate technology; and
- the ability for members to view and listen into a webcast of the meeting.

'Direct voting' provisions are usually contained in most modern constitutions and allow members to deliver votes by non-traditional methods approved by the entities' directors (including voting through electronic means). Direct voting is a mechanism by which members can vote directly on resolutions which are to be determined by poll. Votes cast by direct vote of a member are taken to have been cast on the poll as if the member had physically cast the votes on the poll at the meeting.

Directors must determine that votes can be cast through direct vote for all or any of the resolutions and they must determine the manner appropriate for the casting of direct votes, in line with the applicable provisions in the entity's constitution. In conducting a hybrid meeting, we recommend that all of the resolutions are determined by poll, given that it is not only regarded as best practice in normal circumstances but also facilitates direct voting.

If such a determination is made by the entity's directors, then the notice of meeting will need to include information on the application of direct voting. However, entities will need to assess whether it is clearly set out in their constitutions whether a member who is exercising a right of direct voting is deemed to be present at the hybrid meeting (and is accordingly eligible to vote at it).

Most share registries have the appropriate technology to enable a meeting to be conducted as a hybrid meeting and, as long as the entity's constitution permits online participation, then this may be the most appropriate and safest way for entities to ensure their members can still reasonably participate in all facets of their meeting.

Can a fully virtual shareholder meeting be held?

A virtual meeting is a meeting conducted wholly online with no physical element (ie unlike a hybrid meeting, there is no combination of a physical meeting at a specific venue and online participation from members). In a virtual meeting, members would be given the opportunity to participate electronically in the meeting through an online platform (typically provided by the entity's share registry) which would allow members to vote, direct questions to the Board and otherwise participate in real time, instead of attending the meeting at a physical venue.

Whilst virtual meetings are held in other jurisdictions such as the United States and Canada, ASIC has stated there is some doubt over whether a virtual AGM is permitted under the Corporations Act.

This is likely because of section 249S of the Corporations Act, which permits meetings to be held at two or more venues, provided technology is used that gives the entity's members as a whole the reasonable opportunity to participate. That section contemplates a meeting at several venues, linked

by appropriate technology, rather than a meeting conducted wholly online. ASIC has noted that it does not have the power to modify the Corporations Act to allow for virtual AGMs.

ASIC has, however, explained in the ASIC Notice that it intends to take a 'no action' position on non-compliance with provisions of the Corporations Act which restrict the holding of virtual AGMs, where an entity elects to hold a virtual meeting in order to comply with the extended deadline of 31 July 2020.

Virtual meetings – potential challenges to validity

Entities still need to be conscious that, even though ASIC may take a 'no action' position on virtual AGMs, this does not prevent potential action from activist groups or disgruntled members over the validity of a virtual shareholder meeting and of the resolutions passed at such a meeting.

In that regard, it may be that particular members who do not like the results of a vote at a virtual meeting may later seek to challenge the validity of the meeting as a whole (including those voting results).

Entities will need to be wary of this possibility, particularly when considering their potential exposure having regard to:

- contractual obligations;
- warranties (for example, that particular shareholder approvals have been obtained and corporate actions validly undertaken in relation to certain matters); and
- whether there is a need to flag (in the notice of meeting or otherwise) the possibility of the results of the meeting being able to be challenged, as a result of the manner in which the company has determined to hold it.

Given the potential risks of complete technology failure during a meeting, non-compliance with the Corporations Act, or a member challenge to the validity of virtual meetings, if an entity's constitution permits it to hold a hybrid shareholder meeting then we encourage entities to pursue that approach rather than holding a wholly virtual meeting.

If your Constitution does not permit electronic voting – then consider deferring your AGM until late July

Depending on when an entity's constitution was last updated, it might only provide for voting by a show of hands or by poll, rather than also allowing voting by electronic means. However, in the current Coronavirus environment, a traditional physical AGM will be contrary to governmental meeting restrictions regarding social distancing and maximum attendee numbers.

In such a case, some entities may prefer at this stage to delay the convening of their AGMs in the hope that existing Coronavirus restrictions may be relaxed in the coming months. Obviously however, whilst ASIC's position of 'no action' means that it does not intend to take regulatory action regarding the deferral of AGMs, that is only the case if the relevant AGM is ultimately held before 31 July 2020.

Accordingly, entities considering deferring their AGM should be prepared to revisit their approach on or before the first week of June 2020, to ensure they have sufficient time to send their Notices of AGM to members in time to hold that meeting before 31 July 2020 (assuming that ASIC's 'no action' position has not by that time been extended until a later AGM deadline date).

In this regard, entities should note that notices of meeting may take longer than usual to settle and dispatch to shareholders, due to longer lead times potentially being required for each step in the process (particularly printing).

For entities without the constitutional capability to utilise electronic voting methods, if the existing physical gathering restrictions remain in place approaching the date set down for the shareholder meeting, shareholders should be specifically encouraged to vote by proxy (and accordingly lodge their proxy votes within time).

Notice of Meeting already dispatched? Don't despair

If entities have already dispatched their notices of meeting for a physical meeting, then they should consider converting the meeting into a hybrid meeting instead (as described above) if the entity's constitution allows for it.

ASIC has stated that it supports such entities sending supplementary instructions to their members to accommodate updated voting instructions for online participation in the meeting by way of the following:

- electronically to their members through email (if the member has nominated email as their preferred contact method);
- on the entity's website; and
- via an ASX announcement.

If an entity cannot get these supplementary instructions to its members through their nominated contact method then ASIC's 'no-action' position provides that ASIC will not take action in respect of any failure of the supplementary instructions to comply with section 249J of the Corporations Act.

Further, in such a situation and otherwise as mentioned above, entities can encourage their members to submit votes by proxy ahead of time to ensure those votes are considered at the meeting.

Conclusion

We consider a meeting held by an entity by way of a hybrid meeting approach (if allowed under its constitution) to be the most effective way for it to hold a shareholder meeting, consistent with its obligations under the Corporations Act, under the present restrictions on gatherings imposed by the Australian Government as a result of the Coronavirus pandemic.

Physical attendance may not be possible or practical, subject to restrictions both on travel and gatherings, and hybrid meetings will provide an entity's members the best opportunity in such circumstances to participate in hearing addresses from the Board, viewing any presentation materials, asking questions and voting on relevant resolutions.

ASIC has stated in the ASIC Notice that it will carefully monitor how market conditions and Coronavirus impacts are affecting the AGM obligations of entities and that it may update its guidance for entities with 31 March or 30 June year-end dates.

This update is current as at 1 April 2020 and may change given ASIC's position in monitoring events and the large number of entities likely to be restricted in conducting their AGMs in line with their statutory obligations under the Corporations Act, as well as restrictions which may apply from time to time regarding travel and public gatherings of people.