

Company Meetings

Shareholders' meetings, notices, proxies, poll voting and minutes

Guidance – COVID-19 and Annual General Meeting (AGMs)

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Social distancing requirements and the associated legislative restrictions on travel and public gatherings as a result of the COVID-19 pandemic have created significant difficulties for public entities in complying with their obligations under the Corporations Act to hold an AGM within 5 months of the end of their financial year (s 250N, Corporations Act). This is especially relevant for entities with a financial year ending on 31 December, with the deadline of 31 May to hold an AGM fast approaching. This guidance will outline the alternatives available to entities to meet their obligations with regard to AGMs in the context of COVID-19. For general guidance on AGMs see [AGMs of public companies](#) and [Conduct of meetings](#).

The Governance Institute of Australia (GIA) has produced a thorough and useful Guidance on COVID-19 and the impact on AGMs. This is available on the GIA's [website](#). Practitioners should note, however, that this document is current as at 20 March 2020 which predates the imposition of stricter restrictions under State and Territory Public Health Acts which limit gatherings to two people not in the same household (except in NT where the limit is 10) and require individuals to stay at their principal places of residence unless undertaking an enumerated number of essential activities (which do not include AGMs). As such, certain recommendations made by the GIA, and in particular the material relating to hybrid (combinations of physical and electronic) meetings are no longer applicable.

What are the current options?

As a result of the current situation, a traditional physical AGM with large numbers of shareholders and company officers gathering in the same premises is simply not possible. A hybrid AGM, with options for both physical and virtual participation by shareholders is also not possible. Therefore, entities are left with 3 main options: postpone the AGM, proceed with the AGM as “virtual” electronic meeting or combine these options and postpone the AGM, in order to allow time to organise for either a virtual or hybrid AGM to be held at a later date as circumstances permit. ASIC's [“no-action” position](#), issued on 20 March 2020, allows for all of these options. The ASX has [announced](#) its support of ASIC's “no action” position.

Proceeding with a virtual AGM

Given the current government restrictions, the only possible option at the moment is to hold a virtual AGM solely via online and/or telephonic means. ASIC's position is that hybrid AGMs are permitted under the Corporations Act, provided that an entity's

constitution does not restrict them. ASIC does not have power to modify the Act to allow for hybrid AGMs where they are not permitted by an entity's constitution.

However, there is doubt as to whether the Corporations Act permits solely virtual AGMs, and whether resolutions at such AGM are valid. This is principally due to the s_249R requirement that meetings be held "at a reasonable time and place", which imports a requirement for a physical location. In addition, the constitutions of individual entities may restrict or not allow for virtual AGMs. Decision makers and advisors should therefore have close regard to the particular entity's constitution in deciding how to proceed with regard to the AGM. ASIC does not have power to modify the Act to allow for virtual AGMs, however it has announced that it intends to take no action on non-compliance with Corporations Act provisions that restrict the holding of virtual AGMs up to the statutory deadline of 31 May 2020 and for a further 2 month extension period from that date (until July 31 2020). ASIC has indicated this period is subject to a further possible extension depending on circumstances.

Practice Tip: Decisionmakers and advisors should note the following considerations:

- In practice, few company constitutions contemplate hybrid AGMs and even fewer, if any would explicitly allow for fully virtual AGMs. The provisions of the particular entity's constitution should be carefully considered in deciding a way forward, including provisions regarding quorum, proxy voting and direct voting where available.
- ASIC's no action position does not preclude disaffected shareholders or other third parties such as other regulators or government authorities from taking private actions either claiming that the Corporations Act and/or the entity's constitution renders a virtual AGM and the resolutions passed at it invalid and/or taking issue with any delay in holding an AGM.

Crucially, ASIC's no action position on virtual AGMs is subject to entities meeting the s 249S requirement of providing members as a whole with a reasonable opportunity to participate in the AGM. Entities choosing to hold a virtual AGM should ensure the following:

- that auditors "attend" the electronic meeting and that members have an adequate opportunity to ask questions of auditors
- that members have an adequate opportunity to ask questions about the entity's management
- that voting occurs via a poll (or, if available in the constitution, direct voting facilities online prior to the AGM) rather than via a show of hands

ASIC recommends that entities assess their technological capability to hold a virtual AGM and ensure the above factors are adequately addressed. This will involve liaising with technology providers to ensure that the platform and arrangements used to hold the AGM allow for the above, including capability for:

- the AGM to be livestreamed online
- an online forum allowing members to ask questions of auditors and management is established – for example via a video or text chat function

- electronic polls to be used and electronic means to register proxies or engage in direct voting are provided

If entities lack adequate technological capacity to hold a virtual AGM, they should postpone and work to establish capacity for a virtual or hybrid AGM at a later date.

Note that a possible breach of s 249S (or any other irregularity with regard to an AGM) does not automatically render the meeting invalid. Section 1322(3A) stipulates that where a member does not have a reasonable opportunity to participate in a meeting, the meeting will only be held to be invalid on that ground if a Court declares the meeting to be invalid on the basis of a finding that a substantial injustice has been or may be caused and such an injustice cannot be remedied by any alternative order.

Postponing the AGM

Process for postponing

ASIC's no action position also provides entities with the option to delay holding an AGM until 31 July 2020. Entities therefore have the option to make use of both aspects of ASIC'S no action position – that is, postpone their AGM, and then hold the postponed meeting as a virtual AGM.

However, as noted above, the no action position is merely a statement of regulatory intent regarding to ASIC's intended exercise of its own powers. It therefore does not preclude members or other third parties from commencing private actions regarding the deferral or postponement of an AGM.

Public companies requiring an extension of time beyond the current no action position deadline of 31 July 2020 to comply with their AGM obligations have the option of applying directly to ASIC for a further extension of time pursuant to s 250P of the Act. This process is governed by [RG 44](#) which provides that ASIC will be inclined to grant an extension of time only if:

- the inability of a company to hold its AGM on time is due to factors beyond its control; or
- ASIC is persuaded that it is in the interests of the shareholders to do so.

Where an extension of time is sought due to restrictions on gatherings as a result of COVID-19, the first test will almost certainly be met, and the second is also likely to be satisfied on the basis that it is in the interests of members to have a delayed AGM in which they have an adequate opportunity to fully participate.

RG44 also provides that s 250P applications must:

- be made before the end of the time period within which the applicant entity would otherwise be obliged to hold an AGM (so in the case of entities with a balance date of 31 December 2020 that is May 31 2020, and not the extended period ending 31 July 2020); and

- be lodged in advance to give ASIC sufficient time to consider the application and to allow the company to hold the AGM by the due date if the application is refused.

In granting a s 250P application, ASIC will specify the period of extension which is granted and the company is then obligated to hold the AGM within this extended period.

Practice tips: Entities intending to file a s 250P application should:

- familiarise themselves with the requirements of RG44 and adhere to it;
- make their applications as promptly as possible, given the likelihood that there will be an influx of such applications in light of the effects of COVID-19 and particularly as the 31 May 2020 deadline approaches, and that ASIC is currently occupied with a raft of regulatory and relief priorities relating to the pandemic.

ASIC has cautioned entities against holding AGMs while restrictions on large physical gatherings are in place unless they can provide members with a reasonable opportunity to participate via electronic means, and has encouraged entities with constitutions that restrict virtual AGMs or that otherwise do not have the technical or logistical infrastructure for effective online participation to rely on its no action position to defer AGMs. ASIC has signalled it will take a flexible and pragmatic approach. All of this indicates that it is likely to respond positively to requests under s 250P deriving from the effects of COVID-19.

Unlike reliance on the ASIC no action position, an extension granted pursuant to s 250P has the advantage of ensuring no breach of the Corporations Act has occurred and thus obviates any claims by members or other third parties.

Considerations for a postponed AGM

Entities electing to postpone their AGMs (either in reliance on ASIC's no action position or an a s250P extension) should bear in mind that, even as restrictions on gatherings may be expected to ease over the coming months, it is expected that large indoor gatherings are likely to remain prohibited or restricted for some months (and almost certainly until the extended deadline of 31 July 2020). Therefore postponing the AGM with the aim of holding a traditional physical AGM accommodating hundreds of members, directors, executive and external attendees is unlikely to be a viable strategy for 2020. Instead, entities should postpone the AGM with the aim of ultimately planning to hold a virtual or hybrid AGM for 2020 and utilise the time granted by a delay to make adequate practical and technological infrastructure arrangements for such a meeting.

One pragmatic solution is to postpone the AGM until restrictions on physical gatherings are relaxed sufficiently to allow a hybrid AGM to be held, with a very limited number of attendees present in person allowing for appropriate social distancing measures, and the majority of members and others participating online. This is a good option for entities whose constitutions make allowance for hybrid but not fully virtual meetings. It also avoids difficulties relating to quorum requirements

and obviates any challenges on the basis of non-compliance of a virtual meeting with the provisions of the Corporations Act. Entities electing to take this route should plan ahead to encourage members to promptly return or register proxies or utilise the direct voting provisions in their constitutions (where applicable).

What if a notice of meeting for an AGM has already been issued?

When an entity has issued a notice of meeting pursuant to the requirements of s 249J for an AGM scheduled to be held prior to 31 May 2020, ASIC's no action position covers any supplementary notice to members providing instructions for online participation in the AGM, provided such a notice is sent at least 2 business days before the meeting is held via email, publication of notice on the entity's website and making of a market announcement (note that all 3 elements are required for the notice to enable the entity to rely on ASIC's no action position).

This allows corporate entities that have already scheduled physical or hybrid AGMs prior to the onset of COVID-19 restrictions on public gatherings to amend those arrangements to virtual meetings at short notice.

An entity that has issued an AGM notice may also elect to postpone the AGM if its constitution permits it to do so. However, the postponed AGM must still be convened within the s 250N timeframe, so an entity that seeks to postpone an already scheduled AGM will need to rely on ASIC's no action position and/or an individual extension granted under RG44.

Where the entity's constitution does not include such a power, the entity may notionally commence its AGM and then adjourn it to a later date. The specifics of adjournment will be governed by the entity's constitution. Again, an entity in this position will need to rely on ASIC's no action position and/or an individual extension granted under s 250P and RG44.

Timing and future developments

As noted above, ASIC's current no action position with regard to both virtual AGMs and postponements operates until 31 July 2020 and thus is intended to address the immediate situation facing companies with a 31 December balance date. ASIC has indicated that it intends to monitor the position with respect to AGMs for entities with a balance date of 31 March or 30 June and will provide further updates as required.

As outlined in more detail in our [previous legal update](#), The Coronavirus Economic Response Package Omnibus Bill which came into effect on 25 March 2020 included amendments to the Corporations Act to assist corporate entities. The new Pt 9.11 grants the Federal Treasurer a temporary instrument-making power to amend provisions of the Corporations Act to provide relief from or any obligations under the Act to a class or persons that are unable to meet their Corporations Act obligations, either by exempting them from such obligations or modifying the requirement to comply. This power operates for 6 months and any instrument made under it operates for 6 months from the date it is made. It is available when the Treasurer is satisfied that:

- it would not be reasonable to expect the persons in the class to comply with the provisions; or
- the exemption or modification is necessary or appropriate, in circumstances relating to COVID-19, to facilitate continuation of business or to mitigate the economic impact of the coronavirus.

Depending on how the impacts of COVID-19 unfold, this wide-ranging power may potentially be used to provide relief in relation to AGM obligations in a number of ways:

- provide temporary relief to corporate entities (either as a whole or those in certain classes/ meeting certain criteria) from the s 250N obligation to hold an AGM within 5 months of the end of the entity's financial year (for example, by extending that time period)
- amend the s 249S provision relating to the holding of AGMs at multiple venues via technological means provided members are given a reasonable opportunity to participate and the s 1322 provision regarding meeting irregularities – to clarify the position with regard to virtual meetings and what constitutes a reasonable opportunity to participate via technological means
- specify that the s 249R requirement for meetings to be held at a reasonable time and place enclosed online or electronic locations or domains
- amend the provisions of the Act such that corporate entities are able to hold hybrid and/or virtual AGMs notwithstanding the lack of such provisions in their constitutions.

Notably, unlike ASIC's no action stance, amendment of Corporations Act obligations via legislative instrument in this manner will operate to preclude shareholder and third-party claims, as the effect will be that there is no breach of the Act.