

COVID-19 and Annual General Meetings of listed entities – key considerations

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 Annual General Meeting (AGM) within 5 months of the end of their financial year. This infographic summarises the options available and the key practical considerations that entities should take into account in deciding how to proceed with their 2020 AGMs.

What is your entity's balance date?

31 December 2019

- Usual position: AGM must be conducted by 31 May (s 250N).
- Post-COVID-19: ASIC's [no action position](#) extends this to 31 July (this may be extended further).
- Can apply directly to ASIC for further extension per s 250P & RG 44 (this also ensures no breach of the Act and removes litigation risk).
- Given current restrictions on gatherings to 2 people, the only viable possibility is a virtual AGM. Entities unable or unwilling to proceed with a fully virtual AGM should rely on ASIC's [no action position](#) and/or s 250P extension from ASIC until restrictions are eased sufficiently to allow for a hybrid AGM.

31 May 2020 or 30 June 2020

- Usual position: AGM must be conducted by 31 October or 30 November respectively (s250N). By then, restrictions on gatherings may be relaxed but unlikely to be totally lifted, especially for large indoor gatherings.
- Post-COVID-19: Traditional physical AGM not viable for 2020 but hybrid AGM with few in-person attendees and the majority of members and others joining online is possible. Plan now for a virtual or hybrid AGM.
- ASIC's [no action position](#) does not apply but ASIC will monitor developments and may extend the no action position to companies with 31 May and 30 June balance dates if warranted.
- Can apply directly to ASIC for further extension per s 250P & RG 44 (this also ensures no breach of the Act and removes litigation risk).
- Treasurer may use instrument-making power under the new Pt 9.11 of the Corporations Act to vary or provide relief from AGM obligations via legislative instrument. Watch this space!

Practical considerations: Postpone or proceed with a virtual AGM?

Proceed with virtual AGM if:

- Company constitution allows for virtual AGM. Check provisions regarding:
 - Quorum
 - Electronic return of proxies
 - Direct voting
 - Other requirements for conducting meetings
- Entity does not have particular concerns regarding challenges by disgruntled members or other interested parties as to validity of a virtual AGM and any resolutions passed at it
- Entity is confident it currently has in place sufficient logistical capability and technological infrastructure to run a virtual AGM in a manner that fulfils the s 249S requirement that members be given a reasonable opportunity to participate.

Postpone (and proceed with a hybrid AGM when circumstance allow) if:

- Company constitution lacks provisions for virtual AGM
- Entity is vulnerable to legal action by disgruntled members or other third parties claiming that virtual AGM breaches s 249R of the Act
- Entity does not have infrastructure in place to run a fully virtual AGM in a manner that fulfils s 249S requirement that members be given a reasonable opportunity to participate and prefers to postpone meeting to build technical capability and/or to plan for a hybrid meeting when physical distancing restriction are relaxed.

Applying for exemption under section 250P

- **Consider whether to apply if:**
 - the extension of time granted by ASIC's no action position (until 31 July 2020) is not sufficient time to organise a virtual or hybrid AGM; and/or
 - the entity is vulnerable to legal action by disgruntled members or other third parties claiming breach of the s 250P requirement to hold an AGM within 5 months of the end of financial year
- **Follow application requirements in Regulatory Guide 44:**
 - Apply before the statutory deadline to hold an AGM (for companies with a balance date of 31 December 2019, this is 31 May 2020)
 - Allow sufficient time for ASIC to consider the application and to allow AGM to be held by due date if application fails. Given the current strain on ASIC's capacity, make application as soon as possible.
 - Use Form 2501 and pay lodgement fee of \$3,487
 - Address at least one of the following 2 requirements – that inability of the company to hold the AGM by the deadline is due to factors beyond its control **OR** it is in the interests of shareholders for an extension to be allowed. Given the context of COVID-19, ASIC has indicated it is conscious of the need to ease regulatory burdens and will likely be receptive to s 250P applications.

Steps to ensure a virtual or hybrid AGM complies with s 249S requirement to provide a reasonable opportunity to participate:

- Inform all stakeholders in sufficient time of details and arrangements for virtual AGM (can be done via supplementary notice if an AGM has already been called)
- Have a secure and reliable process to control access and validate attendees
- Have the capability to livestream AGM online in real time and reliably
- Provide secure electronic access to all documents ordinarily required to be presented at AGM (annual financial report, directors' report, auditors' report)
- Arrange for auditors to attend meeting digitally (per s 250RA requirement)
- Have an online forum or platform for members to submit questions of auditors and management, e.g. via video or text chat function
- Ensure that secure electronic means to register proxies or engage in direct voting are provided to members prior to meeting
- Have a procedure for voting via electronic polls during meeting