

## Guidance: Update on AGMs, electronic document execution and digital shareholder communications

3 May 2021

The temporary [measures](#) permitting Australian corporations to hold virtual and hybrid meetings and enabling the electronic execution of documents and digital shareholder communications expired on 21 March 2021.<sup>1</sup> This follows the Government's attempt to pass the [Treasury Laws Amendment \(2021 Measures No. 1\) Bill](#) before Parliament rose. That Bill would have extended the ability to hold virtual AGMs (and other general meetings, and scheme meetings), execute documents electronically and use technology to communicate with shareholders to September 2021. The Bill would also have made changes to the continuous disclosure regime.

Pending the passage of that Bill, the *Corporations Act 2001* (Corporations Act) has reverted to its pre-COVID form and companies planning shareholder meetings, particularly companies with a balance date of 31 December or 31 March, will need to consider the implications for their AGMs and other meetings. At the same time companies will need to monitor public health announcements in the event of further outbreaks of COVID-19 and may wish to have flexible arrangements in place to cover this situation.

In a welcome development ASIC [announced](#) on 29 March that it would adopt a 'no action' position in relation to the convening and holding of virtual AGMs and giving notice of meetings. ASIC amended its position on 23 April to extend several deadlines. The 'no action' position as of 23 April:

- Supports the holding of meetings using appropriate technology,
- Facilitates electronic notice of meetings including supplementary notice,
- Allows additional time for the lodgement and distribution to members of financial reports, directors' reports and audit reports for listed and unlisted entities prior to the AGM, and
- Allows public companies additional time to hold their AGMs.

ASIC has also re-issued the [ASIC guidelines for investor meetings using technology](#), updated to reflect the current 'no action' position. In the guidelines ASIC encourages directors to consider whether holding a meeting using virtual technology is appropriate in the circumstances, taking into account the needs of investors and whether there are or may be any COVID-19 restrictions in place at the time.

In addition, ASIC's latest [no-action](#) position allows an extra two months for public companies to hold AGMs for companies with financial years ending between 7 January and 7 July 2021.<sup>2</sup> These entities will be able to defer their AGMs for up to seven months, rather than the usual five months. Deadlines for the lodgement of financial reports, directors' reports and audit reports for listed and unlisted entities have also been extended by one month (refer: [21-082MR ASIC to extend deadlines for 30 June 2021 financial reports and amends 'no action' position for AGMs](#)).

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<sup>1</sup> See for example Corporations (Coronavirus Economic Response) Determination (No. 3) 2020 (Determination No. 3) which replaced an earlier Determination to the same effect.

<sup>2</sup> ASIC had previously [announced](#) a 'no-action' position for public companies with financial years that end from 31 December 2019 to 7 January 2021. This has been further extended for balance dates up to 7 July 2021.

Importantly, a 'no action' position will not necessarily remove the risk of legal action from third parties, for example, challenging the validity of a resolution passed at a virtual meeting. However, the legal position around electronic execution of documents has reverted to its pre-COVID form and ASIC has no power in relation to that topic.

Unless a company intends to rely on ASIC's 'no action' position, this means:

- Hybrid AGMs may not be allowed if not expressly permitted by a company's constitution.
- There is once again legal uncertainty about the validity of virtual-only AGMs.
- Full notices of meeting will need to be sent to shareholders for AGMs and other meetings
- There is once again uncertainty in some jurisdictions about the validity of a company executing documents electronically.

### **1. ASIC 'no-action' position 23 April 2021**

The 'no-action' position is temporary and will be reviewed in September 2021 (or earlier, if relevant measures are introduced by Parliament). It applies to meetings held between 21 March 2021 and the earlier of:

- 31 October 2021, and
- the date Parliament passes any measures relating to the use of virtual technology in meetings of companies or managed investment schemes.

In its 'no action' position ASIC restates its view that the Corporations Act permits hybrid meetings but encourages companies to review their constitutions to ensure there is no restriction. ASIC also restates the view that there is doubt about whether virtual meetings are allowed under the Corporations Act and whether resolutions passed at a virtual AGM are valid. In addition, ASIC notes companies' constitutions may restrict them from holding a virtual AGM.

### **2. 'No action' position on virtual meetings**

The 'no-action' position on virtual meetings is conditional on:

- the technology or technologies used to hold the meeting providing members as a whole a reasonable opportunity to participate (sections 249S and 252Q). This includes ensuring that members who are participating remotely are able to ask questions and make comments at the meeting
- voting at the meeting occurring by a poll rather than a show of hands
- each person entitled to vote being given the opportunity to participate in the vote in real time (where practicable voting should also be available in advance of the meeting); and
- the notice of meeting including information about how those entitled to attend can participate in the meeting (including how they can vote, ask questions, make comments or otherwise speak at the meeting to the extent they are entitled to do so).

Where the 'no-action' position is relied upon, companies should take care to address these requirements and ensure that proxy form wording permits proxies to vote by poll on procedural motions, as well as the resolutions formally proposed in the notice of meeting.

### **3. 'No action' position on sending notices of meeting**

The 'no-action' position will also extend to contraventions of the Corporations Act if a company sends a notice of meeting, or supplementary information in relation to a meeting, using one or more technologies to communicate to those entitled to receive notice of the meeting.

The following conditions apply:

- A notice of meeting or supplementary information in relation to a meeting, whether given electronically or otherwise, must either include the contents of the notice or details of an online location where the contents of the notice can be viewed or from where they can be downloaded.
- Where a shareholder has not nominated an electronic address, notice of how to access the contents of the notice must still be given personally or by post.
- Supplementary instructions for on-line participation in the meeting must be given at least two business days before the meeting is held by:
  - electronic message (if the member has provided the relevant details);
  - a notice on the entity's website; and
  - a market announcement if the entity is listed.<sup>3</sup>

#### **4. AGMs held within two months after their due date**

The 'no-action' position also extends to public companies with a financial year end between 7 January 2021 and 7 April 2021 that do not hold their AGMs within five months after the end of their financial years, where these meetings are held up to seven months after year end. This builds on the existing equivalent no-action position that applies to public companies with financial years that ended from 31 December 2019 to 7 January 2021 (refer: [20-276MR ASIC to further extend financial reporting deadlines for listed and unlisted entities and amends 'no action' position for AGMs](#)).

#### **5. Virtual-only AGMs**

As noted above, as the law now stands it is uncertain whether companies are able to hold legally valid online or virtual meetings without a physical component due to their constitutions not expressly contemplating meetings being held this way, as well as issues as to whether specific provisions of the Corporations Act contemplate virtual meetings. ASIC and others have 'expressed doubt as to whether section 249S allowed "virtual meetings", that is meetings which were not conducted in a specified place or places at which all participants attended through technology'.<sup>4</sup> In addition, many companies' constitutions do not expressly contemplate online shareholders' meetings.

The temporary arrangements enabling virtual AGMs during 2020 saw widespread take up of virtual AGMs and increased levels of stakeholder engagement. In its AGM Snapshot 2021 Link Group observed that ... 'The statistics indicate an increase in engagement and the ability to participate in meetings irrespective of the attendee's location'.<sup>5</sup> Many companies in the charitable and not-for-profit sector report having been able to engage with their members and other stakeholders at AGMs and other meetings in new and innovative ways as well as realising significant cost savings.

#### **6. Hybrid AGMs**

Depending on the specific provisions in a company's constitution, a company may be able to hold a hybrid AGM that is a combination of a physical and virtual meeting — for example, by using technology to connect people at one or more locations. It is important to obtain legal advice on this issue as many company constitutions do not expressly contemplate hybrid meetings. Companies conducting hybrid AGMs should make shareholders aware that they can participate fully in the AGM virtually online. Holding a hybrid AGM in itself will not preclude the ability of shareholders to attend in person and companies may wish to consider adapting the basis on which they hold their AGMs —

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<sup>3</sup> This no-action position covers any failure of supplementary instructions to comply with section 249J of the Corporations Act.

<sup>4</sup> See the advice of Douglas Gratton, Barrister-at-law at paragraph 53 attached to the [Statement on electronic storage and execution of documents and electronic meetings](#), September 2020. See also MR *ASIC adopts 'no-action' position and re-issues guidelines for virtual meetings*, 29 March 2021.

<sup>5</sup> See [AGM Snapshot 2021](#), Link Group, February 2021 at page 6.

see below. Under section 249S of the Corporations Act meetings held in two or more places must give shareholders 'as a whole a reasonable opportunity to participate'.

Registries and technology providers can assist with facilitating hybrid AGMs.

## **7. Court validation of virtual or hybrid meetings**

Where a shareholder meeting is convened by the court (for instance, in a scheme) the court can make orders as to how the meeting may be held, and can authorise a virtual or hybrid meeting. In that case, it is best that specific orders be sought.

For general meetings and AGMs, the court's ability to confirm or validate a hybrid or virtual meeting can be affected by timing and circumstances. For instance, the Federal Court has the power to make declarations under the Federal Court of Australia Act 1976, but the notice of meeting may have to have been issued for there to be a justiciable matter. Alternatively, the court has power under section 1322(4) of the Corporations Act to validate irregularities — but the meeting would have to have been held before the power becomes active, and the case law is divided as to whether an intentional or deliberate irregularity can be cured — so this is not without risk. These powers may, however, be helpful in more limited circumstances where a virtual or hybrid meeting is necessary because the ability to hold a physical meeting has been affected by a lockdown or public health emergency.

## **8. Notices of meeting**

Unless a company intends to rely on the ASIC 'no-action' announcement, the position now is that section 249J of the Corporations Act requires written notice of a meeting to be given to each member. It can be sent to an electronic address nominated by the shareholder or through a nominated access means. Under section 249L(1)(a) the notice must set out the place, date and time and, if the meeting is to be held in two places, the technology that will be used to facilitate the meeting.

Where a company is holding a hybrid meeting there should be clear instructions about the technology being used for the meeting and how to join the online part of the meeting. Companies will be required to send a full notice of meeting and accompanying documents to members either by mail or by electronic means where the shareholder has opted to receive electronic communications.

## **9. 'Reasonable opportunity to participate'**

In its re-issued [Guidelines for investor meetings using virtual technology](#) ASIC indicates that a reasonable opportunity to participate means shareholders 'should be given an opportunity to participate in the meeting that is equivalent to the one they would have had if attending in person.' The Guidelines outline a range of practices it considers would achieve this:

- Shareholders participating virtually should be able to follow the proceedings of the meeting uninterrupted.
- Changes to account for the virtual environment should be tailored, as far as possible, to preserve and promote genuine and effective interaction between members and the directors.
- Shareholders should have a reasonable opportunity to ask questions live during the course of the meeting either online or in person and be able to comment on, and raise questions in response to, presentations, debate and other matters arising at the meeting. There should also be an opportunity for questions about, or comments on, the management of the company, the remuneration report (if relevant) and the auditor.
- If a company is able to review and select members' questions or comments submitted in advance of, and/or at, the meeting, the selection process should be balanced and representative as well as transparent about the number and nature of the questions asked and not answered — and records of questions, comments and responses.
- Shareholders entitled to vote on resolutions put at the meeting should have the opportunity to consider responses to questions and debate before doing so and have the same opportunity to vote during the meeting via virtual technology as those attending the meeting in person. This is

the case even where it also possible to vote prior to the meeting via proxy or through direct voting.

## 10. Tips for AGMs in the current environment

While there have been a limited number of outbreaks of COVID-19 in recent months, companies should have in-built flexibility in their AGM arrangements to ensure they can move quickly if circumstances change. The following suggestions may assist in planning and conducting AGMs.

- Contact your registry and technology provider to discuss arrangements and contingency plans — registries and technology providers made a number of enhancements to their technology platforms in 2020. They should be able to advise about features which may enhance shareholders' experience.
- Establish a dedicated AGM area on the company website. This area can include the details of arrangements for the meeting, links for web-streaming and can be updated to reflect changes to the situation such as changes following public health announcements in the event of further outbreaks of COVID-19.
- Encourage proxy voting. Include specific provisions in the notice of meeting encouraging shareholders to vote by proxy. Facilitate online voting and online proxy lodgement given that postal services may be slower than pre-COVID-19. Supplement this with appropriate messaging on the company website. While shareholders can choose any proxy they want — encourage them to choose the Chair, 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 — see below.
- Encourage shareholders to provide email addresses and mobile phone numbers as part of pre-registration, to facilitate shareholder communications and updates in the event of public health announcements following further outbreaks of COVID-19.
- Consider an additional physical shareholder event 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.
- 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. During 2020 some companies used QR codes which lead to greater efficiencies. It will also assist in minimising queues at the registration / identification desk. You will also need to check with the venue whether there are any limitations on the size of events.
- Consider whether you will provide refreshments and any other complimentary offerings before and after the meeting. The venue for the meeting may have its own requirements.
- Ensure you have arrangements in place for COVID safe check in at the meeting and check whether COVID marshals are required if there are likely to be a significant number of attendees at the meeting.
- Consider live streaming the AGM. Where technologically possible, a live stream of the event and/ or a phone link could be set up. While a small number of companies used telephone lines at their 2020 AGMs they were not widely used by shareholders. Telephone lines are generally charged separately, and you will need to decide whether you will use an operator. You will also need to make arrangements to verify the identity of those calling into the meeting. Registries and technology providers will be able to assist with more information.
- 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. Ordinarily, the chair is required to be present. If directors are standing for re-election it is preferable that they attend the meeting either physically where possible or by video link.

- Given current international travel restrictions overseas resident directors will not be able to attend the meeting in person but can be available for questioning via video link. If overseas directors will be joining the meeting you will need to consider differing time zones.
- 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 with your auditor in advance about any requirements they may have as they are likely to be attending numerous AGMs.
- Be conscious of privacy issues, and notify shareholders if it is possible or likely that the meeting will be recorded.

## 11. Holding meetings involving technology

### Pre-meeting

- Check your constitution regarding any provisions affecting the AGM, including direct voting.
- There are some key practical changes to the processes and procedures of an AGM which uses technology which need to be addressed before the meeting date. You will need to contact your registry and technology provider to discuss arrangements. Key to the successful execution of your AGM is a secure, robust platform that can provide a seamless experience for shareholders. Your chair will want to be involved in the decisions on what technology to use and how the meeting will be conducted.
- Decide what experience your shareholders will have. A webcast will allow attendees to see and hear almost as if they are in the room. Another option is to hold the meeting via audio link with the use of slides. This will allow shareholders to hear but not see the speakers. You should aim to hold a meeting that facilitates effective interaction between shareholders and the board and 'feels' as much as possible like a physical meeting. Decide the technology option that will enable voting and questions. There are various technology offerings that provide online platforms that can be combined with telephone lines, providing shareholders with the ability to vote, submit questions online or call in with questions. You should ask potential providers if they can offer a secure log-in, both real-time and pre-submitted questions, and real-time voting. You should also review processes for how you will verify whether someone is a shareholder. This is especially relevant for when you are allowing shareholders to participate (for example, asking questions) by telephone.
- It is important to engage early and often with your internal IT team. If you are using an external technology provider, it is best to facilitate two-way contact between your IT team and the provider. This will enable the proper consideration of firewall access, the risk of cybersecurity breaches and other technical matters.
- Carefully consider the clarity and simplicity of the login instructions provided to shareholders and guests at the meeting. Some retail and institutional shareholders reported login difficulties during the 2020 season. It may help to test these instructions with internal staff who are unfamiliar with the login environment before sending to shareholders.
- If you are filming from a specific location, you will need to engage with an audio-visual service provider — usually your registry provider will arrange this on your behalf.
- Who will host your meeting and act as moderator? A host (typically the registry provider) will usually introduce and facilitate the meeting, while the moderator is required to field questions from the online audience. It is strongly recommended that you appoint a moderator to field questions from the online audience rather than leave it for the chair to review the questions (see more detail about questions below)
- Ahead of the AGM, hold rehearsals to test the technology that will be used to facilitate the meeting and confirm that the chair and key stakeholders are comfortable with it. One way is to conduct a number of test scenarios with the chair, the CEO and other board members and staff participating as shareholders. There will most likely be a time lag between the shareholder and chair experience and you will need to take this into account in your planning. Ensure you hold rehearsals preferably on the same day of the week and at the same time of day as the AGM to test whether internet speeds will be adequate for the meeting.

## At the meeting

- You will also need to consider what will happen if the technology supporting the AGM fails, for example as a result of widespread network outages. Your service provider should have full redundancy built into their platform to ensure audio and visual back up if required. An alternative chair's script/AGM procedures can be prepared, and moderators can be located with the technology team to communicate easily with the support team if required. Include in the communications with your shareholders your plan B if something happens with the technology during the meeting.
- Be aware that a shareholder's experience and ability to participate will depend on the internet speed where they are located and their own equipment. You may need to have trouble shooting tips available on the AGM section of the website and some registries provide a telephone number for shareholders to contact for assistance.
- If any directors or senior executives will be joining the meeting via technology consider whether they will need a full audio-visual link to the meeting to enable them to address the audience or whether they only need to observe. The speed and reliability of their internet connections may be an issue. If they are attending from home and will be on camera, a professional backdrop may be considered. There should also be a plan in case their internet connections fail.
- It is important that shareholders are able to communicate during the meeting and ask questions on how to use the technology. Companies can consider using technology that gives them the ability to communicate with shareholders via email or phone (a help line) during the meeting. Details of the helpline should be included on the AGM page on the company website.
- Open the poll for voting at the beginning of the meeting and, before closing the poll, make sure that the chair gives a clear notice that they are about to do so and provide a short window (around three to five minutes) for shareholders to have a final opportunity to cast their votes. This notice can be given at the same time that the chair closes the poll.
- Be aware that the ASIC no-action relief requires voting on all resolutions to be conducted by poll — even procedural motions, and other matters that the company might normally put to a vote by show of hands.
- Ensure the length of the addresses are as concise as possible and, for listed companies, ensure lodgement of any chair or CEO speeches with ASX as required by the ASX Listing Rules prior to the AGM. For unlisted companies consider pre-releasing statements so that the AGM is more of an update.

## Questions

- During the 2020 AGM season many companies used online platforms which enabled shareholders to submit questions. Be aware that it may take shareholders time to type their questions into the platform and allow sufficient time to enable shareholders to submit questions. In 2020 some chairs opened up the Q&A session early in the meeting to enable shareholders to submit questions online. They also signalled clearly to the meeting when they would close the Q&A session to enable shareholders to submit final questions.
- Make the Chair's position regarding questions that are practically similar clear. For instance, it is within a Chair's discretion to decline to address repetitive or duplicative questions separately — but it is important to manage shareholder's expectations, and that there may be nuances in questions that would be lost if questions were grouped. Where a question is practically identical to others previously addressed, and the Chair does not wish to address it separately — they should acknowledge that other shareholders have asked questions along the same lines as the one that was answered.
- Be especially mindful in a virtual environment that there is a risk that shareholders do not feel 'heard'. Therefore make a special effort to address as many relevant questions as possible. The goal of the meeting should be to ensure shareholders have a reasonable opportunity to participate. In 2020 some companies read out questions fully to ensure shareholders knew the meeting had 'heard' their questions.

- Ensure you keep a record of questions and comments received both before and during the meeting (with the exception of any inappropriate or defamatory questions/comments). Companies may wish to consider making this available on their websites within a short timeframe of the meeting occurring. This record should not form part of the minutes of the meeting.

## 12. Quorums for meetings

Under the temporary arrangements for online meetings those attending online were able to be counted for the purposes of forming a quorum for the meeting. These arrangements have now expired, and it will be important to ensure that an AGM is quorate. Generally, this is likely to require a small number of attendees, often between two and five. The relevant provisions will be in the company constitution.

Under the Corporations Act (section 1322(2)), a procedural irregularity that has prevented a quorum will not invalidate a meeting where it has not caused any substantial injustice. However, it is preferable that care is taken to establish a quorum, rather than intentionally relying on this provision.

## 13. Executing documents electronically

One of the most significant benefits of the temporary arrangements was the ability to execute documents electronically. While many documents required to be signed under the Corporations Act, including minutes, can be signed electronically if the signatory has authorised the affixing of their electronic signature, the temporary arrangements removed any doubt.<sup>6</sup> As a matter of practice it will be necessary to prove that the signatory authorised and authenticated the use of their signature. For example, by retaining an email authorising the use of an electronic signature or a separate document or including the authorisation in the minutes of a meeting. ASIC has specifically noted that its 'no-action' position in relation to virtual meetings does not address electronic execution of documents.

Alternatively, for the purposes of signing documents (other than deeds) under section 127 of the Corporations Act, a 'modified split execution' method may also be used. For example, a document is wet-ink signed by one director, then scanned to the other director or the secretary to print out the document (incorporating the first signature) to also be wet-ink signed, ideally with a statement incorporated in the document to the effect that the first-signing director authorised the second-signing director to produce a copy of the document, so that the copy is taken to be signed by the first-signing director.

For strict compliance with section 127 of the Corporations Act, it is still preferable that where possible, two officers of the company wet ink sign the same document.

## 14. Deeds

At common law a deed is an instrument written on paper, parchment or vellum and must be signed physically. Under section 127(3) of the Corporations Act a company can execute a document as a deed if it is expressed to be executed as a deed and is signed by two directors or a director and secretary.<sup>7</sup> Section 38A of the Conveyancing Act 1979 (NSW) means that in NSW deeds may be created and signed electronically. Queensland and Victoria also enacted temporary relief to a similar effect in response to COVID-19. Other states did not pass similar legislation. In these states the safest approach is to execute a paper document with a 'wet' signature signed directly by both officers (ie, not using the 'modified split execution' method detailed above, which may not be effective to execute a deed).

<sup>6</sup> See the [Statement on electronic storage and execution of documents and electronic meetings](#), September 2020 at page 2 and the attached advice of Douglas Gratton, Barrister-at-law at paragraph 34.

<sup>7</sup> See the advice of Douglas Gratton, Barrister-at-law at paragraph 39 ff attached to the [Statement on electronic storage and execution of documents and electronic meetings](#), September 2020.



## 15. Additional references

[Guidance: Holding a virtual AGM](#), Australasian Investor Relations Association, Governance Institute of Australia and Business Law Section The Law Council of Australia

[Guide to online meetings](#), Australian Shareholders' Association.

[Statement on electronic storage and execution of documents and electronic meetings](#), Governance Institute of Australia, September 2020.

[Expiry of COVID-19 relief: virtual AGMs, electronic signatures and continuous disclosure](#), AICD, March 2021.

[Virtual member meetings — Guidance for NFPs](#), AICD, 2020 and [AICD Director Tools: Virtual member meetings](#), AICD, 2020, [Board Minutes](#), AICD, 2020.