

COVID-19: (AUSTRALIA) ASIC OUTLINES "NO-ACTION" STANCE ON DELAYED AGMS DURING THE COVID-19 CRISIS

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**This information is accurate as of 9.00 am Wednesday 25 March 2020 and is subject to change as this situation evolves.*

In response to the ongoing COVID-19 crisis, the Australian Securities and Investments Commission (ASIC) has on 20 March 2020 issued guidance on the annual general meeting (AGM) obligations of entities with a 31 December financial year end. ASIC is also "closely monitoring" the situation with regards to possible effects on financial reporting.

ASIC has adopted a formal "no-action" position on entities with a financial year end of 31 December failing to meet the 31 May AGM deadline, provided the entity holds their AGM by 31 July. ASIC has also confirmed its support for the holding of AGMs using "appropriate technology" such as hybrid and virtual AGMs.

THE STATE OF PLAY

As the world grapples with the unfolding COVID-19 outbreak and increasing restrictions on movement and gatherings are applied, entities have been faced with rising uncertainty as to how they are to comply with their legal and regulatory obligations.

Restrictions on gatherings

In line with measures adopted internationally, the Australian Federal Government on 18 March 2020 declared a ban on all "non-essential" indoor gatherings of more than 100 people. With shareholder meetings not being exempted as "essential", this presents a clear dilemma for entities obliged to convene meetings in the immediate future and beyond.

What are the AGM requirements?

Section 250N(2) of the *Corporations Act 2001* (Cth) (the Act) mandates that a public company must hold an AGM at least once per calendar year and within five months after the end of its financial year (ie 31 May for companies with a financial year end of 31 December).

The Act does allow for a company to apply to ASIC for an extension to the period in which they are required to hold an AGM. Although each application is assessed on its merits and we would expect ASIC to be broadly sympathetic to companies affected by COVID-19, uncertainty surrounding the length of gathering bans and further measures may not make indefinite delays preferable nor acceptable.

What if an AGM has already been called?

The Act does not provide any mechanism by which a company can postpone or cancel an AGM that has already been convened. Consequently, companies need to examine their constitutions in order to ascertain whether an express power of postponement or cancellation exists. It should be noted that ASIC does not have the power to sanction the unconstitutional postponement of a convened AGM. As such, a company would not be immune to third party claims.

ASIC's "no-action" position

As noted above, ASIC has taken a formal "no-action" stance on a 2-month delay of AGMs beyond the 31 May deadline. At present, this applies only to entities that have a 31 December financial year end. This means that the regulator will take "no-action" against entities that fail to comply with their obligations under section 250N(2) of the Act.

Given the fluidity of the COVID-19 outbreak and the adoption of responsive measures, ASIC is continually monitoring this stance and has eluded to the possibility of further extensions.

Hybrid and virtual shareholder meetings: a viable alternative?

ASIC has also provided limited guidance concerning the use of so-called "appropriate technology" should an entity commit to holding their AGM in compliance with the 31 May deadline or during the extension period. Again, a blanket delay of AGMs is unlikely to be an acceptable nor workable policy indefinitely.

Additionally, ASIC will take "no-action" against entities that fail to comply with section 249J of the Act by sending supplementary instructions for online participation to members at least 2 business days before the meeting is held. This covers instructions distributed via electronic message, a notice on the entity's website or by way of market announcement (if listed) and serves to encourage the adoption of "appropriate technology".

Hybrid Shareholder Meetings

Hybrid shareholder meetings (that is, a shareholder meeting held concurrently across both a physical and virtual platforms) are permissible under section 249S of the Act – provided members as a whole are given a reasonable opportunity to participate. This may include the use of an online polling system by which members can vote and ask questions using their unique shareholder identifiers.

Unfortunately, companies must again consult their constitutions as to whether there are any restrictions on holding meetings in this manner. ASIC does not have the power to validate hybrid shareholder meetings where they are not permissible under an entity's constitution.

Companies should consider current restrictions on non-essential travel and gatherings when planning for a shareholder meeting as members may still wish to attend the physical meeting.

Virtual Shareholder Meetings

Current authority suggests that the Act does not sanction the use of virtual shareholder meetings (held entirely online). Whilst ASIC has taken a "no-action" stance on the use of virtual shareholder meetings, it should be noted that they do not have the power to validate virtual shareholder meetings if deemed non-compliant under the Act or are in breach of an entity's constitution.

Moreover, ASIC's "no-action" position is limited to virtual AGMs that can meet the requirements of section 249S of the Act (ie members as a whole are given a reasonable opportunity to participate). Again, third party liability remains.

ASIC further directs entities to seek legal advice in relation to relief which may be available under section 1322 of the Act, which provides that irregularities associated with meetings are not invalidated in certain circumstances.

Poll voting at a shareholders meeting

Since 1 December 2019 consistent with recommendation 6.4 of the ASX Corporate Governance Principles and Recommendations (fourth edition) and ASX Guidance Note 35, all voting at shareholder meetings has to occur by way of a poll. Unless relief is obtained from ASX, practical issues will arise for hybrid or virtual shareholder meetings as all shareholders attending a general meeting are entitled to vote on a poll even if their proxy has not been lodged within the requisite time period prior to the actual meeting. At the hybrid or virtual shareholder meeting (using electronic communication) consideration should be given as to how to enable all shareholders attending to vote by poll.

NEXT STEPS

Given the fluidity of the COVID-19 situation and the evolving regulatory response, businesses should investigate alternatives to the traditional AGM and conduct a thorough review of their constitution to identify potential roadblocks.

If you have any queries in relation to your entity's obligations, hybrid and virtual shareholder meetings, or your constitution, please get in touch. K&L Gates is here to assist you in navigating the global uncertainty of COVID-19.

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