

COVID-19: GOVERNANCE: HOLDING AGMS DURING A PANDEMIC (AUSTRALIA)

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Legal Briefings - By **Stefanie Wilkinson, Lauren Selby, Jessica Ginberg**

We have been assisting a number of clients with contingency planning for their upcoming AGM, in light of recent guidance and emerging market practice.

IN BRIEF

- In May 2020, the Treasurer announced temporary amendments to the Corporations Act which cover shareholder meetings and these have now been extended to 21 March 2021.
- Treasury has since proposed reforms to the *Corporations Act 2001* (Cth) to make the amendments in relation to virtual meetings and electronic notices permanent.
- Companies with upcoming AGMs should consider whether they can rely on the temporary amendments, or if not, consider whether a physical or hybrid AGM is most appropriate in the circumstances, and the practicalities and ramifications of each approach.

CONTINGENCY PLANNING FOR YOUR AGM AND COVID-19

AMENDMENTS TO THE CORPORATIONS ACT

In May 2020 the Treasurer announced temporary amendments to the *Corporations Act 2001* (Cth) under the *Corporations (Coronavirus Economic Response) Determination (No. 1) 2020* to allow companies to hold AGMs and other meetings entirely online. In September, the Treasurer issued *Corporations (Coronavirus Economic Response) Determination (No. 3) 2020*, which extended these provisions until 21 March 2021 (**the Determination**).

Under the Determination, company boards are able to to:

- provide notice of annual general meetings to shareholders using email (but only for those shareholders who have provided an email address – the balance will still need to get a letter or postcard by mail telling them how to find the notice online); and/or
- hold hybrid or virtual annual general meetings using one or more technologies without attendees being physically present.

While the risk of technology failure and meeting invalidity is not addressed, the temporary provisions make the process to adjourn or postpone relatively inexpensive because everything can be done electronically (including distributing the notice of meeting), provided it is done while the temporary amendments remain in force.

TREASURY CONSULTATION PROCESS

Treasury has proposed permanent reforms to the *Corporations Act 2001* in relation to virtual meetings and electronic notices and issued an exposure draft *Corporations Amendment (Virtual Meetings And Electronic Communications Bill 2020 (Draft Legislation)*.

Treasury's objective is to modernise the legislation and make permanent the temporary relief provided by the Determination, so that companies can continue to hold meetings virtually and send meeting-related materials electronically.

Submissions for consultation closed on 6 November 2020.

WHAT THIS MEANS FOR YOUR UPCOMING AGM

For companies with upcoming AGMs, you will need to carefully consider the timing and whether you can rely on the Determination:

- if your AGM will be held before 21 March 2021, you will be able to rely on the Determination to hold a hybrid or virtual meeting. Notably, if you hold your AGM as a hybrid or virtual meeting under the Determination, you are not compelled to continue with that approach going forward if you would rather adopt a different approach for your following AGM (ie return to a physical meeting in the future);
- if your AGM will be held after 21 March 2021, you will not be able to rely on the Determination to hold a hybrid or virtual meeting. It is not certain if or when Treasury will pass the Draft Legislation. This means that 31 December year-end companies will need to think carefully about how best to proceed and plan a meeting that meets the requirements under the normal provisions of the Corporations Act and the Company's constitution. In these circumstances, planning to hold a physical meeting may remain the

most reliable option, albeit on a more low key basis and in the circumstances in a smaller and more controllable venue. Companies considering holding a hybrid meeting will need to check whether their constitution actually permits holding hybrid meetings and should remain cognisant of the potential downsides of this form of meeting (including the risk of a technology failure that may invalidate the meeting, creating a precedent for future meetings and the additional effort and administration that managing essentially two forms of meetings at the same time (ie both a physical and online platform together) can create).

Please contact a member of the Head Office Advisory Team if you would like to discuss your upcoming AGM, including consideration of your constitution.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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