

ANNUAL GENERAL MEETINGS A GUIDE FOR DIRECTORS

SECOND EDITION



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AUSTRALIAN INSTITUTE
of COMPANY DIRECTORS

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Acknowledgments

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This publication, *Annual General Meetings: A guide for directors*, is written by Ms Leah Watterson, Senior Policy Advisor/Legal Counsel at Company Directors. Members of our Chairman's Forum and Law, Corporate Governance and Reporting Committee also provided considerable technical expertise and insight.

In particular, the inaugural edition benefited from the guidance of Mr Steven Cole FAICD, Mr David Gonski AC FAICD *Life*, Ms Priscilla Bryans MAICD, Mr Andrew Lumsden MAICD, Mr Tony Hulett, Mr Tom Bostock, and Mr Andrew Amer FAICD.

For this second edition of *Annual General Meetings: A guide for directors*, we gratefully acknowledge the contribution made by Ms Priscilla Bryans MAICD and Ms Stefanie Wilkinson of Herbert Smith Freehills.

Preface

This book is a procedural guide for directors. It clearly and succinctly sets out the principal steps required to prepare for, convene and conduct an efficient and effective annual general meeting (AGM). For new directors this book will be a useful introduction to AGM procedure and a starting place for further inquiry into this topic. For more seasoned directors, this book will be a reminder of the procedural requirements.

The AGM is one of the key events in the corporate calendar. It is a mechanism for keeping the board accountable for the performance of directors and the company, and for engendering transparency in company reporting. For members, the AGM provides an opportunity to see who the directors are, to engage with the individuals responsible for leading the company and to participate in certain key items of company business. For directors, and in particular the chairman, the AGM imposes a range of obligations. For example, the company must discharge the items of business required by law and the company constitution. However, the AGM also offers directors the opportunity to exhibit their vision for the company, to explain the company's recent performance, and to hear from shareholders without the filter of intermediaries.

Currently, the Corporations and Markets' Advisory Committee (CAMAC) is undertaking a review of the AGM following the release of its discussion paper *The AGM and Shareholder Engagement* in September 2012. Any changes recommended by CAMAC, which may be adopted by the federal government, have the potential to impact the AGM process. While we await CAMAC's response, we have updated this guide to reflect changes to the law that have occurred since this guide was first published.

We note that this guide will not apply to entities registered with the Australian Charities and Not-for-profits Commission (ACNC) from 1 July 2013. However, registered charities that continue to hold annual general meetings after 1 July 2013 may still find the good practice components of the guide useful.

The Australian Institute of Company Directors continues to be of the view that a solid understanding of meeting procedure and effective preparation before the AGM assists directors to approach all aspects of the AGM with confidence.

John H. C. Colvin

Chief Executive Officer and Managing Director

Leah Watterson

Senior Policy Advisor and Legal Counsel

Introduction

This book is divided into four parts. The first chapter identifies the key elements of the AGM, including its role, the requirement to hold an AGM and the various laws and rules that govern the AGM. The remaining chapters follow each stage of the meeting, namely, preparing for the AGM (Chapter 2), holding the AGM (Chapter 3) and the requirements to be attended to after the AGM (Chapter 4).

This guide refers extensively to provisions in the *Corporations Act 2001* (Cth), which will be referred to as “the Act” throughout the publication. All sections of legislation referred to here, unless indicated otherwise, are from the Act.

Many of the provisions referred to in this guide also apply to other general meetings of companies, not just the AGM. However, the discussion here will be confined to the application of these provisions in the context of the AGM.

This guide will not apply to charities registered with the ACNC from 1 July 2013.

Finally, it is emphasised that directors, even those who are well versed in AGM procedure, will be assisted by the company’s professional advisors in navigating the AGM. Given the importance of the AGM and the time and effort generally spent by the company in holding the meeting, a guide such as this is not a substitute for professional advice. Directors should consult the company’s professional advisors through each step of the AGM process, as appropriate, to ensure that the AGM complies with all legal requirements and is conducted as efficiently as possible.

This guide is current as at January 2013.

Chapter One

Key elements of the AGM

In brief:

- The AGM is an important event for the company and its members.
- The requirements for holding AGMs are found in a number of sources.
- Public companies with more than one member must hold an AGM.
- Time limits apply to the holding of an AGM.
- An extension of time for holding an AGM will only be granted in exceptional circumstances.
- A number of necessary items of business must be discharged at the AGM and these items can be considered even if they are not formally included in the notice of meeting.

1.1 Role of the AGM

Traditionally, the AGM was a key source of company information for members/ shareholders. Today, there is recognition that members, particularly those of listed companies, obtain the large majority of company information from sources other than the AGM.¹ While information sharing remains a goal, the key roles of the AGM include to:

- engender company and director accountability by requiring the presentation of company reports and allowing the board, the auditor and management to be questioned by members on these reports and other issues

- transact key items of company business, including allowing members to exercise their rights to elect representatives to the board of directors.

The AGM also aims to:

- engage members by providing a forum for member discussion and debate
- provide director visibility by giving members the opportunity to see and hear from their directors in person
- provide an opportunity for directors to hear directly from members in person without the filter of intermediaries.

A recent survey of members of the Australian Institute of Company Directors who currently or previously held listed company directorships, found that from the perspective of these directors the three most important functions of the AGM are:

- board accountability to shareholders
- presenting information to shareholders
- answering questions from shareholders.²

1.2 AGM obligations and guidance

The laws, rules and guidance governing the AGM are set out in a number of sources. When preparing for the AGM it is essential that the relevant provisions, rules and guidance in the following sources be considered and where applicable, complied with:

- the *Corporations Act 2001* (Cth)
- the common law
- the company's constitution
- the ASX Listing Rules (for listed companies)
- the ASX Corporate Governance Council's *Principles and Recommendations with 2010 Amendments*, 2nd edition, 2010 (for listed companies)
- the ASX Corporate Governance Council's *Guidelines for Notices of Meeting* (for listed companies).

1.3 Requirement to hold an AGM

Section 250N of the Act provides that public companies with more than one member must hold an AGM at least once every calendar year.³ As such, this guide only discusses the legislative requirements and procedures applicable to public companies. The Act defines a public company as a company other than a proprietary company.⁴ Public companies therefore include companies limited by guarantee. It is important to note, however, that the regulation of charities in Australia is currently undergoing a period of transition. From 1 July 2013 this guide will not apply to charities that are registered with the Australian Charities and Not-for-Profits Commission (ACNC).⁵

The constitution of a company, which creates contractual obligations between the company and its members, may also impose a requirement on a company to hold an AGM.⁶ The timing of a public company's AGM must be within 18 months of registration and subsequently within 5 months after the end of the company's financial year.⁷ It is important to note that an AGM must be *held* within these time frames, it is not sufficient for an AGM to merely be convened within these periods.

The failure to hold an AGM within the stipulated time is a strict liability offence.⁸ The penalty for failing to hold an AGM within the specified time is a fine of ten penalty units (currently \$1100), three months imprisonment or both.⁹

1.4 Extension of time

A company may apply to the Australian Securities and Investments Commission (ASIC) to extend the time within which to hold its AGM.¹⁰

Generally, an application for an extension of time will only be granted where circumstances exist that are beyond the control of the company¹¹ or where it would be in the interests of members to do so.¹² The limited ability to obtain an extension reflects that the AGM of a company is an important safeguard for shareholders, investors and creditors.¹³

An application for an extension of time under section 250P of the Act must be made before the time expires within which the company would otherwise be required to hold its AGM.¹⁴ If an application seeking an extension of time is to

be made to ASIC, a directors' resolution to this effect should be passed before an application is made.¹⁵

If ASIC does not grant an extension, the company must be in a position to hold the AGM within the normal time frame or risk defaulting under the Act. For this reason, any application for an extension of time must be made well in advance of the deadline for holding an AGM. If ASIC does grant an extension, the company must hold its AGM within the extended period.¹⁶ The process for seeking an extension of time is set out in *ASIC Regulatory Guide 44*.¹⁷

The Act also provides that ASIC may exempt companies under administration from having to hold an AGM.¹⁸

1.5 Business of the AGM

A number of items of business may be considered at an AGM even if they are not included in the notice of meeting, these are:

- the receipt and consideration of the annual financial report, directors' report and the auditor's report¹⁹
- the election of directors²⁰
- the appointment of the auditor²¹
- the fixing of the auditor's remuneration.²²

It is considered good practice to include these items in the notice of meeting.²³

While this guide largely focuses on the role of directors and the chairman at the AGM, it is important to understand the role of members at the AGM. Generally, members participate in the AGM by:

- electing directors
- participating in a non-binding vote on the remuneration report (for listed companies)
- approving any appointment or change of the auditor
- considering and questioning the board and the auditor on matters arising from the annual report
- voting on special business if scheduled for the AGM,²⁴ such as changing the capital structure of the company, selling major assets, considering

related-party transactions, removing directors and approving the non-executive director remuneration cap.

The key items of business to be considered at the AGM are discussed in more detail in the following chapters.

Notes

- 1 See for example, the ASX 2010 *Australian Share Ownership Study* available at www.asx.com.au/documents/resources/2010_australian_share_ownership_study.pdf.
- 2 Australian Institute of Company Directors' Member Survey, November 2012. This survey is referred to in the Australian Institute of Company Directors' response to the CAMAC Discussion Paper *The AGM and Shareholder Engagement* dated 21 December 2012, available at www.companydirectors.com.au.
- 3 Section 250N(2) of the Act. A calendar year is 1 January to 31 December. See Eilis S. Magner, *Joske's Law and Procedure at Meetings in Australia* (11th edn, 2012), 117.
- 4 Section 9 of the Act.
- 5 For more information about the interaction between the Corporations Act and the *Australian Charities and Not-for-Profits Commission Act 2012* (Cth) see Part 1.6 of the *Corporations Act and the Australian Charities and Not-for-Profits Commission (Consequential and Transitional) Act 2012* (Cth).
- 6 Proprietary companies are no longer required by law to hold an AGM, however, they may be required to do so under the constitution of the company.
- 7 Section 250N(1) and (2) of the Act.
- 8 Section 250N(2A) of the Act.
- 9 Section 1311 and Schedule 3 of the Act. See also *In the matter of Clinical Cell Culture Ltd* (2004) FCA 1798 where the company, its directors and officers were relieved of any civil liability for failing to hold an AGM on the basis that the company had inadvertently and innocently defaulted when trying to synchronise its financial year with that of its controlled entity.
- 10 Section 250P of the Act.
- 11 For example, a temporary or permanent loss of key personnel, including the external auditor.
- 12 See ASIC *Regulatory Guide* 44.17.
- 13 See *In Re Gem Exploration & Minerals N/L and the Companies Act* [1975] 2 NSWLR 584.
- 14 See section 250P(2) of the Act and ASIC *Regulatory Guide* 44.7.
- 15 See LexisNexis, *Australian Corporation Practice*, (18 January 2013) at [15.065]. ASIC *Regulatory Guide* 44.6 provides that a director of the company or the company secretary must sign the application.
- 16 Section 250P(3) of the Act.
- 17 Available at www.asic.gov.au.
- 18 Sections 250PAA and 250PAB of the Act. For example, where a company is in receivership and the receiver has control over the management of all the day-to-day operations of the company, ASIC will generally grant an extension of up to six months to hold the AGM, provided that certain conditions are met. See ASIC *Regulatory Guide* 44.24.
- 19 Sections 250R(1)(a) and 317(1) of the Act. Section 317(1) will not apply to a small company limited by guarantee in relation a report where the company is not required (pursuant to a member direction made under section 249A or an ASIC direction made under section 249B) to prepare or obtain the report.
- 20 Section 250R(1)(b) of the Act.
- 21 Section 250R(1)(c) of the Act.
- 22 Section 250R(1)(d) of the Act.
- 23 Notices of meeting are considered in more detail at section 2.5 of this guide.
- 24 Special business items often include those that require a special resolution, however, some items of special business will only require an ordinary resolution. See A.D. Lang, *Horsley's Meetings Procedure, Law and Practice*, 2010, Lexis Nexis Butterworths at [11.6].