

General meetings of members

Meeting effectiveness

A meeting is a gathering that has a purpose. General meetings include any meetings of members (usually shareholders) such as annual general meetings (AGMs), meetings of different classes of members and creditors' meetings.

General meetings are governed by Part 2G.2 – Part 2G.4 of the *Corporations Act 2001*, the company's constitution, case law and, in the case of meetings of listed companies, by the ASX Listing Rules. General meetings usually cover matters outside of the scope of daily management, such as changes to the company name, status or capital structure, the constitution, approval of certain director benefits, removal and election of directors and auditors and director remuneration.

What are the requirements for a valid meeting?

Much court time is taken up with litigation concerning invalid meetings. To be valid, general meetings have to be properly convened, constituted and conducted. Below is a very brief outline of some legislative requirements (see the *Corporations Act 2001* for full details):

Frequency

- Public companies must hold an AGM at least once each calendar year in addition to other general meetings, except if they have only one member. A public company AGM must be held within five months after the end of its financial year (s 250N).

Who may call a meeting

- A director of any company may call a meeting (s 249C). In the case of a listed company, this power is despite anything in the company constitution (s 249 CA);
- Directors are obliged to call a meeting if requested to do so by members with at least 5 per cent of the votes (s 249D). The directors must call the meeting within 21 days of the request being given to the company and the meeting is to be held within two months;
- The *Corporations Legislation Amendment (Deregulatory and Other Measures) Act 2015* amended s 249D of the *Corporations Act 2001* to remove the '100 member rule', which required directors to call a general meeting at the request of 100 members. This was done to better reflect the collective interests of shareholders, as the decision to call a general meeting is now based on a minimum volume of shares as opposed to the number of individual shareholders – a right that could be abused by shareholder activists seeking to push their own agendas. However, the '100 member rule' does remain in place for managed investment schemes (s 252B).
- Members with at least 5 per cent of the votes that may be cast at a general meeting (s 249F);
- The court, if it is 'impracticable' to call the meeting any other way (s 249G). The court may make the order on application by any director or member who would be entitled to vote. The courts require strong evidence of it being 'impractical' to call a meeting before they will intervene. Examples of what has been considered a sufficient reason include all the directors having been killed in an accident, insufficient shareholders to make a quorum or unruly behaviour at a previous meeting.

Notice of meeting

- How much notice must be given:
 - The general rule is that at least 21 days notice must be given, although constitutions may specify longer. A shorter period can be specified for an AGM if all the members entitled to vote agree beforehand. A shorter period can be specified for any other general meeting if members with at least 95 per cent of the votes agree beforehand. Notice shorter than 21 days is not allowed for a meeting at which a resolution will be moved to appoint or remove a director or to remove an auditor (s 249H);
 - More than 28 days for listed companies regardless of what the company constitution says (s 249HA)
- Who to give notice to:
 - All members and directors;
 - Individually or for joint members to the first named person (s 249J);
 - Auditors (s 249K)
- How is notice given (s 249J):
 - Personally, by post or fax;
 - Electronic means if nominated by the member
- Contents of notice (s 249L):
 - Place, date and time of the meeting;
 - General nature of business;
 - Any special resolutions. For listed companies this includes the resolution on the directors' remuneration report;
 - Any details regarding the appointment of proxies;
 - Information in the notice must be presented in a 'clear, concise and effective manner' (s 249L (3)) – it must not be misleading. There is a common law duty on directors to provide such material as will fully and fairly inform the shareholders of what is to be considered at the meeting and to enable them to make a properly informed judgment (although not necessary to provide every piece of material that might conceivably affect voting – adequacy of material to be assessed in a realistic, practical way);

“Information in the notice must be presented in a ‘clear, concise and effective manner’ (s 249L (3)) – it must not be misleading.”

- Meeting must be held for a proper purpose (s 249Q). As long as there is a proper purpose, it does not matter that there may also be an improper purpose ('If the purpose for which the requisition is made is truly to have a meeting of members convened in order to consider and, if thought fit, to pass the resolution, then it does not matter that the requisitionist is motivated to pursue that purpose by ill-will or self interest' (*NRMA Ltd v Scandrett* (2002) 171 FLR 232 at 243);
- Meeting must be held at a reasonable time and place (s 249R). Meetings should be held during normal business hours and at a place convenient for the greatest possible number of shareholders to attend. Usually, this place would be in the city where the company's head office is situated or where the majority of individual shareholders reside. Companies may also periodically hold meetings in other places where a significant number of shareholders reside;
- Can meet in more than one venue if technology that gives members a reasonable opportunity to participate is used (s 249S)

Quorum

- Two members, unless the company constitution specifies another quorum. This quorum must be present for the duration of the meeting (s 249T);
- If the quorum is not present within 30 minutes of time in notice, the meeting is adjourned

Chairing

- Directors can elect a chair (s 249U), unless the company constitution specifies otherwise;
- AGMs – Chair must allow a reasonable opportunity for members to ask questions about or make comments on the management of the company (s 250S) and to ask questions of the company's auditors or their representative (s 250T).

Must minutes be kept?

All companies must keep minutes for general meetings (s 251A). The minutes must record the proceedings and resolutions of the meeting and be included in the minute book within one month of the meeting. The company secretary is responsible for minute taking and the chair is required to sign the minutes. Minute books must be kept at the company's registered office or principal place of business (s 251A (5)).

What is the role of chair in general meetings?

The performance of the meeting's chair is central to its success. The chair has the power to preserve order, regulate the discussion, adjourn the meeting and also has powers in relation to voting procedures. For example, under s 250S of the *Corporation Act 2001*, the chair must 'allow a reasonable opportunity for the members as a whole at the meeting to ask questions', which gives the chair the ability to restrict the number of questions or comments a speaker can make and the amount of time that they can speak to give everyone entitled to speak the opportunity to do so.

The chair has the power to preserve order, regulate the discussion, adjourn the meeting and also has powers in relation to voting procedures.

Specific duties of the chair include:

- To work with the CEO and company secretary to confirm the agenda;
- To understand all legal and constitutional rules about meetings;
- To determine that the meeting has been properly convened and that a quorum is present and maintained throughout the meeting;
- To understand the business and objectives of the meeting;
- To ensure the agenda is worked through efficiently with the greatest time spent on the most significant issues;
- To handle all matters impartially;
- To put all relevant questions to the meeting, take a vote and declare a result;
- To deal with the minutes through the company secretary;
- To declare the meeting closed or adjourned.

What are the principal rules on AGMs?

The ASX Corporate Governance Council states (in *Corporate Governance Principles and Recommendations 3e*, 2014, p 27) that annual general meetings are:

"[A]n important forum for two-way communication between a listed entity and its security holders. They provide an opportunity for a listed entity to impart to security holders a greater understanding of its business, governance, financial performance and prospects, as well as to discuss areas of concern or interest to the board and management. They also provide an opportunity for security holders to express their views to the entity's board and management about any areas of concern or interest for them."

This is reflected in a 2012 member survey by the Australian Institute of Company Directors, which found that from the perspective of directors, the top three functions of AGMs are:

- Board accountability to shareholders;
- Presenting information to shareholders; and
- Answering questions from shareholders.

Only public companies are required to hold AGMs each year; proprietary companies are not. The *Corporations Act 2001* specifies numerous obligations for public companies in addition to those already discussed for general meetings. The principal purpose of the AGM is to consider the annual financial reports. Section 317 (1) requires that:

"The directors of a public company that is required to hold an AGM must lay before the AGM:

- (a) The financial report; and*
- (b) The directors' report; and*
- (c) The auditor's report;*

for the last financial year that ended before the AGM."

Public companies must hold their AGM within five months of their financial year end (s 250N (2)).

Auditors have to attend the AGM and be prepared to answer member questions (s 250RA). Members are able to submit questions for the auditor at least five business days before the AGM, provided they are relevant to the content of the audit report or related to the conduct of the audit. A list of any questions submitted to the auditors must be given to members who attend the meeting (s 250PA).

Although the company has to supply a notice of meeting to all members setting out the business for the meeting, there are some items which can be included in an AGM without being mentioned in the notice of meeting (s 250R). These matters are:

- Consideration of the financial, directors' and auditor's reports;
- Election of directors;
- The appointment of, and fixing the remuneration of, the auditor.

The chair must allow a reasonable opportunity for members to ask questions or make comments on the company's management (s 250S) and the remuneration report (s 250SA).

“The chair must allow a reasonable opportunity for members to ask questions or make comments on the company's management...”

Listed companies are required to put a resolution to members that the remuneration report be adopted. Their vote is only advisory and is not binding on directors (s 250R (2)-(3)). However, a vote against the remuneration report by at least 25 per cent of the votes cast can lead to the 'two strikes' situation. This means that, if there is a 25 per cent vote against the remuneration report at the next annual general meeting, there must be a spill resolution that another meeting will be held within 90 days. At that spill meeting, there will be a vote on the directors (s 250V).

Who can attend the AGM?

Apart from shareholders/members and proxy holders, meeting attendees can include:

- Directors including the chairs of key committees such as audit, who may be required to answer questions in relation the financial statements;
- Senior executives, especially the CEO and CFO;
- Company secretary;
- External auditor, as per the *Corporations Act 2001*, which requires the attendance of the external auditor for listed companies and entitles them to attend for other companies;
- Director candidates;
- Legal representatives;
- External experts, for example remuneration advisors.

Other attendees at the AGM who may be invited, but will generally not be allowed ask questions, include:

- Media representatives;
- Analysts; and
- Family members of shareholders.

What is the law on voting at general meetings?

For companies with share capital, subject to any rights or restrictions attached to any class of shares, each member has one vote on a show of hands. On a poll, each member has one vote for each share they hold (s 250E (1)). For companies without share capital, each member has one vote both on a show of hands and a poll. The chair has a casting vote and also, if they are a member, any vote they have in their capacity as a member. If a share is held jointly and more than one member votes in respect of that share, only the vote of the member whose name appears first in the register of members counts.

A challenge to a right to vote at a meeting of a company's members may only be made at the meeting and must be determined by the chair, whose decision is final (s 250G).

Generally, a poll may be demanded on any resolution. However, a company's constitution may provide that a poll cannot be demanded on any resolution concerning the election of the chair of a meeting or the adjournment of a meeting (s 250K). A poll may be demanded by at least five members entitled to vote on the resolution or members with at least 5% of the votes that may be cast on the resolution on a poll or the chair (s 250L). A company's constitution may provide that fewer members or members with a lesser percentage of votes may demand a poll.

A poll demanded on a matter other than the election of a chair or the question of an adjournment must be taken when and in the manner the chair directs.

A poll on the election of a chair or on the question of an adjournment must be taken immediately (s 250M).

Are meetings invalidated by irregularities?

Section 1322 (1) of the *Corporations Act 2001* provides that a proceeding (which includes a general meeting) under that Act is not invalidated because of any procedural irregularity unless the court is of the opinion that the irregularity has caused or may cause substantial injustice that cannot be remedied by any order of the court and by order declares the proceeding to be invalid.

A reference to a procedural irregularity includes a reference to the absence of a quorum at a meeting of a corporation and a defect, irregularity or deficiency of notice or time.

Disclaimer

This document is part of a Director Tools series prepared by the Australian Institute of Company Directors. This series has been designed to provide general background information and as a starting point for undertaking a board-related activity. It is not designed to replace legal advice or a detailed review of the subject matter. The material in this document does not constitute legal, accounting or other professional advice. While reasonable care has been taken in its preparation, the Australian Institute of Company Directors does not make any express or implied representations or warranties as to the completeness, currency, reliability or accuracy of the material in this document. This document should not be used or relied upon as a substitute for professional advice or as a basis for formulating business decisions. To the extent permitted by law, the Australian Institute of Company Directors excludes all liability for any loss or damage arising out of the use of the material in this document. Any links to third-party websites are provided for convenience only and do not represent endorsement, sponsorship or approval of those third parties, or any products and/or services offered by third parties, or any comment on the accuracy or currency of the information included in third party websites. The opinions of those quoted do not necessarily represent the view of the Australian Institute of Company Directors.

© 2016 Australian Institute of Company Directors

About us

The Australian Institute of Company Directors is committed to excellence in governance. We make a positive impact on society and the economy through governance education, director development and advocacy. Our membership includes directors and senior leaders from business, government and the not-for-profit sectors.

For more information **t:** 1300 739 119 **w:** companydirectors.com.au