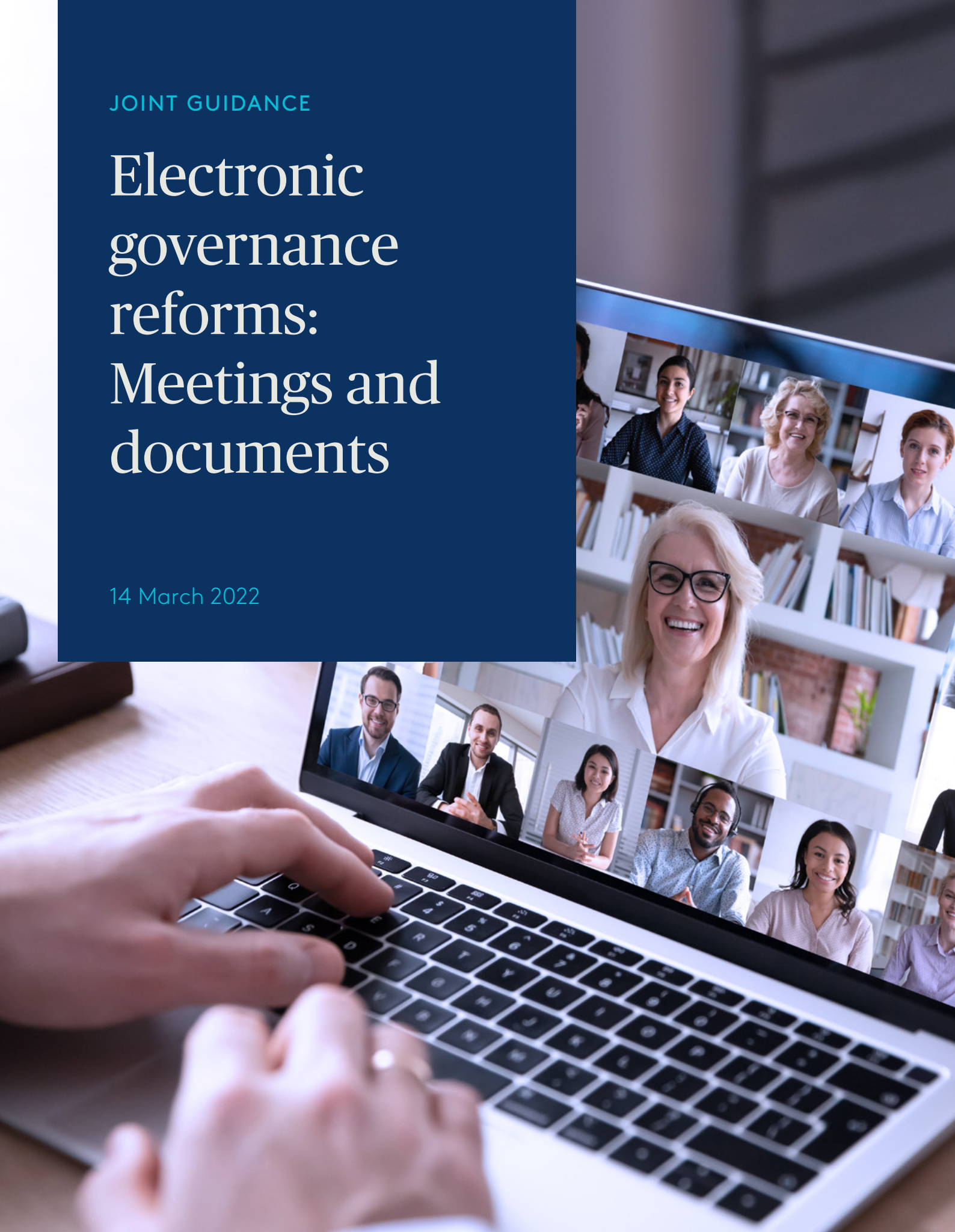


JOINT GUIDANCE

# Electronic governance reforms: Meetings and documents

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Australian  
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Company  
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# Contents

Introduction	3
Section One   Tips for convening AGMs	5
Holding meetings using technology	7
Section Two   Detailed guidance on permanent reforms	10
1. Convening meetings using technology	10
2. ASIC Instrument allowing additional time for the holding of virtual only meetings	11
3. Meeting-related documents including notices of meeting	11
4. 'Reasonable opportunity to participate'	12
5. Quorums for meetings	13
6. Independent reports on polls for listed companies and schemes	13
7. Signing and executing documents electronically	14
8. Review of legislation	14
9. Additional resources	14

# Introduction

The long-awaited permanent reforms under the *Corporations Act Amendment (Meetings and Documents) Act 2022* (the Act) relating to AGMs and the signing and sending of electronic documents passed Parliament and came into effect on February 2022.

The Act provides much needed certainty for organisations which have been operating under a series of temporary measures throughout the COVID-19 pandemic.

Specifically, the reforms amend the *Corporations Act 2001* (Cth) (**Corporations Act**) and will enable companies and registered schemes to:

- convene physical, hybrid (that is, partly physical and partly virtual) and, if expressly permitted by the entity's constitution, wholly virtual meetings;
- execute documents electronically, including corporate agreements, deeds and meeting minutes;
- allow their members to elect whether to receive meeting-related documents in either physical or electronic form; and
- enable a member or group of members with at least five per cent of the voting power of a listed company or registered scheme to require the appointment of an independent person to observe or report on a poll.

The reforms relating to document execution came into force on the day after the Act was assented to. However, the permanent reforms relating to meetings and meeting-related documents apply to documents sent and meetings held on or after 1 April 2022.

In the meantime, the temporary measures introduced under the *Treasury Laws Amendment (2021 Measures No. 1) Act 2021* (**TLAA**), which includes the ability to hold virtual AGMs regardless of any constitutional limitations, remain in force and will expire on 31 March 2022. Until this time, companies are still able to hold virtual members' meetings even if these are not currently permitted by their constitutions. ASIC has issued **FAQs** about virtual meetings for companies and schemes holding meetings before 30 June 2022.

There is no change to ASIC's emergency powers introduced under TLAA which enable it to grant individual or class relief for up to 12 months to allow companies and registered schemes to:

- hold wholly virtual meetings even after the expiry of the temporary relief under TLAA and even if not permitted by their constitutions, if it considers it may be unreasonable to expect the holding of meetings at one or more venues because of a situation beyond their control;
- extend the deadline by which to hold their AGMs where exceptional circumstances arise; and
- send members documents electronically or have an extension of time to provide that document, where there is a particular time frame.

On 3 March 2022, ASIC used these emergency powers to grant relief to allow additional time for certain companies and registered schemes to hold virtual-only meetings, subject to conditions.<sup>1</sup>

This guide provides practical tips for companies convening member meetings using technology (**Section One**) and detailed guidance on the permanent reforms (**Section Two**).

1. See ASIC MR 22-035 **ASIC allows additional time to hold virtual only meetings**, 3 March 2022.

# Section One | Tips for convening AGMs

It remains to be seen whether the threat of outbreaks of COVID-19 (including new variants), particularly in the major capital cities, will continue. 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, whichever the preferred format, in the current environment:

- 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 and 2021. They should be able to advise about features which may enhance members' experience, including options to meet requirements for members to be able to submit questions orally and in writing.
- 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 if further outbreaks of COVID-19 occur. You may also wish to include a short video demonstrating how to use the meeting platform.
- Encourage proxy and direct voting. Include specific provisions in the notice of meeting encouraging members to vote by proxy or directly. Facilitate direct online voting and online proxy lodgement given that postal services remain slower than pre-COVID-19. Supplement this with appropriate messaging on the company website. While members can choose any proxy they want — encourage them to choose the chair, to avoid requiring other proxies to attend in person.
- Establish an online member Q&A for the AGM. Members 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 if the AGM is live streamed — see below.
- Encourage members to provide email addresses and mobile phone numbers as part of preregistration, to facilitate member communications and updates in the event of public health announcements following further outbreaks of COVID-19.
- Consider pre-registering attendees. It may assist in assessing the number of attendees and enable proxy cards to be collected swiftly. In the last two years 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 a physical meeting. The venue for the meeting may have its own requirements.
- Ensure, if required, you have arrangements in place for COVID safe check-in at a physical meeting and check whether COVID marshals are required, if there are likely to be a significant number of attendees at the meeting. Companies may also need to have limits on the number of attendees at physical meetings to comply with local restrictions.
- If you have not already done so, consider how your company will comply with the requirement to give members attending using virtual meeting technology, a reasonable opportunity to exercise orally and in writing a right to ask questions and make comments. Technology has rapidly developed in this area over the last two years and there are many factors that may affect the meeting experience. Larger companies may consider it appropriate to provide external telephone lines for online attendees to dial into the meeting to ask questions, or, if available, enabling the audio question feature on the company's online AGM platform. Smaller companies may rely on free online conferencing software with in-built audio features. While a small number of companies used telephone lines at their 2020 and 2021 AGMs, they were costly and not widely used by members. However, another consideration is that the audio quality of an in-built microphone in an online platform will vary depending on the type of device and internet connection used by the individual member asking the question. It is not necessary to offer more than one facility for asking questions orally. Companies should consider whether they will require members to verify their identity before asking a question orally. Verification processes may enhance security but may also add cost and delays. To enhance security and to enable organisations to estimate demand, those using telephone lines may consider requiring members to contact their registry to obtain a verified access code ahead of the meeting. The process for asking questions orally, including any requirement to contact the registry, should be clearly explained in the notice of 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 requirement for a person to chair the meeting) this is not a legal requirement, and it therefore does not invalidate the meeting if some (or most) are unable to attend. Most constitutions provide that the chair of the board should also chair members' meetings. If directors are standing for re-election, it is preferable that they attend the meeting either physically where possible or by video link
- Confirm any applicable travel restrictions or potential delays for overseas resident directors. If they are not able to attend the meeting in person, they can be available for questioning via video link. If overseas directors will be joining the meeting via video link you will need to consider differing time zones.
- The auditor of a listed company is required to attend the AGM, and therefore provisions for the auditor to attend should be arranged. 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 members if it is possible or likely that the meeting will be recorded.

## Holding meetings using 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 using 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 members. 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 members will have. A video 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 only webcast with the use of slides. This will allow members to hear but not see the speakers. You should aim to hold a meeting that facilitates effective interaction between members 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 some with an inbuilt ability to ask questions orally or by using telephone lines, providing members 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 members 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. Where companies have issues with internal firewalls, they may wish to consider using a separate studio or a production company to assist with the smooth running of the meeting.
- Companies holding hybrid or virtual-only meetings may also consider pre-registering attendees to enable better planning for in-person attendance versus that for the virtual component of the meeting. Understanding the number of virtual attendees may determine the choice of platform provider and technology options available.
- Consider pre-recording a video of the ‘housekeeping’ and procedural elements of the meeting. Companies report this enabled the virtual component of the meeting to flow better.
- Carefully consider the clarity and simplicity of the login instructions provided to members and guests at the meeting. Some retail and institutional members reported login difficulties during the 2020 and 2021 AGM season. It may help to test these instructions with internal staff who are unfamiliar with the login environment before sending to members.
- If you are filming from a specific location, you may 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 of the Q&A? A host, typically the webcast 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.
- If the chair is up for election at a hybrid or virtual meeting, ensure there is a director or other person available to assume the chair during the election and ensure they are included in planning, preparations and rehearsals.
- 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 some test scenarios with the chair, the CEO and other board members and staff participating as members. 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. Be aware that there is high demand for meeting technology providers' services, and it would be prudent to secure bookings for their services sooner rather than later.
- 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 members 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 should be considered. There should also be a plan in case their internet connections fail.
- It is important that members can communicate during the meeting and ask questions about how to use the technology. Companies can consider using technology that gives them the ability to communicate with members 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 members to have a final opportunity to cast their votes. This notice can be given simultaneously with the chair closing the poll.

## At the meeting

- You will also need to consider what will happen if the technology supporting the AGM fails, for example because 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. Consider locating the meeting moderators with the technology team so they can communicate easily if required. Include in the communications with your members your plan B if something happens with the technology during the meeting.
- Listed companies should be aware that the new legislation requires that voting on all resolutions set out in the NOM must be conducted by poll — procedural motions may still be put to a vote by show of hands.
- Ensure the length of the addresses is as concise as possible and, for listed companies, ensure any chair or CEO speeches are lodged 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.



## Member questions

- During the 2020 and 2021 AGM seasons many companies used online platforms which enabled members to submit questions orally or in writing. Be aware that it may take members time to type their questions into the platform and allow sufficient time to enable members to submit questions. Some chairs adopted the practice of opening up the Q&A session early in the meeting to enable members to submit written questions online. They also signalled clearly to the meeting when they would close the Q&A session to enable members to submit final questions, either orally or in writing.
- Ensure the Chair's position about questions that are practically similar is clear. For instance, it is within a Chair's discretion to decline to address repetitive or duplicative questions separately. However, it is important to manage members' expectations, and to consider 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 members have asked questions along the same lines as the one that was answered.
- Be especially mindful in a meeting using technology that there is a risk that members 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 members as a whole have a reasonable opportunity to participate. In 2020 and 2021 some companies read out questions fully to ensure members knew the meeting had 'heard' their questions.
- Ensure you keep a record of questions and comments received both before and during the meeting (except for any inappropriate or defamatory questions/ comments). Companies may wish to consider making this available on their websites within a short time frame of the meeting occurring. This record should not form part of the minutes of the meeting.

# Section Two | Detailed guidance on permanent reforms

## 1. Convening meetings using technology

Directors' meetings may be called or held using any technology consented to by all the directors and a consent may be a standing one – section 248D.

Companies may hold members' meetings, physically, as a hybrid (that is a combination of a physical and virtual meeting) or using virtual meeting technology (only, if expressly permitted by their constitution) – section 249R. A similar provision applies for registered schemes – section 252P. The ability to hold physical meetings will continue to depend on any restrictions on physical gatherings in force at the time of the meeting in any physical location that the meeting is to be held.

Under section 249RA, the place and time of a:

- physical meeting at one physical venue is the place and time at the physical venue;
- hybrid meeting (that is, at more than one venue, physical and online) is the place and time at the main physical venue of the meeting set out in the notice of meeting (**NOM**); and
- virtual meeting is the registered office of the company and the time at the registered office.

The meeting must be held at a 'reasonable time' which must be reasonable at the location of the meeting, the main location or at the location where the meeting is taken to be held – section 249S (3). Similar provisions apply for registered schemes – sections 252PA and 252Q (3).

The NOM for a physical meeting must specify the date, time and place for the meeting, and, if there are two or more physical locations, the date and time for the meeting at each location, and the main location for the meeting. If **virtual meeting technology** is to be used there must be sufficient information in the NOM to enable members to participate using the technology – section 249L (1) (a) (iii).

Registries and technology providers can assist with facilitating hybrid and virtual AGMs.

From 1 April 2022 virtual meetings are only possible where they are expressly required or permitted by a company's constitution, subject to ASIC's instrument. Where a company's constitution does not currently permit virtual meetings, it may wish to consider amending its constitution during the 2022 AGM season by way of a special resolution, to enable it to hold virtual meetings.

Members who attend a physical meeting or by using virtual meeting technology are taken for all purposes to be 'present' at the meeting while so attending – section 249RA (3).

Under a new section 250JA (1), listed companies must conduct polls if:

- the NOM sets out an intention to propose a resolution;
- the company has given notice of a members' resolution under section 249Q; or
- a poll is demanded.

This requirement cannot be overridden by a company's constitution — section 250JA (2).

## 2. ASIC Instrument allowing additional time for the holding of virtual only meetings

On 3 March 2022, ASIC **announced** the making of **ASIC Corporations (Virtual-only Meetings) Instrument 2022/129**. Under this instrument, ASIC granted relief to allow additional time for certain companies and schemes to hold virtual-only meetings, subject to conditions. The instrument gives all listed companies and listed and unlisted schemes, the option to hold virtual-only meetings for an additional two months until 31 May 2022. Unlisted companies have an additional month, to 30 June 2022 to align with the extended deadline for unlisted public companies with 31 December 2021 year ends to hold their AGMs.

To rely on the relief the directors of a company or responsible entity must pass a resolution that it would be unreasonable for the company or scheme to hold a meeting of its members wholly or partially at one or more physical venues, due to the impact of the COVID-19 pandemic.

This extension is in addition to the temporary amendments allowing the use of virtual technology to convene and hold meetings, including hybrid and virtual-only meetings that are due to expire on 31 March 2022. ASIC has also indicated it may consider relief for other entities on a case-by-case basis, where appropriate.

## 3. Meeting-related documents including notices of meeting

Part 1.2AA Division 2 inserted by the Act deals with documents to be sent to directors, members, auditors and others — 'covered documents' — which includes:

- a document that relates to a meeting of members of the company or registered scheme including a class meeting;
- a document that relates to a resolution to be considered by members of a company without a meeting;
- an annual financial report of a company, a registered scheme or a disclosing entity; and
- a notice of members' rights to receive documents in their preferred format.

The Act amends section 249J of the Corporations Act to ensure members can be notified of meetings electronically.

Section 110D provides that documents may be sent to members physically, by sending sufficient information physically to enable electronic access (a postcard or notice of access) or electronically. Electronic sending is permitted on the proviso that when sent, it is reasonable to expect the document would be readily accessible — subsection 110D (2). Under subsection 110D (3), annual reports may be 'sent' by publishing them on a website.

Members can elect to be sent documents in physical or electronic form — subsection 110E (2). They can also elect not to receive documents at all or to receive only some documents — subsections 110E (4) and (5). In practice, this may prove challenging for companies where members frequently change their elections.

It is a strict liability offence to fail to take 'reasonable steps' to comply with a member's election to receive documents (section 110F) or not to be sent documents (section 110G).

Members can also make 'ad hoc' requests to be sent documents in a particular form – section 110J.

Under section 110K public companies must notify members of their right to elect to receive documents either physically or electronically or not to be sent documents 'at least once' each financial year or must make such a notice available on their website.

Companies may have various communications preferences for various types of member communications in place. Companies should consult their registries about what elections are in place. Where a member has multiple and/or potentially conflicting elections, or the wording of a particular election is unclear, companies may wish to seek legal advice.

Listed companies must include in their NOM a physical place to send proxies, or sufficient information to enable members to provide proxy documents by electronic means: section 250BA(1).

### **Elections made prior to the commencement of the Act**

Importantly under sections 1687D–H, where members' elections to receive documents in physical or electronic form have been made after the commencement of the TLAA but prior to commencement of the Act, there is no requirement to re-elect their request.

Such elections will be taken as standing elections unless members notify the company or registered scheme.

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

Section 249S provides that companies must give the 'members entitled to attend the meeting, as a whole, a reasonable opportunity to participate in the meeting'. In practice this requires:

- it must be reasonable to hold the meeting at the time at the physical venue or deemed venue – sub-section 249S (3);
- if there is only one physical venue (whether or not virtual meeting technology is also being used), it must be reasonable to hold the meeting at that venue – sub-section 249S (4);
- where there is more than one physical venue, (whether or not virtual meeting technology is also being used), it must be reasonable to hold the meeting at the main venue set out in the NOM – sub-section 249S (5);
- where there is more than one physical venue, (whether or not virtual meeting technology is also being used), the technology used to hold the meeting at more than one venue must be reasonable – sub-section 249S (6);
- if the meeting is held using virtual meeting technology (whether or not it is being held at one or more physical venues), the virtual meeting technology must be:
  - reasonable; and
  - allow the members entitled to attend and who do attend using the technology, as a whole to exercise, orally and in writing, any of their rights to ask questions and make comments – sub-section 249S (7).

Members must also have an opportunity to vote in real time, even if they already have an opportunity to vote before the meeting. However, they may also be given the opportunity to record a vote in advance of the meeting if they choose. – section 253Q (4).

The **ASIC Guidelines** for investor meetings using virtual technology (originally developed to assist companies to comply with meeting requirements under the temporary relief measures, but which have since now been withdrawn), nevertheless remain of assistance in outlining a range of practices that may help to achieve this reasonable opportunity to participate:

- Members 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.
- Members should have a reasonable opportunity to ask questions live during 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 (as required by the Corporations Act).
- If a company can 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 should be maintained.
- Members 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 is also possible to vote prior to the meeting via proxy or through direct voting.

Section 1322(3A) gives members the right to apply to court to have the meeting invalidated on the basis that they did not have a reasonable opportunity to participate in the meeting. The court will only make an order where it considers there has been a substantial injustice which cannot be remedied any other way.

## 5. Quorums for meetings

Members who attend a physical meeting or by using virtual technology are taken for all purposes to be 'present' at the meeting — section 249RA (3). 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.

## 6. Independent reports on polls for listed companies and schemes

Under the new legislation, Part 2G.7 enables members or a group of members holding five per cent of the voting power to request the appointment of an independent person to observe and/or prepare a report on a poll conducted at a members' meeting. Companies and schemes must take reasonable steps to appoint an independent person after receiving a request.

In response to concerns raised by the preparers of this guidance, the Explanatory Memorandum clarifies that there is a rebuttable presumption that an auditor or registry service provider will be independent. It also states that where there is an independent person to observe and/or prepare a report on polls as part of their standard meeting practices this will satisfy these requirements and there is no additional burden on companies.<sup>2</sup>

2. See Explanatory Memorandum at paragraphs 1.103 and 1.105.

## 7. Signing and executing documents electronically

The Act includes a new Part 1.2AA which sets out the requirements for how company documents can be validly executed in electronic form.

- Under these changes, when a company executes a document:
  - persons may sign the document electronically
  - the fixing of a seal can be witnessed electronically
  - separate copies of a document may be used by each person executing the document
  - each person executing the document does not have to sign the same form of the document as another person, nor do they have to sign the same page, and the document does not have to include all the information recorded in the document, and
  - a mixture of wet ink and electronic signature methods can be used.
- The new Part 1.2AA enabling an electronic method of signing will apply to:
  - a document, including a deed, to be signed by a person exercising the powers of a company under section 126 or section 127 of the Corporations Act, and
  - a meeting-related document (including a NOM) under the Corporations Act.
- The new legislation also makes the following changes to enable:
  - proprietary companies with a sole director and no company secretary to use the statutory document execution mechanisms, which they currently cannot do, and
  - agents to make, vary, ratify or discharge contracts and execute documents (including deeds) on the company's behalf (without a requirement for the agent to be appointed by deed).

It also clarifies there is no requirement for deeds made under this section to be witnessed.

Minutes of member and director meetings may now be kept electronically and signed by the chair electronically. The minute book may also be provided to members electronically.

The legal requirements for the execution of documents by unincorporated entities and individual persons differ from those of corporations and are typically governed by state law and common law. The Commonwealth, state and territory governments are currently collaborating on reforms to the law governing execution of deeds and statutory declarations by individuals and non-incorporated businesses, and some states have already enacted temporary or permanent reforms in this area.

## 8. Review of legislation

There is a requirement for an independent review of both the temporary measures under TLAA and the permanent changes relating to virtual meetings within two years of the Act's commencement. If the review does not occur within this time frame, section 1687K of the Corporations Act provides that the changes enabling virtual meetings will cease to apply.

## 9. Additional resources

**FAQs – virtual meetings for companies and registered schemes held on or before 31 March 2022**, ASIC

**Guide to online meetings**, Australian Shareholders' Association.

**Virtual member meetings – Guidance for NFPs, AICD, 2020 and AICD Director Tools: Virtual member meetings**, AICD, 2020

**Joint Statement on Minutes**, AICD and Governance Institute of Australia, 2019

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