

COVID-19 (AUSTRALIA): OPERATING A BUSINESS DURING COVID-19: THE IMPLICATIONS FOR PUBLIC COMPANIES

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Australia Corporate Alert

By: Harry Kingsley, Kaveh Zegrati, Alex Garfinkel

On 26 March 2020, K&L Gates published a [Legal Insight](#) regarding the Australian Securities and Investments Commission (ASIC)'s adoption of a formal "no-action" position on public companies with a financial year end of 31 December failing to meet the 31 May annual general meeting (AGM) deadline, provided the company holds its AGM by 31 July. ASIC also confirmed its support for the holding of AGMs using "appropriate technology" such as hybrid and virtual AGMs.

Notwithstanding ASIC's guidance, companies have been grappling with how they can hold and conduct their members' meetings in light of current health and safety concerns, and without falling foul of the State and Federal Government's social distancing measures.

Effective immediately, the *Corporations (Coronavirus Economic Response) Determination (No. 1) 2020* (the Determination), introduces a number of short-term (six months) regulatory relief measures by addressing the provisions under the *Corporations Act 2001* (the Act) and Corporations Regulations 2001 dealing with meetings and document execution that are not compatible with current public health requirements. The scope of the Determination also extends to the Insolvency Practice Rules, and the Passport Rules, which are not discussed here.

RECAP: OBLIGATIONS REGARDING AGMS

Section 250N(2) of 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.

These measures in the Determination apply to any companies that have a financial year end of 31 December 2019, and are yet to hold their AGM with respect to the 2019 financial year. It will also apply with respect to any extraordinary general meetings going forward and potentially the AGMs for companies with a financial year ending 30 June 2020.

HOW HAVE COMPANIES RESPONDED THUS FAR?

So far, companies have adopted various approaches in complying with their obligations concerning AGMs while adhering to applicable social distancing requirements. As a general rule, companies have opted to use technology to hold meetings rather than hold face-to-face meetings.

Different approaches have also been adopted with respect to voting and questions from members. For example, certain companies have notified members that resolutions may only be voted via proxy, while others have

provided access to technology which allows for voting at the meeting. While some companies have allowed for questions, others have indicated no questions will be taken at the meeting.

These different approaches may be as a result of each company's particular constituent documents, but generally highlights uncertainty in the market with respect to how to deal with the relevant issues.

The Determination brings further certainty.

THE DETERMINATION - HOLDING MEETINGS

In summary, the Determination provides that:

- A company meeting may be held using one or more technologies that give all persons entitled to attend, a reasonable opportunity to participate.
- Votes at the meeting must be taken on a poll and not on a show of hands, by using one or more technologies to give each person entitled to vote the opportunity to participate in the vote in real time and, where practicable, by recording their vote in advance of the meeting.
- Companies must give attendees an opportunity to speak.
- A proxy may be appointed using one or more technologies specified in the notice of meeting.
- A notice of a meeting (and other information to be provided with the notice) may be provided by way of technology. If a member has not provided the company with an email address, the company can send a letter or postcard to the member, with details of where the meeting documents can be accessed (e.g. accessed via an online address).
- The notice of meeting must include information about how those entitled to attend can participate in the meeting.
- Companies who have already issued a notice of meeting but have not yet held the meeting must, at least seven days before the meeting is held, give a further notice with the details of online participation.

THE DETERMINATION - EXECUTING DOCUMENTS

The Determination also modifies section 127(1) of the Act to allow use of electronic signatures to meet requirements for a signature. A person will comply with Section 127(1) if they use a method which reliably identifies the person in the electronic communication and provides a clear indication of that person's intention in respect of the contents of the document.

CONCLUSIONS AND RECOMMENDATIONS

For those that have experienced video/audio conferencing in recent months, it is foreseeable that some of the requirements under the Determination may result in logistical challenges for the larger meetings of members.

However, the modifications introduced are welcomed as they provide clear guidance to companies on how to comply with their legal obligations in these unusual circumstances.

We remind companies that have already issued a notice but are yet to hold that meeting to take note of their obligations to issue a further notice (at least seven days before the meeting), to provide the additional information required to be included in a notice of meeting pursuant to the Determination.

KEY CONTACTS



HARRY KINGSLEY
PARTNER

MELBOURNE
+61.3.9205.2093
HARRY.KINGSLEY@KLGATES.COM



KAVEH ZEGRATI
SPECIAL COUNSEL

MELBOURNE
+61.3.9205.2174
KAVEH.ZEGRATI@KLGATES.COM



ALEX GARFINKEL
LAWYER

MELBOURNE
+61.3.9640.4270
ALEX.GARFINKEL@KLGATES.COM

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