

## STAKEHOLDER

# General meetings of members

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.2–2G.4 of the *Corporations Act 2001* (Cth), 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* (Cth) 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 – a replaceable rule). 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 five 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* (Cth) 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).

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The court may call a meeting, 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.

#### **How much notice must be given?**

The general rule is that at least 21 days’ notice must be given, although constitutions may specify longer. More than 28 days’ notice must be given for listed companies regardless of what the company constitution says (s 249HA). 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).

Who to give notice to:

- All members and directors (s 249J);
- 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).

A 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 requisition is motivated to pursue that purpose by ill-will or self-interest’ (*NRMA Ltd v Scandrett* (2002) 171 FLR 232 at 243)).

A meeting must be held at a reasonable time and place (s 249R). It 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.

A meeting can be held in more than one venue if technology that gives members a reasonable opportunity to participate is used (s 249S).



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.

### Quorum

Two members make up a quorum, 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.

At AGMs, the chair must allow a reasonable opportunity for members to ask questions about or make comments on the management of the company (s 250S) and, in the case of listed companies, the remuneration report (s 250SA), 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)).

Minutes can be used as evidence in court. The minutes must be a correct record of the meeting and the minute book must be kept up to date.

### 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* (Cth), 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.

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; and
- to declare the meeting closed or adjourned.

## What are the principal rules on annual general meetings?

The ASX Corporate Governance Council states in *Corporate Governance Principles and Recommendations*<sup>1</sup> 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.*

Only public companies are required to hold AGMs each year; proprietary companies are not. The *Corporations Act 2001* (Cth) 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 the:*

- a) financial report; and*
- b) directors' report; and*
- c) 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).

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 annual general meeting?

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 to the financial statements;
- senior executives, especially the CEO and CFO;
- company secretary;
- external auditor, as per the *Corporations Act 2001* (Cth), which requires the attendance of the external auditor for listed companies and entitles them to attend for other companies;

1. ASX Corporate Governance Council, 2019, *Corporate Governance Principles and Recommendations*, 4th Edition, February, p 24, <https://www.asx.com.au/documents/asx-compliance/cgc-principles-and-recommendations-fourth-edn.pdf>, (accessed 12 September 2019).

- 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.



Shareholder activism is aimed at a broad range of topics: company underperformance, mismanagement, strategic failures, corporate governance concerns, and social and environmental issues.

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 per cent 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* (Cth) 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.

### Shareholder activism

Shareholder activism presents a real threat to the conduct of general meetings for companies involved in some industry sectors as minority shareholders may in effect sabotage an AGM.

Shareholder activism is aimed at a broad range of topics: company underperformance, mismanagement, strategic failures, corporate governance concerns, and social and environmental issues. There are two groupings of shareholder activists:

- investors or activist funds that invest in a company with the aim of disrupting the existing board and management to make changes to how the company is run and its strategy to drive performance; and
- dissatisfied shareholders who attend general meetings to make changes to the governance of the company, its operations or its environmental or social impact.

There are several ways companies can address these risks including:

- engaging with activists prior to a general meeting to find what they are trying to achieve and objectively considering their ideas;
- increasing the minimum threshold shareholding before a resolution can be proposed and discussed;
- stronger chairing of the meeting; and
- better security to address unruly behaviour.

### What is the future for AGMs?

Aside from the legal requirement to do so, AGMs are held for two main reasons:

- two-way engagement with members, and
- making decisions through passing resolutions.

However, declining AGM attendance has led some commentators to forecast the demise of the AGM in its current format. While it is true that fewer shareholders attend AGMs, this decline can be linked to factors such as the availability of information well in advance of meetings and resolutions having already been decided prior to the AGM through the increased use of proxy and online voting.

In defense of the AGM, Steven Cole, in his article *The Future of the AGM: Don't throw the baby out with the bathwater*<sup>2</sup>, points out that AGMs are still necessary for effective corporate governance and should be improved rather than abolished. For example, general meetings assure the accountability of the board to shareholders and allow them to ask questions around the company's performance, strategic direction and future prospects.

Suggestions for improvements include:

- multiple venue and virtual AGMs for shareholder convenience;
- plain English notices of meeting and explanatory notes;
- increased information available on directors standing for election;
- improved use of audio/visual technology rather than having speakers reading out reports verbatim; and
- current directors, in addition to the CEO and the chair, have opportunity to answer shareholders' questions.

2. AICD, 2017, "Future of the AGM: Don't throw the baby out with the bathwater", *Governance Leadership Centre*, 25 May, <http://aicd.companydirectors.com.au/advocacy/governance-leadership-centre/practice-of-governance/future-of-the-agm-dont-throw-the-baby-out-with-the-bathwater>, (accessed 15 May 2019).

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