

Key takeaways

Company secretaries and directors should be aware of the key processes and timing considerations when preparing for the upcoming annual general meeting (**AGM**) season.

Where a company's AGM materials are extensive or complex, secretaries and directors should ensure they prepare and, where applicable, submit for ASX and/or ASIC review, the AGM materials well in advance of the final date for sending materials to shareholders.

This paper highlights some of the critical timing considerations, as well as common AGM resolutions, which your company may wish to consider when preparing for its next AGM.

Background

Australian public companies are required to hold an AGM at least once in each calendar year and within five months after the end of their financial year. The majority of ASX-listed public companies operate on a 30 June financial year end date, requiring those companies to hold their AGM by 30 November each year.

Whilst the role of the AGM has been the subject of discussion and debate over recent years, it remains an important event to be undertaken by a company each year and provides a forum for shareholder engagement, and for companies to seek shareholder approvals which will facilitate the ongoing operation and functionality of their corporate activities.

This document highlights some of the matters that company secretaries and directors of Australian public companies should consider and be aware of as they prepare for the upcoming AGM season.

AGM Materials

In order to call and hold an AGM, companies will need to prepare and send to shareholders a Notice of Meeting (including the accompanying Explanatory Memorandum and Proxy Form) (**AGM Materials**). AGM Materials must be prepared and given to shareholders in accordance with the *Corporations Act 2001* (Cth), ASX Listing Rules, and the constitution of the company.

A public listed company must give shareholders at least 28 days' notice of any general meeting, including the AGM. When preparing for an AGM, companies will need to take into account the time required to:

- draft the AGM Materials;
- have the AGM Materials reviewed by ASX (to the extent required, which will be determined based on the matters to be considered by shareholders at the AGM), noting that ASX may take five business days to conduct its review;

- have the AGM Materials reviewed by ASIC (to the extent required, which will be determined based on the matters to be considered by shareholders at the AGM), noting that ASIC may take 14 days to conduct its review; and
- print and send the AGM Materials to shareholders.

Companies will also need to carefully consider when the AGM Materials are deemed to have been provided to or received by shareholders under their constitution, which in practice may require companies to send their AGM Materials to shareholders more than 28 days prior to the AGM date.

Each year, throughout October, ASX and ASIC receive a large volume of AGM Materials for review (often with requests that ASX and ASIC abridge their permitted review period). ASX and ASIC are generally reluctant to abridge their permitted review period on the basis that a company requires an accelerated review of its AGM Materials in order to meet its minimum notice requirements. Consequently, we recommend that companies plan for their AGM and prepare their AGM Materials well in advance of the last permissible date for sending their AGM Materials to shareholders. This is particularly important if there are a number of resolutions being put to shareholders or complex transactions that are to be considered at the AGM.

If you will require ASX waivers from any ASX Listing Rules in connection with your AGM Materials, additional time should be allowed to obtain the waiver as the five business day period referred to above does not include the time needed to obtain a waiver.

Business to be Conducted at an AGM

The ordinary business of an AGM may include:

- consideration of the annual financial report, directors' report and auditor's report;
- election of directors;
- appointment of auditor; and
- fixing of auditor remuneration,

even if such matter is not referred to in the AGM Materials.

ASX-listed companies must put to their shareholders a non-binding resolution to adopt the company's remuneration report at the AGM.

In addition to the ordinary business contemplated above, there are a significant number of other resolutions which companies may consider putting to shareholders at their AGM, including the following more common resolutions:

RESOLUTION	EXPLANATION
Previous Securities Issues	Companies should consider whether they have undertaken any issues of securities without shareholder approval during the 12 months prior to the AGM which may be restricting the company's placement capacity under ASX Listing Rule 7.1 or 7.1A, and consider seeking shareholder approval for any such issues to refresh their placement capacity.
Prospective Securities Issue	Companies may seek approval from shareholders for the issue of new equity securities to existing or new investors. Companies may want to seek this approval in circumstances where a proposed issue of equity securities will exceed its 15% capacity under ASX Listing Rule 7.1, or to otherwise minimise the restrictive effect of ASX Listing Rule 7.1 on any further issues of equity securities by the company in the following 12 months.
Additional 10% Placement Capacity (ASX Listing Rule 7.1A)	<p>ASX Listing Rule 7.1A enables companies that have a market capitalisation of AU\$300 million or less at the date of the resolution who are not included in the S&P/ASX 300 Index to seek shareholder approval to have an additional capacity to issue equity securities of up to 10% of its issued ordinary share capital through placements over a 12-month period following the AGM or until the shareholders approve a transaction under ASX Listing Rule 11.1.12 or 11.2, whichever occurs first. This additional 10% placement capacity is in addition to a company's 15% placement capacity under ASX Listing Rule 7.1.</p> <p>Companies who have previously obtained approval for the additional 10% placement capacity under ASX Listing Rule 7.1A should be aware of specific content requirements for their AGM Materials if they are seeking the additional placement capacity again.</p>
Issues Under Employee Incentive Plans	Companies with employee share option plans, performance rights plans or other employee incentive plans may seek shareholder approval to allow the company to issue equity securities under those plans for a period of three years from the date of the shareholder approval without those issues reducing the company's placement capacity under ASX Listing Rule 7.1. Companies should be aware that if shareholder approval under ASX Listing Rule 7.2 (Exception 9) is obtained, the company will nonetheless need to obtain shareholder approval prior to any issue of equity securities to a director (or other related party) under the employee incentive plans under Chapter 10 of the ASX Listing Rules.
Provision of Potential Termination Benefits Under Employee Incentive Plans	Often a company's employee incentive plan will give the Board discretionary powers to determine, where a participant ceases employment with the company, that some or all of the incentive securities vest rather than lapse. The exercise of this discretion is considered a 'retirement benefit' for the purposes of section 200B of the Corporations Act. If your company's employee incentive plan provides such discretionary powers to the Board, you may wish to seek shareholder approval for the Board to exercise the discretion to mitigate the limitations on companies providing 'retirement benefits' to senior employees.
Issues of Securities to Related Parties	If your company proposes to issue securities to directors (or other related parties) in the near term, you may wish to consider seeking shareholder approval for the proposed issue(s) at the AGM for the purposes of ASX Listing Rule 10.11 or 10.14 (if the issue is under an employee incentive plan).
Change of Auditor	If your company is reviewing its external audit arrangements, you may wish to appoint a new auditor at your upcoming AGM. Replacing your auditor requires strict compliance with procedures prescribed by the Corporations Act, including obtaining the incumbent auditor's resignation and ASIC's consent to that resignation, and formal nomination and shareholder approval of the proposed new auditor.
Contingent Resolution – 'Spill Meeting'	If your company's remuneration report received a 'first strike' (meaning 25% or more of the votes cast were against the adoption of the remuneration report) at its previous AGM, this year's AGM Materials will need to include a contingent 'spill resolution' which will need to be put to shareholders in the event that the remuneration report receives a 'second strike' this year. The 'spill resolution' will ask shareholders to vote on whether the company should hold a further general meeting of shareholders to consider spilling the board. Such companies will also need to comply with all necessary disclosure obligations associated with these spill resolutions.

Conclusion

The AGM is an important event on each company's corporate calendar. Not only does the AGM provide a forum for shareholder engagement, it gives companies an opportunity to procure important shareholder approvals for their corporate activities in the upcoming year. A well planned AGM may also serve to avoid the time and expense of calling extraordinary general meetings (being shareholder meetings held in addition to the AGM) to procure shareholder approvals that could have been sought at the AGM.

If you would like further assistance with the planning and preparation of the AGM Materials for your company's AGM please contact:

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