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NEWS

Fund and company meetings – decision making in a pandemic

The current social distancing measures have created a range of challenges for the corporate world. Companies and funds still need to be operated, decisions need to be made by boards, and sometimes shareholders and investors need to be called upon to make decisions as a group.

However, meetings usually involve people getting together, and formal decisions normally involve some sort of vote. It is particularly likely in this turbulent and quickly changing environment that some important decisions need to be made, and they might need to be made quickly. How can this be achieved when it is impossible for stakeholders to meet?

Here, special counsel Matt Moses outlines the types of meetings that may be needed and explains the Federal Government's latest COVID-19 driven response which expressly allows virtual meetings for companies and registered managed investment schemes.

TYPES OF MEETINGS WHICH MAY BE NEEDED

Decisions may need to be made at different levels. Meetings of the following could be required:

- The board of directors of a company (which could be a private company or a public company eg a responsible entity).
- The shareholders in a private company.
- The shareholders in a public company (for example, an annual general meeting (AGM) of a company with a reporting year ending 31 December instead of 30 June).
- The investors in a wholesale (ie unregistered) fund.
- The investors in a registered fund.

HAVE THE LAW AND GOVERNING DOCUMENTS KEPT UP WITH THE TIMES?

Email and the internet have now been around for a relatively long time. So, it would be reasonable to assume corporate governance and procedure laws have moved with technological developments. Unfortunately, this is not quite the case.

For decisions which need to be made by a board, there are ways around the need to have an 'in person' meeting. From a legal perspective, there is more flexibility in Australia about how directors can discuss a matter and make a formal decision. Circulating resolutions has become common practice and is sanctioned by the Corporations Act. Although, directors still need

to have regard to their company's constitution. There is also some flexibility in relation to resolutions which need to be passed by shareholders in a private company.

For meetings and resolutions of shareholders in a public company and investors in a registered fund, the position has been (perhaps surprisingly in 2020) not as accommodating, at least prior to a very recent temporary change to the Corporations Act discussed below which the Federal Government has facilitated.

VIRTUAL MEETINGS—RECENT CHANGES

The Corporations Act allows meetings of shareholders in a public company or investors in a registered fund to be held at two of more 'venues' using technology.

However, there is debate over whether an entirely virtual or online meeting can be validly held. So-called hybrid meetings, where the chairperson and some stakeholders attend in person and others online, may be a different story. If you are looking to take advantage of technology to hold a meeting or seek a vote in the current environment, then you should be careful and obtain advice. There can be ways around potential hurdles (eg proxy voting) which might be able to effectively happen online.

ASIC recently acknowledged the challenges COVID-19 might cause in the context of AGMs, saying it is prepared to take a no-action position in relation to companies with a 31 December balance date which are unable to hold their AGMs by 31 May. ASIC has also commented that the legal position in relation to entirely virtual, or online, shareholder meetings is in doubt.

However, in a recent important development, on 5 May 2020, the Federal Government used its powers under the COVID-19 response legislation to amend the Corporations Act to expressly allow virtual meetings in relation to companies and registered schemes, as well as to allow the calling of meetings via electronic means. This is subject to some conditions, including that the meeting documents must explain how people can participate.

Despite these welcome amendments, they are only in force for six months. Also, there could still be a question around whether you can take advantage of them if the applicable governing document (for example your fund's constitution) does not contemplate holding virtual meetings.

Wholesale funds are generally not regulated in the same way as retail funds. Therefore, there can be more flexibility. However, at the same time, it is important to check your fund's constitution and perhaps disclosures which have previously been made in relation to the decision-making process and investor meetings and obtain advice.

NEXT STEPS

In these unprecedented times, there are ways in which formal decisions can be made efficiently and validly. However, it is important not to rush and to always check your company's or fund's underlying governing documents, and to get advice. Our lawyers will respond to your queries and provide practical advice.

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