

COVID-19 driven Corps Act amendments

Reporting Update

17 September 2021, 21RU-020



Temporary relief to use technology to meet regulatory requirements

Permanent ASIC powers for individual or class order relief

Pursuit of permanent reforms

Highlights

- Virtual meetings and electronic communications
- Reforms to continuous disclosure laws

The Government has passed the [*Treasury Laws Amendment \(2021 Measures No. 1\) Bill*](#) (Bill) which amends the *Corporations Act 2001* (Corps Act) and *Australian Securities and Investments Commission Act 2001*, where relevant, with the following effects:

- renewal of temporary relief for virtual meetings and electronic communications (including measures to facilitate the electronic execution of company documents)
- reforms to the continuous disclosure laws.

These changes commence on 14 August 2021.

Virtual meetings and electronic communications

The Bill renews the temporary relief that allows companies to use technology to meet regulatory requirements under the Corps Act.

These temporary relief measures will allow companies to hold virtual meetings and use electronic communications to send meeting-materials and execute company documents until **31 March 2022**.

This relief ensures that companies can meet their obligations as they continue to deal with the uncertainty of the COVID-19 pandemic. In particular, the renewed relief will give certainty to listed and unlisted companies that are expected to hold an annual general meeting later this year and early next year (see below for further discussion). The relief applies to holding meetings of directors of a company, meetings of shareholders of a company and meetings of members of a registered scheme.

The legislation also gives ASIC permanent powers to provide individual or class order relief in relation to meetings and sending documents. ASIC will be able to provide this relief in circumstances beyond companies' control, such as those caused by the COVID-19 pandemic.

The Government will seek to introduce permanent reforms later this year to give companies the flexibility to use technology to hold meetings, such as hybrid meetings, and sign and send documents.

Annual General Meetings (AGMs)

Public companies (listed and unlisted) are generally required to:

- dispatch notices to convene an AGM
- hold AGMs in person (i.e. not use virtual technology)
- within five months of the end of the relevant financial year.

As a consequence of relief measures contained in [Corporations \(Coronavirus Economic Response\) Determination \(No. 3\) 2020](#) (Determination) expiring in March 2021, ASIC provided **temporary** relief ('no-action' position) around the convening of an AGM, the holding of an AGM using virtual technology, and the deadline by which the AGM is required to be held. Except in relation to the deadline by which the AGM is required to be held, we expect ASIC to review this relief given the passing of the Bill by Parliament. This was foreshadowed when the relief was announced in March 2021.

Convene an AGM

Able to send notices electronically

The Bill temporarily permits the dispatch of notices of meeting by electronic means from 14 August 2021. The relief provided by the Bill will remain in force until 31 March 2022, however the Government is expected to introduce permanent reforms in late 2021.

As noted above, in March 2021 ASIC adopted a 'no-action' position in relation to entities sending a notice of meeting, or sending supplementary information in relation to a meeting, using one or more technologies to communicate to those entitled to receive notice of the meeting. This position is no longer required from 14 August 2021 due to the passing of the Bill.

Hold an AGM

Hold virtual meetings

Some entities may wish to hold their AGM using technology instead of traditional physical meetings given COVID-19 restrictions. This could take the form of online meetings (virtual) or physical and online meetings (hybrid).

Consider constitution of entity

ASIC considers that hybrid AGMs are permitted under the Corps Act but entities need to check whether their constitution restricts meetings being held in this way. Entities that are concerned about the validity of virtual meetings may wish to seek legal advice.

The Bill temporarily permits the use of virtual technology to hold AGMs. The technology must give all persons entitled to attend the meeting a reasonable opportunity to participate without being physically present in the same place. The relief provided by the Bill will remain in force until 31 March 2022, however the Government is expected to introduce permanent reforms in late 2021.

In March 2021 ASIC adopted a 'no-action' position in relation to entities who elected to hold their AGM using virtual technology, including hybrid meetings. This position is no longer required from 14 August 2021 due to the passing of the Bill.

ASIC guidelines

To assist companies and responsible entities, ASIC has issued [guidance](#) setting out its views on the appropriate approach to calling and holding meetings using virtual technology.

'No-action' position extended to 7 July 2021 financial year ends

ASIC Instrument now replaces 'no-action' position

Consider your constitutions

Extension of time is either two or four months depending on balance date

Deadline to hold an AGM

In 2020 ASIC advised that it would adopt a 'no-action' position where public companies do not hold their AGMs within five months after the end of financial years that end from 31 December 2019 to 7 January 2021, but do so up to seven months after year end. That is, a two-month extension.

In a March 2021 [media release](#) ASIC effectively extended this 'no-action' position for a financial year end between 7 January 2021 and 7 April 2021. In a April 2021 [media release](#) ASIC further extended this 'no-action' position for a financial year end between 7 April 2021 and 7 July 2021.

In a September 2021 [media release](#) ASIC had a further announcement on the time public companies have to hold their AGMs. ASIC has issued [ASIC Corporations \(Extension of Time to Hold AGMs\) Instrument 2021/770 \(AI 2021/770\)](#) which provides that:

- all public companies with balance dates between 21 February 2021 and 7 July 2021 have an additional **two** months to hold their AGM, and
- public companies limited by guarantee with balance dates between 24 January 2021 and 7 April 2021 have an additional **four** months to hold their AGM.

This legislative instrument formalises and adds to the 'no-action' position ASIC has previously taken giving companies with balance dates up to 7 July 2021 an additional two months to hold AGMs.

ASIC has granted this extension to allow flexibility for companies preparing for the upcoming AGM season while restrictions on gathering and movement persist during the COVID-19 pandemic.

Entities should also consider the requirements to hold AGMs under their constitutions and seek legal advice if needed.

Public companies limited by guarantee

Under AI 2021/770, public companies with a balance date of between 21 February 2021 and 7 July 2021 (other than public companies limited by guarantee with balance dates between 24 January 2021 and 7 April 2021) will have an additional **two** months within which to hold that AGM. Public companies limited by guarantee with balance dates between 24 January 2021 and 7 April 2021 will have an additional **four** months within which to hold the AGM.

ASIC has stated that public companies limited by guarantee are often not-for-profit or community membership-based organisations who may have limited resources and additional logistical issues with holding a virtual meeting within the time required.

The impact for a public company limited by guarantee with a financial year ending on a date that is:

- between 24 January 2021 and 7 April 2021 is a four-month extension
- between 8 April 2021 and 7 July 2021 is a two-month extension.

While companies with balance dates of 24 January 2021 to 7 April 2021 will already have been required under section 250N to hold their AGM prior to the commencement of AI 2021/770, they have been included to formalise the position for companies that, in reliance on ASIC's 'no-action' position, have not yet held an AGM.

Refer to [21RU-019 COVID-19 financial reporting deadlines – 2021](#) for further details on the two-month extension to hold an AGM.

Electronic execution of documents

The Bill also included measures to facilitate the electronic execution of company documents to meet the requirements in the Corps Act relating to:

- executing company documents
- executing documents relating to meetings
- recording, keeping and providing minutes
- providing notice of a meeting and give other documents relating to meetings to the prospective attendees.

The measures contained in the Bill are effective from 14 August until 31 March 2022, however the Government is expected to introduce permanent reforms in late 2021.

“The renewal of these temporary measures to facilitate virtual meetings and the use of electronic communications will be welcomed by entities given the continuing evolving COVID-19 impacts on physical meetings and deliveries. Making permanent reforms will modernise the provisions of the Corporations Act in this area.”

Michael Voogt
Director, Department of Professional Practice

Reforms to continuous disclosure laws

Introduces at fault element

The Bill makes permanent the temporary changes to Australia's continuous disclosure laws made in May 2020.

The Bill amends the Corps Act so companies and their officers will only be liable for civil penalty proceedings in respect of continuous disclosure obligations where they have acted with "knowledge, recklessness or negligence".

The Government has stated that these changes will mitigate the risk of companies and their officers being subject to opportunistic class actions under continuous disclosure laws and in doing so, will support companies and their officers to release forward-looking guidance to the market.

The temporary changes made on 25 May 2020 were in response to concerns that the heightened level of uncertainty around companies' future prospects as a result of the COVID-19 crisis could cause companies to be seen to be falling foul of their continuous disclosure obligations if their forecasts are found to be inaccurate. This could also expose companies to the threat of opportunistic class actions for such alleged statements. These temporary changes were in effect until 23 March 2021. The Bill has made these changes permanent with effect from 14 August 2021.

Mandatory review after two years

The Bill requires an independent review of its impact within six months after the second anniversary of commencement of the Bill, being 14 August 2021.

No change to ASX Listing Rules on continuous disclosure

Subject to certain exceptions, ASX Listing rule 3.1 requires listed entities to notify the ASX immediately of any information concerning it which a reasonable person would expect to materially affect its share price. The ASX Listing rules relating to continuous disclosure have not changed.

Companies may seek legal advice to ensure that they have appropriately discharged their continuous disclosure reporting obligations.

21RU-020 COVID-19 driven Corps Act amendments

The information contained in this document is of a general nature and is not intended to address the objectives, financial situation or needs of any particular individual or entity. It is provided for information purposes only and does not constitute, nor should it be regarded in any manner whatsoever, as advice and is not intended to influence a person in making a decision, including, if applicable, in relation to any financial product or an interest in a financial product. Although we endeavour to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.

To the extent permissible by law, KPMG and its associated entities shall not be liable for any errors, omissions, defects or misrepresentations in the information or for any loss or damage suffered by persons who use or rely on such information (including for reasons of negligence, negligent misstatement or otherwise).

©2021 KPMG, an Australian partnership and a member firm of the KPMG global organisation of independent member firms affiliated with KPMG International Limited, a private English company limited by guarantee. All rights reserved. The KPMG name and logo are trademarks used under license by the independent member firms of the KPMG global organisation. Liability limited by a scheme approved under Professional Standards Legislation.