

Guidance on
Governance
issues arising
from the 2014
AGM season

How to deal with:

- the form of voting when the vote is close
- proxy forms, and
- the adjournment of the meeting when a resolution is contentious.

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The annual general meeting (AGM) is an important institution with more than one objective. It is an occasion when shareholders consider the formal business before the meeting and it is often the primary and only statutory opportunity for the board and management to engage in person with retail shareholders.

1. Maintaining integrity in the voting process

Various resolutions are usually put to the vote at a company's annual general meeting (AGM).

At a listed company's AGM, an ordinary resolution must be put to the vote that the company's remuneration report be adopted. The vote is advisory and does not bind the directors or the company. However, where 25 per cent or more of the votes cast by members entitled to vote are against the adoption of the remuneration report, this triggers the 'two strikes' mechanism in the *Corporations Act 2001*.

If the proxy votes received indicate that a resolution, including the resolution on the remuneration report, is likely to pass or fail, it is not good governance for the chair to put the matter to a vote on a show of hands in the hope or expectation that the vote on a show of hands will produce a different result from that of a vote by poll. Chairs should also consider that it may be a breach of their duties if they do not give effect to the wishes of shareholders.

A poll reflects the wishes of shareholders present at the meeting as well as those shareholders who have lodged proxies. It is often the case that only a very small percentage of shareholders, by number and value, attend the AGM. It is **not** good governance for the chair to knowingly allow the wishes of this small percentage of shareholders to prevail over the wishes of a larger number of shareholders attending the meeting by proxy or casting direct votes.

Before a vote is taken the chair must inform the meeting whether any proxy votes have been received and how the proxy votes are to be cast. This is a requirement of the *Corporations Act* (s 250J) if the company uses the replaceable rules and in other cases is considered good governance. The chair should not, in good faith, ignore the wishes of the shareholders who have lodged proxies. Numerous cases have confirmed the chair's common law duty to ensure that the true will of the membership is discovered on any particular proposal.

In the case of the resolution to adopt the remuneration report that is required to be put to each listed company AGM, it is arguable that this duty extends to ascertaining whether a 'strike' has been recorded against the company.

Shareholders or the chair may always demand a poll (other than in some cases on the election of the chair or adjournment of the meeting) (ss 250K and 250L). From 2014, the voting policies of the Australian Shareholders' Association (ASA) explicitly support companies holding a poll on all resolutions. Some companies, especially those with a large institutional shareholder base who do not attend the AGM, utilise voting by poll on each resolution, to ensure that the votes of those shareholders are counted.

The chair should explain to shareholders why the vote is being decided by poll if the company decides this is the preferred method for a resolution (including the remuneration-report resolution and subsequent spill resolution, if required).

The chair should also explain why a resolution is being decided on a show of hands, which may be appropriate, for example, if the chair knows that the proxies lodged are overwhelmingly in favour of the resolution (in which case, voting on a show of hands will expedite the meeting), or if the resolution is non-contentious.

If the chair wishes to call a poll, the words in the chair's script could be:

In order to reflect the wishes of shareholders who are attending the meeting in person as well as those who have appointed a proxy to attend and vote on their behalf [or have cast a direct vote], this vote on this resolution will be determined by a poll.

A poll can be called:

- before a vote is taken
- before the result on a show of hands is declared or
- immediately after the result on a show of hands is declared.

Some companies use electronic hand-held voting devices to expedite the process of determining the outcome of the poll on a resolution, (including the remuneration-report resolution and spill resolution, if required).

Section 250R was amended in June 2012 to clarify that the chair of an AGM can vote undirected proxies on the non-binding resolution to adopt the remuneration report and on a spill resolution where the shareholder provides the chair with express authorisation to do so.

2. Proxy forms and recommendations to shareholders with respect to resolutions

Shareholders expect their boards to make recommendations on the resolutions before a meeting (in the same way that boards expect management to make recommendations on resolutions before the board). However, the board must always respect that the decision as to how to vote is ultimately a matter for each individual shareholder and the shareholder, or their proxy or representative, must be able to vote for or against or abstain on each resolution before the meeting.

The notice of meeting should include a clear reference to shareholders' rights to appoint a proxy, or where the constitution so provides, to cast a direct vote. Voting forms should clearly and prominently state how the chair of the meeting intends to vote undirected proxies.

The shareholder must be able to indicate whether they wish the proxy to vote 'for' or 'against', or abstain from voting on, each resolution, or whether they wish to leave the decision to the appointed proxy.

Shareholders must not be given the impression that they are required to vote in a particular way. Nor should a company make it any more difficult to vote in one way than another.

Great care therefore should be taken in issuing pre-completed proxy forms and it is generally considered good governance not to do so. More generally, it is important for directors to consider if any meeting materials provided to shareholders are misleading and whether there is any improper exercise of the board's powers. Recommendations on a resolution must be made in good faith and for a proper purpose. If the board is expending the company's money to argue in favour of or against a resolution, the board must be satisfied that it is in the best interests of the company to do so. The directors cannot act purely to protect their own interests.

The Australian Securities and Investments Commission (ASIC) has raised concerns about the use of pre-completed proxy forms. Companies are encouraged to seek legal advice if contemplating the use of pre-completed proxy forms and to consider:

- whether the form is misleading
- whether it is an improper exercise of the board's powers, and
- the governance issues attached to pre-completed proxy forms.

3. Adjournment of the meeting when a resolution is contentious

Meetings may be adjourned by the chair, if empowered under the company's constitution. The adjournment can either be to a date to be fixed or to a date, time and place specified at the time of the adjournment.

Adjournments have sometimes been utilised by a chair if they form the view that a vote on a resolution may be negative, and they wish to halt the meeting in order to canvass further shareholder support for the resolution.

The chair should be mindful of the requirement for directors to exercise their powers in the best interests of the company. It is good governance for the chair to explain why a meeting is being adjourned.

An adjournment re-sets the date for the receipt of proxies. The voting entitlement date may also be re-set or remain unchanged. A critical issue in deciding the length of any adjournment, therefore, is the effect, if any, it will have on proxies. For example:

- If the record date for voting does not change, the register does not change for the purposes of voting.
- If the record date for voting changes, the register and therefore shareholder voting entitlement are likely to have changed.
- If a proxy has been rejected for being lodged too late, that proxy may be valid at the resumed meeting (s 250B).

Legal advice should always be sought if possible before any adjournment beyond the day of the original meeting.

For companies using the replaceable rules, if the meeting is adjourned for one month or more, a new notice of the resumed meeting must be given (s249M). Otherwise, the provisions in the constitution apply.