AGM season is coming!
Quick tips to make it easy

The 2015 AGM Season is nearly here, so we have put together this practical guide to:

- key things an ASX listed entity should consider when preparing the notice of meeting (NOM); and
- procedural matters you need to be on top of when it comes to the main event.

Procedures that matter — the preparation timetable
Set out below is a checklist of the key procedures you need to get done before and immediately after the AGM to ensure you comply with legal requirements.

Advise ASX of the date of AGM
Advise ASX of the date of the AGM at least five business days before the closing date for receipt of director nominations (LR 3.13.1). You need to check your constitution for when director nominations need to be received, with the default position being 35 business days prior to the AGM (LR 14.3).

Drafting the NOM
Carefully consider which approvals to seek at the AGM. Holding general meetings is expensive and an AGM can be a great opportunity to get things approved. See our list of usual and less common resolutions [and our handy tips] below. You also need to check the proxy form (LR 14.2).

Does your notice need ASX review? What about voting exclusions?
Check whether the notice requires prior approval of ASX under ASX Listing Rule 15 (for example, where you are seeking approval under the listing rules) and, if so, allow five business days for ASX to review.
You should also check if any voting exclusion statements are required under either the Listing Rules or the Corporations Act for any of the resolutions.

FOR MORE INFORMATION

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BEFORE THE AGM

**Release NOM and annual report on ASX and despatch to shareholders and auditor**
Notice for a listed entity AGM must be given to shareholders at least 28 days before the AGM (but check your constitution for any additional requirements). If you are a foreign company listed on the ASX then the laws of your local jurisdiction should generally apply in terms of notice, and maybe less than 28 days.

The NOM and the annual report must be released to the ASX and distributed to shareholders, with two hard copies of the annual report being provided to the ASX. Don’t forget to send an electronic copy of the NOM and annual report to the auditor (with hard copies to follow).

**Release CEO/MD’s and Chairman’s address**
Release the CEO/managing director’s and chairman’s addresses (if any) to the AGM and the slide pack before the AGM commences (LR 3.13.3).

AFTER THE AGM

**Release outcome of each resolution**
Immediately after the meeting, release to ASX the outcome of each resolution. This is to include details of proxies received — showing those for, against, abstaining and open on each resolution (LR 3.13.3).

**Prepare minutes of meeting**
The company secretary to prepare minutes of meeting and have directors approve at following Board meeting.

**Notify ASIC of director changes**
Any notify ASIC of director changes are to be notified to ASIC within 28 days of the date of change.

The usual resolutions included in the NOM

We are all generally familiar with the usual resolutions included in an AGM notice but here are some hints and tips you may not have thought about:

**Approval of financial reports**
The Corporations Act requires that the directors’ report, auditor’s report and the financial reports be presented to the AGM. Shareholders are not required to vote on the reports at the AGM (other than the non-binding vote on the remuneration report — see Spill Meetings below). However, shareholders must be given the opportunity to make comments on or raise questions with respect to these reports at the AGM.

**Our tip**
Shareholders also have the right to submit written questions to the auditor as long as it is at least five business days before the meeting — let shareholders know about this in your NOM.

**Election and re-election of directors**
Directors may come up for re-election as a result of rotation (see constitution and LR 14.4) or if they were appointed to fill a casual vacancy or as an addition to the board (must be re-elected at the next AGM following their appointment). These rules do not apply to the managing director of the company (provided there is not more than one).

**Our tip**
Make sure your NOM is clear on the reason why the director is coming up for re-election (confirmation of a casual vacancy appointment or retirement by rotation). Directors are not excluded from voting on their own re-election but it is good form to exclude them from any recommendation on that resolution.
Remuneration Report
A public listed company is obliged to put a resolution that the Remuneration Report be adopted by a vote at the company’s AGM. The vote is advisory only and does not bind the directors of the company. However, if at two consecutive AGM’s the Remuneration Report receives “no” votes of 25% or more (known as the “Two Strikes Rule”) then this may lead to a board spill (see Spill Meetings below).

Our tip
Key management personnel (KMPs) whose remuneration is included in the Remuneration Report, and their closely related parties, are restricted from voting on the Remuneration Report. Make sure you check your voting exclusion carefully — including how it applies to undirected proxies (not entitled to vote unless held by Chair) and proxies held by the Chair (Chair can vote both directed and undirected proxies), making sure it is clear that proxies can not be cast on behalf of KMPs or their closely related parties.

Spill meetings
If the resolution to approve the Remuneration Report receives “no” votes of 25% or more at two successive annual general meetings (known as the “Two Strikes Rule”) shareholders will be required to vote at the second of those annual general meetings on a “board spill resolution” to determine whether another meeting should be held within 90 days at which all of the company’s directors (other than the managing director) must stand for re-election.

Our tip
If your company received 25% or more “no” votes at the last AGM, you must include a “board spill resolution” in your NOM which is clearly drafted to only be put if a second 25% or more “no vote” is received at this AGM. Just remember, KMPs and their closely related parties cannot vote on the adoption of the Remuneration Report or on the “board spill resolution” but are permitted to vote on the election of directors at a spill meeting (if one is held).

Some additional resolutions which you may want to consider
As a result of changes in the Corporations Act and ASX Listing Rules over the past few years, we are seeing a number of additional resolutions being included in the NOM.

Additional Capacity LR7.1A
Under Listing Rule 7.1A eligible listed entities may, subject to shareholder approval by way of special resolution at an AGM, issue up to 10% of their issued share capital in addition to their usual 15% placement capacity under Listing Rule 7.1. An eligible entity for this purpose is an entity that is not included in the S&P/ASX 300 Index and has a market capitalisation of $300 million or less at date of AGM.

Our tip
ASX recommends entities seeking this approval provide a draft calculation of its market capitalisation to ASX at the time they lodge their draft notice of AGM for review. Also, if an ASX entity believes there is a risk it may be in the ASX 300 by the time of the AGM, the resolution should drafted to be conditional on this not being the case (in other words, the resolution is not put to shareholders if the entity has made it to ASX 300). Finally, a voting exclusion applies under Listing Rule 7.3A.7 and entities should consider carefully how it will apply in their situation (extra tip: there is an ASX User Guide which gives some handy examples).
Termination Benefits

Subject to limited exceptions, public listed companies are prohibited from giving retirement benefits to directors and certain senior executives without shareholder approval where the benefit exceeds that director or executive’s one year average annual base salary (or a lesser pro rata amount if they have been with the company for less than one year). “Benefits” has a broad meaning for this purposes and include automatic or accelerated vesting of shares. We have been seeing termination benefit approvals regularly included in the notices of listed companies — in particular for pre-approval of accelerated vesting under an employee incentive scheme which applies on cessation of employment.

Grant of equity to directors

The ASX Listing Rules prohibit listed entities from issuing or agreeing to issue equity securities (which include options) to related parties (such as directors) without shareholder approval (LR 10.11). An issue under an employee incentive plan also requires approval if it is to a director, an associate of that director or the ASX determines approval should be obtained (LR 10.14).

Approve or refresh ESOP

Listing Rule 7.2 exception 9 provides that, where an employee incentive plan has been approved by shareholders, issues of securities under the plan do not count towards the company’s 15% capacity under ASX Listing Rule 7.1 (or 10% capacity under Listing Rule 7.1A if it applies). The terms of the scheme must be summarised in the notice of meeting and a voting exclusion does apply to the resolution.

Our tip

More and more entities include a pre-approval of accelerated vesting of options and other incentives granted under an employee incentive plan. If an entity decides to seek the approval, we have seen two key approaches — approval for a specific grant or a wholesale approval of grants made under a particular plan. There are pros and cons to both approaches and consideration should be given to the effectiveness of taking a wholesale approach.

Our tip

If seeking approval for issue of securities to directors or their associates think carefully about which Listing Rule applies (10.11 or 10.14) as the disclosure you need to include in your NOM and the voting exclusion will be different. For Listing Rule 10.14 approvals, the benefit of complying with Listing Rule 10.15A is that it provides a pre-approval for issues up to three years in advance (as opposed to 12 months if Listing Rule 10.15 is complied with or just one month for Listing Rule 10.11).

Our tip

The shareholder approval under Listing Rule 7.2 exception 9 must be refreshed every three years — so remember to check when your last approval was given and include a new resolution in the NOM if appropriate.