

Annual Members' Meetings: One small step for member empowerment

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On 5 April 2019, the *Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 1) Act 2019 (Act)* received the Royal Assent. The Act was designed to give—

'every day Australians more power over their superannuation providers and a stronger prudential framework to deliver a more transparent and accountable compulsory retirement savings system'¹.

The Act expanded Division 5 of Part 2B of the *Superannuation Industry (Supervision) Act 1993 (SIS Act)* to require the RSE licensee (ie. the trustee) of a registrable superannuation entity² (**fund**) to hold an annual meeting of members of the fund in relation to each year of income of the fund beginning on or after 6 April 2019³. Consequently, many RSE licensee are planning to hold their first annual members' meeting in 2020.

This article examines the new annual members' meetings regime for funds and compares it to the existing regimes for annual general meetings for public companies and for meetings of members of registered managed investments schemes.

This article also addresses what trustees should be doing now to prepare to hold their first annual members' meeting, given ASIC has indicated that, at this stage, no deferral is planned due to COVID-19⁴. It is anticipated that electronic or virtual annual members' meetings will be the preferred option for trustees, particularly given current challenges with holding a physical meeting.

Annual Members' Meetings - What is required?

The trustee must give notice of an annual members' meeting no later than 6 months after the end of the year of income for the fund and at least 21 days before the date of the meeting⁵. The meeting must be held within 3 months after the notice is given⁶.

For a trustee using the financial year ending 30 June as the year of income of a fund:

- the first annual members' meeting held under the regime will be in relation to the financial year beginning on 1 July 2019 and ending on 30 June 2020;
- notice of the meeting must be given by no later than 31 December 2020; and
- the meeting must be held within 3 months after the notice is given, which makes 31 March 2021 the latest possible date for the first annual members' meeting.

Before holding an annual members' meeting, the trustee must give notice of the meeting to:

- all members of the fund;
- all responsible officers of the trustee; and
- all auditors and actuaries of the fund for the particular income year⁷.

The notice must specify the time and location of the meeting, details of how the meeting can be attended electronically (if it will be held by electronic means), the agenda for the meeting and any other information

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¹ Senator James McGrath, Second Reading Speech

² The requirement does not apply to a registrable superannuation entity that is: (a) a superannuation fund with fewer than 5 members; (b) an excluded approved deposit fund; (c) a pooled superannuation trust; or (d) an eligible rollover fund (see s29P(7) of the SIS Act).

³ Item 6 of Schedule 7 to the *Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 1) Act 2019*

⁴ ASIC, COVID-19 - Information for superannuation trustees, FAQ 2B, updated 1 April 2020

⁵ s29P(3)(d) of the SIS Act

⁶ s29P(4) of the SIS Act

⁷ s29P(2) of the SIS Act

prescribed by the regulations⁸. Currently, no regulations have been made. ASIC has indicated that it considers that trustees can hold an annual members' meeting without any regulations being made⁹.

If the notice is given to the Chair of the board of directors of the trustee, a director of the trustee, an executive officer¹⁰ of the trustee, or an auditor or actuary of the fund for the particular income year, that person will be required to attend the meeting or otherwise face a potential penalty of 50 penalty units¹¹ (\$10,500). However, a person is not be required to attend a meeting if the person has a reasonable excuse for not attending¹². In addition, a director of the trustee is not required to attend the meeting if other directors of the trustee attend the meeting and the number of directors attending is no less than the number who would constitute a quorum for a meeting of the board of directors¹³.

At the annual members' meeting, the trustee must give members of the fund 'reasonable opportunities' to ask questions about the fund, the trustee, its responsible officers, any audit of the fund for the income year, any actuarial investigation of the fund in the income year, and any information included with the notice of the meeting¹⁴. The explanatory memorandum to the Act states that to ensure that an annual members' meeting runs effectively, the trustee is able to determine the duration and content of the meeting¹⁵.

If a member of the fund asks a responsible officer, auditor or actuary of the trustee a question, that person must answer the question at the meeting or, if it is not reasonably practicable to do so, within 1 month after the meeting¹⁶. A failure to answer a question is an offence punishable by 50 penalty units.

However, a responsible officer, auditor or actuary does not need to answer a question:

- if it is not relevant to the fund, or an action or failure to act by the trustee in relation to the fund or one or more members of the fund;
- if answering the question would breach the governing rules of the fund or any law;
- if answering the question would result in detriment to the members of the fund as a whole; or
- in any other circumstances prescribed by regulation.

Further, an auditor does not need to answer a question that is not relevant to an audit of the fund carried out by the auditor, or any matter that might reasonably be expected to be apparent to the auditor of the fund in relation to the fund. Similarly, an actuary does not need to answer a question that is not relevant to an actuarial investigation of the fund carried out by the actuary, or any matter that might be reasonably expected to be apparent to the actuary of the fund in relation to the fund.

The trustee will need to ensure that minutes of the annual members' meeting are prepared and include answers to any question asked at the meeting that a person is obliged to answer under the new regime¹⁷. The minutes will need to be made available to all members on the fund's website.

Annual General Meetings (AGMs) regime

The annual members' meeting regime can be compared to the AGM regime under the *Corporations Act 2001* (Cth) (**Corporations Act**). A public company must hold an AGM at least once in each calendar year and within 5 months after the end of its financial year¹⁸. The time for holding the meeting may be extended by ASIC if the company applies in writing to ASIC before the default period for holding the meeting expires.

The company must give 21 days' notice of the AGM to the company's members, directors and auditor. This is the same notice period as for annual members' meeting.

⁸ s29P(3) of the SIS Act

⁹ ASIC, COVID-19 - Information for superannuation trustees, FAQ 2B, updated 1 April 2020

¹⁰ Section 10 of the SIS Act defines "executive officer" to mean a person, by whatever name called, who is concerned or takes part in the management of the body.

¹¹ Section 29PA of the SIS Act

¹² s29PA(5) of the SIS Act

¹³ s29PA(6) of the SIS Act

¹⁴ s29P(5) of the SIS Act

¹⁵ para 8.36 of the Revised Explanatory Memorandum

¹⁶ ss29PB, 29PD and s29PE

¹⁷ s29P(6) of the SIS Act

¹⁸ s250N(2) of the Corporations Act

The notice for an AGM must state, in a clear, concise and effective manner, the time, date and place for the meeting, whether proxy voting is allowed, the general nature of the meeting's business, any special resolution to be proposed and the resolution in relation to adopting the remuneration report.

In contrast to the annual members' meeting regime, there is no requirement for a company auditor to attend an AGM, unless the company is a listed company. Rather, the auditor has a right to receive the notice of the AGM and all of the materials that a member is entitled to receive. The auditor is also entitled to attend the AGM in person or through a representative and comment on any part of the business of the meeting that concerns the auditor in their capacity as such.

For a listed company, the auditor is required to attend the AGM and any member of the company who is entitled to vote at the AGM may submit a written question to the auditor prior to the AGM in respect of auditor's report and the audit of the annual financial report. The auditor must then prepare a list of questions, based on the member's submissions, which the auditor considers are relevant to the auditor's report and the conduct of the audit of the annual financial report to be considered at the AGM.

The AGM regime provides that the following four matters may be dealt with at the AGM, even if they are not included in the notice of meeting:

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

A resolution that the remuneration report be adopted is required to be put to a vote at the AGM of a listed company. The remuneration report must include information about the nature and amount of remuneration of the key management personnel¹⁹. If 25 percent of the votes cast at the AGM are against adopting the remuneration report two years in a row, the members at the AGM must vote on whether to have a further meeting at which the directors of the company may be sacked.

Similarly to an annual members' meeting, the chair of an AGM must allow '*a reasonable opportunity for the members as a whole*' to ask questions about or make comments on the management of the company²⁰ and, for a listed company, the remuneration report²¹. Further, if the company auditor or their representative is at the AGM, the chair must allow '*a reasonable opportunity for the members as a whole*' to ask in relation to the auditor's report and related work in respect of the company²².

The explanatory memorandum for the second Corporate Law Simplification Bill (which introduced these provisions in the Corporations Act) explains that what is a 'reasonable opportunity' will depend on the circumstances of the meeting. In addition, the phrase '*as a whole*' is used to confirm that each individual does not have the right to ask a question. Notably, these words are missing from the annual members' meeting regime. As mentioned above, the explanatory memoranda to the Act states that, to ensure that annual members' meetings run effectively, the trustee is able to determine the duration and content of the annual members' meeting. While this might lead to the same result, ideally, the Act could have also provided that the RSE licensee must give a reasonable opportunity for members of the registrable superannuation entity **as a whole** to ask questions.

In contrast to the regime proposed for annual members' meeting, there is no penalty under the Corporations Act for failing to answer questions at an AGM. On one view, there is no need for such penalties at AGMs because, if directors fail to answer questions, members can take other action such as vote against the proposed resolution, elect new directors or even dispose of their interests in the company. In a superannuation fund, a member can really only transfer or withdraw their interest in the fund.

At AGMs, members are given the opportunity to vote on any resolution that is included in the notice for the meeting and, in any event, the matters mandated by the Corporations Act which are outlined earlier in

¹⁹ Key management personnel are those in the company with the authority and responsibility for planning, directing and controlling the activities of the company, including any director (whether executive or otherwise).

²⁰ s250S of the Corporations Act

²¹ s250SA of the Corporations Act

²² s250T of the Corporations Act

this article. This is in stark contrast to annual members' meeting where the Act does not require members to vote on anything.

Managed Investment Schemes (MISs) regime

Registered managed investment schemes and APRA regulated superannuation funds are similar investment vehicles and both are structured as trusts. However, in the main superannuation funds operate within a broader policy framework - namely, the 'compulsory' superannuation system - and within the concessional tax environment. Like companies, registered managed investment schemes already have a meeting regime but it is totally different to what the Act has created for superannuation funds.

The responsible entity of a registered scheme is not required to hold meeting of members (ie. those holding an interest in the scheme) annually. Instead, meetings may be required for the purpose of allowing members to vote on special resolutions or extraordinary resolutions.

Special resolutions are needed for particular changes under the Corporations Act, including changing the constitution (ie. the governing rules) of the scheme. Special resolutions must be passed by at least 75% of the votes cast by members entitled to vote on the resolution.

Extraordinary resolutions are also needed for particular changes under the Corporations Act, including winding up of the scheme and the retirement or removal of the responsible entity. Extraordinary resolutions must be passed by at least 50% of the total votes that may be cast by members entitled to vote on the resolution (including members who are not present in person or by proxy).

The responsible entity of a registered scheme must call and arrange to hold a meeting of the scheme's members to consider and vote on a special or extraordinary resolution on the request of:

- members with at least 5% of the votes that may be cast on the resolution; or
- at least 100 members who are entitled to vote on the resolution.

The request must be in writing and must state any resolution to be proposed at the members' meeting.

If the responsible entity fails to call a members' meeting within 21 days of the request, members with more than 50% of the votes carried by the interests held by the members who made the request may call and arrange to hold a meeting of the scheme's members. The responsible entity must pay, out of its own assets, the reasonable expenses incurred in calling, arranging and holding that members' meeting.

Alternatively, members who hold interests carrying at least 5% of the votes that may be cast at a meeting of the scheme's members may call and arrange to hold a meeting of the scheme's members to consider and vote on a proposed special or extraordinary resolution. The members calling the meeting must pay the expenses of calling the meeting.

Before holding a members' meeting, the responsible entity must provide written notice to each member of the scheme entitled to vote at the meeting, each director of the responsible entity, the auditor of the scheme, and the auditor of the scheme compliance plan. The notice must include the details of the meeting, including the general nature of the business of the meeting, the resolutions to be proposed at the meeting, and information about voting rights and proxies. Subject to the scheme's constitution, the notice must be given at least 21 days prior to the date of the meeting.

Once a meeting has been called, the following members may, by written notice to the responsible entity, propose a resolution to be moved at the meeting:

- members with at least 5% of the votes that may be cast on the resolution; or
- at least 100 members who are entitled to vote on the resolution.

The members proposing the resolution may also request the responsible entity to send all of the members of the scheme a statement provided by them about:

- the proposed resolution; or
- any other matter that may be properly considered at the meeting.

The responsible entity may hold a members' meeting at 2 or more venues using any technology that 'gives members as a whole a reasonable opportunity to participate' which may include audio visual technology.

Subject to the scheme's constitution, the quorum for a members' meeting is 2 members. The quorum must be present at all times. If the meeting does not have a quorum within 30 minutes of its start, the meeting is adjourned.

The auditor of the registered scheme and the auditor of the scheme compliance plan are entitled to attend, in person or through a representative, and be heard on any part of the business of the meeting which concerns them in their capacity as auditors.

The responsible entity must keep minute books in which it records proceedings and resolutions of the meeting. The record must be made within 1 month of the meeting and must be signed by the chair within a reasonable time from the meeting. The responsible entity must make the minutes books available to members for inspection free of charge.

Table comparing meeting regimes

	Annual Member Meeting regime (superannuation funds)	AGM regime (public companies)	MIS regime (managed investment schemes)
How often are meetings held?	Annually	Annually	If required
Do members have a right to ask questions?	Yes	Yes	No
Are members able to vote on resolutions?	No	Yes	Yes

Evaluating annual members' meetings

While the Annual Member Meeting regime borrows heavily from the features of the AGM regime and to some extent the MIS regime, it serves a fundamentally different purpose. The latter two regimes are designed to give members control over aspects of the management of a public company or MIS.

In the case of an AGM, members may, subject to the company's constitution, go so far as to remove the company's directors and appoint new directors in their place. Under the MIS regime, members may replace the responsible entity and even resolve to amend the constitution of the scheme.

By contrast, the Annual Member Meeting regime lacks an effective mechanism for empowering members to effect change regarding the management of the trustee and the superannuation fund. The only power given to members is the power to ask the responsible officers of the trustee, the auditor of the fund and the actuary of the fund questions, which are required to be answered at the meeting or within one month of the meeting. Senator McGrath stated that the purpose of the legislation was to give 'every day Australians more power over their superannuation providers'. Technically, that objective may have been met, but arguably, members have only been afforded minimal additional power.

On its face, it might seem attractive to expand the role of annual members' meetings to empower members to vote on a remuneration report for the trustee (similarly to the AGM regime), or sack the trustee of their fund or even amend the governing rules of the fund (similarly to the MIS regime), as a means of improving member engagement. However, we would argue this would ignore the fundamental differences between these vehicles and distort the policies underpinning them. Specifically:

- Members of a public company are the owners of the company whereas the members of a superannuation fund are its clients. It therefore makes sense that under the Annual Member Meeting regime super fund members will not be able to vote on remuneration.
- Whilst MISs and superannuation funds are both structured as trusts, the 'compulsory' nature of superannuation means that employees become investors whether they want to or not. In most cases, employees become members of the fund at the choice of their employer or pursuant to an industrial arrangement. Current levels of member disengagement within superannuation render measures designed for active investors in an MIS unsuitable for application to superannuation funds.
- Further, there is also the question of whether, as a matter of policy, it is desirable to give members such powers over a trustee that is legally required to act independently and which cannot be subject to the direction or discretion of others (including members) and that is liable for those decisions.

The annual members' meeting regime is a half measure, which aims to encourage member engagement, but not member activism or decision-making. In that regard, the annual members' meeting regime is best described as a compulsory measure to increase member engagement, with the cost over time likely to be footed, directly or indirectly, by the members.

When the Bill that became the Act was under review by the Senate Economics Legislation Committee, some industry bodies and superannuation trustees questioned the cost benefit of conducting annual members' meetings. One industry super fund estimated that organising and hosting an electronic annual members' meeting for its nearly 2 million members may cost up to \$5.9 million. This contrasted with Treasury's estimates of \$66,000 per fund per annum for electronic meetings. Irrespective of which estimate is preferred, it is clear that the proposed annual members' meeting regime would come at no small cost. It is relevant then to examine the cost benefit of the regime.

Section 101 of the SIS Act previously required a trustee of a regulated superannuation fund, other than a self-managed superannuation fund, to take all reasonable steps to ensure that it had arrangements under which a beneficiary or former beneficiary of the fund had a right to make an inquiry into, or complaint about, the operation or management of the fund. Consequently, superannuation members had a statutory right to ask questions, albeit this right was rarely exercised.

The *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018* replaced section 101 of the SIS Act with the result that, rather than each trustee needing to have arrangements so that each beneficiary has a right to make an inquiry or complaint, each trustee must have an internal dispute resolution (**IDR**) procedure that complies with the standards, and requirements, mentioned in subparagraph 912A(2)(a)(i) of the Corporations Act in relation to financial services licensees. An IDR system is for dealing with complaints rather than inquiries and the draft updated Regulatory Guide 165 suggests that ASIC does not expect a trustee to deal with a simple request for information through the trustee's IDR process²³. However, if a member asks a question and the trustee does not answer the question to the member's satisfaction, the member could complain to the trustee and the complaint would need to be handled under the trustee's IDR process.

Separately, section 1017C of the Corporations Act obliges a trustee of a fund, on request by a concerned person, to give the concerned person information that the concerned person reasonably requires for the purposes of, among other things, making an informed judgment about the management and financial condition of the fund and making an informed judgment about the investment²⁴. Similarly, a failure to comply with that obligation is an offence.

In light of a trustee's obligations to give information and respond to complaints, in our view, it is difficult to justify the cost of the annual members' meetings regime, which in effect does nothing more than impose a further requirement on the trustee to answer beneficiaries' questions. One has to ask whether the former right to make inquiries under section 101 of the SIS Act, had it been better publicised, provided a way for members to make inquiries that was just as good, if not better, than the ability for them ask questions at annual members' meetings.

Preparing for annual members' meetings

A trustee cannot hold an annual members' meeting that complies with the SIS Act without first providing notice of the meeting. There are a number of details that need to be worked out before the notice can be given, including the agenda for the meeting. There is no set format for the meeting, other than that there must be sufficient opportunity to ask questions. Therefore, trustees have an opportunity to decide what else to include (if anything) in order to make the meeting more valuable.

It is clear from section 29(3)(a) of the SIS Act that a meeting can be attended electronically, at least where the meeting is to be held by electronic means. The notice of the annual members' meeting must specify how the meeting can be attended electronically, so that the meeting qualifies as being held by electronic means. This provides trustees with sorely needed flexibility in the context of social distancing laws (current as at the date of this article) that can change quickly and impact the number of people who are permitted in a venue. It also means that those who are required to attend have the option to do so electronically. The explanatory memorandum to the Act suggests that missing your flight and not boarding a later flight because it would not get you to the meeting in time for your speaking slot would not

²³ Consultation Paper 311 / Draft Regulatory Guide 165: Internal dispute resolution, RG 165.35

²⁴ Section 1017C.

constitute a reasonable excuse for not attending²⁵, so having a dial-in option may be what is needed to prevent a penalty being incurred.

It would be wise for trustees to have any pre-prepared speeches carefully reviewed by not only their PR experts but also by their lawyers. It is not difficult to imagine a well intentioned statement by the CEO or Chair - for example, a statement about a future matter or forecast - that later proves to be inaccurate resulting in legal issues for the fund²⁶.

Those who will be asked questions during the meeting need to be trained in advance so that they know exactly what questions they are required to answer and what questions they should not answer. Speakers will also need to be alerted to issues that may not be apparent (for example, to an ambush from a particular lobby group) in real time. In particular, speakers will need to be able to answer questions in a way that does not:

- unintentionally waive legal professional privilege - thereby jeopardising the fund's legal position to the detriment of the members as a whole;
- disclose confidential information in breach of the fund's confidentiality obligations; or
- disclose personal information in breach of Privacy legislation.

The explanatory memorandum to the Act suggests that, where a person is asked a question that could be better answered by another person, there is no hindrance to the other person answering the question²⁷.

Query whether the reference to '[t]he responsible officer' in subsection 29PB(2) of the SIS Act is sufficiently ambiguous to permit recourse to the explanatory memorandum, but we hope that no penalty would be imposed where a member's question is answered appropriately. Trustees are encouraged to design mechanisms for asking questions in a way that reduces the risk of members directing their questions to the wrong person.

We all know from watching interviews that people will not necessarily agree on whether someone has answered a question. However, there is a penalty for failing to answer questions that is unique to the annual members' meeting regime. It might be useful for the trustee to employ strategies to ensure answers remain on point - for example, by having someone attend the meeting who can gently remind those providing answers about the question that was asked.

Responsible officers may find it useful to practice answering the types of questions that can be expected from members. The Financial Services Royal Commission highlighted that answering questions under pressure can be a very risky business.

Conclusion

Annual members' meetings appear to be well intentioned. Increasing member engagement, is a laudable objective. However, it remains to be seen whether a Q&A session will result in a meaningful increase in engagement.

The annual members' meeting regime will come at a cost. Holding annual members' meetings will increase cost pressures on trustees and put upward pressure on fees and costs. The Productivity Commission, in reporting on its inquiry into the efficiency and competitiveness of Australia's superannuation system, found that reported fees in Australia are higher than in many OECD countries and some of the differences may reflect regulatory or other factors beyond the control of trustees²⁸. We are sceptical of the notion that annual members' meetings will provide a net benefit to members by improving performance (due to increased accountability) by more than the cost of the meetings.

In 2017/18, APRA identified a cohort of underperforming funds where they had concerns across measures of net returns, fees and costs and sustainability²⁹. APRA has taken action in relation to those concerns and indicated that it will continue to use data-driven insights to identify underperforming funds, products and option and will regularly review and update its "outlier" list.³⁰ If members were given the ability to vote on resolutions at members' meetings (as is the case with MISs), members in an underperforming fund could force a trustee to investigate a potential successor fund transfer. However,

²⁵ Example 8.2

²⁶ For example, for misleading and deceptive conduct under section 769C of the Corporations Act.

²⁷ Paragraph 8.40

²⁸ "Superannuation: Assessing Efficiency and Competitiveness", Productivity Commission, Inquiry Report, Overview, p14.

²⁹ APRA, Letter to all RSE licensees, "Assessing quality outcomes in the superannuation industry", 31 August 2017

³⁰ APRA, Letter to all RSE licensees, "Putting members first: Expectations and areas of focus for the year ahead", 29 March 2019

for members with portability, voting with their feet (by moving their money to another fund) is a simpler and more cost efficient option. It is also a more equitable option, because a majority of members are not passing a resolution that a minority may have valid reasons for opposing.

Arguably, in their currently legislated form, annual members' meetings will do little to increase member engagement. Time will tell whether the annual members' meetings introduced by the Act prove to be:

- an important first step towards expanded meetings where members are afforded a meaningful say in how their retirement savings are managed; or
- remain limited to a costly opportunity to ask questions.

At a time when more meetings are being held electronically than ever before, ASIC is not expected to change its current position and allow trustees to defer their annual members' meetings. By preparing well for annual members' meetings, trustees can manage the costs and hopefully make the meetings more valuable.

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