

April 2020

COVID-19 PIGOTT STINSON UPDATE: BOARD MEETINGS

Many questions have arisen for clubs since they closed from 12 noon on Monday the 23rd March 2020.

A number of those issues relate to Board meetings. I have set out some questions and answers to assist.

Q. Does the Board still need to have Board meetings?

A. Yes.

Section 30(1) of the *Registered Clubs Act* sets out a number of rules which are deemed to apply to a club and will apply even if the rule is not contained in the Club's Constitution. Sub section 30(1) (c) provides that:

"The governing body of the club shall hold a meeting at least once in each month of the year and minutes of all proceedings and resolutions of the governing body shall be kept and entered in a book provided for the purpose."

As ClubsNSW has indicated in its 3 April 2020 circular Liquor and Gaming NSW have issued a Statement of Regulatory Intent which acknowledges the unprecedented pressures on the industry and will accordingly take a reasonable and proportionate approach to compliance.

What this means in relation to the legal requirements to have a monthly board meeting is not known.

However apart from this statutory requirement, boards of clubs need to meet to monitor the performance of their clubs during the shutdown. In particular they need to be able to make decisions to ensure the Club's liquidity is not compromised during the shutdown.

Q. Can the Board meet if all the directors are not in the same room?

A. Yes.

The *Corporations Act* allows board meetings to be called or held using any technology which is consented to by all directors. For example, all directors on the board could consent to directors attending board meetings by using technology like a tele-conference, Skype or Zoom.

The CEO can seek a standing consent from directors so that the consent applies to all board meetings. This consent remains in place until such time as it is withdrawn by a director. A director can only withdraw their consent within a reasonable period of time before the meeting.

The ability for clubs to call and hold board meetings using technology automatically applies under the *Corporations Act* so it does not matter if it is not in the Club's Constitution.

Q. Do the same rules apply for meetings held with technology?

A. Yes.

Boards who are holding a "virtual" meeting should remember that the same obligations of confidentiality continue to apply. A board member who is participating by way of Zoom or Skype or telephone should ensure he/she is in a room by themselves and cannot be overheard by others. All board documents should be held securely and a club should have a policy that sets out a director's obligations in this regard.

Boards should remember to follow their ordinary procedures including accurate minutes and the disclosure of any material personal interests (in compliance with the *Corporations Act* and Registered Clubs Accountability Code).

Voting rules are also the same. For most Board decisions, a resolution will be passed if a simple majority (50% plus 1) of votes cast on the resolution are cast in favour.

Q. Great, we are all digital; can the Board do away with signing the minutes?

No.

Section 251A of the *Corporations Act* requires a company to keep a minute books to record (amongst other things) proceedings and resolutions of directors' meetings and resolutions passed by directors without a meeting.

If the minute books are kept in accordance with 251A then the club can rely on those minutes as evidence (unless the contrary is proved). This "evidentiary value" includes:

- the meeting is deemed to have been duly held and convened;
- all recorded proceedings are deemed to have duly taken place; and
- all recorded appointments are deemed to have been validly made.

One of the key requirements is that the minutes of a meeting are signed by either the chair of the meeting or the chair of the next meeting.

While Covid-19 means that legislation is rapidly changing, at this stage we still recommend that the Chair print and sign (with wet ink) the minutes.

Q. The Board needs to urgently decide on an issue but the next Board meeting is 2 weeks away - do we have to wait until then?

A. No.

Many club constitutions will have a provision that allows the Chairperson or Secretary to call a Board meeting. This would also allow a meeting to be called by technology.

The benefit of having an additional meeting is that ideas can be challenged and questions raised (as would ordinarily occur in a regular Board meeting). All directors must be given reasonable notice to enable them to participate in the meeting.

Q. The Board has some routine matters to approve; can we pass a circular resolution?

A. Probably, it depends on your constitution.

For straight forward and uncontentious matters that do not need to be debated a "circular resolution" may be appropriate.

Section 248A of the *Corporations Act* provides that the directors can pass a resolution without a board meeting if all directors of the company which are entitled to vote on the resolution sign a document containing a statement that they are in favour of the resolution set out in the document.

Section 248A is a "*replaceable rule*" in the *Corporations Act*. In practical terms, for most clubs this means that a board can only use this section to pass a resolution without a board meeting if the club's constitution or its by-laws allow it to do so. It also means that it is possible that a club's constitution could have adopted a variation of the rule (for example allowing a resolution to be passed if a majority (i.e. 50%+1) or some other percentage (66% or 75%) of directors sign the circular resolution).

The passing of a resolution without a board meeting pursuant to section 248A (that has not otherwise been varied by a Club's constitution) would involve:

- (a) the CEO or chairperson issuing the resolution to all directors of the club, preferably by email; and
- (b) each director printing a copy of the resolution;
- (c) each director signing (i.e. with wet ink) the resolution;
- (d) each director returning a copy of the signed resolution to the CEO or chairperson by scanning a copy of the signed resolution to the CEO or sending a photograph of the signed resolution to the CEO or posting it to the CEO.

Q. Are there alternatives to printing, (wet ink) signing and scanning?

Yes, however the legal position is unclear under the *Corporations Act*.

The Federal Treasurer has recently been given the power to modify the operation of some provisions of the *Corporations Act*.

Once further information has been released we will be better placed to understand how much flexibility will be given to clubs in relation to their obligations under the Corporations Act on this point and generally.

However in our view and in the meantime, having regard to the unprecedented times, and provided it is not inconsistent with a club's constitution, a Board could pass a resolution to put a system in place which would allow directors to pass a resolution by sending a reply email saying "*I agree*" with their name printed below in response to the proposal outlined in the email from the CEO or the Chairperson. The Board could consider approving the following resolution:

"RESOLUTION

A resolution in writing signed by all the directors shall be as valid and effectual as if it had been passed at a meeting of the Board duly convened and held. Any such resolution may consist of several documents in like form each signed by one or more directors. The resolution shall be passed when the last director signs the document containing the resolution. In addition to this, a resolution may be passed by the Board if the proposed resolution is emailed to all directors and each director agrees to the proposed resolution by sending a reply email to that effect. The resolution shall be passed when the last director sends his or her reply email agreeing to the proposed resolution."

This should probably be treated as an interim measure only and a specific rule allowing board resolutions to be passed by reply email should be formally incorporated into the club's constitution at a future annual general meeting.

We encourage Boards to exercise caution in the use of circular resolutions. Good governance still requires directors to discuss and question ideas. Circular resolutions including those by way of email (if not inconsistent with a club's constitution) should not be used to stymie debate or discussion. Instead it can enable boards to continue to communicate and deal with simple straight forward issues not only while face to face meetings are impacted by Covid-19 but beyond then if used properly. .

Further information

If you have any questions regarding the matters raised in this article, or any other matter, please contact your usual contact at Pigott Stinson or the author, [Bruce Gotterson](#).

This Newsletter is produced by Pigott Stinson. It is intended to provide general information only. The contents of this Newsletter do not constitute legal advice and should not be relied upon as legal advice. Formal legal advice should be sought from us in respect of the matters set out in this Newsletter. Liability limited by a scheme approved under Professional Standards Legislation.