



AGM Corporate Update

Preparing for the reporting season and your AGM

A general guide for ASX listed public companies

With the traditional annual general meeting (**AGM**) season fast approaching, we take this opportunity to draw your attention to some of the matters that should be addressed to help make sure everything runs according to plan.

We also outline some of the recent amendments to the *Corporations Act 2001* (Cth) (**Corporations Act**), which may be relevant to your future annual reporting.

Some common resolutions

A number of resolutions appear in a company's notice of AGM each year, including resolutions to:

- receive and consider the annual financial report, directors' report and auditor's report;
- adopt the remuneration report; and
- elect / re-elect directors.

However, when preparing the notice of AGM, consideration should be given as to whether any special business needs to be attended to, so as to avoid the additional time and expense involved in calling a separate meeting to consider such matters. This special business may include:

- modification of the company's constitution, for example:
 - proportional takeover provisions in a constitution need to be renewed every 3 years (or less if specified in the constitution); and
 - to take account of 2010 changes to the circumstances in which dividends may be paid (section 254T of the Corporations Act);
- approval or renewal of the company's employee share option / performance rights plan and/or dividend reinvestment plan;
- approving any increase in the total quantum of non-executive directors' remuneration;
- the issue of any shares, options or performance rights to directors;
- approving executive termination benefits (see below for further details); and
- ratification of any allotments of securities not yet ratified by shareholders since the previous AGM or shareholders meeting.





Executive termination benefits

Since the global financial crisis, payments of termination benefits to executives (golden handshakes or parachutes) have caused considerable public concern. These concerns resulted in amendments to the Corporations Act made in late 2009.

In summary, termination benefits paid or provided to executives are generally only permitted:

- with shareholder approval; or
- where the value to be paid or provided to the executive does not exceed 1 year's base salary (including superannuation), which is calculated by averaging the amount of base salary the person received in the last 3 years of service with the company.

Termination benefits include any payment or other valuable consideration paid or provided to an executive and take account of payments made in lieu of notice. Termination benefits exclude matters required by law to be paid, such as accrued entitlements.

Whether or not a termination benefit can be lawfully paid without shareholder approval can be a complex issue and companies should not rely on previous practice as justifying compliance.

New law with respect to executive remuneration

The Corporations Act was further amended this year by the *Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Act 2011* (the **amending Act**). The main changes introduced by the amending Act are set out below in summary.

“Two strikes” rule

Perhaps the most controversial reform is the introduction of the “two strikes” rule, which provides a mechanism for board replacement. The new rule applies to votes on remuneration reports after 1 July 2011. The rule works as follows:

A company will receive a strike (the first strike) where at least 25% of the votes cast on the remuneration report at the AGM are cast against the remuneration report. Where this occurs, the remuneration report for the next financial year (2012 at the earliest) must explain how comments received from shareholders at the AGM were addressed, and if not, why not.

A second strike will occur if the remuneration report receives a no vote of at least 25% of the votes cast at the following AGM. In this situation a “spill” resolution will be put at the AGM at which the second strike occurs. If the spill resolution is passed (by 50% of more of eligible votes cast), the company must hold a spill (re-election) meeting within 90 days at which all of the directors (other than the managing director) who were directors at the time of the second AGM have to stand for re-election.





A company's 2011 notice of AGM and explanatory memorandum will need to outline the two strikes rule to shareholders. Future AGM notices (i.e. for the 2012 AGM) will need to make provision for voting on a spill resolution (if appropriate).

Voting on remuneration matters

"Key management personnel" and their closely related parties (spouse, child, dependent, controlled company etc.) are now prohibited from voting on the remuneration report, any spill resolution and any resolutions pursuant to Chapter 2E of the Corporations Act put at a meeting. This prohibition applies to their shares, and the shares of their closely related parties. The prohibition does not apply to directed proxies (including those given to change the meeting).

Unfortunately, the amending Act does not make it clear whether or not a chairperson of an AGM who is also a director of the company, and where remuneration details are included in the remuneration report, can vote undirected proxies on remuneration report resolutions. We recommend that you obtain legal advice on this matter if this situation may apply at your 2011 AGM.

Engaging remuneration consultants

To ensure the independence of a remuneration consultant's recommendations, before a company enters into a remuneration consultancy contract (from 1 July 2011), the proposed consultant must be approved by the directors of the company or the remuneration committee, and any recommendations provided by the consultant must be provided directly to the non-executive directors or the remuneration committee, rather than company executives. The board of directors and the consultant must also make separate declarations that the remuneration recommendation is free from undue influence from key management personnel to which the recommendation relates.

The company commits an offence if, at the time the company enters into the contract, the proposed consultant has not been approved in this manner.

Where a remuneration consultant makes a recommendation in relation to the remuneration of key management personnel, the remuneration report of the company will be required to disclose a number of matters, including the name of the consultant, a statement that the consultant made the recommendation, a description of the other services provided to the company by the consultant, the fees payable for the remuneration advice and other services provided, the arrangements the company made to ensure the recommendation was free from undue influence from key management personnel to who it relates, a statement that the board is satisfied in this regard and the reasons the board is satisfied.

Persons to be named in remuneration report

For financial years commencing on or after 1 July 2011, a company's remuneration report will only be required to make remuneration disclosures in relation to key management personnel, as opposed to the previous requirement of providing the remuneration details of the key management personnel and the five most highly remunerated officers of the company (if different).





Hedging of incentive remuneration

It was possible for directors and executives to “hedge” their exposure to incentive remuneration. Now, key management personnel must not enter into arrangements on or after 1 July 2011 that have the effect of limiting the individual’s exposure to risk relating to an element of their remuneration that has not vested or has vested but remains subject to a holding lock.

As a result of the prohibition, the previous disclosure requirement in relation to a company’s hedging policy in the annual report is no longer required.

No board vacancy declarations

Shareholder approval must now be sought for any decision or determination by a board that there are no vacant board positions in circumstances where the number of board positions filled is less than the maximum number specified in the company’s constitution.

New directors may still be appointed, so long as these appointments are confirmed by shareholder vote at the following AGM.

Companies that wish to effectively limit the size of their boards should first consider whether the current maximum number of directors specified in their constitution (if any) is appropriate and, if not, consider seeking constitutional amendment.

Prohibition on cherry picking proxy votes

From 1 August 2011, if a non-Chair proxy elects to vote, the proxy must vote as directed. If the non-Chair proxy holder does not attend the meeting or does not vote, the vote will default to the Chair, who must vote on a poll and has a duty to vote the proxies as directed.

The new legislation is designed to prevent proxyholders from cherry-picking how they use their proxy votes and gives shareholders more certainty that their voting intentions will be carried out.

The Centro decision

The recent decision in Centro has confirmed that directors must have a degree of financial literacy and inform themselves as to the financial affairs of the company to the extent necessary to form each year the opinions required of them to sign off on the financial statements.

Directors are entitled to delegate responsibilities and rely on others; however, this reliance should not be taken too far. This is because ultimate responsibility for approval of the financial statements rests with the board in a way that they cannot delegate.





Other Considerations

Given AGM season is particularly busy, it pays to make early arrangements with respect to:

- booking an appropriate venue for the AGM;
- ensuring relevant directors and the auditor can attend;
- the format of AGM notices and proxy forms (especially regarding the Chair voting undirected proxies);
- seeking ASX and, if applicable, ASIC approval of the notice of AGM (remember that ASIC can take up to 14 days to review any related party resolutions); and
- printing and postage of the notice of AGM.

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