

Preparing for your AGM: A general guide for ASX listed 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.

Corporate Commercial Update

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.

Common resolutions:

In addition to the general business of receive and consider the annual financial report, directors' report and auditor's report, a number of resolutions need to be considered at company's notice of AGM each year, including resolutions to:

- adopt the remuneration report; and
- elect / re-elect directors.

When preparing the notice of AGM, consideration should be given as to whether any other 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 other business may include:

- approval or renewal of the company's employee share option / performance rights plan;
- approving any increase in the total quantum of non-executive directors' remuneration;
- approving the issue of any shares, options or performance rights to directors;
- approving executive termination benefits and termination entitlements to avoid a contravention of the section 200B of the Corporations Act;
- ratification of any allotments of securities not previously approved by shareholders; and

Who does this affect?

- ASX listed companies and in particular, directors of the board.

Article Highlights

- A number of resolutions need to be considered in a company's notice of AGM each year.
- Introduction of the "Two strikes" rule provides a mechanism for board replacement.
- A company's 2012 notice of AGM and explanatory memorandum will need to outline the two strikes rule to shareholders.
- Provision for voting on a spill resolution is required if the company received its first strike at the 2011 AGM.



- 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 to issue up to 25% of shares on issue over the next 12 months by way of placement (see below for further details).

"Two strikes" rule:

Last year saw the introduction of the controversial "two strikes" rule, which provides a mechanism for board replacement. The 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 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 votes against of at least 25% of the votes cast at the following AGM. In this situation a "spill" resolution must be put at the AGM at which the second strike occurs. If the spill resolution is passed (by more than 50% 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 must stand for re-election.

A company's 2012 notice of AGM and explanatory memorandum will need to outline the two strikes rule to shareholders, and will need to make provision for voting on a spill resolution if the company received its first strike at the 2011 AGM.

Voting on remuneration matters

"Key management personnel" (KMP) and their closely related parties (spouse, child, dependent, controlled company etc.) are prohibited from voting on:

- adoption of the remuneration report;
- any spill resolution under the "two strikes" rule; and
- any resolutions pursuant to Chapter 2E of the Corporations Act in respect of related party transactions.

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This prohibition applies to shares held in the name of KMPs and their closely related parties. The prohibition does not apply to directed proxies.

Voting on remuneration matters at 2011 AGMs was marred by a lack of clarity (caused by conflicting provisions in the relevant amendments to the Corporations Act) in respect of the manner in which the chairperson appointed as a proxyholder could deal with undirected proxies on the remuneration report resolution.

Amending legislation has now been introduced and it is clear that the chair of an AGM is able to vote undirected proxies on the remuneration report resolution provided:

- a) the vote is not cast on behalf of a member of the KMP whose remuneration details are included in the remuneration report, or a closely related party of such a member; and
- b) the proxy appointment expressly authorises the chair to exercise the proxy even if the resolution is connected directly or indirectly with the remuneration of a member of the KMP.

New ASX Listing Rules for capital raisings by small to mid cap listed companies came into effect on 1 August 2012.

Until now, listed companies have been prohibited from issuing or agreeing to issue more than 15% of their issued shares in any 12 month period without shareholder approval under Listing Rule 7.1 or unless an exception applies.

New Listing Rule 7.1A provides that a company not in the S&P/ASX 300 index and having a market capitalisation of \$300 million or less may seek shareholder approval at its AGM to increase its placement capacity by 10%, meaning the company may undertake a placement of up to 25% of its issued share capital during the period of 12 months commencing on the date of shareholder approval.

For companies seeking approval of the additional 10% facility, the ASX Listing Rules require the explanatory statement accompanying the notice of AGM to include details of:

- the minimum issue price;
- potential dilution of existing shareholders;
- the expiry date for the issue(s);
- the purpose of the capital raising;
- allocation policy;
- why the company is using a placement rather than a rights issue;
- any proposed underwriting arrangements; and
- the expected expenses of the issue.



For further details of this important initiative, please see our recently published client alert "New Capital Raising Rules for ASX Listed Companies".

Other considerations

With over 800 listed companies now based in Perth, the 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 chairperson 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 has recently indicated that it will not consider draft notices of meeting that have not first been approved by ASX); and
- printing and posting of the notice of AGM and annual report.

Disclaimer: This publication is intended to provide general information only and should not be relied upon as legal advice. If you require legal advice on a matter please contact us.

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