

COMPANY ANNUAL GENERAL MEETINGS IN 2011 AND BEYOND

Brett Cowell, Chairman of Partners
Patrick Cook, Associate

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As our listed company clients gear up for their 2011 Annual General Meetings, it is opportune to consider how recent changes to the *Corporations Act (Act)* will affect company AGMs this year and beyond.

'Two Strikes' Rule

For a number of years, the Act has required listed companies to put their remuneration reports to a non-binding shareholder vote at the company's AGM. You will be aware that the Act now also provides a 'two-strikes' and re-election process.

- The 'first strike' occurs when a company's remuneration report receives a 'no' vote of 25 per cent or more of the votes cast on a resolution that the remuneration report be adopted.
- The 'second strike' occurs when the company's subsequent remuneration report also receives a 'no' vote of 25 per cent or more of the votes cast on a resolution that the remuneration report be adopted.

The 'two strikes' rule only applies to AGMs held on or after 1 July 2011, therefore the 2011 AGM is the first time that a company can receive a 'first strike'.

If the company receives a 'second strike', then at the same AGM, the shareholders must vote on a resolution (ordinary resolution) that another meeting ('spill meeting') be held within 90 days to vote on 'spilling' the board.

Companies must be prepared for the 'second strike' and the notice of meeting and accompanying material such as proxy forms must foreshadow the potential for a 'spill meeting'.

If the 'spill meeting' does not occur within 90 days of the 'second strike', then each director of the company has committed an offence.

At the 'spill meeting' all the company's directors (other than the managing director and any director taking office since the directors resolved to put the directors' report to the most recent AGM) must vacate their positions and shareholders vote to appoint directors to the vacant board positions. Vacating directors may stand for re-election at the spill meeting. If they are re-elected, then the term of their office will run as if the "spill" and re-appointment had not occurred.

If the effect of the 'spill meeting' is to leave the company with less than three directors, then those candidates with the highest percentage of votes in favour of their appointment cast at the 'spill meeting' will be deemed to have been successfully appointed, even if less than half the votes cast on the resolution were in favour of their appointment.

Voting Restrictions on Remuneration Report

As a result of the recent changes to the Act, key management personnel (chairperson, directors and senior management) whose remuneration details are included in the remuneration report and their closely related parties (collectively referred to below as “chairperson”) cannot vote on remuneration report resolutions put to shareholders.

The only exception to this restriction applies where the chairperson is appointed in writing as a proxy and the shareholder has provided a directed proxy on how to vote on the remuneration report resolution.

The wording of section 250R of the Act does not allow the chairperson to vote undirected proxies on remuneration report resolutions.

ASIC has advised that the Government proposes to amend the law to clarify that chairpersons are permitted to vote undirected proxies in relation to remuneration reports, if shareholders provide express authorisation for the chairperson to vote such undirected proxies. However, any amendment to the Act will not be in place for this year’s AGM season.

One option is for chairpersons simply not to vote undirected proxies on remuneration report resolutions. This may not be a satisfactory solution and may mean that the votes of a number of shareholders cannot be validly cast, even though those shareholders gave otherwise valid proxies.

As an alternative, we recommend that companies can address this issue by including clear wording in their AGM explanatory notes and on their proxy forms to the effect that undirected proxies will be taken to be directions to the chairperson to vote on the remuneration resolution in the manner set out in the notes and proxy form. Careful wording will need to be adopted to effectively achieve this result so please consult us if you have any queries about how to proceed. It is important to get this right because any vote cast in breach of section 250R is not to be counted and the person casting the vote will have committed an offence under the Act.

As a further alternative, until the necessary amendments are made to the Act, ASIC will consider applications to grant relief to enable the chairperson to cast undirected proxies on a remuneration report resolution. Companies seeking relief will need to do so in advance of the dispatch of documents to shareholders.

Click [here](#) to read the ASIC guidance on voting on the remuneration report resolution.

No Vacancy Rule

If directors wish to set a limit on the number of directors at a number lower than the maximum allowed under the company’s constitution, this must be approved by ordinary resolution.

The notice of meeting to shareholders must set out the ‘no vacancy’ resolution and be accompanied by an explanatory statement.

The approval must be renewed at each AGM.

The board is permitted to make appointments during the year, even where they exceed the approved number. However, if appointments are made, they must be approved by shareholders at the next AGM.

Proxy Cherry Picking

New rules remove the practice of ‘cherry picking’ directed proxies. Now, if a person holding a directed proxy does not vote that proxy, the proxy must be exercised by the chair of the meeting.

This change has a practical effect on the administrative procedure of AGMs. Companies must be careful to ensure that:

- an accurate list of all proxies and proxy holders is produced;
- attendance and poll voting of proxy holders and anyone who has given a directed proxy is checked;

- the chair is informed when directed proxies are not voted – the chair must then vote those proxies on the related resolution.

Click [here](#) to read our client alert on the effect of changes to listed company reporting requirements in 2011.

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