



SEPTEMBER 2013

CORPORATE UPDATE

IT'S THAT TIME OF YEAR AGAIN – AGM SEASON IS UPON US

For many public companies, significant efforts will be dedicated over the next few months to the company's AGM. The AGM presents an opportunity to engage and communicate with shareholders, but it is imperative to ensure that it is run properly.

In the current economic circumstances, it is not surprising that there is a strong focus on accountability and shareholder engagement.

- In September 2012, the Corporations and Markets Advisory Committee ("CAMAC") released a discussion paper focusing on the AGM and shareholder engagement. Submissions were received and compiled during the remainder of 2012, and since that time CAMAC has undertaken roundtable discussions with relevant stakeholders.
- More recently, in August 2013, the Australian Shareholders' Association released a policy discussion paper regarding board structures, shareholder engagement and executive remuneration. In addition, the ASX Corporate Governance Council recently released a

consultation paper regarding a review of its corporate governance principles and recommendations.

- Shareholder activism remains prevalent both in Australia and overseas, as high profile investors continue to push for accountability and performance by directors.

The current climate means that it is as important as ever for companies to ensure compliance with the Corporations Act and their constitution (and for public companies listed on the ASX, the ASX Listing Rules) before, during and after the AGM. This article sets out some important points to consider throughout that process.

PREPARING FOR THE AGM

It is important to give careful consideration to the resolutions that will be put to the vote at the AGM. Some examples of items that a listed company may be considering include:

- **Spill resolution:** The remuneration of a company's key management personnel continues to be a highly publicised issue in

Australia's corporate landscape. In addition to the advisory resolution on a company's remuneration report, if a listed company's remuneration report received a "no" vote of 25% or more at its 2012 AGM, then the 2013 AGM notice will need particular drafting attention. If the remuneration report receives a second "no" vote at the 2013 AGM, then shareholders will be given an opportunity to vote on whether to spill the entire board (except the managing director).

- **Election and re-election of directors:** For any directors that are proposed to be elected or re-elected, it is worthwhile considering (and bringing to the attention of shareholders) any factors that concern whether the proposed director is independent. This will involve a consideration of the person's interests, positions, associations and relationships. In addition, items required to be brought to the attention of shareholders under the corporate governance principles and recommendations of the ASX Corporate Governance Council include biographical details, details of relationships between the candidate and the company and between the candidate and other directors, details of other directorships and other positions held, and the term of office currently served (relevant to current directors proposed to be re-elected).
- **Director remuneration:** Some companies may consider that there is a need to seek shareholder approval for fees (or an increase in fees) payable to non-executive directors. Any such remuneration should not be solely focussed on attracting, retaining and motivating directors, but should also be designed to ensure creation of value for shareholders.

[The final page of this alert contains a general, non-exhaustive checklist of resolutions that boards of ASX-listed companies may need to consider when preparing their 2013 notice of AGM.](#)

IN THE LEAD-UP TO THE AGM

Companies should implement processes and procedures designed to ensure transparency and integrity in the voting process:

- Given the strong focus on ensuring accountability in executive remuneration, it is

important for companies to update and maintain an accurate list of key management personnel and closely related parties. In some circumstances, these people are restricted from casting votes in relation to remuneration resolutions, and it is important that there is clarity on who can vote (and who cannot vote) on particular resolutions. Proxy forms and guidance given to shareholders in this regard will also require specific review.

- For any companies that intend to conduct a poll to determine whether resolutions are passed, it is important to ensure that there are clear and unequivocal polling procedures in place. A company's share registry can assist in this regard, and can be vital for maintaining order and control at an AGM.
- In response to technological advances, companies are increasingly relying on electronic methods of sending and receiving documents. If documents (such as notices of meeting, proxy forms, powers of attorney and so on) are proposed to be sent or received electronically, it is important to review relevant provisions of the Corporations Act and the company's constitution to ensure that any proposed methods are permitted.

Similarly, a company proposing to allow "direct voting" (which allows shareholders to deliver votes to the company by post, fax, or other electronic means, without attending the AGM and without necessarily appointing a proxy) will need to ensure that its constitution permits it to do so.

DURING THE AGM

Again, in the digital age, there are more and more examples of companies relying on the use of technology in conducting their AGM. Companies considering use of technology will need to consider:

- Whether the proposed technology will allow shareholders to participate in the meeting; including the ability to communicate with the chairperson, and to be heard by other shareholders (including those at other venues).
- Whether the proposed technology will allow the chairperson to conduct and control proceedings, and whether shareholders will be able to follow proceedings.

- Whether the proposed technology will be appropriate in light of the number of people expected to attend the AGM, and in light of any particular business to be conducted at the AGM (for example, use of visual presentations).
- Whether votes can be counted from multiple venues.

The AGM is an important opportunity for shareholders to ask questions and provide comments on particular matters, and companies should be prepared for questions and comments from shareholders. The Corporations Act provides opportunity for questions and comments by shareholders on various matters, including management of the company, the company's remuneration report, conduct of the audit and independence of the auditor, preparation and content of the auditor's report, and accounting policies adopted in relation to the preparation of financial statements.

IN CLOSING

As always, it is of critical importance to ensure that an AGM is run properly and in accordance with all applicable laws and other documents (including the Corporations Act, the company's constitution and the ASX Listing Rules). This is especially so, given the recent wave of additional scrutiny being applied by shareholders, regulators and interest groups.

[For more information, or for assistance with the preparation of your notice of AGM, please contact:](#)



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CHECKLIST

This checklist contains a general, non-exhaustive overview of other resolutions that boards of ASX-listed companies may need to consider when preparing their 2013 notice of AGM.

Item	Overview	Type of resolution
Remuneration report	Adoption of the 2013 remuneration report.	Ordinary
Spill resolution	To be put to the AGM if a second "no" vote of 25% or more is received for the resolution to adopt the remuneration report (see notes above).	Ordinary
Rotation of directors	A director (excluding the managing director) must not hold office past the third AGM following the director's appointment or three years, whichever is the longer. A director (excluding the managing director) appointed to fill a casual vacancy or as an addition to the board must not hold office past the next AGM following the director's appointment. These directors must retire from office, however may be re-elected at the AGM.	Ordinary
Refresh 15% placement capacity	To approve issues of securities made by the company in the past 12 months under its 15% placement capacity, so that the placement capacity is "refreshed" and available for use.	Ordinary
Increase 15% placement capacity to 25%	To increase the company's placement capacity to 25%.	Special
Refresh employee incentive scheme	To approve the issue of securities under an employee incentive scheme so that the issue does not count towards the company's 15% placement capacity. The scheme must be approved (as an exception to the relevant ASX Listing Rule) every three years.	Ordinary
Approve issue of securities to directors and other related parties	To approve the issue of securities to directors and other related parties.	Ordinary
Approve proposal to allow direct voting	To amend the company's constitution to allow "direct voting" (which allows shareholders to deliver votes to the company by post, fax, or other electronic means, without attending the AGM and without necessarily appointing a proxy).	Special
Refresh proportional takeover provisions	A proportional takeover bid is a bid to buy a specified portion of each shareholder's shares. A company's constitution may contain proportional takeover provisions that prevent a bidder from acquiring shares without shareholders approving the bid. The proportional takeover provisions must be renewed every three years (or at the end of any shorter period as provided for in the company's constitution).	Special
Increase the total remuneration payable to non-executive directors	To increase the total remuneration payable to non-executive directors.	Ordinary