

Australian Public Companies - Shareholder Proposals: Background and Process

This note was prepared on 10 February 2021. Your attention is drawn to the disclaimer at the end of this note.

Background

There have been an increasing number of resolutions proposed by shareholders for consideration of climate change related matters at annual general meetings ("AGMs") of Australian companies in recent years.

To date, a majority of these resolutions have been proposed by public interest groups rather than investors. Nevertheless, a pattern of investor support is emerging.

Thus, the proxies which have been lodged in relation to the specific climate change resolutions have in many cases been material. In 2019-20, over 10 resolutions received over 20% proxy support, 6 resolutions received over 30% proxy support, and one resolution received more than 50% support from proxies lodged. This is in comparison to 2017-18, where only 2 resolutions received over 20% proxy support.

Further, a multinational mining company whose shares are listed on the ASX and the London Stock Exchange indicated to the market in response to high levels of proxy support for a climate change related resolution, as follows:

"[Company] engaged extensively with investors throughout 2020 on the Company's approach to industry associations ... [Company] also consulted broadly with investors on [the climate change related resolution] and will undertake further consultations over the next few months with shareholders that voted for and against [the climate change related resolution] to better understand the reasons for their position."

The Australian Corporations Act ("**Corps Act**") provides an avenue through which shareholders of Australian public companies or security holders in a registered managed investment scheme ("**REIT**") with relatively small holdings can propose resolutions, including ones relating to disclosure of a company's greenhouse gas emissions and any reduction plans relating thereto, for inclusion in the agenda of a company or REIT at the next AGM. Even if these resolutions do not succeed at the AGM as indicated above, they may still have a big impact on a public company's or REIT's business and operations.

To ensure that the proposed resolutions are included in the agenda for the proposed AGM and the notice sent to members, a practice has been evolved of firstly proposing a resolution for the amendment of the entity's constitution and then proposing resolutions, to follow if the first resolution is successful, to address the specific climate change issues of concern to the shareholder or security holder. This is to ensure that the proposed resolutions relate to a matter which may properly be considered by the members in general meeting and are not matters for which the directors are exclusively responsible in the conduct of the company's business.

Whilst the procedure is cumbersome, it does ensure that the resolutions are included in the agenda and notice of meeting for the AGM and provides an opportunity for investors to express an opinion through their proxies in relation to the climate change resolutions.

Australian regulators have begun to move towards and express support for disclosure of climate change related issues. ASIC states in Regulatory Guide 247 that where a public company or REIT is required to disclose in its operating and financial review (pursuant to Corps Act Section 299A(1)(c)) material business risks affecting prospects for future financial years, this may also include climate change risks. The ASX Corporate Governance Council ("**Corporate Governance Council**") specifically recommends in its 2019 "Corporate Governance Principles and Recommendations" that:

"A listed entity should disclose whether it has any material exposure to environmental or social risks and, if it does, how it manages or intends to manage those risks"¹

The Corporate Governance Council further encourages entities to consider whether they have a material exposure to climate change risk by reference to the recommendations of the Financial Stability Board's Task Force on Climate-related Financial Disclosures ("**TCFD**") and, if they do, to consider making the disclosures recommended by the TCFD.

The Australian Accounting Standards Board ("**AASB**") and Auditing and Assurance Standards Board ("**AUSAB**") also refer to the importance to investor decision-making of climate-related risks. In their materiality definition and AASB Practice Standard 2 Making Materiality Judgements ("**APS**") entities can no longer treat climate-related risks as merely a matter of corporate social responsibility and should consider them also in the context of financial statements.

Sections 249N and 252L Resolutions in General

In general, shareholders and security holders are able to submit resolutions they propose to move at an AGM pursuant to Sections 249N and 252L of the Corps Act. There are no limits within the Corps Act regarding the number of resolutions each shareholder may submit per company per year. The notice must be in writing, set out the wording of the proposed resolution, and be signed as described below. Shareholders and security holders may also request a company to give to all its shareholders or security holders a statement (provided by the persons making the request) about the resolution that is to be moved at the AGM. The statement should not be longer than 1,000 words or be defamatory. The shareholder or security holder, or an authorized representative, should attend the AGM to present the proposal.

¹ In Recommendation 7.4.

Eligible Shareholders

This right to submit a resolution may be exercised by a member (shareholder or security holder) who individually, or collectively with other members, have at least 5% of the votes at the AGM. This equates to a holding of at least 5% of the shares or securities on issue.

Alternatively, a resolution may be proposed by at least 100 members who are entitled to vote.

Proof of Eligibility

Although the Corps Act does not set out any particular requirements around confirming the eligibility of the requisitioners to make the request under Sections 249N or 252L, the entity will need to confirm that a valid request has been made so sufficient details should be included for them to do so (for example, the member's full name and address, the number of securities they hold with their security reference number to be provided on request).

Process to be followed

The proposal should be prepared by the relevant member in writing, but must be signed by the registered holder of the shares or securities, which means that where the same are held by a custodian or nominee, the custodian or nominee must sign. Where the shares or securities are held by the member, the proposal should be submitted by the member.

Sample letters for requisitioning a resolution are set out at Appendix 1 (for shareholders or security holders holding more than 5% of the voting rights) and Appendix 2 (for requests made by at least 100 members). Shareholders and security holders should coordinate any requisition for resolutions with competent legal advisers.

Members acting collectively to achieve a 5% holding

Members seeking to propose a resolution may need to do so collectively with other members to achieve the 5% holding requirement. In that case, each of the members concerned should sign the proposal, or authorize one of them to do so on their behalf, and the proposal should be lodged by one of the members on behalf of all of them.

This may result in the members becoming "associates" with each other and as a consequence, be required to lodge a Form 603 with the relevant entity and with the ASX for release to the market. If a member wishes to seek the support of another member or members to achieve a 5% holding, then the member should seek advice from its individual lawyer with respect to the process for and implications of doing so.

Submission Timeline

A resolution in respect of which notice has been given under Section 249N or 252L must be considered at the next general meeting that occurs more than 2 months after notice is given. In practical terms this means that the notice must be given at least 2 months prior to the date of the scheduled AGM².

Once the notice has been given, the resolution must be included in the agenda for the next AGM and in the notice of that meeting sent to all members.

Expenses

Where a members' statement or requisitioned resolution relates to an entity's AGM and a valid request is received 2 months prior to the meeting, the entity is required to pay the expenses of circulating the statement, otherwise the members must pay the costs (unless the entity resolves to do so).

Conclusion

Sections 249N and 252L provide a means by which members of public companies or REITs can voice their opinions at annual general meetings without the expense of circulating proposals to all members. Though both sections appear fairly simple to adhere to, there is a deep and rich policy and legal history behind the rule and shareholders should coordinate any submissions with competent counsel before making a submission.

Counsel

Investors considering taking any of the actions described in this note should seek independent legal advice in advance from their own counsel.

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² The date of the AGM is usually provided for in the corporation calendar. Failing this, it is possible to assume that the next AGM will occur on or around the same date as in the previous year.

APPENDIX 1 REQUISITION LETTER FOR REQUEST MADE BY HOLDERS OF 5% OF THE VOTING RIGHTS

Below is an example proposal:

[MEMBER/CUSTODIAN OR NOMINEE LETTERHEAD³]

[DATE]

[COMPANY OR REIT NAME]

[ADDRESS]

ATTN: [COMPANY SECRETARY]

To Whom it May Concern,

Please be advised that [MEMBER/CUSTODIAN OR NOMINEE NAME^{4,5}] holds [INSERT NUMBER OF SHARES OR SECURITIES HELD⁵] in [COMPANY OR REIT] (which represents at least [INSERT THE PERCENTAGE] percent of the votes that may be cast at an annual general meeting) [on behalf of [FUND/ENTITY/PERSON]]⁶ and proposes the following resolution/s to be considered by members at the next annual general meeting of [COMPANY OR REIT] to be held after the date this notice is lodged with the [COMPANY OR REIT].

RESOLUTION 1⁷:

To amend the Constitution of the [COMPANY OR REIT] to insert a new clause [INSERT NUMBER]:

The shareholders in general meeting may by ordinary resolution express an opinion, ask for information, or make a request, about the way in which a power of the company partially or exclusively vested in the directors has been or should be exercised. However, such a resolution must relate to an issue of material relevance to the company, and cannot either advocate action which would violate any law or relate to any personal claim or grievance. Such a resolution is advisory only and does not bind the directors or the company.

³ The proposal should be on the letterhead of and signed by the shareholder or security holder member or where the shares or securities are held by a custodian or nominee on the letterhead of the custodian or nominee and signed by the custodian or nominee.

⁴ As above n 3.

⁵ Where the proposal is by two or more members, their names and number of shares or securities held should be shown separately in an attachment.

⁶ This wording is only required where the shares or securities are held by a custodian or nominee

⁷ This resolution is required to ensure that the resolutions are included in the agenda and notice for the AGM.

RESOLUTION 2:

Subject to Resolution 1 being approved by the requisite majority, the following resolution [HERE INSERT THE TEXT OF THE ISSUE RELATING TO GREENHOUSE GAS EMISSIONS LEVELS AND REDUCTIONS PLANS RELATING THERETO OR OTHER CLIMATE CHANGE RELATED MATTERS].

If there are any questions concerning this matter, please do not hesitate to contact me directly.

[MEMBER/ CUSTODIAN OR NOMINEE SIGNATURE]

Name, address and contact details

APPENDIX 2 REQUISITION LETTER FOR REQUEST MADE BY AT LEAST 100 MEMBERS

Below is an example proposal. Each of the 100 members may sign and submit a separate requisition letter to propose the resolution or alternatively two or more members may sign the proposal.

[MEMBER NAME]⁸

[DATE]

[COMPANY OR REIT NAME]

[ADDRESS]

ATTN: [COMPANY SECRETARY]

To Whom it May Concern,

Please be advised that [MEMBER NAME]⁹ holds [INSERT NUMBER OF SHARES OR SECURITIES HELD]⁸ in [COMPANY OR REIT] who is entitled to vote at an annual general meeting, proposes the following resolution/s to be considered by members at the next annual general meeting of [COMPANY OR REIT] to be held after the date this notice is lodged with the [COMPANY OR REIT].

RESOLUTION 1¹⁰:

To amend the Constitution of the [COMPANY OR REIT] to insert a new clause [INSERT NUMBER]:

The shareholders in general meeting may by ordinary resolution express an opinion, ask for information, or make a request, about the way in which a power of the company partially or exclusively vested in the directors has been or should be exercised. However, such a resolution must relate to an issue of material relevance to the company, and cannot either advocate action which would violate any law or relate to any personal claim or grievance. Such a resolution is advisory only and does not bind the directors or the company.

RESOLUTION 2:

Subject to Resolution 1 being approved by the requisite majority, the following resolution [HERE INSERT THE TEXT OF THE ISSUE RELATING TO GREENHOUSE GAS EMISSIONS LEVELS AND REDUCTIONS PLANS RELATING THERETO OR OTHER CLIMATE CHANGE RELATED MATTERS].

⁸ The proposal should be on the letterhead of and signed by the shareholder or security holder member or as the shares or securities are held by a custodian or nominee on the letterhead of the custodian or nominee and signed by the custodian or nominee.

⁹ As the proposal is by two or more members, their names and number of shares or securities held should be shown separately in an attachment.

¹⁰ This resolution is required to ensure that the resolutions are included in the agenda and notice for the AGM.

If there are any questions concerning this matter, please do not hesitate to contact me directly.

[MEMBER SIGNATURE]

Name, address and contact details.