

Legal Update – June 2011

Latest Corporations Act Changes

New Law

On Monday 20 June 2011, the *Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Bill 2011 (Cwth)* was passed. Companies need to take note of the resulting changes to the *Corporations Act* for the upcoming AGM season.

Summary of the changes

From 1 July 2011, the following rules come into effect:

- **25% no votes against remuneration report may mean a “spill” of the board** - a “two-strikes” test for directors in respect of a “no” vote regarding a company’s remuneration report (where both of the company’s two most recent AGMs are held on or after 1 July 2011);
- **Remuneration consultants targeted** - a new regime concerning the use of remuneration consultants;
- **Restrictions on hedging** - a prohibition on the hedging of certain executive incentive remuneration;
- **Changes to “no vacancy rule”** - a requirement that shareholder approval be obtained for declarations of “no vacancy” on boards; and
- **Remuneration report changes** - simplified remuneration report disclosure requirements for financial years starting on or after 1 July 2011.

From 1 August 2011 (will not apply to AGMs held in July 2011), the following rules come into effect:

- a prohibition on key management personnel and their closely related parties from voting their shares, or exercising undirected proxies, on certain resolutions that concern their remuneration; and

- provisions designed to prevent the “cherry picking” of proxies.

Key Issues

Votes against remuneration - the “two strikes” rule for board spills

If in two consecutive years at least 25% of shareholders vote against the remuneration resolution a “spill resolution” must be put to the meeting at which the second vote on the remuneration report occurs.

If the spill resolution is passed by a simple majority, the company must convene another general meeting (the “spill meeting”) within 90 days to elect new directors. All directors who approved the second remuneration report must stand down prior to the spill meeting, but may stand for re-election.

Remuneration consultants

- A company cannot retain a remuneration consultant to provide a remuneration recommendation concerning a member of the key management personnel, unless the remuneration consultant has been approved by non-executive directors.
- “Remuneration recommendation” is defined to exclude most advice given by lawyers and accountants.
- It is now required that companies disclose the nature of remuneration recommendations and the fees paid for remuneration recommendations received from “remuneration consultants”, even if the recommendation has not been accepted.

Hedging remuneration of Key Management Personnel

Any arrangement by members of the key management personnel of listed companies that has the effect of limiting risk relating to an element of the remuneration of key management personnel that has not yet vested, is prohibited.

Voting at shareholder meetings

Key management personnel cannot vote on resolutions that concern their remuneration. It also prohibits them from voting undirected proxies on such resolutions (unless they are the Chairman of the meeting and hold the proxy in that capacity).

The “no vacancy” rule and the size of your board

Company constitutions invariably set a maximum size for the board of directors. Directors are now banned from passing a “no-vacancy” resolution designed to limit board size below the maximum specified in the constitution. Practically this means that shareholders of a company with, for example, a three person board will be able to nominate further directors to the board if the constitution provides for a larger board.

Shareholder approval is now required annually before the board can restrict the number of board members below that set in the company’s constitution.

What can companies do?

- Establish procedures to ensure the new obligations are observed.
- Advise your share registry about who are the company’s key management personnel and their closely related parties and their security holdings, so that relevant exclusions can be flagged.
- Consider the need for remuneration report resolutions to be conducted by poll.
- Consider complexities around preparing for an AGM where a first strike was received the previous year as the meeting will need to contemplate the possibility of a spill resolution being put to the meeting.
- Consider the need for a resolution limiting the number of board members that can be appointed to the board.
- Prepare for additional queries from security holders relating to the complexities of the legislation.

Contact Us

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