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Shareholders' Rights & Shareholder Activism

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Herbert Smith Freehills

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Contents

1. Shareholders' Rights p.3

1.1 Types of Company p.3
1.2 Type or Class of Shares p.4
1.3 Primary Sources of Law and Regulation p.4
1.4 Main Shareholders' Rights p.5
1.5 Shareholders' Agreements / Joint Venture Agreements p.5
1.6 Rights Dependent Upon Percentage of Shares p.5
1.7 Access to Documents and Information p.5
1.8 Shareholder Approval p.6
1.9 Calling Shareholders' Meetings p.6
1.10 Voting Requirements and Proposal of Resolutions p.6
1.11 Shareholder Participation in Company Management p.7
1.12 Shareholders' Rights to Appoint / Remove / Challenge Directors p.7
1.13 Shareholders' Right to Appoint / Remove Auditors p.7
1.14 Disclosure of Shareholders' Interests in the Company p.8
1.15 Shareholders' Rights to Grant Security over / Dispose of Shares p.8
1.16 Shareholders' Rights in the Event of Liquidation / Insolvency p.8

2. Shareholder Activism p.8

2.1 Legal and Regulatory Provisions p.8
2.2 Level of Shareholder Activism p.9
2.3 Shareholder Activist Strategies p.10
2.4 Targeted Industries / Sectors / Sizes of Companies p.10
2.5 Most Active Shareholder Groups p.11
2.6 Proportion of Activist Demands Met in Full / Part p.11
2.7 Company Response to Activist Shareholders p.11

3. Remedies Available to Shareholders p.12

3.1 Separate Legal Personality of a Company p.12
3.2 Legal Remedies Against the Company p.12
3.3 Legal Remedies Against the Company's Directors p.12
3.4 Legal Remedies Against Other Shareholders p.13
3.5 Legal Remedies Against Auditors p.13
3.6 Derivative Actions p.13
3.7 Strategic Factors in Shareholder Litigation p.13

Herbert Smith Freehills operates from 27 offices across Asia Pacific, EMEA and North America and is at the heart of the new global business landscape providing premium quality, full-service legal advice. The firm's Sydney and Melbourne-based head office advisory team (HOAT) is Australia's largest dedicated legal team specialising in corporate governance advice and was awarded 'Commercial Team of the Year' at the 2018 and 2019 Australian Law Awards. As the 'go-to' governance adviser for market-leading listed companies in Australia, HOAT's permanent team of 16 qualified lawyers regularly advises major clients on sensitive and strategic matters relating to corporate culture and governance, executive remuneration, and shareholder engagement and activism.

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1. Shareholders' Rights

1.1 Types of Company

In Australia, the Corporations Act 2001 (Corporations Act) provides that companies may be registered as either private (proprietary) or public, depending on whether they are privately or publicly owned. Proprietary and public companies may be further categorised based on their level of shareholder (member) liability.

Proprietary companies

The Corporations Act requires a proprietary company to have at least one shareholder at all times, and no more than 50 non-employee shareholders. A proprietary company may not invite the public to deposit money with the company or subscribe for its shares or debentures. A proprietary company may be a company limited by shares or an unlimited liability company. A proprietary company limited by shares is either 'small' or 'large', depending on whether they meet statutory thresholds for revenue, assets and employees.

Public companies

By contrast, a public company may raise funds from the public and, subject to meeting relevant exchange requirements, list and be publicly traded on the Australian Securities Exchange (ASX). The Corporations Act requires a public company to have an auditor and, if it has more than one member, to hold a general meeting for its members at least once a year. A public company may be a company limited by shares, limited by guarantee, an unlimited company, or, in specific circumstances, a no liability company.

Companies limited by shares

Companies limited by share capital, denoted by 'Limited' or 'Ltd' at the end of their name, are the most common type of proprietary and public company. In a company limited by shares, the personal liability of a shareholder is limited to the amount (if any) unpaid on shares held by the shareholder.

Other types of company

Other types of companies include:

- companies limited by guarantee (eg, charities);
- unlimited liability companies (eg, professional associations); and
- no liability companies (available for mining companies only).

Each of these company types involve varying degrees of shareholder liability, and this is reflected in their different naming conventions.

Shareholder criteria and restrictions
The Corporations Act imposes relatively few criteria in relation to a person's eligibility to be a shareholder in an Australian company. Natural persons and body corporates may hold shares. Persons under the age of 18 may also hold shares in an Australian company, however they are not considered to have legal capacity which creates difficulties in relation to the enforceability of contracts and exercise of their rights. Accordingly, a company's Constitution will often contain mechanisms to address these issues, such as allowing a parent or guardian of a minor to exercise their vote by proxy.

Generally, there are no requirements that a person must be an Australian citizen, resident or business in order to hold shares in an Australian company. However, the Foreign Acquisitions and Takeovers Act 1975 gives the Australian Federal Treasurer the power to prohibit a proposed acquisition by foreign persons of certain specified assets or shares in an Australian corporation (or a foreign corporation that holds relevant Australian assets or entities) where it is considered contrary to the national interest. The Treasurer can also make divestment orders when an investment has already been implemented without prior approval. The Treasurer administers the legislation in conjunction with the Foreign Investment Review Board (FIRB).

Notably, proposals to acquire 20% or more of a business valued at over AUD266 million (or AUD1,154 million for certain non-government investors from Canada, Chile, China, Japan, Korea, Mexico, New Zealand, Singapore and the United States) require prior approval from FIRB. Certain other types of businesses or assets have lower thresholds, such as those relating to land, agriculture or 'sensitive industries' (eg, technology, defence, media, etc).

1.2 Type or Class of Shares

Most Australian companies have a single class of ordinary shares on issue. However, it is not uncommon to issue multiple classes of shares with differential rights. A company may use conventional class titles, such as 'ordinary', 'A-class', 'B-class' and so on, or develop names for each class themselves.

The rights attached to different classes of shares commonly differ in relation to:

- voting at general or class meetings;
- dividend entitlements and priority of payment; and
- rights to repayment of capital on a reduction of capital or winding up.

The most common categories of shares issued by Australian companies are ordinary shares, preference shares and partly-paid (or contributing) shares. Hybrid securities are also relatively common, for example, debt securities which may be converted into equity securities under their terms of issue.

Ordinary shares
Ordinary shares are the most commonly issued and traded shares and form the primary class of shares for Australian companies. All holders of ordinary shares generally have equivalent rights to vote at general meetings, to participate in dividends or to the distribution of assets if the company is wound up. Australian listed companies almost universally have a single class of ordinary voting shares, pursuant to the requirements of the ASX.

Preference shares
Preference shares give their holder priority over ordinary shareholders in relation to dividend payments or distributions of assets if the company is wound up. However, preference shares may carry no voting rights or rights to vote only on certain items of business or in particular circumstances.

Partly-paid shares
Partly-paid shares are issued by a company on terms that part of the share price is paid upfront, and the outstanding balance is to be paid when the company calls for it on a future date (or dates). The future payment date(s) must be specified from the outset, and when a call is made, holders of partly-paid shares are legally obliged to pay. The exception to this is no liability companies, which do not need to specify call dates in advance, and for whom partly-paid shareholders have the option to forfeit their shareholding when a call is made, instead of paying the amount called for.

1.3 Primary Sources of Law and Regulation

Shareholders' rights are derived from and governed by the terms of the company's Constitution, shareholders' agreements (if any), any 'replaceable rules' in the Corporations Act which have not been replaced by the company's Constitution, and the Corporations Act generally.

The Corporations Act gives a company's Constitution the effect of a statutory contract between the company and its shareholders, between the company and its directors and secretary, and between the shareholders and each other. The Constitution typically establishes the powers of the company, and the rules which govern topics such as the issue and transfer of shares, meetings of members and directors, director appointments and distribution of dividends.

While shareholders' rights in relation to a company are typically enshrined in the company's Constitution (or the 'replaceable rules' under the Corporations Act) and the Corporations Act generally, with respect to proprietary companies, it is relatively common for matters relating to the exercise of those rights to be agreed between shareholders and set out in a shareholders' agreement. In some cases, the company may also be party to the shareholders' agreement.

1.4 Main Shareholders' Rights

The rights conferred on shareholders (or members) differs based on the type of company and the class of shares held. However, rights commonly held by shareholders include:

- the right to vote at general meetings of shareholders on items such as director appointments and removal, constitutional amendments, an advisory resolution that the company adopt the remuneration report (for listed companies), auditor appointments, certain issues of shares, share buybacks, and mergers and de-mergers;
- the right to share in dividends;
- the right to participate in the distribution of company assets in the event of return of capital or the winding up of the company; and
- the right to requisition a resolution or general meeting (see **1.9 Calling Shareholders' Meetings** and **1.10 Voting Requirements and Proposal of Resolutions**).

Varying shareholders' rights

The rights attaching to different classes of shares may be varied or cancelled by following the process set out in the company's Constitution or, if there is none, then by special resolution of the company (ie, at a general meeting) and a special resolution of the holders of shares in the affected class (ie, at a class meeting). A special resolution is passed if at least 75% of the votes cast by shareholders are in favour of the proposal.

Shareholders' rights are typically varied through amendment to the company's Constitution. In respect of a public company, once the Constitution is amended it must be provided to the Australian Securities and Investments Commission (ASIC) and, if listed, to the ASX as well.

A shareholders' agreement may only be varied by consensus between all the parties to the agreement. Depending on the parties to the agreement, this could mean reaching consensus between all of a company's existing shareholders, or just within a certain class (or classes) of shareholders.

1.5 Shareholders' Agreements / Joint Venture Agreements

Shareholders' agreements and joint venture agreements are enforceable as contracts under Australian common law, and subject to the same requirements and limitations as all contracts. Importantly, this includes the requirement that terms are sufficiently certain, that a person must be party to the contract in order to be bound by its terms, and that any claim must be brought within the relevant statute of limitations (typically within six years of the date that the cause of action under the contract accrued).

1.6 Rights Dependent Upon Percentage of Shares

As in other jurisdictions, the more significant a shareholders' holding in a company, the more influence they will be able to exert over the company. Under Australian law, common thresholds for the exercise of relevant rights include:

- shareholders with at least 5% voting power may requisition a resolution, or requisition or convene a general meeting (see **1.9 Calling Shareholders' Meetings** and **1.10 Voting Requirements and Proposal of Resolution**);
- shareholders with more than 10% of a company's ordinary shares, or shares in a class, can block the compulsory acquisition by an acquirer of remaining (ie, not yet acquired) shares in the company or that class;
- shareholders with at least 25% of voting power may block special resolutions to change a company's Constitution;
- shareholders with more than 50% voting power may appoint and remove directors from a company's Board, as well as approve any other resolution that requires an ordinary resolution of the company;
- shareholders with at least 75% voting power may amend the company's Constitution, as well as approve any other resolution that requires a special resolution of the company; and
- an acquirer with at least 90% of a company's ordinary shares, or shares in a class, can compulsorily acquire any remaining (ie, not yet acquired) shares in the company or that class.

While there is no legislative threshold, it is relatively common for Boards of Australian listed companies to acquiesce to a shareholder's request to nominate a director to the Board where they hold 10-15% of the company's voting power. Where the shareholder has a larger holding, they may often have multiple nominees on the company's Board.

1.7 Access to Documents and Information

Under Section 173 of the Corporations Act, companies are required to allow anyone to inspect the register of members and obtain a copy on payment of relevant fees (which are typically modest). Members have the right to inspect the register free of charge. Listed companies are also required to maintain a register of information relating to relevant beneficial interests held by shareholders in the company and access to that register must also be provided on similar terms to the register of members.

Section 251A of the Corporations Act requires companies to keep minute books for all decisions made by the company at general meetings of members and by the directors at board meetings. Section 251B provides members with the right to inspect the minute books of decisions made by the company at general meetings of members free of charge. Members may request copies, and the company may determine whether it will charge members for this service (up to a prescribed amount).

Under the Corporations Act, a reasonable opportunity must be given for members of a public company to ask questions

about the management of the company at an annual general meeting (AGM).

Shareholders may apply to the Federal Court of Australia or the Supreme Court of Australian State of Territory (a Court) for an order to inspect the company's books, however this right is rarely invoked in practice. The nature of information that a shareholder may inspect under a court order is broad, subject to any limitations imposed by the order. 'Books' is defined in the Corporations Act to include a document, register, any other record of information and financial reports or records, however compiled, recorded or stored. The right to inspect books is conditional upon the member's application being in good faith and for a proper purpose.

In other forms of court proceedings, shareholders are able to inspect the company's books only to the extent that the inspection is necessary with reference to a specific dispute or question.

1.8 Shareholder Approval

The decision-making powers of a company are divided between the Board and the company's shareholders under Australian law.

A company's Constitution will generally vest all powers of management in the Board. Accordingly, in the absence of express constitutional provisions providing otherwise, shareholder power to affect management decisions is limited. Shareholders most often exercise their decision-making power by voting for or against resolutions at general meetings and by appointing and removing directors.

Under the Corporations Act, particular issues that require the approval of shareholders by a simple majority at a general meeting (including an AGM) include:

- director election (Section 201G – however, this is a replaceable rule and the company's Constitution can establish an alternative process for director appointment and election);
- director removal (Section 203D – public companies);
- auditor appointment (Section 327B and 327D – public companies);
- certain types of 'equal' return or reduction of capital or 'equal' buying back of shares (for example, Sections 256C and 257C); and
- entering into certain transactions that give a related party (including directors) a financial benefit (Section 208 – public companies).

Under the Corporations Act, particular issues that require the approval of shareholders by a specified 'special' majority include:

- adoption, amendment or repeal of the Constitution (Section 136);
- changing the company's name (Section 157);
- changing the company's type (Section 162);
- variation of the rights attached to a class of shares (under the Constitution or, if it does not have a process under its Constitution, then Section 246B);
- certain 'selective' types of return or reduction of capital or 'selective' buying back of shares or buying back of shares outside statutory limits (for example, Sections 256D and 257D);
- a voluntary winding up of the company (Section 491); and
- providing financial assistance for the acquisition of shares in the company (Section 260B).

1.9 Calling Shareholders' Meetings

Shareholders' rights to call meetings

Ordinarily, general meetings of shareholders will be called by the Board.

However, the Corporations Act provides that shareholders with at least 5% of the votes which may be cast a general meeting may either request that the Board call a general meeting, or call one themselves at their own cost. See **2.1 Legal and Regulatory Provisions**.

If members call and arrange to hold a general meeting themselves, they must pay the associated expenses, and the meeting must be called in the same way, so far as possible, in which general meetings of the company may be called.

Shareholders' rights to notice of meetings and information

In general, private and unlisted companies are required under Section 249H of the Corporations Act to provide members with at least 21 days' notice of a shareholders' meeting. A company's Constitution may specify a longer period of notice.

With the exception of meetings to appoint or remove a director of a public company, or to remove an auditor, a company may give a shorter notice period if agreed among the requisite number of shareholders. To give a shorter notice period for AGMs, all shareholders with voting rights must agree. To give a shorter notice period for other general meetings, shareholders with at least 95% of the votes must agree.

Listed companies must provide members with at least 28 days' notice of a general meeting (including an AGM).

1.10 Voting Requirements and Proposal of Resolutions

Voting at shareholders' meetings is governed by the company's Constitution and would usually be conducted on:

- a show of hands, where each shareholder typically has one vote; or
- poll, where each shareholder typically has one vote for each share held.

In order for the meeting to be valid, the Corporations Act provides that a quorum of at least two members must be present at all times. However, a company's Constitution can provide otherwise.

Generally, the business to be considered at shareholders' meetings is determined by the Board and notified to shareholders in the relevant notice of meeting. However, under the Corporations Act, the business of an AGM may include specified items even if they are not provided for in the notice of meeting.

As noted above, under the Corporations Act, a reasonable opportunity must be given for members of a public company to ask questions about the management of the company at an AGM. Resolutions may also be proposed by shareholders holding at least 5% of the votes that may be cast at a general meeting, or at least 100 shareholders who are entitled to vote at the general meeting. See **2.1 Legal and Regulatory Provisions**.

1.11 Shareholder Participation in Company Management

Shareholders' right to participate in management

A company's Constitution will usually reserve all powers of management of the company to the Board. Thus, if a shareholder is not on the Board, unless a matter is one which shareholders may validly vote on, shareholder participation on issues of management is limited to their ability to appoint and remove directors or amend the company's Constitution at a general meeting using the methods described in **1.9 Calling Shareholders' Meetings** or **1.10 Voting Requirements and Proposal of Resolutions** above.

Shareholders on the Board

Provided they can secure the requisite support for their appointment, a shareholder may sit on a company's Board of directors if they meet the relevant requirements in the Corporations Act and any rules in the company's Constitution. Under the Corporations Act, a director must be an individual of at least 18 years of age, not a body corporate, and cannot be disqualified from managing corporations under the Corporations Act unless ASIC permission or leave by a Court is granted. A director of an entity regulated by the Australian Prudential Regulation Authority must meet certain additional requirements in relation to being 'fit and proper' according to prudential standards.

The company's Constitution may impose further requirements for a shareholder to qualify as a director, for example, that they obtain a minimum shareholding prior to, or within a certain timeframe following, their appointment.

Director appointments of listed companies are subject to further requirements, including election by shareholders, a requirement that directors (except the managing director) stand for re-election every three years, disclosure of a director's interest in securities in the company within five business days of appointment (as well as any subsequent changes to their notifiable interests), and immediate notification to the ASX of changes to the Board.

1.12 Shareholders' Rights to Appoint / Remove / Challenge Directors

A company's Constitution will generally provide both the Board and shareholders the right to appoint directors. Shareholders also have the right to appoint directors at common law, unless a company's Constitution limits that right.

Whether shareholders have the power to remove directors depends on whether the company is public or proprietary. For a proprietary company, the Constitution will determine whether the shareholders have a right to remove directors from the Board. For a public company, shareholders have a statutory right to do so by way of ordinary resolution.

As discussed in **1.10 Shareholders' Rights to Appoint / Remove / Challenge Directors**, shareholders vest the Board with the power to manage the company. Shareholders cannot use their statutory right to requisition resolutions to challenge the Board's decisions if the subject of the resolution is a matter of management exclusively vested in the directors. Shareholders' main recourse in relation to these matters is to amend the company's Constitution to either confer additional rights on the shareholders or direct the Board in relation to the exercise of the power to manage the company or, alternatively, to appoint or remove directors from the Board.

1.13 Shareholders' Right to Appoint / Remove Auditors

Section 301 of the Corporations Act requires companies to have their financial reports audited. However, small proprietary companies and small companies limited by guarantee are exempt from this requirement in most circumstances.

Section 327A of the Corporations Act requires public companies to appoint an auditor (subject to the auditor's consent under Section 328A) within one month of registering as a company, unless the company has already done so at a general meeting. At a public company's first AGM, shareholders are required to approve the appointment of the auditor by an ordinary resolution. The auditor will hold office until they resign or are removed.

Where the auditor resigns, a company is required to appoint a new auditor to fill the vacancy until the company's next

AGM. A shareholder is required to nominate a new auditor under Section 328B of the Corporations Act, and at the next AGM shareholders will be required to vote on a resolution to appoint the nominated auditor (provided the nominated auditor consents to their appointment).

Shareholders of public companies and proprietary companies that have appointed auditors may also remove an auditor by ordinary resolution under Section 329 of the Corporations Act provided that notice of the proposed removal is given at least two months prior to any scheduled meeting of shareholders

1.14 Disclosure of Shareholders' Interests in the Company

In certain circumstances, shareholders of public companies are required to disclose their interests in a company.

Shareholder substantial notice

Shareholders who have a 'substantial holding' in a listed company must provide a substantial holding notice to the company if they:

- begin or cease to have a substantial holding;
- have a substantial holding and there is a 1% or greater movement in their holding; and/or
- make a takeover bid for securities of the company.

A shareholder has a 'substantial holding' if they (alone or with associates) hold relevant interests in voting shares which represent at least 5% of the total votes available. Relevant notices received by the company are required to be released on the ASX's market announcements platform.

Director notifiable interest

Where a director of a listed company is also a shareholder of the relevant company, the Corporations Act and ASX Listing Rules require the company to notify the ASX of the directors' notifiable interests in relation to the company's securities.

1.15 Shareholders' Rights to Grant Security over / Dispose of Shares

Granting security over shares

Shares are considered personal property under the Personal Properties Securities Act 2009 (PPSA). A shareholder may therefore grant security interests over their shares, subject to meeting the requirements of the PPSA.

Disposing of shares

Australian courts have established a strong presumption that shares in commercial companies are freely transferable, unless there is a clear statement to the contrary in the terms of issue of the shares, the company's Constitution or applicable replaceable rules in the Corporations Act.

If a company is publicly listed, a shareholder can readily dispose of their shares by selling them on the ASX. Alternatively, or if the shares are in a proprietary company, a shareholder may dispose of their shares by:

- selling to a third-party purchaser, if they know of one;
- selling to one or more existing shareholders in the company; or
- participating in a share buy-back by the company.

It is relatively common for the Constitution of a proprietary company to contain limitations on share transfers. For example, the Constitution may confer upon directors the right to refuse to register a share transfer for any reason, or require that the transferor offer shares to other shareholders before offering those shares to third parties. By contrast, pre-emptive rights are less common in the Constitutions of public companies and prohibited from the Constitutions of ASX listed companies.

1.16 Shareholders' Rights in the Event of Liquidation / Insolvency

Members of a company can resolve to put a company into voluntary liquidation by passing a special resolution. Alternatively, members may petition the Court to compulsorily put a company into liquidation. The Corporations Act governs the circumstances in which members may do so:

- where directors are acting in their own best interests, and not those of the company;
- where there is oppressive, unfairly prejudicial or unfairly discriminatory conduct; or
- where it is 'just and equitable' to do so.

Courts are hesitant to readily grant an order of compulsory liquidation and, as such, it is seen as a remedy of last resort.

In the case of a company becoming insolvent, shareholders' rights to payment of dividends rank behind those of the company's creditors. During liquidation, the liquidator is required to keep books that provide a complete and accurate record of the administration of the company's affairs, which shareholders are entitled to inspect.

2. Shareholder Activism

2.1 Legal and Regulatory Provisions

The Australian legal regime is generally conducive to shareholder activism. Shareholders have clear statutory rights under the Corporations Act to call shareholders' meetings, to requisition resolutions and, in respect of public companies, to remove directors. At common law, shareholders generally have broad powers to appoint and remove directors (though they may be limited under companies' Constitutions).

However, despite this conducive regime for activists, boards and management of Australian companies also have various defences and structural advantages at their disposal to counter activist campaigns.

Calling shareholders' meetings

Section 249D of the Corporations Act provides that a shareholder, or a group of shareholders acting together, can requisition a general meeting of a company's shareholders provided that they hold 5% of the votes in the company. The directors of a company that receives a legally compliant requisition under Section 249D are obliged to hold a meeting of shareholders within two months of the date of receiving the notice.

To be legally compliant, the requisition must be in writing, state clearly any proposed resolutions, be signed by the shareholders making the requisition and be properly given to the company. If shareholders fail to adhere to these requirements, a company is entitled to refuse the request to convene a meeting.

Alternatively, shareholders themselves may convene a general meeting of shareholders under section 249F of the Corporations Act. Section 249F allows shareholders with at least 5% of the votes in the company to convene a meeting and, as the conveners of the meeting, they will have the ability to determine the time and place for the meeting and the content of the relevant notice of meeting. Whilst this alternative means of convening a meeting provides the requisitioning shareholders with a strategic advantage by affording them greater control, it is rarely used in Australia as the Chairman of the Board will typically have the right to conduct the proceedings of the meeting under the company's Constitution anyway, and the requisitioning shareholders must also bear the considerable costs associated with calling and holding the meeting.

Requisitioning additional resolutions

Section 249N of the Corporations Act provides for either 100 shareholders or shareholders with 5% of a company's votes to provide a company with notice of a resolution that they will seek to move at the next scheduled general meeting that is more than two months later (usually, the next AGM).

Notice must be appropriately provided to the company in writing and must set out the wording of the proposed resolution and be signed by those shareholders seeking to move the resolution. Companies are not obliged to give notice of a requisitioned resolution where it is either longer than 1,000 words or defamatory. Listed companies have two business days to make an announcement on the ASX market announcements platform after receiving notice from a shareholder.

Almost universally, a company's Constitution will vest the power of management in the company's Board. Australian case law has confirmed that if a requisitioned resolution seeks to direct the Board on the exercise of its powers, the Board is entitled to dismiss the requisitioned resolution and is not required put it to shareholders for consideration.

In practice, shareholder activists targeting Australian companies will often seek to pass a preliminary special resolution to amend the Company's constitution to enable shareholders to direct the Board in the exercise of its powers or to allow shareholders to pass 'advisory' resolutions in relation to the exercise of Board powers. A second resolution will then also be proposed (contingent on the passage of the Constitutional amendment), being a 'substantive' resolution to direct the board on the exercise of its powers or express an advisory view in relation to the relevant matter. Given the significant threshold for amending a company's Constitution (being a special resolution passed by at least 75% of the votes cast by shareholders), this style of requisition is rarely successful. However, it does provide activists with a forum for communicating their concerns to the broader shareholder base.

2.2 Level of Shareholder Activism

Historically, company Constitutions in Australia have not mandated a minimum level of shareholder support for nominating an external candidate for election to the Board. With some notable exceptions, this position persists in an overwhelming majority of listed company Constitutions. Accordingly, a single shareholder is typically able to nominate an external candidate to the Board, provided they comply with the timing requirements of the company's Constitution.

Ordinarily, an external candidate can be elected to the Board by a simple majority of votes, however, where a company already has its maximum number of directors in place, the external candidate will instead need to outpoll an incumbent director to be successful in obtaining a position on the Board.

Given that the nominations process for most companies has no meaningful threshold level of support required for proposing a candidate, it has in the past been used by certain external candidates as a means to communicate with the company's shareholder base to agitate for changes to the company's commercial operations or public positions (eg, through the candidate's profile in the notice of meeting and candidate speeches at the meeting itself).

The Corporations Act provides a process whereby a shareholder of a public company can requisition a resolution to remove a director by providing notice of their intention to do so, and otherwise complying with the process for requisitioning a resolution under Section 249N (see **2.1 Legal and Regulatory Provisions**). Section 203D(2) of the Corporations Act requires the shareholder to provide the company

with a notice of intention at least two months before the meeting is to be held. The incumbent director will be given the opportunity to put their case to shareholders in both a written statement and by speaking to the motion at the shareholders' meeting.

2.3 Shareholder Activist Strategies

Use of publicity

Shareholder activism in Australia has traditionally been most often conducted through private approaches to companies' Boards and, historically, it has been relatively rare for activists to take the next step of publicly advocating for their proposals (eg, through white papers, open letters to the Board, creating campaign websites or leveraging the media). However, recent campaigns in Australia have begun adopting increasingly public methods of advocacy, including:

- publicly criticising the Board, individual directors and management;
- proposing or supporting candidates for appointment to the Board;
- advocating for (or formally proposing) removal of existing directors;
- requisitioning shareholder resolutions and members' statements;
- requisitioning general meetings of shareholders; and
- encouraging unsolicited offers for the company or its assets.

Use of the advisory vote on listed company's remuneration reports

The Corporations Act requires Australian listed companies to put an advisory resolution to their shareholders for adoption of the company's remuneration report at each AGM. Where at least 25% of the votes cast in two consecutive years are cast against the report (receiving 'two strikes'), a Board spill resolution must be put to shareholders. If passed, this will require that the non-executive directors of the company stand for re-election at a special 'Board spill meeting' of the company, if they wish to continue in office.

In recent years, this mechanism has been co-opted by some activist shareholders to protest against the company's current management or operations. Specifically, shareholder activists have been able to use this mechanism as an indirect means of suggesting a spill of the board and placing pressure on the company's directors.

Collaboration by activist groups

Collaboration amongst retail shareholder activist groups is commonplace in Australia, although increasingly, ESG-activist groups are individually targeting companies resulting in duplicative or overlapping campaigns (eg, AGL Energy and Origin Energy each received requisitioned resolutions from multiple climate change activist groups at their respective 2019 AGMs).

Collaboration by institutional shareholder activists is less common. This is largely due to Section 12(2)(c) of the Corporations Act which provides that investors may become 'associates' for the purposes of Australian laws where they act in concert in relation to a common portfolio company. As a result, the relevant activists may become subject to notices to the market for takeovers and substantial changes in shareholdings where they act together. While the Australian Takeovers Panel is generally reluctant to interfere with shareholders' rights to requisition proposals and/or spill companies' Boards, recent decisions have shown that they will step in where there is sufficient evidence of an undisclosed association and intervention is in the public interest.

Holding discussions with other investors, making voting recommendations to other investors, and making individual or joint representations to the company's Board are all permissible and are generally unlikely to cause issues of association.

On the other hand, jointly signing requisitions for shareholders' meetings or resolutions, formulating joint proposals regarding board appointments or strategic issues, accepting inducements to vote or act in a specific way, agreeing on a plan concerning voting or limiting their freedom to vote (eg, by granting another investor their irrevocable proxy) are all indicators that the investors involved may be associates.

In Australia, there are also broad provisions relating to insider trading that apply to the use of any material information in respect of a company, irrespective of whether it has come from a company insider. In the context of forcing a significant corporate transaction for the purposes of influencing a governance agenda, the significance of the broad insider trading laws is that knowledge of an activist's intent to target a company could constitute materially price sensitive information and any ensuing action could be deemed insider trading. The risk of liability in Australia for insider trading is thus a very influential factor in discouraging collaborative activist campaigns.

2.4 Targeted Industries / Sectors / Sizes of Companies

In Australia, the energy and resources sectors have been the traditional focuses of retail shareholder activists agitating for social or environmental change. These campaigns have not discriminated against the size of companies, and often they have targeted companies within the S&P ASX100. Examples include the requisitions proposed against Santos and Woodside, which attempted to amend the companies' Constitutions and to request additional disclosure concerning alignment of the business with the Paris Climate Agreements and emissions targets, in addition to a review of the companies' positions, oversight and processes relating to public policy advocacy. Neither requisition complied with the Corporations Act requirements and therefore were rejected on grounds of non-compliance.

Increasingly, however, retail shareholder activist campaigns are targeting a broader range of companies, including in the finance sector (in relation to the climate impact of their lending and investing activities) and the consumer sector (in relation to human rights and labour rights). While these campaigns are typically led by retail shareholder groups they have, in some cases, been supported by larger institutional investors with aligned views on climate change and ESG matters.

In 2018, two prominent examples of retail shareholder activism expanding outside of the energy and resources sector included:

- International air carrier Qantas - Qantas received requisitioned resolutions to amend its constitution and to implement heightened human rights due diligence and policies regarding deportation of refugees and asylum seekers on the airline's services; and
- National supermarket retailer Woolworths - Woolworths received requisitioned resolutions to amend its constitution and requesting it to reach agreement with the National Union of Workers to introduce a pre-qualification programme ostensibly directed at labour hire providers' compliance with labour and human rights standards in Woolworths' supply chain.

Outside of retail shareholder ESG activism, there is less correlation between sector and activist campaigns. Often, these campaigns are typically focused on crystallising economic gains from the relevant company and the relevant activists are typically institutional shareholders which are largely agnostic as to sector. Recent campaigns have targeted companies spanning sectors from retail (Myer), to finance (AMP) and aged care/real estate (Aveo Group).

2.5 Most Active Shareholder Groups

Retail shareholders focussing on ESG issues have typically been the most prominent activists in Australia. Whilst such shareholders have always been active in Australia, in recent years there has been a spike in the number of shareholder requisitioned resolutions being proposed in relation to ESG issues.

Economic activism by institutional shareholders is also becoming increasingly prominent in Australia. Although forms of economic activism are not new in Australia, Activist Insight data suggests that there was a 10% increase in Australian listed companies facing activist Board-related demand in the 12 months ending 5 April 2019 (as compared with the prior corresponding period). This has been driven by a mix of onshore and offshore institutional investors.

Sir Ron Brierley and Dr Gary Weiss have long been prominent activist shareholders in the Australian market. Other notable local activist shareholders include Mercantile Investment (which is Brierley-linked), Merlon Capital, Ariadne (which is Weiss-linked), Sandon Capital and Thorney Opportunities, and the local branch of Allan Gray.

Offshore shareholder activists which are active in the market include Lone Star Value Management, Janchor Partners, Coliseum Capital Management and, previously, Elliott Management.

2.6 Proportion of Activist Demands Met in Full / Part

With respect to retail shareholder activism, such as resolutions requisitioned under Section 249N of the Corporations Act, activist campaigns have almost universally been unsuccessful. For example, all of the resolutions proposing to amend listed companies Constitutions at the 2018 AGM season were overwhelmingly defeated, with approximately 90-95% of shareholders voting against the resolutions on average. However, generally the resolutions were requisitioned simply as a mechanism for the activist groups to have a platform for communicating with companies' shareholders, and to encourage the relevant companies' to engage in relation to the relevant issues, and from that perspective the activist campaigns have been largely successful.

With respect to institutional shareholder activist campaigns, the outcomes are more varied. In several cases, activist investors have been successful in catalysing Board changes and obtaining representation through nominee directors (eg, Janchor Partners at Bellamy's Australia or Ariadne at Ardent Leisure). In other cases, however, the outcome has been less determinative and the relevant activist demands have not been met (eg, Elliott Management's demand for BHP to abandon its dual-listed structure).

2.7 Company Response to Activist Shareholders

Directors' duty to act in the best interests of the company and for a proper purpose remains paramount throughout an activist campaign and the Board must have regard to this duty in formulating its strategic direction and response. Importantly, this consideration extends to the board's use of company funds, which must be bona fide and not connected with a Board's 'personal' agenda. To this end, the Advance Bank case established the limitations placed on boards with respect to their use of company funds in any response to contested director elections (Advance Bank Australia Ltd v. FAI Insurances Ltd (1987) 9 NSWLR 464; 12 ACLR 118).

While the legal framework for how companies can respond to activist campaigns is not yet well defined in Australian case law, the Advanced Bankcase and other case law does relevantly allow for:

- directors to make recommendations to shareholders where they hold a genuine belief that it is preferable for shareholders to know the board's view on a matter; and

- directors to communicate information to shareholders that is material to their decision on how to vote on the external nomination or shareholder requisitioned resolutions.

In communicating with shareholders, directors have a duty to provide shareholders with any material information with regard to an activist proposal that the board has become privy to. Keeping shareholders appropriately informed is an opportunity for the board to clarify and rebut inaccurate aspects of activist proposals and to make counterarguments for shareholder consideration. Relevantly, this opportunity cannot be used to direct shareholders how to vote on proposals or to engage in debate over non-commercial issues, such as the personality of directors in contested elections. However, in responding to an activist proposal, the board typically has recourse to the following:

- formulation of a board recommendation in relation to the proposal;
- high-level meetings between the board and the company's substantial shareholders;
- sending shareholders hard copy or email communications; and
- the institution of a hotline for receiving calls from shareholders to respond to questions relating to an activist's proposals.

Boards may also engage a proxy solicitation firm to call shareholders directly. This approach carries some risk given the principles established in the Advance Bank case, however boards can avoid breaching these principles by restricting the scope of these calls to making shareholders aware of the key issues and the relevance of their vote, and by ensuring that the costs involved are reasonable. If the activist campaign is particularly forceful, the board may be justified in taking a more emphatic stance in ensuring shareholders receive balanced and accurate information.

3. Remedies Available to Shareholders

3.1 Separate Legal Personality of a Company

Under Australian law, a company has a separate legal personality and remains distinct from its shareholders, Board, and management. The Corporations Act provides for the incorporation of companies as 'limited liability companies', which limits shareholder exposure to liabilities incurred by the company.

Australian Courts are generally hesitant to 'pierce' the corporate veil and will only do so in cases where the company's separate legal personality is being used as a vehicle for fraud, to shield the shareholder(s) from an existing legal obligation or, in corporate groups, where the level of control is so complete that parent company should be deemed to be directly liable for its subsidiary company.

3.2 Legal Remedies Against the Company

The Australian legal system provides shareholders with recourse to a number of different types of action against companies they hold shares in. These include:

- Personal actions – where the shareholder has a cause of action against the company for loss or harm that the shareholder has incurred personally.
- Shareholder class actions – where a class of current or former shareholders has a cause of action against the company for loss or harm that the shareholders have incurred collectively. Frequently, class action proceedings are instituted against listed companies in Australia for alleged breaches of the companies' continuous disclosure obligations under the Corporations Act and ASX Listing Rules. Through class actions, shareholders seek to recover alleged losses where they bought or sold shares during a period where the company is alleged to have failed to keep the market updated.
- Statutory injunction – if a shareholder perceives that the company will breach the Corporations Act, they may seek an injunction under the Corporations Act to prevent this kind of breach.
- Oppression – Section 232 of the Corporations Act provides shareholders with a means to seek remedial action where they determine the company has engaged in oppressive conduct. Specifically, a shareholder may bring an action against the company where the conduct of the company's affairs, an actual or proposed act or omission by the company, or an actual or proposed resolution of shareholders or a class of shareholders is contrary to the interests of the shareholders as a whole or oppressive to a shareholder or shareholders.
- Winding-up – there are some limited circumstances in which shareholders are able to apply to the Court for an order to wind-up the company.

3.3 Legal Remedies Against the Company's Directors

Shareholders have similar remedial rights against directors as they have against companies and, if directors are alleged to have breached any of these duties or obligations, shareholders might have recourse to the following remedies:

- Personal actions - where the shareholder has a cause of action against the director for loss or harm that the shareholder has incurred personally.
- Shareholder class actions - see **3.2 Legal Remedies Against the Company**. Directors may be joined to shareholder class action claims against the company.
- Statutory derivative action - see **3.6 Derivative Actions**.
- Statutory injunction - a shareholder can seek a statutory injunction against directors under Section 1324 of the

Corporations Act if that shareholder perceives that the directors will cause the company to breach the Corporations Act.
- Oppression - Section 232 of the Corporations Act provides a regime for minority shareholders to bring an action to address objectively oppressive conduct stemming from the conduct of the company's affairs, an actual or proposed act or omission by or on the company's behalf, or a resolution or proposed resolution.

Most often, however, aggrieved shareholders will progress complaints against directors by reporting them to ASIC for investigation. ASIC is charged with enforcement of the Corporations Act and, where it perceives that directors have failed to discharge their duties under the Act or the common law, it will institute proceedings against them.

3.4 Legal Remedies Against Other Shareholders

As discussed in sections **3.2 Legal Remedies Against the Company** and **3.3 Legal Remedies Against the Company's Directors**, Section 232 of the Corporations Act also provides shareholders with some recourse against another shareholder or a class of shareholders who bring about a set of circumstances that would be contrary to the best interests of, or oppressive to, the shareholders of the company as a whole. These actions are expensive and, unlike a derivative action (see **3.6 Derivative Actions**), will be funded by the shareholder who brings the claim.

A shareholder may also be able to bring a contractual claim against another shareholder for breach of the terms of a relevant shareholders' or joint venture agreement, or enforcement of the provisions of the company's Constitution, recognising that the Constitution statutorily applies as a contract between shareholders (see **1.3 Primary Sources of Law and Regulation**).

3.5 Legal Remedies Against Auditors

Auditors are strictly regulated by the Corporations Act. In ascertaining the true financial position of the company, auditors are subject to significant duties of care, independence, diligence and skill. Auditors may be liable to the company in both contract and tort for negligence, as well as statutory breach of duties under the Corporations Act. Where the company declines to pursue a claim against the auditor, shareholders may have recourse to bring proceedings in the company's name by way of a statutory derivative action (see **3.6 Derivative Actions**).

Section 199A of the Corporations Act prohibits a company from excusing its auditor from any liability to the company incurred as an auditor of the company.

3.6 Derivative Actions

Under Section 236 of the Corporations Act, a shareholder can bring a derivative action in the name of the company provided the cause of action is vested in the company and is not one that belongs to the shareholder personally. Derivative actions typically relate to a breach of director's duties, however, they can be brought to enforce rights held against a third party (including an auditor). A shareholder seeking to bring a derivative action must apply to the Court for leave to bring proceedings, and the Court must grant leave if it is satisfied the following conditions are met:

- it is probable that the company will not bring the action itself;
- the shareholder is acting in good faith;
- it is in the best interests of the company that leave be granted;
- there is a serious question to be tried; and
- either the shareholder provided the company with written notice of their intention to seek leave from the Court for a derivative action 14 days prior to doing so, or the Court deems it appropriate to grant leave despite notice not having been given to the company.

3.7 Strategic Factors in Shareholder Litigation

Courts are entitled to make cost orders against shareholders instituting proceedings, including those seeking leave to institute proceedings (eg, by way of a statutory derivative action) and, given the risk of cost orders, this can be a dissuasive factor for bringing proceedings. Accordingly, it is more common in Australia for shareholder activist campaigns to be focused on non-litigious processes such as shareholder requisitioned resolutions and removal of directors.

Litigation against the company is, however, sometimes used as a tactic in activist campaigns as a means of placing pressure on the incumbent Board to hasten negotiation or crystallise change at the company. Statutory derivative actions under Section 236 of the Corporations Act and proceedings related to conduct that is alleged to be oppressive to shareholders under Section 232 of the Corporations Act are sometimes used for this purpose. Occasionally, litigation may also be instituted against directors, such as defamation claims against individual directors.

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