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26 April 2019[1]

Advisory shareholder resolutions

The Australian Shareholders' Association (ASA) represents its members to promote and safeguard their interests in the Australian equity capital markets. The ASA is an independent not-for-profit organisation funded by and operating in the interests of its members, primarily individual and retail investors, self-managed superannuation fund (SMSF) trustees and investors generally seeking ASA's representation and support. ASA also represents those investors and shareholders who are not members, but follow the ASA through various means, as our relevance extends to the broader investor community.

ASA position on non-binding shareholder resolutions

The ASA supports the introduction of a new shareholder right in the *Corporations Act* 2001 (Cth) providing for the right of shareholders to move a non-binding resolution on a broad range of topics, that would be subject to the following statutory rules:

- signatures of 100 shareholders or at least 5% of voting capital or an entity representing at least 100 shareholders to move the proposal
- the non-binding resolution requiring 50% of the vote in favour to pass.[2]

Current capacity of shareholders to express opinions on the company

The voting rights shareholders currently enjoy in Australia include a mechanism to put resolutions on the general meeting agenda under s 249N of the Act, if the threshold of 5% shareholding or 100 shareholders is met. However, the courts define a shareholder resolution as a 'decision' of the company. Therefore, such resolutions are considered to be a binding decision of the company.

As a result, Australian law does not permit shareholders to propose either an advisory resolution or a shareholder vote to express an opinion, except in relation to the remuneration report. Given that a company constitution allows for decision-making rights to be allocated to shareholders, a proposed amendment to the constitution has been viewed as providing shareholders with the right to make particular kinds of decisions that are not currently provided for in either the Act or ASX Listing Rules.

This has resulted in shareholders who wish to raise an issue first proposing a constitutional amendment. This makes it difficult for shareholders to hold public companies to account on some important issues on which they would like to express an opinion or seek further transparency

[1] Original policy position issued 17 November 2017. This is a revised policy position.

[2] ASA's original policy position included an additional safeguard of marketable parcels being held by the signatories at the time of lodgement of the resolution. This has been deleted in light of concerns from institutional shareholders as to the complexity attached to working out the size of parcels and in order to facilitate reform on the introduction of a non-binding shareholder resolution right. This change is subject to review at any time by ASA.

from the company as to how it is managing particular risks, such as environmental, social and governance (ESG) risks.

The ASA does not consider it appropriate to use a resolution to amend the constitution to give shareholders new voting rights or to impose reporting obligations. The ASA is of the view that any new shareholder voting rights should be a matter dealt with under the Corporations Act and applicable to all companies.

The ASA notes that providing shareholders with an advisory vote on a specific issue is now broadly accepted by companies and shareholders, following its introduction for the remuneration report resolution in 2004. This reform and the subsequent two-strikes rule are generally credited with having improved the level and quality of company engagement in Australia.

Non-binding resolutions can assist shareholders in negotiating changes at companies. This may occur either by effective engagement which results in the resolution being withdrawn as the company and shareholders engage on the issue and arrive at a productive outcome, or by public pressure on the board to justify their current stance on the issue.

Rationale for statutory rules supported by ASA in relation to advisory shareholder resolutions

- The requirement to attain 100 signatures or at least 5% of the voting capital shows that the proposed resolution has been considered and has the support of a significant enough percentage of the shareholder base to warrant discussion and potential further shareholder support at the general meeting. Maintaining the current threshold of 5% of capital or 100 shareholders for bringing proposals is consistent with the requirement to put resolutions on the agenda under s 249N and supports Australia's strong engagement culture by providing a mechanism for escalating particular issues.
- The new shareholder right would provide for both individual shareholders and a body representing the interests of shareholders to put forward a non-binding resolution on the agenda. Bodies such as the Australian Shareholders' Association, that represents retail shareholders, can garner the 100 signatures required to provide for retail shareholder utilisation of this shareholder right, whereas accessing 99 other retail shareholders can prove almost insurmountable for an individual retail shareholder. For the individual, their only recourse is to seek a copy of the register of members and write to them individually, at significant cost to the individual.
- The introduction of a new shareholder right providing for shareholders to move a non-binding resolution on a range of topics should not disenfranchise a specific, atomised group of shareholders. Given that those shareholders have a body representing their interests, it enfranchises that group if they can utilise their representative body to gather 100 signatures. Should the representative body be unable to gather the requisite 100 signatures, it is proof that the advisory resolution does not have sufficient shareholder support to go forward.

- The threshold for carrying the motion needs to be set at the same level as an ordinary resolution, that is 50%. The threshold of 75%, which applies to a special resolution, is too high and as such it is unlikely that any advisory resolution would pass
- The ASA is of the view that it is not appropriate to impose a length of shareholding requirement as this would be difficult to establish.