Australia

Heather Richardson and Denise Wightman

Kalus Kenny Intelex

SOURCES OF CORPORATE GOVERNANCE RULES AND PRACTICES

Primary sources of law, regulation and practice

1 What are the primary sources of law, regulation and practice relating to corporate governance? Is it mandatory for listed companies to comply with listing rules or do they apply on a 'comply or explain' basis?

The main elements of Australia's corporate governance framework are as follows:

- legislation, including the Corporations Act 2000 (Cth), which governs all companies;
- rules, including the Australian Stock Exchange (ASX) Listing Rules; and
- non-binding guidelines, including:
  - the ASX Corporate Governance Council's Principles and Recommendations;
  - guidance and commentary published by the Australian Securities and Investment Commission (ASIC); and
  - guidelines published by the Australian Institute of Company Directors, the Governance Institute of Australia, the Financial Services Council, and the Australian Council of Superannuation Investors.

Public companies listed on the ASX must comply with the ASX Listing Rules.

Responsible entities

2 What are the primary government agencies or other entities responsible for making such rules and enforcing them? Are there any well-known shareholder or business groups, or proxy advisory firms whose views are often considered?

The main government agencies in Australia's corporate governance framework are ASIC, which enforces the Corporations Act, and the ASX, which enforces the ASX Listing Rules and the ASX Principles.

The following groups are influential on the corporate governance practices of companies and whose views are often considered:

- shareholder lobby groups, which advise specific industry shareholder groups (eg, the Australian Shareholders Association and the Australasian Centre for Corporate Responsibility);
- institutional investors, which have large shareholdings (eg, superannuation and managed funds); and
- proxy advisory groups, which provide advice to shareholders about voting during the annual general meeting season (eg, Glass Lewis).

THE RIGHTS AND EQUITABLE TREATMENT OF SHAREHOLDERS AND EMPLOYEES

Shareholder powers

3 What powers do shareholders have to appoint or remove directors or require the board to pursue a particular course of action? What shareholder vote is required to elect or remove directors?

The Corporations Act 2000 (Cth) sets out the procedure for the appointment and removal of directors.

Shareholders of a proprietary company can appoint and remove directors by a simple majority vote at a general meeting. A company's constitution can modify or replace this rule.

Shareholders of public companies can appoint and remove directors at a general meeting by an ordinary resolution. If the directors appoint a new director, the shareholders must confirm that appointment at the company's next annual general meeting.

Usually, a company's constitution will vest the power of management in the company's board. Therefore, shareholders generally do not have the right to require the board to pursue a particular course of action.

Shareholder decisions

4 What decisions must be reserved to the shareholders? What matters are required to be subject to a non-binding shareholder vote?

Shareholders can make decisions only on those matters expressly reserved to them under the company's constitution, or those reserved under the Corporations Act, which include:

- adopting or altering the company's constitution;
- consolidating or subdividing shares and reducing share capital;
- altering the rights attached to shares; and
- initiating a shareholders' voluntary winding up.

Some reserved decisions are passed by a majority resolution but some require the support of 75 per cent of shareholders.

Australian law does not permit shareholders to propose an advisory resolution or shareholder vote to express an opinion, except in relation to the remuneration report for listed companies.

Disproportionate voting rights

5 To what extent are disproportionate voting rights or limits on the exercise of voting rights allowed?

The Corporations Act allows proprietary companies to issue different types or classes of shares with different rights, including voting rights, attached to each type of shares. The rights attached to shares are usually set out in the company's constitution.

Classes of shares include ordinary shares and preference shares. Ordinary shares usually have one vote for each share held. Preference shares may carry no voting rights or the right to only vote on certain matters.

Australian listed companies have less flexibility. Usually, they have a single class of ordinary voting shares in accordance with the ASX Listing Rules. One vote is allocated for each fully paid ordinary share.

Shareholders' meetings and voting

6 | Are there any special requirements for shareholders to participate in general meetings of shareholders or to vote? Can shareholders act by written consent without a meeting? Are virtual meetings of shareholders permitted?

The procedure for shareholder participation in general meetings of shareholders is set out in Part 2G.2 of the Corporations Act.

For a proprietary company, at least 21 days written notice must be given to each shareholder of a shareholders' meeting; for a listed company, at least 28 days written notice must be given. The notice must be in the prescribed form.

If all shareholders sign a document stating that they are in favour of a resolution set out in the document, then a shareholders' meeting is not required.

The Corporations Act does not permit virtual shareholders' meetings. This caused difficulties during the coronavirus pandemic. As a result, the Australian Treasury enacted a number of temporary measures, including the ability of companies to hold virtual meetings provided all shareholders have a reasonable opportunity to participate (the Determination). This allowed company meetings to be held virtually until the Determination expired on 22 March 2021. However, legislation is under consideration (the Treasury Laws Amendment (2021 Measures No. 1) Bill) to extend this expiry date to 15 September 2021.

Shareholders and the board

7 | Are shareholders able to require meetings of shareholders to be convened, resolutions and director nominations to be put to a shareholder vote against the wishes of the board, or the board to circulate statements by dissident shareholders?

The Corporations Act contains a number of ways for shareholders to influence the board's actions, including:

- Shareholder(s) with at least 5 per cent of the company's votes may request the board to call a general meeting or call one themselves, at their cost.
- Shareholder(s) with at least 5 per cent of the company's votes can provide the company with notice of a resolution that they will seek to move at the next general meeting. (Australian case law has confirmed that if a resolution seeks to direct the board on the exercise of its powers, then the board is entitled to dismiss the resolution and is not required to put it to shareholders for consideration).
- Shareholder(s) with at least 5 per cent of the company's votes can request the company to give to its shareholders a statement about any resolution that is proposed to be moved at a general meeting or a matter to be considered at a general meeting.
- Subject to a company's constitution, shareholders can appoint and remove directors by an ordinary resolution.

Controlling shareholders' duties

8 | Do controlling shareholders owe duties to the company or to non-controlling shareholders? If so, can an enforcement action be brought against controlling shareholders for breach of these duties?

Shareholders, even controlling shareholders, do not owe a fiduciary duty to the company. Therefore, a shareholder is not required to act in a manner that promotes the best interests of the company.

Shareholder responsibility

9 | Can shareholders ever be held responsible for the acts or omissions of the company?

Generally, shareholders are not liable for the acts or omissions of the company because the incorporation of a company creates a separate legal entity, which has an existence distinct from its shareholders. However, in exceptional circumstances, the courts can lift the corporate veil and impose liability on shareholders and directors. This has been done in cases where it was found that corporate structures were used to avoid legal liabilities.

If a subsidiary of a holding company trades while insolvent, then, in certain situations, the holding company's shareholders can be liable for the subsidiary's debts (part 5.7B, division 5 of the Corporations Act).

Employees

10 | What role do employees have in corporate governance?

Directors rely on the company's management to manage their corporation.

An executive director, often a managing director, is usually an employee of a company who has executive functions in the management and administration of a corporation. A managing director is usually the chief executive who is a director of the board to which they report. Usually, a managing director of a company has delegated powers from the board for the management of the corporation's business.

General employee participation in corporate governance, at least at a formal level, is limited. Even directors, as individuals, cannot exercise their position in isolation. Decisions are generally made by the board acting either unanimously or by a majority.

CORPORATE CONTROL

Anti-takeover devices

11 | Are anti-takeover devices permitted?

Anti-takeover devices are generally not permitted in Australia.

Lock-up devices, such as break fees and no-shop or no-talk provisions, are generally permitted, provided that they are not an unacceptable deterrent to an alternative takeover proposal and they comply with any guidance notes issued by the Australian Takeovers Panel.

The Panel is the main forum for resolving takeover disputes. It determines whether a target company has engaged in any actions that would frustrate a takeover. It has issued guidance notes on how it will exercise its powers, including on lock-up devices and break fees. For example, the Panel will generally accept break fees that do not exceed 1 per cent of the target's equity value.

Issuance of new shares

12 | May the board be permitted to issue new shares without shareholder approval? Do shareholders have pre-emptive rights to acquire newly issued shares?

Under the Corporations Act, the board has the power to issue shares.

Shareholders' approval of share issues is required, if:

- the company's constitution or shareholders' agreement requires shareholder approval;
- the Corporations Act 2000 (Cth) requires shareholder approval, for example, if the issue:
  - creates a new type of class shares which requires shareholders to amend the company's constitution;
  - varies the rights attaching to existing shares; or
  - is a related party transaction; or
- the company is listed on the Australian Stock Exchange (ASX) and the ASX Listing Rules require shareholder approval.

The Corporations Act requires newly issued shares to be offered pro rata to existing shareholders. This right can be modified by a company's constitution or shareholders' agreement.

Restrictions on the transfer of fully paid shares

13 | Are restrictions on the transfer of fully paid shares permitted and, if so, what restrictions are commonly adopted?

The constitution of a private company and shareholders' agreements can restrict the transfer of shares by including the following provisions:

- pre-emptive rights in favour of existing shareholders;
- drag and tagalong rights;
- the right of the board to refuse a transfer of shares; and
- compulsory transfer rights triggered by specified events (eg, the death or bankruptcy of a shareholder).

An ASX-listed company cannot restrict the transfer of shares unless it is permitted to do so by the ASX Listing Rules (for example, the imposition of a holding lock in certain situations) or is required to do so by law.

Compulsory repurchase rules

14 | Are compulsory share repurchases allowed? Can they be made mandatory in certain circumstances?

There is no general right permitting shareholders to require the company or its other shareholders to purchase their shares. However, a contractual right to purchase can arise if a shareholders' agreement or a company's constitution requires the company or the other shareholders to buy back the shares in certain circumstances (eg, on the death of a shareholder or if drag or tagalong rights are activated).

Shareholders can be forced to sell their shares in certain circumstances under the Corporations Act (eg, by the compulsory purchase of minority holdings under the takeover provisions).

Dissenters' rights

15 | Do shareholders have appraisal rights?

There are no general appraisal rights available to Australian shareholders under the Corporations Act. However, courts have a very wide discretion to provide remedies for conduct which is oppressive or unfairly prejudicial to minority shareholders. These remedies include requiring a majority shareholder or the company to purchase the shares of a minority shareholder at fair value.

RESPONSIBILITIES OF THE BOARD (SUPERVISORY)

Board structure

16 | Is the predominant board structure for listed companies best categorised as one-tier or two-tier?

Australian companies that are listed on the Australian Stock Exchange (ASX) usually adopt a one-tier board model, being a board of directors. In some circumstances, a company may decide to form an advisory board (aka advisory panel, advisory committee or advisory council) which is distinct from the board of directors. An advisory board will generally support a board of directors in providing expert advice, specialist experience, insights, knowledge and recommendations regarding certain functions or facets of the company. They, however, are not directors in the sense that they do not owe any fiduciary duties to the company and are generally not authorised to act on behalf of the company.

Board's legal responsibilities

17 | What are the board's primary legal responsibilities?

As fiduciaries, directors owe duties to the company that are enshrined in the Corporations Act 2000 (Cth) and in common law.

A board's legal responsibilities are broad-reaching and include the following:

- the duty to prevent insolvent trading (section 588G of the Corporations Act 2001 (Cth));
- the duty to meet pay-as-you go obligations under the Tax Administration Act 1953 (Cth);
- the duty to avoid a breach by the organisation of the Fair Work Act 2009 (Cth);
- the duty arising under the Competition and Consumer Act 2010 (Cth);
- the duty under state work health and safety legislation; and
- the duty under various state-based environment protection legislation.

Directors may personally face civil and criminal penalties for breaches of their obligations under the above Acts.

Board obligees

18 | Whom does the board represent and to whom do directors owe legal duties?

The board represents shareholders, who appoint directors to act on their behalf.

Directors owe a fiduciary duty to the company and must act at all times in the interests of the company. Although directors do not owe a duty to creditors, directors may need to consider creditors when acting in the interests of the company.

Obligations of directors also exist under various legislation. For example, under the Competition and Consumer Act 2010 (Cth) directors can be held personally liable for breaches of the Act.

Enforcement action against directors

19 | Can an enforcement action against directors be brought by, or on behalf of, those to whom duties are owed? Is there a business judgement rule?

Directors owe duties to the company and to shareholders as a whole but do not owe duties to individual shareholders.

Enforcement action against persons to whom duties are owed is likely to occur in the context of a shareholders' oppression action where

conduct is contrary to the interests of shareholders or oppressive, unfairly prejudicial or discriminatory against a shareholder or shareholders (section 232 of the Corporations Act).

The Australian Securities and Investment Commission (ASIC) has enforcement powers under the Corporations Act and under the Australian Securities and Investment Commissions Act 2001 (Cth).

The business judgment rule is enshrined in section 180 of the Corporations Act, which provides that a director or officer who makes a business judgment is taken to be acting with the required degree of care and diligence if they, among other things, make the judgment in good faith for a proper purpose and do not have a material personal interest in the subject matter.

However, this applies only to a claim for breach of the duty of care and diligence and not generally to the conduct of directors.

Care and prudence

20 | Do the duties of directors include a care or prudence element?

A relationship between a director and their company is a fiduciary relationship. At all times, a director must act in the interests of their company.

Directors owe a duty of care and diligence to that company, which is enshrined in common law and set out in the Corporations Act.

Section 180(1) of the Corporations Act requires a director or officer of a corporation to exercise their powers and discharge their duties with the degree of care that a reasonable person would use in the same circumstances.

A director who makes a business judgment is taken to have exercised care if the judgment is made in good faith for a proper purpose, the director has no material personal interest in the subject matter, informs themselves of the subject matter and believes the judgment is in the best interest of the company. (Section 180(2) of the Corporations Act).

Board member duties

21 | To what extent do the duties of individual members of the board differ?

Directors bring their life experiences to their role on the board. Qualifications and life experience will assist directors to perform their duties effectively.

Although different directors will necessarily bring different skill sets to their role, their duties as directors are fundamentally the same.

Board committees may be formed to consider and advise on particular issues. However, all board members are responsible for the ultimate decisions of the board.

A company's constitution may allow directors to have different duties.

Delegation of board responsibilities

22 | To what extent can the board delegate responsibilities to management, a board committee or board members, or other persons?

Directors of a company may delegate any of their powers to a committee of directors, employees of the company, or any other person unless the company's constitution provides otherwise in accordance with section 198D of the Corporations Act. Any delegation of responsibilities or powers must be recorded in the company's minute book.

If a director delegates a power, they will be responsible for how the delegate exercises that power as if the director had exercised it themselves. Pursuant to section 190 of the Corporations Act, the only time a director will not be considered responsible for the actions of a delegate is if the director believed:

- on reasonable grounds that the delegate would exercise the power in conformity with the duties imposed on directors of the company by the Corporations Act; and
- on reasonable grounds and in good faith, and after making a proper inquiry if the circumstances indicated the need for an inquiry, that the delegate was reliable and competent in relation to the responsibility delegated.

Non-executive and independent directors

23 | Is there a minimum number of 'non-executive' or 'independent' directors required by law, regulation or listing requirement? If so, what is the definition of 'non-executive' and 'independent' directors and how do their responsibilities differ from executive directors?

A non-executive director is not employed by the organisation for which he or she is a director, but may be related to the organisation in another capacity (ie. as a shareholder).

An independent director may not have a relationship with the organisation other than being a director. That is to say, an independent director may not be a current or previous shareholder of the organisation nor otherwise linked to the organisation in any way (eg, by way of a contractual relationship or family ties with a person involved in the organisation).

Generally, a company's constitution will set out the requirements for the composition of its board, including the minimum number of directors and non-executive directors.

Board size and composition

24 | How is the size of the board determined? Are there minimum and maximum numbers of seats on the board? Who is authorised to make appointments to fill vacancies on the board or newly created directorships? Are there criteria that individual directors or the board as a whole must fulfil? Are there any disclosure requirements relating to board composition?

The Corporations Act provides that:

- private companies must have at least one director who 'ordinarily resides' in Australia; and
- public companies must have at least three directors, two of which must 'ordinarily reside' in Australia.

The Corporations Act does not specify a maximum number of directors for private or public companies.

A company's constitution usually outlines the circumstances in which the board or shareholders may appoint a replacement or additional directors to the board. In the absence of any such provision and provided that the replaceable rules set out in the Corporations Act apply, the replaceable rules allow shareholders or the directors of a company to appoint other directors to the board in certain circumstances.

There are no express requirements or limitations regarding the expertise, gender or diversity of directors of Australian companies, however, the ASX Corporate Governance Council recommends that publicly listed companies should adopt a diversity policy and make public disclosures concerning the diversity of their board's composition.

To be eligible to act as a director, a person must be at least 18 years of age and must not be disqualified from managing a company under the Corporations Act (eg, as a result of undischarged bankruptcy, insolvency, or having been convicted of certain fraud or insolvency offences).

Board leadership

25 Is there any law, regulation, listing requirement or practice that requires the separation of the functions of board chair and CEO? If flexibility on board leadership is allowed, what is generally recognised as best practice and what is the common practice?

The Corporations Act does not specify any requirements for the separation or amalgamation of the roles of a board chairperson and a chief executive. However, the ASX Corporate Governance Council recommends that the chairperson of a publicly listed company is an independent director and not a person who already acts as the CEO of the company.

Board committees

26 What board committees are mandatory? What board committees are allowed? Are there mandatory requirements for committee composition?

There are no mandatory board committees for private companies, however, the Corporations Act provides that the directors of a private company may delegate any of their powers to a committee of directors (unless the company's constitution provides otherwise).

Publicly listed companies that are included in the S&P All Ordinaries Index must establish and conduct audit and remuneration committees.

The Governance Council recommends that all publicly listed companies establish committees in respect of audits, remuneration and nomination. However, these committees are not mandatory.

Board meetings

27 Is a minimum or set number of board meetings per year required by law, regulation or listing requirement?

The Corporations Act and the ASX Listing Rules do not prescribe a minimum number of board meetings to be held by private or public companies per year. However, it is common for a company's constitution or shareholders' agreement to specify a minimum number of annual board meetings.

Board practices

28 Is disclosure of board practices required by law, regulation or listing requirement?

There are no obligations on private companies to make public disclosures in respect of their board practices.

The ASX Listing Rules require a publicly listed company to prepare an annual corporate governance statement disclosing the extent to which it has followed the recommendations of the ASX Corporate Governance Council during the relevant financial year, and, should such recommendations are not followed, explain the reasons why and provide details of any alternative practices that were adopted.

Board and director evaluations

29 Is there any law, regulation, listing requirement or practice that requires evaluation of the board, its committees or individual directors? How regularly are such evaluations conducted and by whom? What do companies disclose in relation to such evaluations?

There are no obligations on private companies to conduct evaluations of the board, its committees or individual directors.

The ASX Corporate Governance Council recommends that all publicly listed companies:

- have and disclose a process for periodically evaluating the performance of the board, its committees and individual directors; and
- in each reporting period disclose whether a performance evaluation was undertaken in accordance with that process.

While compliance with the ASX Corporate Governance Council's recommendations is not mandatory, the ASX Listing Rules require publicly listed companies to benchmark their corporate governance practices against the Governance Council's recommendations. If a publicly listed company does not comply with the Governance Council's recommendations, such non-compliance must be disclosed and explained in the company's annual corporate governance statement.

REMUNERATION

Remuneration of directors

30 How is remuneration of directors determined? Is there any law, regulation, listing requirement or practice that affects the remuneration of directors, the length of directors' service contracts, loans to directors or other transactions or compensatory arrangements between the company and any director?

The general practice is that, per section 202A of the Corporations Act 2000 (Cth), directors of a company are to be paid remuneration in an amount as determined by a resolution by the board or the members (usually referred to as shareholders). This, however, can be varied by the company's constitution which may set out how directors are to be paid. In the case of large publicly listed companies, the board is required to present a pool of fees it proposes will be paid to the board as a whole to the company's shareholders for acceptance. Some companies may appoint a remuneration committee to advise on the appropriate amount and structure of fees.

If a director is terminated for any reason, the Corporations Act (and the ASX Listing Rules, for publicly listed companies) limit certain payments that can be made to directors or senior management. Payment of termination benefits is prohibited by Listing Rule 10.18 if a change occurs in the shareholding or control of the company generally. Further, if a termination benefit exceeds 5 per cent of the company's equity interests, shareholders' approval must be obtained in accordance with Part 2D.2 of the Corporations Act and ASX Listing Rule 10.19.

If a director incurred any liabilities to the company during their time as a director, the company must not exempt nor indemnify them of such liabilities.

Remuneration of senior management

31 How is the remuneration of the most senior management determined? Is there any law, regulation, listing requirement or practice that affects the remuneration of senior managers, loans to senior managers or other transactions or compensatory arrangements between the company and senior managers?

It is the responsibility of the board to determine senior executive remuneration, including bonuses, similar to the way director remuneration is determined. Senior managers are, therefore, bound by the same process as the directors.

Say-on-pay

32 | Do shareholders have an advisory or other vote regarding remuneration of directors and senior management? How frequently may they vote?

For listed companies, shareholders are required to vote on whether or not to accept a pool of fees proposed by the board. If approved, the pool is then split between the directors as agreed by the board. Whatever the limit shareholders accept as remuneration continues to apply until another vote is held to increase or decrease the limit.

The allocation of fees and remuneration (including salaries and bonuses) for directors and senior management for listed companies must be published in an annual report and presented to shareholders to adopt. If the annual report is not adopted by 25 per cent of the shareholders at two consecutive annual general meetings, it is considered a 'second strike' and shareholders may resolve to 'spill' the board and re-elect directors by ordinary resolution at the second annual general meeting.

DIRECTOR PROTECTIONS

D&O liability insurance

33 | Is directors' and officers' liability insurance permitted or common practice? Can the company pay the premiums?

Directors' and officers' liability insurance is common practice and is highly recommended. A company can pay the premiums of such insurance.

Insurance may provide cover for both executive and non-executive directors, the company secretary, executive officers and employees involved in management by either listing their role or name.

Cover can include defence costs, compensation awarded against a director, and costs awarded against a director. In some instances, the cover will also include reimbursement of the company for indemnities it provides to directors. Ideally, the cover should continue to apply after a director ceases to hold office.

Cover will depend on the policy and boards should review their insurance periodically to ensure the cover is adequate.

Personal director and officer insurance, that protects an individual director, is also available.

Indemnification of directors and officers

34 | Are there any constraints on the company indemnifying directors and officers in respect of liabilities incurred in their professional capacity? If not, are such indemnities common?

Corporations may indemnify their directors and officers through an indemnity deed. The scope of directors' and officers' conduct which may be protected is limited. Generally, directors' and officers' insurance exists alongside indemnity deeds.

Typically, indemnity deeds limit the scope of an indemnity 'to the maximum extent permitted by law', which acknowledges limitations imposed by the Corporations Act 2000 (Cth).

Section 199A(2) of the Corporations Act prohibits a company from indemnifying a director or officer for:

- liabilities owed to the company;
- liabilities for a pecuniary penalty; and
- liabilities that did not arise out of conduct in good faith.

Section 199A(3) of the Corporations Act limits the circumstances in which a director can be indemnified for legal costs.

Advancement of expenses to directors and officers

35 | To what extent may companies advance expenses to directors and officers in connection with litigation or other proceedings against them or in which they will be a witness?

Companies may indemnify directors and officers for legal costs with proceedings arising from their role as a director through a deed of indemnity and through directors' and officers' insurance. It is usual for both a deed of indemnity and directors' and officers' insurance to be in place.

However, section 199A(3) of the Corporations Act limits the circumstances in which a director can be indemnified for legal costs.

It is common in litigation for a party that calls a witness to cover the witness's travel expenses. If they are being called in their professional capacity, a witness may be paid for their time to appear in proceedings.

Exculpation of directors and officers

36 | To what extent may companies or shareholders preclude or limit the liability of directors and officers?

Corporations may indemnify their directors and officers through an indemnity deed. The scope of directors' and officers' conduct which may be protected is limited. Generally, directors' and officers' insurance exists alongside indemnity deeds.

Typically indemnity deeds limit the scope of an indemnity 'to the maximum extent permitted by law', which acknowledges limitations imposed by the Corporations Act. Section 199A(2) of the Corporations Act sets out prohibitions on a company indemnifying a director or officer and section 199A(3) limits the circumstances in which a director can be indemnified for legal costs.

DISCLOSURE AND TRANSPARENCY

Corporate charter and by-laws

37 | Are the corporate charter and by-laws of companies publicly available? If so, where?

The constitution of a company deals with its internal governance. Whether the constitution is publicly available depends on the type of company.

Listed public companies must disclose their constitution to the public on the Australian Stock Exchange (ASX).

An unlisted public company must lodge a copy of its constitution, together with any changes to its constitution, with the Australian Securities and Investment Commission (ASIC) within the time frames prescribed by the Corporations Act 2000 (Cth).

The constitutions of proprietary companies are not publicly available, because proprietary companies are not required to lodge or disclose a copy anywhere. However, such a company must keep a copy of its constitution in its records and provide a copy to a shareholder within seven days of receiving a request.

Company information

38 | What information must companies publicly disclose? How often must disclosure be made?

The ASX Listing Rules require listed companies to:

- disclose certain transactions (eg, issuing dividends);
- issue half-yearly and annual financial reports and publish annual reports; and
- immediately disclose information that will have a material effect on the price or value of the company's shares to the ASX.

Public unlisted companies have less demanding reporting requirements. They are required to prepare and lodge their financial reports, directors'

reports and audit reports with ASIC. Unlisted companies and managed investment schemes that are 'disclosing entities' (as defined in section 111AC of the Corporations Act) must meet the continuous disclosure obligations in section 674 of the Corporations Act.

Proprietary companies have limited financial reporting obligations.

HOT TOPICS

Shareholder-nominated directors

39 Do shareholders have the ability to nominate directors and have them included in shareholder meeting materials that are prepared and distributed at the company's expense?

The ability of shareholders to appoint nominee directors will usually be set out in a shareholders' agreement or the company's constitution. Although appointed by a shareholder, nominee directors must act in the best interests of the company. Listed companies are subject to election and re-election requirements in relation to directors.

Shareholder engagement

40 Do companies engage with shareholders? If so, who typically participates in the company's engagement efforts and when does engagement typically occur?

There is no general rule determining the extent or level of engagement with shareholders a company must undertake. Therefore, the level and extent of shareholder engagement can vary significantly between companies. Generally, there is a greater degree of shareholder engagement in publically listed companies than in proprietary companies.

Usually, the board is the entity with the main responsibility for encouraging and advancing shareholder engagement. The quality of the board's engagement with shareholders often depends on the efforts of the individual board members, especially the chairperson, to keep in touch with shareholder concerns and views.

An annual general meeting provides a forum for shareholders to participate in, and engage with, the company, especially in director accountability and scrutiny of company management.

Sustainability disclosure

41 Are companies required to provide disclosure with respect to corporate social responsibility matters?

Corporate social responsibility refers to the practice of measuring and reporting on a business' economic, social and environmental performance.

There is no overarching requirement for businesses to engage in corporate social responsibility reporting, however, various sets of legislation mandate reporting on specific issues.

For example, the National Greenhouse and Energy Reporting (NGER) Scheme, established under the National Greenhouse and Energy Reporting Act 2007 (Cth), is a framework for reporting and publishing information about greenhouse gas emissions, energy production, and energy consumption of Australian companies. Controlling corporations that meet a threshold under the Scheme, must apply to be registered under section 12 of the NGER Act, failure to do so attracts severe penalties.

CEO pay ratio disclosure

42 Are companies required to disclose the 'pay ratio' between the CEO's annual total compensation and the annual total compensation of other workers?

In Australia, companies are not required to disclose the pay ratio between the chief executive's annual total compensation and the annual total compensation of other workers.

Gender pay gap disclosure

43 Are companies required to disclose 'gender pay gap' information? If so, how is the gender pay gap measured?

Australia's Workplace Gender Equality Agency (WGEA) was established by the Gender Equality Act 2012. The WGEA aim to promote gender equality in the workplace and sets up reporting requirements for large employers (ie, non-public sector employers with 100 or more employees) and registered higher education providers.

Employers covered by the Act must supply the WGEA with annual reports that include a set of gender equality indicators, including:

- the gender composition of the workforce;
- the gender composition of governing bodies;
- equal remuneration between women and men; and
- the availability and utility of employment policies relating to flexible working arrangements and to working arrangements supporting employees with family or caring responsibilities.

Once a report is submitted to WGEA, employers must notify their employees to enable them to review and comment on it.

UPDATE AND TRENDS

Recent developments

44 Identify any new developments in corporate governance over the past year. Identify any significant trends in the issues that have been the focus of shareholder interest or activism over the past year.

New development in corporate governance

On 1 July 2021, amendments to the Environment Protection Act 2017 (Vic) will become effective. The amendments will require businesses to meet obligations to reduce their impact on the environment under a new general environmental duty.

The amendments require businesses to consider the environmental impacts their operations may have – including runoff stormwater, waste management practices and air or soil pollution – and take reasonable steps to reduce such impacts.

Businesses that fail to adhere to this new duty may be subject to fines of up to A$1.6 million.

Trends in shareholder interest

Recent shareholder activist campaigns led against large Australian companies, including airlines, supermarkets and the 'Big Four' banks (Commonwealth Bank of Australia, Westpac Banking Corp, National Australia Bank, and Australia and New Zealand Banking Group), demonstrate the increased interest shareholders are taking in the social and environmental implications of their businesses' operations and decision-making processes.

Investors are also taking a keen interest in businesses' responses to environmental, social and governance issues to guide their decisions regarding making investments.

There is a view that the manner in which business address issues such as climate change, board quality and other social issues, can be an indicator of the financial value of the business and its long-term viability.

Coronavirus

45 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The Covid-19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020 (Vic) (which were made under section 4 of the Covid-19 Omnibus (Emergency Measures) Act 2020), which provided for electronic signatures and witnessing the signing of documents by audio-visual links, was due to be repealed on 26 April 2021. Pursuant to section 64 of the Covid-19 Omnibus (Emergency Measures) Act 2020 (Vic), regulations made under section 62 that were in force immediately before that repeal will continue to be in force for six months.

The Australian Treasury enacted a number of temporary measures authorising companies to hold virtual general and shareholders' meetings (the Determination). Since this Determination expired on 22 March 2021, the Treasury Laws Amendment (2021 Measures No.1) Bill 2021 (Cth) was referred to the Senate Economics References Committee, and a report on it is due on 30 June 2021. This bill seeks to extend the period that companies are permitted to hold virtual annual general meetings, execute documents electronically and use technology to communicate with shareholders.

In the meantime, ASIC has adopted a temporary 'no-action' position to support the holding of annual general meetings using technology, allow the electronic provision of notices of meeting, and allow public companies an additional two months to hold their annual general meetings.

KALUS KENNY INTELEX LAWYERS

Heather Richardson
hrichardson@kkilawyers.com.au

Denise Wightman
dwightman@kkilawyers.com.au

Level 1, 4 Riverside Quay
Southbank
Melbourne
Australia
Tel: +61 388254800
kkilawyers.com.au