

REMUNERATION REPORTING: HOW BINDING IS THE NON-BINDING VOTE?

This reporting season has seen the commencement of a non-binding shareholder vote on the remuneration report of ASX listed companies. An issue that was the focus of much attention in the lead up to the introduction of the requirement for the non-binding shareholder vote was the manner in which companies would respond to a vote against the remuneration report.

This issue has again come to the fore in light of the significant dissent votes received by a number of companies and particularly in light of ASIC's response to the shareholder vote on the remuneration report of Novogen Limited (Novogen). Approximately 70% of the proxy votes submitted in respect of the resolution to approve Novogen's remuneration report were directed against the resolution. At the AGM, the resolution was carried on a show of hands and no poll was called despite the high dissenting proxy vote.

ASIC raised two key concerns regarding the actions of Novogen in relation to the shareholder vote. The first issue concerned the failure of the chairman to call a poll, which ASIC considered was "contrary to the duty of a chairman of a meeting (in the absence of a valid request to do so) to call a poll when it is clear that it would produce a different result from a vote on a show of hands."

The second concern raised by ASIC related to the manner in which Novogen disclosed the results of the resolution. In reporting the results of the meeting, Novogen presented the votes against the resolution as a proportion of the total issued share capital of the company (being 12.5%), rather than as a proportion of the number of votes reflected in proxy forms lodged prior to the meeting, namely 70%. ASIC considered this was inappropriate as it created an entirely different perception of the level of disapproval of the remuneration report.

ASIC went on to state its view that good corporate governance requires that a company explain to its shareholders what action, if any, it intends to take in response to a negative vote, even though the vote itself is non-binding. ASIC has indicated its intention to be proactive in monitoring compliance by companies with this requirement, stating that it will be "concerned to ensure that listed companies do not muzzle the voice of their shareholders...or obfuscate a negative result in subsequent market disclosures".

ASIC's response to the Novogen case and the adverse publicity for the company relating to its reporting, does indicate that the regulator will monitor the manner in which the votes are conducted and officially announced. It is also interesting that the regulator comes close to asserting that companies will have no alternative but to take into account the views of shareholders, as expressed through the vote (although technically this is questionable if the vote is truly 'non-binding').

In planning for the AGM, companies need be aware of, and plan for, the potential ramifications of a vote against the remuneration report. Companies would be well advised to:

- Communicate with key shareholders ahead of the AGM to ensure that the board is able to address the key concerns of shareholders regarding the company's executive remuneration policy in a timely manner. This communication may also amount to proxy solicitation.
- Consider how the Board would respond to a 'no' vote or a substantial negative vote, including the timing of the response and the manner in which shareholder concerns in relation to executive remuneration will be addressed.

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