PANORAMIC

SHAREHOLDER ACTIVISM & ENGAGEMENT

New Zealand

LEXOLOGY

Shareholder Activism & Engagement

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Shareholder Activism & Engagement

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GENERAL

Primary sources

What are the primary sources of laws and regulations relating to shareholder activism and engagement? Who makes and enforces them?

Most entities in New Zealand that may be subject to shareholder activism and engagement are companies established under the Companies Act 1993. Companies listed on the New Zealand Stock Exchange (NZX) are subject to the NZX Listing Rules. The Takeovers Code also applies to all companies listed on the NZX and to companies with a broad shareholding (see below).

The other principal legislation is the Financial Markets Conduct Act 2013 and the Financial Markets Conduct Regulations 2014, which regulate misleading and deceptive conduct in relation to dealings in securities, enforce a substantial product disclosure regime and impose restrictions on the making of unsolicited offers to acquire securities.

Parliament passed the Companies Act and the Financial Markets Conduct Act, and the Governor-General makes and amends the regulations under each of these on the recommendation of the Minister of Commerce and Consumer Affairs, granted under the authority of the relevant primary legislation.

The NZX Listing Rules are made and enforced by NZX Limited, as operator of the New Zealand Stock Exchange, with oversight from the Financial Markets Authority.

The Companies Act and the constitution of each relevant company are of principal relevance for any activism and shareholder engagement as they provide for the rights and requirements of shareholders in convening a shareholder meeting, the right to propose resolutions and explanatory statements and form the basis for the substantial body of corporate governance law.

The Takeovers Code is a regulation made by Order in Council on the recommendation of the Minister of Commerce and Consumer Affairs under the Takeovers Act 1993, and prescribes a code for the conduct of takeovers of 'code companies'. A code company includes any company incorporated in New Zealand and listed on the NZX or that has 50 or more shareholders and 50 or more share parcels, even if not listed. The Takeovers Code is enforced by the Takeovers Panel.

Law stated - 20 February 2025

Shareholder activism

How frequent are activist campaigns in your jurisdiction and what are the chances of success?

Like most jurisdictions, the prevalence of observable shareholder activism in New Zealand has grown during the past few years.

Most shareholder activism occurs on a private basis, at least initially, and only a percentage develops into a public campaign where there is a noticeable outcome. It is, therefore, difficult to establish specific data or statistics. The nature of the types of activist engagement

traverses the typical spectrum seen in most other jurisdictions, ranging from de facto or proxy takeovers and director-election contests to 'vote no' campaigns and advocacy in relation to board and management remuneration.

For the most part, company boards take activist engagement very seriously and respond to activists in good faith to understand their concerns. This can result in the alignment and adoption of some or all of the strategic changes to the company that have been proposed by the activist or a change in the board of directors without any public activist presence. Alternatively, where activism develops into a public campaign, results can vary with corporate changes agreed upon or board resignations after the publicity develops but before a vote ever takes place. Very few campaigns go to a vote and, for those that do, the results can be close.

Law stated - 20 February 2025

Shareholder activism

How is shareholder activism generally viewed in your jurisdiction by the legislature, regulators, institutional and retail shareholders and the general public? Are some industries more or less prone to shareholder activism? Why?

Generally, regulators do not take a position on activism. The relevant regulators, particularly the Financial Markets Authority and the Takeovers Panel, frequently receive complaints from stakeholders during a campaign and generally do not get involved unless it is clear that the conduct in question breaches specific provisions of the Takeovers Code or relevant legislation. In this regard, shareholders have been censured for timely failure to disclose substantial product holder positions or for misleading conduct.

Shareholder activists in New Zealand are not restricted to any particular industry. However, there is a strong concentration of listed companies on the NZX that have controlling shareholders through being majority-owned by the New Zealand government (for example, three of the major energy companies and Air New Zealand) or having a strategic controlling shareholder. Naturally, these companies are less prone to activism.

Like other jurisdictions, targets are typically identified by poor operational or share price performance, high cash balances, untapped or mismanaged opportunities, governance issues (including matters of social importance), and perceived consolidation or buy-out opportunities.

Law stated - 20 February 2025

Shareholder activism

What are the typical characteristics of shareholder activists in your jurisdiction?

Significant activists tend to be long-term shareholders, including institutional investors and KiwiSaver (superannuation) funds. However, due to the relative ease of proposing shareholder resolutions, activists can also include disgruntled minority shareholders.

Occasionally, industry participants also engage in activism on a strategic basis, but this is generally not as successful or as well received as a takeover transaction. Shareholding percentages need not be particularly significant to have an impact.

Institutional shareholding in New Zealand has become more concentrated in recent years due to the continued growth of New Zealand superannuation contributions to KiwiSaver funds. For the most part, these tend to be passive investors and are more likely to abstain than be seen to support an activist in any proxy campaign. However, this naturally enhances the votes held by the activists when only the shares that vote are taken into account. Unlike some jurisdictions, there is no requirement for KiwiSaver funds, among others, to periodically disclose how they have voted.

While we see alliances form between shareholders where there is mutual support in a campaign, it is not uncommon to see these fall apart through a sale of shares by a party during the course of the campaign or a shareholder reaching a satisfactory accommodation with the target on their issues.

Investors who consider engaging in an activist strategy are also likely to be mindful of any possible effect on their reputations and how activism could affect their further participation in initial public offerings or other corporate opportunities.

Law stated - 20 February 2025

Shareholder activism

What are the main operational governance and sociopolitical areas that shareholder activism focuses on? Do any factors tend to attract shareholder activist attention?

The main areas on which shareholder activism focuses are:

- poor governance, including scrutiny on related party transactions, the sudden announcement of significant financial write-downs and deficiencies in transparency from management in reporting to shareholders;
- change-of-board campaigns or director-appointment campaigns;
- vote-no campaigns to shareholder resolutions; and
- shareholder and hedge fund activism in connection with a value strategy manifested through a shareholder proposal. These can range from players looking to elevate the share price quickly for profit, activism associated with takeover activity to pressure the board or those looking to effect a genuine long-term value-added strategy for the company.

Say on pay

There are no express provisions for shareholder say on management pay in New Zealand. However, director pay is a direct focus for the New Zealand Shareholders' Association, which regularly takes published positions on director remuneration resolutions and votes discretionary proxies from its members. In particular, the Shareholders' Association generally takes the position that the requested director fee increase must be demonstrated to be

reasonable and, where remuneration benchmarking reports are used to justify fee increases, the full report should be made available to shareholders. Fee pools and the fees paid to directors should be comparable with the company's peers, and the peer group companies should be of a similar scale. The directors should take into account the overall performance of the company prior to asking shareholders to approve a fee increase. In this regard, it may be more appropriate to reduce the number of directors rather than seek an increase. In this context, it has been apparent that smaller, more regular increases are more likely to be palatable than a single large increase.

Law stated - 20 February 2025

SHAREHOLDER ACTIVIST STRATEGIES

Strategies

What common strategies do activist shareholders use to pursue their objectives?

Generally, activist strategies begin with private discussions directly with the subject company to negotiate changes in line with the activist's value strategy. These may then develop into public campaigns, media campaigns and greater pressure from a broader shareholder base.

Shareholder resolutions and proxy contests are generally a last resort.

There is no set playbook and examples differ depending on the company's specific situation, its shareholder agendas and share register.

Law stated - 20 February 2025

Processes and guidelines

What are the general processes and guidelines for shareholders' proposals?

Clause 9(1) of the First Schedule of the Companies Act provides that any shareholder can put up a resolution at a shareholders' meeting by giving written notice to the board, notifying the proposal or text of the proposed resolution.

Provided that the shareholder offers the notice well in advance, the company is required to bear the subsequent cost of including the information in the notice of meeting. The shareholder is also permitted to include an explanatory statement of not more than 1,000 words on the resolution, together with their name and address.

There are limited rules that operate to exclude only a few types of resolutions. The board may only refuse to include a shareholder-proposed resolution in the notice of meeting if the directors consider the resolution to be defamatory (within the meaning of the Defamation Act 1992). The board may only refuse to include an accompanying statement if it is defamatory, frivolous or vexatious.

Instead, the rules focus mainly on timing and who bears the cost of putting the proposal. Specifically, where the notice is received at least 20 working days before the last day for giving notice of the meeting, the board must give notice of the proposal and text of the resolution

at the company's expense. If the notice is received between five and 20 days before the last date, the shareholder is required to bear the cost. If the notice is received less than five days before the last date, putting that proposal to shareholders is at the board's discretion.

Shareholder resolutions can have the effect of appointing and removing directors or changing the company's constitution.

Section 109 of the Companies Act provides broad rights for shareholders to have a reasonable opportunity at the meeting to question, discuss, or comment on the management of the company. Shareholders may also pass a resolution relating to the management of a company (albeit unless the constitution provides that the resolution is binding, such a resolution is not binding on the board). Therefore, an ordinary resolution that relates to the future direction of the company will generally be advisory only. It would, nonetheless, be a brave board to ignore such a steer from shareholders when the same voting thresholds would ordinarily apply to effect a change in the directors who sit on the subject board.

Section 109 should also be read in light of clause 9 of the First Schedule. In this regard, if shareholders only wish to discuss matters concerning the company's management, then it appears that notice need not be given, but if resolutions are proposed, the advance notice requirements under clause 9 should apply to the resolution. That also has the effect of allowing shareholders to appoint proxies with sufficient notice to direct their voting on the resolution.

Law stated - 20 February 2025

Processes and guidelines

May shareholders nominate directors for election to the board and use the company's proxy or shareholder circular infrastructure, at the company's expense, to do so?

The New Zealand Stock Exchange (NZX) Listing Rules specifically require the board of the company to call for nominations from shareholders and impose director rotation requirements. To properly inform shareholders, the company will invariably include any requested biography and other reasonable explanatory statement provided by the candidate for election, at the company's cost.

Law stated - 20 February 2025

Processes and guidelines

May shareholders call a special shareholders' meeting? What are the requirements? May shareholders act by written consent in lieu of a meeting?

Under section 121 of the Companies Act, a shareholder or group of shareholders commanding at least 5 per cent of the company's voting rights can require the board to call a special meeting of shareholders. While the board or the court can only convene a meeting if it is in the interests of the company, shareholders are not limited in this way and are free to do so if this simple percentage threshold requirement is met.

Neither the Companies Act nor the NZX Listing Rules specify any specific timeframe within which the board is required to convene a meeting upon receiving valid notice from shareholders.

Case law has also been limited to the duties of the board to convene a meeting. However, proceedings requiring the board to convene a meeting under section 121(b) of the Companies Act can be brought seeking injunctive relief, which requires the courts to take into account the balance of convenience and the overall justice of the matter. Accordingly, courts commonly accept the principle that a meeting must be called within a 'reasonable time'. What is reasonable must be assessed against the particular circumstances presented before the court.

Under section 109 of the Companies Act, the chairperson at a meeting of shareholders must allow a reasonable opportunity for shareholders to question, discuss or comment on the management of the company as part of the general business at a meeting.

Shareholders may also act by written resolution. However, this is extremely rare in a public company context. Generally, a resolution in writing signed by not less than 75 per cent of the shareholders entitled to vote on that resolution who together hold not less than 75 per cent of the votes is as valid as if it had been passed at a meeting of those shareholders.

Law stated - 20 February 2025

Litigation

What are the main types of litigation shareholders in your jurisdiction may initiate against corporations and directors? May shareholders bring derivative actions on behalf of the corporation or class actions on behalf of all shareholders? Are there methods of obtaining access to company information?

The Companies Act provides a number of statutory remedies for minority (and, in some cases, majority) shareholders. These include rights to:

- apply for relief on the grounds that the company's affairs or acts are 'oppressive, unfairly discriminatory, or unfairly prejudicial';
- apply for the company's liquidation on the grounds that 'it is just and equitable' to do so;
- apply for an injunction restraining the company or a director from breaching the company's constitution or provisions of the Act;
- apply for a compliance order requiring a director or the company to take any steps required to comply with the company's constitution or the Act;
- bring an action against a director or the company for breach of a duty owed to the shareholder personally; or
- bring a statutory derivative action with the leave of the court.

While derivative actions are not particularly common, section 165 of the Companies Act gives the court the ability to grant leave to a shareholder or director of a company to bring proceedings in the name and on behalf of the company or intervene in proceedings to

which the company is a party for the purpose of continuing, defending or discontinuing proceedings on behalf of the company. In essence, the section facilitates the enforcement of directors' duties owed to the company where the company has failed to take the necessary enforcement steps.

While the section does not expressly limit the remedy to minority shareholders, the prevailing view is that a shareholder with a controlling interest should not generally be permitted to use the derivative procedure. There are a number of requirements the court must consider before granting leave to allow derivative actions, including:

- being satisfied that the company does not intend to bring, diligently continue or defend, or discontinue the proceedings – in this regard, the party proposing to bring derivative proceedings must inform the court as to the extent of its effort to convince the company to take action against the directors; and
- being satisfied that it is in the interests of the company that the conduct of the proceedings should not be left to the directors or to the determination of the shareholders as a whole. This may be appropriate in instances of deadlock, cessation of trading and wrongdoer control, where the court considers that it would be in the best interests of the company to sidestep its internal processes for making decisions.

The court must also consider the following four mandatory factors under section 165(2):

- the likelihood of the proceedings succeeding;
- the costs of the proceedings in relation to the relief likely to be obtained;
- any action already taken by the company or related company to obtain relief; and
- the interests of the company in the proceedings being commenced, continued, defended or discontinued.

Under section 178 of the Companies Act, a shareholder may request that a company disclose 'information' held by the company to the shareholder. The company must either provide the information or refuse to provide the information and specify the reasons for the refusal. A company is entitled to a reasonable period to provide the information and may impose a reasonable charge for the service. Without limiting the reasons for which a company may refuse to provide information, a company may refuse to provide information if:

- the disclosure of the information would, or would be likely to, prejudice the commercial position of the company;
- the disclosure of the information would, or would be likely to, prejudice the commercial position of any other person, whether or not that person supplied the information to the company; or
- the request for the information is frivolous or vexatious.

A shareholder who is dissatisfied with a refusal by a company to supply information may appeal that decision to the court. The courts have held that a request for information, when such information may be used as part of a due diligence exercise for a takeover offer, may be declined.

In ***Ayyildiz v Casablanca Sylvia Park Ltd*** [2018] NZHC 2782, the High Court held that:

> the purpose of s 178 is to ensure that those in control of a company, the directors and management, are accountable to shareholders. Accountability is enhanced by allowing shareholders access to company information. Under s 178, there is a wide range of reasons for refusing disclosure of information to shareholders. Some of them are noted in subsection (4) but they are not the only ones. If a company does not co-operate or if it refuses to provide information, the shareholder can come to court to seek orders under s 178(7). On such an application, the court considers whether there are outweighing reasons to justify a refusal of information to a shareholder.

For a company, it may not be as simple as just opposing the application until a Court hearing. In a recent judgment of the High Court in ***Wagner v B Property Group Limited*** [2023] NZHC 1898, in circumstances where no proper reason had been identified for failing to comply with the section 178 request and where the applicant had been put to the expense of applying to the Court and attending a hearing, the Judge was readily satisfied that costs should be awarded in the applicant's favour. The applicant also sought a personal costs order against the sole director of the company.

Law stated - 20 February 2025

SHAREHOLDERS' DUTIES

Fiduciary duties
Do shareholder activists owe fiduciary duties to the company?

Shareholders do not generally owe any fiduciary duties to the company, regardless of the size of their shareholding. Directors who represent a shareholder activist on the board of the target company owe the same duty to act in good faith and in the best interests of the company as all other directors.

Law stated - 20 February 2025

Compensation
May directors accept compensation from shareholders who appoint them?

Board members of listed companies are typically remunerated by the relevant company in accordance with an overall level of compensation that has been approved by the company's shareholders under the New Zealand Stock Exchange (NZX) Listing Rules. Any increase in the number of directors typically results in an automatic corresponding increase in the fee pool to allow equivalent compensation to be paid to the additional director.

However, a director nominee of a shareholder may be separately remunerated by the shareholder under the terms of his or her employment contract or terms of appointment but the director should ensure that they make appropriate disclosure of their interests in the company's interests register as required under the Companies Act.

Law stated - 20 February 2025

Mandatory bids

Are shareholders acting in concert subject to any mandatory bid requirements in your jurisdiction? When are shareholders deemed to be acting in concert?

Under the Takeovers Code, the acquisition by a person (together with that person's associates) of more than 20 per cent of the voting rights in a listed company must be undertaken in accordance with the Code (ie, pursuant to a takeover offer in accordance with the prescribed process set out in the Code or with the approval of an ordinary resolution of the target company's shareholders).

The process for a takeover offer requires a notice of intention to make an offer. The offeror may then send a takeover offer during the period 14 to 30 days after giving their notice of intention to make the offer. However, there is no 'put up or shut up' rule, so the offeror may let the offer lapse and follow up with a further notice of intention to make a takeover offer without being subject to any stand-down period.

The Takeovers Code applies to aggregate holdings of 'associates' (as that term is defined in the Code) but there are generally no restrictions on shareholders agreeing to act in concert provided neither shareholder acting in association acquires shares while their combined shareholdings exceed the 20 per cent threshold and the shareholders comply with the substantial product holder disclosure regime to disclose their relevant interest.

Law stated - 20 February 2025

Disclosure rules

Must shareholders disclose significant shareholdings? If so, when? Must such disclosure include the shareholder's intentions?

Yes. Part 5 of the Financial Markets Conduct Act requires persons who have a 'relevant interest' in 5 per cent or more of a class of quoted voting securities of a listed issuer to make immediate disclosure by means of filing a 'substantial product holder notice' with the NZX and the relevant issuer.

A person must disclose that interest in the prescribed form as soon as the person knows, or ought reasonably to know, that they have become a substantial product holder.

There is then a requirement to disclose any change in the nature of the substantial holding, any movement of 1 per cent or more in the relevant interest held, and upon ceasing to be a substantial product holder.

The rules do not require the holder of the relevant interest to disclose their intentions.

Law stated - 20 February 2025

Disclosure rules

Do the disclosure requirements apply to derivative instruments, acting in concert or short positions?

The Financial Markets Conduct Act specifically provides that if a person has a relevant interest in a derivative over quoted voting security, they are treated as having a relevant interest in the underlying voting security, which must be disclosed if special thresholds or circumstances are met.

The Act specifically also defines a 'relevant interest' to capture interests held by another person if, among other things:

- the other person or its directors are accustomed or under an obligation (whether legally enforceable or not) to act in accordance with the first person's directions, instructions or wishes in relation to the voting security;
- the first person controls 20 per cent or more of the other person; or
- both persons have an agreement to act in concert in relation to the voting security.

A short position itself may not necessarily need to be disclosed but the fact of any borrowing of quoted voting securities or subsequent disposal of those securities may need to be disclosed if any interest at a point in time exceeds 5 per cent of the voting securities on issue.

Law stated - 20 February 2025

Insider trading

Do insider trading rules apply to activist activity?

The Financial Markets Conduct Act includes specific insider trading restrictions. An 'information insider' is prohibited from trading quoted financial products of a listed issuer. An 'information insider' is a person who has material information relating to the listed issuer that is not generally available to the market and knows, or ought reasonably to know, that the information is material information that is not generally available to the market.

It is possible that, through engagement and the provision of information, an activist could become an information insider and it would be appropriate for the activist and target company to enter into a confidentiality and standstill agreement if material non-public information is to be disclosed.

Law stated - 20 February 2025

COMPANY RESPONSE STRATEGIES

Fiduciary duties

What are the fiduciary duties of directors in the context of an activist proposal? Is there a different standard for considering an activist proposal compared to other board decisions?

Directors are subject to a general duty to act in good faith and in the best interests of the company. This applies in the same way in relation to responding to an activist proposal. Generally, this leads to constructive engagement with the activist and consideration of the full or partial adoption of any accretive strategies. The board will also need to consider the provision of information carefully, given continuous disclosure obligations.

Law stated - 20 February 2025

Preparation

What advice do you give companies to prepare for shareholder activism? Is shareholder activism and engagement a matter of heightened concern in the boardroom?

There are no structural defences to shareholder activism that we would typically recommend. Defensive tactics, such as poison pills or rights plans, would generally run afoul of the prohibition on defensive tactics in the Takeovers Code and would likely be inconsistent with the duties of directors to exercise their powers for a proper purpose and in the best interests of the company. Generally, New Zealand's corporate law regime is seen as shareholder-friendly and gives shareholders a number of rights to support the engagement.

Companies should generally have a policy in place that outlines procedures to be followed in relation to an activist approach or a takeover proposal, including consideration of continuous disclosure obligations, contact details for trusted advisers and protocols for engagement – including requirements for a script, and record keeping and confidentiality expectations.

We do not see shareholder activism causing any greater concern in the boardrooms of New Zealand companies than it does in any other jurisdictions.

Law stated - 20 February 2025

Defences

What defences are available to companies to avoid being the target of shareholder activism or respond to shareholder activism?

In addition to good management practices, to avoid being the target of shareholder activism, companies should look to maintain a strong investor relations programme. This includes providing regular market updates and clear communication of the company's business strategy. Investors appreciate opportunities to ask questions on conference calls at the time results are announced. Companies also generally benefit from a good understanding of the interests of significant shareholders on the register and their perspectives (if they are willing to share them).

Monitoring movement in the share register is also important. Particular issues can arise where a particular shareholder is overweight in the company's shares and needs to generate exit options.

Law stated - 20 February 2025

Proxy votes

Do companies receive daily or periodic reports of proxy votes during the voting period?

The company's share registrar normally provides proxy updates daily or upon request to a company in advance of a shareholder meeting. They are typically not disclosed other than the chairman stating at the meeting the number of proxies held and how they are directed to be cast on the resolution. Care needs to be taken with this information in advance of the meeting as it could be considered inside information in relevant circumstances – although institutional investors tend to deliver proxies very shortly before the deadline by which proxies must be received (usually 48 hours before the meeting) so the information may only become meaningful and reliable then and can still be changed, including by attendance in person.

Law stated - 20 February 2025

Settlements

Is it common for companies in your jurisdiction to enter into a private settlement with activists? If so, what types of arrangements are typically agreed?

Private settlements or accommodations of activist agendas are, we understand, much more common than fully fledged public campaigns resulting in shareholder meetings and votes. It is reasonably common to see outcomes with changes in one or more board seats, directors not standing for re-election, and companies agreeingon a compromise position to adopt one or more of the strategies or outcomes advocated for by the activist.

Other than for changes in the directors and management, such outcomes may or may not be publicly announced – and the target company will need to have careful consideration of its continuous disclosure obligations in this regard.

Law stated - 20 February 2025

SHAREHOLDER COMMUNICATION AND ENGAGEMENT

Shareholder engagement

Is it common to have organised shareholder engagement efforts as a matter of course? What do outreach efforts typically entail?

Engagement with shareholders is principally undertaken through continuous disclosure, which is a critical focus of the New Zealand Stock Exchange (NZX) as market supervisor. Many listed issuers have also focused on improving their shareholder engagement in recent years through their investor relations functions and endeavours to provide shareholders with a greater understanding of the business at annual meetings and in shareholder communications. It is not unusual for companies to provide shareholders with access to products or facilitate visits. It is also typical for issuers to hold conference calls to facilitate Q&A at the time of announcing annual and half-year results.

Law stated - 20 February 2025

Shareholder engagement

Are directors commonly involved in shareholder engagement efforts?

Normally, the company's senior management leads any response but, depending on the nature of the proposals – for example, if they concern board or management appointments or changes – independent directors, and in some cases the chair, may also become involved in the engagement.

Law stated - 20 February 2025

Disclosure

Must companies disclose shareholder engagement efforts or how shareholders may communicate directly with the board? Must companies avoid selective or unequal disclosure? When companies disclose shareholder engagement efforts, what form does the disclosure take?

All listed issuers are subject to a continuous disclosure regime under the NZX Listing Rules, which require the immediate disclosure of any material non-public information unless an exception to disclosure applies. It is generally permissible to hold back information that is confidential and concerns an incomplete proposal or negotiation if the objective standard is met that a reasonable person would not expect disclosure. Accordingly, it is possible for most shareholder engagement efforts to play out in private.

It is only when the matter becomes public, such as through a media campaign or open letter, that the company may be compelled to make disclosure through the market announcement platform.

Most issuers would consider a requisition of a shareholders' meeting and the requirement to submit a shareholder resolution as triggering a continuous disclosure obligation and making disclosure to the market.

For these reasons, a company should also require an activist to sign a confidentiality agreement before sharing material information. However, that activist may not want to receive such information to avoid becoming an 'information insider' and thereby being restricted from trading in the target company's shares while in that position.

There is no prescribed form of disclosure, provided that the information disclosed is sufficient to inform the market of all material matters properly. In the case of a demand to call a meeting, this will often include disclosing the form of requisition itself or the text of the resolution proposed.

Law stated - 20 February 2025

Communication with shareholders

What are the primary rules relating to communications to obtain support from other shareholders? How do companies solicit votes from shareholders? Are there systems enabling the company to identify or facilitating direct communication with its shareholders?

Under the NZX Listing Rules, a company is required to disclose all communications it provides to its shareholders through the market announcement platform. However, this does not apply to investor relations materials, personalised letters or dividend and transfer statements. Such requirements do not apply to communications emanating from third parties and third parties do not have the right to post such information on the target company's NZX announcement page. Generally, there are no restrictions on shareholder communications, as long as they are not misleading or deceptive.

Proxy solicitation firms are active in New Zealand and can be seen to operate in relation to some takeovers and other major corporate events for significant companies. In a takeover situation, if the proxy solicitation firm represents an offeror or target company, the Takeovers Panel expects to receive a copy of any script or other communication material, which may also lead to requests from the offeror or target to obtain a copy.

Most shareholders opt to receive electronic communications by email through agreement in writing with the issuer, so it is typical for shareholder engagement to proceed in that manner for shareholders who have agreed to that mode of communication.

Care needs to be taken in relation to proxy solicitation not to become the holder or controller of more than 20 per cent of the voting rights of the target company in breach of the Takeovers Code. In this regard, there is an exemption for proxies appointed after the notice of meeting has been dispatched, provided that the proxy does not pay consideration to receive the proxy.

Law stated - 20 February 2025

Access to the share register

Must companies, generally or at a shareholder's request, provide a list of registered shareholders or a list of beneficial ownership, or submit to their shareholders information prepared by a requesting shareholder? How may this request be resisted?

Significant shareholding positions above 5 per cent in listed issuers are disclosed through the substantial product-holder disclosure regime, which is easily accessed through NZX's website. A listed issuer is also required to summarise these holdings in its annual reports.

Under the Financial Markets Conduct Act, issuers of securities that have been offered to the public are generally required to keep a securities register, make that register available for public inspection upon notice and provide copies of the register to any person on request and payment of any prescribed fee. When a copy of the register is requested, the reasons for the request and intended purpose must be disclosed and the issuer may provide a copy of that statement to the Financial Markets Authority. The Financial Markets Authority may determine that the issuer is not required to comply with the request to provide a copy of the register.

Law stated - 20 February 2025

UPDATE AND TRENDS

Recent activist campaigns

Discuss any noteworthy recent, high-profile shareholder activist campaigns in your jurisdiction. What are the current hot topics in shareholder activism and engagement?

Throughout 2024, there was a significant increase in observable shareholder activism in New Zealand on prior years. This trend is evident across several key themes, including board composition, shareholder litigation, and the somewhat topic of dynamics between council-controlled organisations and their governing councils. Additionally, the New Zealand Shareholders' Association (NZSA) continues to exert influence by expressing its views and weighing in on governance matters. Notably, ESG matters seemed much less of a feature on activist agendas, with a focus on governance and value creation being prevalent.

Board composition

A prominent theme in 2024 was shareholders' assertive involvement in shaping board structures.

Fletcher Building, a company listed on both the NZX and ASX, faced substantial board changes due to shareholder pressure. In February, influential bodies and figures such as the NZSA, Simplicity co-founder Sam Stubbs and Blackbull Research urged the company to overhaul its leadership. The resignation of three directors and its former chair occurred over the following period. These departures underscored the growing influence of shareholders in demanding accountability and transparency within corporate boards.

Another noteworthy example was when, Vista Group, another dual-listed company, encountered board activism from its largest shareholder, Potentia Capital. Holding a 19.93 per cent stake, Potentia proposed replacing two existing directors with its nominees, citing concerns over the company's financial performance and strategic direction. The Vista board unanimously opposed the resolutions, and after 'constructive engagement' with Vista by way of in-person meetings, Potentia stated they could 'see a constructive path forward'. The share price also increased markedly during the period of activism.

Similarly, Agria, the largest shareholder of PGG Wrightson, issued a notice proposed to replace three directors with four of its nominees, prompting the NZSA to counter with its own resolution to prevent Agria from consolidating control. NZSA CEO Oliver Mander described it as 'one of the worst cases of board interference by a majority shareholder in the last few years'. In response to the backlash, Agria withdrew its proposal.

Additionally, the NZSA opposed the re-election of Hallenstein Glasson's long-serving chair Warren Bell and director Graeme Popplewell, citing concerns over tenure. Despite the opposition, both were re-elected with 61 per cent support, and the NZSA acknowledged satisfaction with the company's and directors' overall performance.

These examples highlight the complex interplay between major shareholders and corporate boards, as well as the potential scope for influence by representative bodies such as the NZSA.

Shareholder litigation and regulator involvement

Shareholders also resorted to litigation to address grievances, exemplified by the representative action arising out of the placement of the Du Val Property Group companies

into statutory management. Amidst claims of manipulation, negligence and breach of statutory duty filed against the Financial Markets Authority (FMA), Du Val investors have also filed a claim against the FMA for the anticipating loss of value in their shareholdings, alleging the FMA failed to act with reasonable care when dealing with and/or investigating the Du Val Group entities. The FMA, as the primary regulator of New Zealand's financial markets, plays an important role in ensuring that companies adhere to standards that protect shareholder interests. Recently, Minister for Commerce and Consumer Affairs, Andrew Bayly, has publicly criticised the FMA for being 'too aloof, sitting in the office' and has urged the FMA to engage more actively with industry stakeholders.

Burger Fuel's scheme of arrangement to distribute NZ$4.077 million to shareholders was also subject to shareholder litigation, supported by the NZSA. The funds were raised for a partnership with Subway in the United States for a partnership that did not eventuate, and a minority shareholder, Chris Mason (Burger Fuel's founder) opposed the payout and filed a notice of opposition. Other minority shareholders, as well as the NZSA, also asked to be heard at the hearing on the basis that the capital return may not be in the best interests of the business or the shareholders. The High Court ultimately approved the capital return, but these examples of legal action nonetheless signify a growing willingness among shareholders to hold both companies and regulatory bodies accountable, especially when perceived inaction or oversight failures potentially impact investment values.

Council challenges

The year also saw tensions between council-controlled organisations and their respective councils, particularly concerning financial strategies and asset management. In May 2024, half of the board members of Christchurch City Holdings resigned abruptly, citing disagreements with the shareholding council's decision to prioritise maximising short-term dividends over the board's recommendation to adopt an active portfolio management model focused on long-term investment and debt reduction.

Similarly, Dunedin City Holdings put forward a proposal to sell Aurora Energy, influenced by the Dunedin City Council's desire for higher and more consistent cash returns from its investments. Dunedin City Council voted to retain ownership of Aurora Energy as 80 per cent of submissions received favoured keeping the company under council control. These instances highlight the challenges for local government in balancing immediate financial returns with sustainable long-term planning in public sector investments.

Concluding comments

The landscape of shareholder activism in New Zealand during 2024 reflects a dynamic shift towards more engaged and assertive investors. Shareholders have demonstrated a commitment to intervene to enhance transparency, accountability and strategic alignment in the entities they invest in. This evolving activism underscores the importance for companies and public organisations to proactively engage with their investors and stakeholders to ensure that governance practices meet heightened expectations of accountability and performance.

Law stated - 20 February 2025