

M O R R O W
S O D A L I

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**Shareholder Activism:
When Should the CEO Go?**

INTRODUCTION

Since the turn of the calendar year, Morrow Sodali Australia has witnessed a boom in the frequency of ASX-listed proxy battles, which in almost every case is characterised by the requisitioning of a shareholder meeting to appoint and/or remove non-executive directors. Agitating for board change, having their interests represented through non-executive director oversight, and in some cases, perhaps seeking strategic control without the requirement for initiating a formal takeover offer for shares, are proven to be successful shareholder tactics.

Irrespective of the polarising views that attempt to rationalise the true motivation behind each and every proxy campaign, the fact remains that requisitioning shareholders continue to experience success in exerting their influence through exercising their rights under the Corporations Act.

In this short piece, four individual proxy battles that Morrow Sodali Australia has acted on in 2017 and that share a common thread are profiled: the role of the CEO, the expectation that boards are to hold the CEO accountable for his or her performance, and the CEO's ability to influence the shareholder base to further their own interests.

In other words, when should the CEO go?

- Bellamy's Australia – Jan Cameron was critical of the board's decision to remove the former CEO and voiced this concern in launching a campaign to remove and replace all of the incumbent non-executive directors, which was successful.
- Praemium Limited – upon his termination by the board as CEO, Michael Ohanessian, with the support of some large shareholders, was successful in refreshing the board with director nominees that immediately reappointed him to his former role.
- 1-Page Limited – a substantial shareholder sought board representation through a request to requisition a shareholder meeting that resulted in the immediate resignation of the CEO and co-founder, as well as two non-executive directors. Upon the substantial shareholder obtaining board representation and withdrawing its request for a meeting of shareholders, the former CEO sought to hold a meeting to remove all non-executive directors and replace them with her own nominees. In response, the board sought the removal of the former CEO as a director. The former CEO was unsuccessful.
- Ardent Leisure – after a period of operational underperformance, the former CEO was removed but retained in a newly created position on the same remuneration entitlements and retaining a board seat. The recruitment process and remuneration arrangements for the new CEO were also questioned under corporate governance standards. In response to perceived board failings, a substantial shareholder sought board representation and the appointment of nominees to work alongside the incumbent directors in delivering long term value to all securityholders, which was accepted after considerable resistance and in the final days before a shareholder meeting was to be held to consider the appointment two new director candidates (initially four candidates).

Shareholders inevitably form their own opinions around whether these campaigns may result in unintended consequences, whether the rationale for board change was sufficiently compelling when considering performance and corporate governance practice, and ultimately if the long-term interests of shareholders have been upheld.

In the end there remains only one aspect that cannot be divided by opinion - the results.

BELLAMY'S AUSTRALIA LIMITED

Background

On 4 January 2017, Bellamy's (ASX:BAL) announced that it had received a notice from Black Prince Private Foundation, a 14.48% shareholder, under section 249D of the Corporations Act to requisition a general meeting of the company. Black Prince proposed the removal of four of the company's independent non-executive directors (being Patria Mann, Launa Inman, Michael Wadley and Charles Sitch) and the nomination of four of its own director candidates.

The dissident shareholders expressed their dissatisfaction with the board's performance and stated that the directors they were seeking to remove "do not have the requisite skills and experience to act as non-executive directors".

The timing of the meeting requisition shortly followed significant events at Bellamy's:

- The company received a remuneration strike at its 2016 annual general meeting.
- In December 2016, the company published a 'business update' whereby Bellamy's disclosed that it was experiencing "temporary volume dislocation" due to regulatory changes in China, one of its main markets of operation. As a result, the company experienced a significant decline (~44%) in its share price, which was trading at \$12.13 the day prior to this announcement and closed at \$6.85 on the day of this announcement.
- On 14 December 2016, the company entered into a trading halt pending negotiations with key suppliers and manufacturers in order to determine the impact of those negotiations on its expected financial results, with trading resuming on 11 January 2017.

On 11 January 2017 and upon the company's shares being reinstated to official quotation, the board issued a statement announcing the departure of the CEO, Ms. Laura McBain.

Jan Cameron, one of the proposed director nominees that was later revealed to have close ties with Black Prince, was critical of the board's decision to terminate Ms. McBain's employment. More specifically, Cameron stated that the board was being "stunningly arrogant in not accepting any accountability" and that directors were using the CEO as a "scapegoat". When asked if Ms. McBain might be reinstated as CEO, Ms. Cameron responded: "well, that would be up to Laura".

Director's Recommendations

The Bellamy's board unanimously recommended that shareholders vote against all resolutions proposed by Black Prince.

In recommending against all resolutions, the board expressed its concern regarding the absence of a clearly articulated strategy or plan for the future of the company on behalf of Black Prince, a lack of public company directorship experience for three out of the four Black Prince director nominees, the unclear nature of Black Prince's ownership, and the independent status of Jan Cameron and her associates.

According to the Notice of Meeting that was published on 19 January 2017, the board noted that Jan Cameron and Rodd Peters were the directors and shareholders of the Elsie Cameron Foundation and that there was an expectation that Black Prince would act in accordance with the wishes of the Elsie Cameron Foundation as expressed by Jan Cameron and Rodd Peters.

The board also expressed its concern over governance implications that would arise as a result of these resolutions being passed. Specifically, it was the incumbent board's view that Bellamy's would experience significant loss of corporate knowledge as a result of a change in directors that would negatively impact the company's capability in "delivering long term value to shareholders". In addition, the board highlighted that "Black Prince has not explained how it would address the loss of corporate knowledge which would result from removing four of Bellamy's existing independent directors".

Proxy Advisor Recommendations

Two proxy advisors, CGI Glass Lewis and Ownership Matters, recommended that shareholders vote against Jan Cameron's slate of director nominees, while Institutional Shareholder Services (ISS) recommended in favour of only one of the four proposed directors, Mr. Chan Wai-Chan.

ISS regarded Chan Wai-Chan as "having direct expertise in China" and commented that "there appears to be insufficient representation at board level of a director with direct experience in China to the extent held by Chan Wai-Chan".

By comparison, CGI Glass Lewis and Ownership Matters recommended that shareholders vote against all resolutions. Ownership Matters stated that there was no compelling evidence to suggest that the resolutions were "in the interest of all BAL shareholders, especially given the ongoing questions surrounding control of Black Prince". CGI Glass Lewis commenting that "Ms. Cameron's clear connection to the dissident...introduces the real risk that the current solicitation will result in heavily skewed control of the board". In addition, Ownership Matters raised its concern in regards to the proposed director nominees' independence and experience by stating that they "appear to have no listed directorship experience and their independence is questionable, particularly Jan Cameron who is being put forward as an independent director".

Voting Results

Vaughan Webber, one of Black Prince's proposed director nominees, withdrew his candidacy on 10 February 2017. Mr. Webber did not provide a reason for his withdrawal.

Once the association between Jan Cameron and Black Prince was revealed, the board informed shareholders that Ms. Cameron and entities associated with her and Black Prince collectively held a 17.67% interest in Bellamy's shares.

Shareholders at Bellamy's voted for the appointment of two out of the remaining three proposed director candidates (Chan Wai-Chan with 75.93% of votes cast in favour of his nomination and Rodd Peters with 61.01% of votes cast in favour). Jan Cameron was unsuccessful in obtaining a board seat with 57.77% of votes cast against her election.

Mr. Rob Woolley, chairman of Bellamy's since its formation in 2007, and non-executive director Ms. Launa Inman, both resigned immediately before the vote was held. Shareholders voted for the removal of two company directors (Charles Sitch with 61.24% of votes cast in favour of his removal and Michael Wadley with 61.06% of votes in favour of his removal). The vote to remove the remaining director, Ms. Patria Mann, was not carried, however she would resign as a director on 18 May 2017 and nearly three months following the shareholder vote.

The company announced in March that it was looking to appoint new directors on its board "in due course" while Andrew Cohen was confirmed as the company's permanent CEO.

In May 2017, Bellamy's announced the appointment of a new non-executive director who would also serve as its deputy chairman. In addition, it was announced that recently appointed chairman, Rodd Peters, was being replaced by Jon Ho on the basis that he had a "deep understanding of the Australian and Chinese consumer and health-related markets and expertise in corporate governance".

Share Price Performance

From the date of the general meeting on 28 February 2017 to the date of the publication of this report, the Bellamy's share price has increased 80.5%, versus a 0.2% increase in the S&P/ASX 300 index.

PRAEMIUM LIMITED

Background

On 22 February 2017, Praemium (ASX:PPS) announced that its board had terminated the employment of its CEO and Managing Director, Mr. Michael Ohanessian. The board stated that the decision to terminate Mr. Ohanessian had been under consideration for months prior to the February announcement as the directors ultimately felt that they “could not properly discharge their duties while Mr. Ohanessian remained as Chief Executive Officer.”

In March 2017, the company announced that it had received a shareholder request for a meeting under section 249D of the Corporations Act. The request, which was filed by the former CEO Mr. Ohanessian, his wife and a number of other investors including Paradise Investment Management and Australian Ethical, called for shareholders to vote in favour of removing four of the company’s existing non-executive directors and replacing them with three shareholder nominees. It is worth noting that as of 14 March 2017, the dissident shareholders held approximately 17.28% of Praemium’s issued share capital.

Director’s Recommendations

Praemium’s directors unanimously called for shareholders to vote against all resolutions put forward by Mr. Ohanessian and his supporters.

According to the Notice of Meeting that was published on 4 April 2017, the board considered that Mr. Ohanessian’s dismissal was justified as the former CEO “acted in a way that frustrated the existing directors’ ability to discharge their duty of care and diligence.” The board also disclosed that the CEO frustrated its attempts to obtain information regarding the affairs of the company and that he was also “reluctant to consider the views of others in the company, including members of the Board.” The board had already identified a suitable candidate to replace the former CEO, one who could “lead the company in its next phase of growth and development.”

The board also expressed its concern that should these resolutions be successful, there would be issues around the appropriate separation between the proposed director nominees and executive management. Moreover, the board expressed concern regarding the dissident shareholders’ intentions because, other than reinstating Mr. Ohanessian to his former position as CEO, their proposed strategy for the business moving forwards was largely unclear. Overall, the incumbent board strongly communicated that the dissident shareholders had failed to clearly articulate a compelling case for change and had not proven that the directors targeted for removal had engaged in conduct that warranted wholesale changes to the board.

Proxy Advisor Recommendations

Both proxy advisory firms that issued institutional shareholder voting recommendations for this meeting, ISS and Glass Lewis, recommended that shareholders vote against all resolutions put forward by the requisitioning shareholders.

Glass Lewis stated that there were “sufficient doubts” in relation to the dissident shareholders’ campaign including the absence of strategic vision for Praemium, Mr. Ohanessian’s association with the campaign and the “highly problematic oversight architecture that would result from a successful campaign by the dissident group.” Glass

Lewis highlighted the governance concerns that would arise if the campaign to replace directors succeeded, for example: “the Dissident group has largely eschewed several opportunities to divorce itself from the notion that it operates primarily as an otherwise strategy-free vehicle to reinstate Mr. Ohanessian”.

ISS took a similar perspective to Glass Lewis, that the dissident shareholders’ campaign did not provide extensive information “or presented a compelling case to warrant a wholesale spill of the board”. Should the former CEO be reinstated, ISS questioned the independent classification of the proposed directors and expressed concern regarding the previous conduct of the CEO and his “actions to frustrate the board in its exercise of good corporate governance.”

Voting Results

Praemium’s shareholders voted in favour of the removal of the company’s existing directors and the approval of the dissident shareholders’ proposed nominees. The three proposed director nominees received 53% of votes cast in favour of their election, and four existing directors were removed.

Shortly after the vote results were released to the ASX, the company issued an announcement notifying investors that Mr. Ohanessian was to be re-appointed as Praemium’s CEO. The new chairman of the board Mr. Barry Lewin stated that, “the board has moved quickly to reappoint Mr. Ohanessian under an interim agreement with the objective of re-establishing momentum to Premium and its strategy”.

Share Price Performance

From the date of the general meeting on 12 May 2017 to the date of the publication of this report, Praemium’s share price has increased 5.1%, versus a 1.9% decrease in the S&P/ASX 300 index.

1-PAGE LIMITED

Background

On 15 December 2016, 1-Page Limited (ASX:1PG) announced that it had received a letter from The Trust Company (Australia) Limited as custodian for Merchant Opportunities Fund under section 249F of the Corporations Act to vote on the removal of all directors other than Joanna Riley, Tod McGrouther and Michael Shen and the appointment of Merchant nominees Chris Mews and Mathew Walker as directors.

On 23 December 2016, the company disclosed the resignation of Ms. Joanna Riley as CEO. It was noted in the announcement that Mr. Peter Kent (who was CFO at the time) was to be appointed as Ms. Riley's replacement.

On 23 January 2017, 1-Page announced a series of changes with the resignation of two non-executive directors, Mr. Rueff and Mr. Bosch, "in connection with the reorganisation of the board"; and the appointment of one non-executive director, Mr Andrew Chapman, who was nominated by the custodian of Merchant Opportunities Fund (which at the time had a 9.52% voting interest in 1-Page shares). Concurrent with this director appointment, Merchant provided written notice that it would withdrawal its request for a meeting under section 203D of the Corporations Act.

Mr. Chapman, who founded the Merchant Group in 2011, then gave notice on 27 March 2017 that he intended to introduce a resolution to remove Ms. Riley as a director of 1-Page at a meeting requisitioned under section 249CA of the Corporations Act. At the same time and under section 249D of the Corporations Act, Ms. Riley provided notice that she would seek the removal of four of the current directors: Mr. John Fennelly, Mr. Andrew Chapman, Mr. Tod McGrouther and Mr. Michael Shen.

As disclosed within the Notice of Meeting, Mr. Chapman and the majority of the board thought that the company's continuing strategy was not viable and that cost cutting measures should be implemented in order for 1-Page to survive. Conversely, Ms. Riley stated that 1-Page was at a "very exciting juncture in its strategy in building substantial shareholder value" and that the company's business model was "undermined" by its directors.

Director's Recommendations

All directors, with the exception of Ms. Riley, recommended that shareholders vote in favour of her removal, and against resolutions to remove all directors other than Ms. Riley and appoint replacement directors nominated by Ms. Riley. In recommending against Ms. Riley and the resolutions put forward by her, they argued that given the absence of any sustainable revenue growth, a strategy shift to preserving cash was necessary. They also stated their dissatisfaction with Ms. Riley and senior management, arguing that their "efforts to work with management and Ms. Riley to lower the (cash) burn rate have not been successful and at times actively obstructed." The other directors also argued against the proposed independent classification of Ms. Riley's director nominees, their separation from the interests of the current management team and ability to act in the interests of all shareholders.

Proxy Advisor Recommendations

ISS recommended that shareholders vote in favour of the removal of Ms. Riley from the board, and vote against all other resolutions, being resolutions to remove all directors other than Ms. Riley and appoint replacement directors nominated by Ms. Riley, on the basis that:

- Ms. Riley’s business development strategy is likely to exhaust the company’s cash reserves; and
- It is in shareholders’ best interests to sell the company, noting that “management thus far (have) been largely unsuccessful in generating sufficient recurring income to justify the extent of expenditure”.

Voting Results

1-Page shareholders ultimately voted:

- In favour of the removal of Ms. Joanna Riley from the board;
- Against the removal of the company’s existing directors (except Ms. Riley); and
- Against the appointment of the dissident shareholders’ proposed nominees.

The dissent shareholders received approximately 14% of votes cast in favour of their proposed resolutions while the incumbent directors, with the exception of Ms. Riley, were supported by more than 80% of votes cast against their removal from the board.

Share Price Performance

As of the date of publication of this report, 1-Page shares remain in trading suspension on the ASX.

ARDENT LEISURE GROUP

Background

On 14 June 2017, Ardent Leisure Group (ASX:AAD) announced that it had received a request from Ariadne Australia Limited (Ariadne) and its associates to hold a general meeting of securityholders under section 249F of the Corporations Act. The purpose of the general meeting was to put forward resolutions related to the appointment of Dr. Gary Weiss, Mr. Brad Richmond, Mr. Kevin Seymour and Mr. Andrew Hedges to the board. The requisitioning securityholders were not seeking the removal of any of the existing directors and sought to work in a collaborative manner with the Ardent board.

On 26 July 2017, Ariadne put forward a detailed strategic business plan to “Fix Ardent” and announced its intention of “delivering potentially up to \$1 billion of additional value for all Ardent security holders”. Ariadne was particularly concerned that the Ardent board had presided over a collapse in securityholder value over time, which had been exacerbated by corporate governance failings around the manner in which the replacement of the CEO had been handled, including the former CEO retaining a board position in a newly created role that didn’t fit the business profile and the generous, performance-free remuneration entitlements offered to the incoming CEO.

On 14 August 2017, Ardent announced the appointment of Mr. Randy Garfield (a US-based director) as an independent non-executive director. The appointment of Mr. Garfield was perceived to be a defensive manoeuvre in response to the agitation by Ariadne.

In response to feedback that it had received directly from institutional shareholders, Ariadne announced on 18 August 2017 that “it is now appropriate to withdraw two of our four director nominees”, given that the Ardent board had now “acknowledged that board renewal is warranted”.

Director’s Recommendations

On 14 August 2017, Ardent responded to Ariadne’s proposed director resolutions and recommended that securityholders vote against all resolutions. Further, the board stated that:

- Ardent is already executing a plan to restore value that is more comprehensive than the initiatives presented by Ariadne.
- The Ardent board is focused on long term performance across the portfolio and the company has delivered a five year TSR of 104.5%, outperforming the ASX200 return of 37.7% over the same period.

Proxy Advisor Recommendations

ISS recommended against all director nominee resolutions proposed by Ariadne and stated that “the dissident securityholders have not sufficiently demonstrated that change is superior to the current board agenda of board refreshment and strategic change in line with advice received as part of its strategic review.”

Glass Lewis recommended against all resolutions. It noted that although Ardent had experienced a significant loss in market value, it has “responded amicably with an updated, comprehensive strategic and operational plan coupled with necessary and thoroughly-vetted changes in senior executive management positions and at the board level”. Further, it believed that Ariadne’s two proposed director nominees “have experience that would not be additive to the refreshed board.”

Ownership Matters recommended in favour of the election of Mr. Brad Richmond to the board, with a view that the requisitioning shareholders owned approximately 10.9% of Ardent’s shares and that his skills and US-based experience would be complimentary to the board and the company strategy. Ownership Matters recommended against the election of Dr. Weiss, but noted that it would be “open to Dr. Weiss to nominate as a director for the forthcoming AGM, by which stage investors would be able to assess his candidature compared to the US director that Ardent has identified”. It also took the view that if the syndicate’s holding in Ardent shares were to increase, there would be a “strong case” for Dr. Weiss’ future appointment to the board.

Voting Results

On 3 September 2017 and in the hours immediately following the shareholder voting deadline, it was agreed by both parties that the shareholder meeting would not proceed and that Dr. Weiss and Mr. Richmond would be invited to join the Ardent board effective immediately. The chairman of Ardent stated in its supporting announcement that “we are confident that Dr. Weiss and Mr. Richmond can bring assistance and additional insight to the board. We are pleased that Ardent can now focus on executing its stated strategy to drive performance”.

Share Price Performance

From the date of the appointment of Ariadne’s candidates to the Ardent board on 4 September 2017 to the date of the publication of this report, Ardent’s share price has decreased 10.9%, versus a 0.3% increase in the S&P/ASX 200 index.

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