Activist shareholders shareholders' champion or profiteer?

Activist shareholders agitate to influence a company's performance or control by exercising their rights of share ownership. Some shareholder activism is beneficial for remaining shareholders as it can seek to align the interests of shareholders with that of board and management, improve company returns, improve corporate governance or rectify flawed strategies.

However, some activists go as far as campaigning to sell the entire company or dispose of its assets. Arguably some activists seek to prioritise short-term profits at the expense of long-term growth strategies and preventing such activists from exercising disproportionate control can be an expensive, costly and time-consuming exercise for companies. Hedge fund activist shareholders have previously targeted prominent companies like Apple, eBay, Dell and Sony.

Activism in Australia

Shareholder activism is not limited to the United States. In Australia we have seen an increase in activist activity from the professional or 'for-profit' activist investor in the last few years including:

- In 2014, US activist fund Lone Star Value Investors failed in its attempt to overhaul the board of Perth-based oil and gas company Antares Energy Ltd. Holding 5.3% of Antares, Lone Star called an extraordinary general meeting to remove two employee directors of Antares and elect what it describe as 'five highly qualified, independent directors whose experience is relevant and complementary to the board members.' Lone Star envisaged improvements to corporate governance and maximising value for the benefit of shareholders, however their approach was seen as an attempt to gain effective control of the company without paying shareholders for such control. They used direct communication, press and media interviews, articles and a targeted website as part of the approach. They also threatened court proceedings.

- In 2013, after a number of failed sale discussions an New York based hedge fund Coastal Capital International bought a 5% stake in Billabong and requisitioned a meeting to replace its entire board (aside from founders Gordon Merchant and Colette Paul) with their own representatives. They also sought to amend the constitution and requested a shareholder meeting to vote on issues surrounding the companies refinancing plans. While the resolutions were rejected, within a week of the initial acquisition the company's share price had rose 52%.

Activism set to rise

Australian markets are likely to see a continued increase in plays by shareholder activists, whether for short or long term goals, as Australian law contains numerous mechanisms that could be exploited for shareholder activist tactics, for example:

- a 5%t stake in a company allows a shareholder (or shareholders) to call a general meeting, seek the removal of directors and propose resolutions;
- the entire board of directors can face re-election at a spill meeting if 25% of shareholder votes are against the remuneration report for executives at consecutive general meetings under what is called the "two-strikes rule."
- although used rarely, a shareholder has a statutory right to bring an action on behalf of the company against the company for wrongs suffered by the company under Part 2F.1A of the Act; or
- a formal takeover bid can be made by offering to acquire all shares of shareholders in a company on the same terms.

What do Australian listed companies need to do?

Good governance and good practices not only benefit the company overall but all make companies less vulnerable to attempts by activists to exercise disproportionate control. However, all companies should be aware of trend in activism and prepare for activist interest. Companies should be asking:

You must also comply with all obligations associated with holding an AFSL, including:

- Are we vulnerable to an activist attack? Are we performing well?
- Who are our shareholders? What are their priorities? Does our share register include hedge funds, strategic investors, institutional investors or not-for-profit groups?
- How is our board travelling? Is our remuneration structure best practice? Do we have a board succession plan?

- Do we have a good relationship with our shareholders? Do we communicate regularly with them and
- in a clear and simply way? Do we disseminate correspondence to shareholders regularly? Is this information accurate, fair and balanced?
- Do we have corporate governance policies and procedures in place?
- Do we have a communications team?
- Do we have a communications plan?
- Do we have an activist response plan?
- Do we have a takeover response manual?

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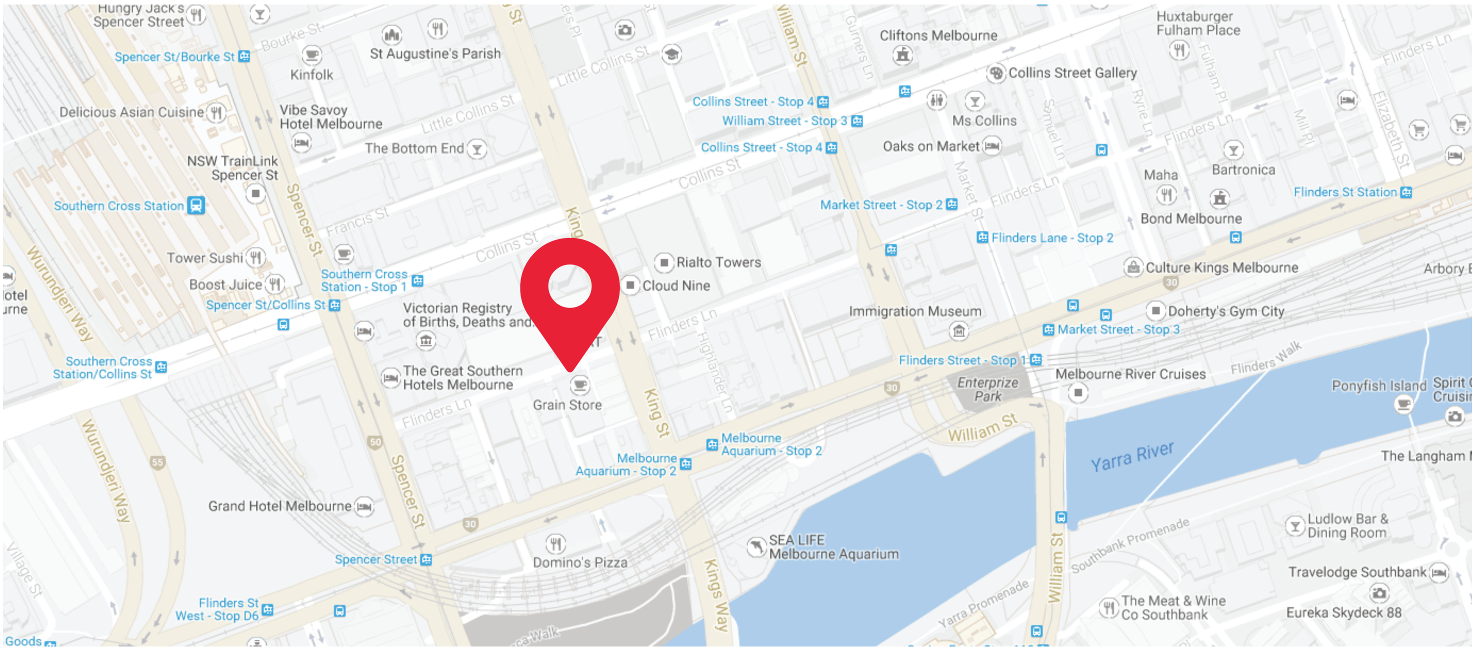

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