

BLAW20001
CORPORATE LAW

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Corporate Groups

Holding companies and subsidiaries (**s46**)

- Controls the composition of the first body's board

Related bodies corporate (**s50**)

Controlled entities (**s50AA**)

- An entity controls a second entity if the first entity has the **capacity** to determine the outcome of decisions about the second entity's financial or operating policies: **s50AA**
- It does not need to be shown that they did actually determine the outcome

Notes

- A company could be a controlled entity without being a subsidiary

Internal Governance Rules (IGR)

S134 provides that companies can use their own rules (constitution), or use replaceable rules.

Replaceable rules don't include different classes of shares, therefore we need a constitution to issue shares with different rights attaching to them.

Replaceable Rules

A company may choose to have its internal management governed by the replaceable rules set out in the CA:

- They apply to a company unless displaced or modified in accordance with **s135(2)** by operation of **s135(1)**.
- **S135(1)** states that replaceable rules do not apply to single director/shareholder companies
- **S135(3)** a failure to comply with the replaceable rules is not a contravention of the Act.

s141 - Replaceable rules set out.

A company will need a constitution to outline rights of shares if more than one class exists.

Not all replaceable rules apply to all companies

- **S249X** – mandatory for public, replaceable for proprietary
- **S203C** – RR for proprietary companies only. **S204D** for public
- **S254D** - (pre-emption) is a RR for proprietary companies only

Constitution

Instead of relying on replaceable rules, a company may adopt a constitution.

- Can be done when company is registered, or later: **S136(1)**
- Company can write some or all of its own rules: **s136(2)**
- Adopting, amending, or repealing a constitution after registration requires as special resolution of members: **s136(2)**. (**S9**: Special resolutions require 75%)
- The constitution can entrench a rule that requires something to be met in addition to a special resolution: **s136(3)**. A provision such as this, also known as an entrenching clause, cannot be altered unless it itself is satisfied: **s136(4)**

Enforcement

A company's internal governance rules operate as a contract, created by statute.

S140 is limited as it provides for the internal governance rules to have effect as a contract only:

- (a) Between the company and each member
- (b) Between the company and each director/secretary
- (c) Between each member and other member

Eley vs Positive Govt Security Life: The court held that the statutory contract is a deemed contract only as between parties referred to in the section and in their capacity as that party. Thus there is no contract between the company and employee. She can sue on her employee contract, but she was sacked by good reason and therefore unlikely to claim breach.

Rayfield v Hands: In interpreting the replaceable rules as they apply to a particular company, the courts would rely on the principles of contract law. This includes interpreting the internal governance rules to give business efficacy.

The company's civil remedies

Breach of general law duties can lead to the following action by a company:

Injunction to stop doing something or to undertake a particular action

Compensation or damages to compensate the company for the loss it has suffered because of the breach of duty

Account of profits to the company – even if the company has not suffered any loss as a result of the breach of duty. *Regal (Hastings) Ltd v Gulliver*

Rescission of contract – termination of contract, the parties are returned to the position they held before the contract was entered into.

Constructive trust – the company can seek a court order that the director holds the property on trust for the company.

In applying these remedies there are 3 principles to consider:

- The company must not delay in bringing action
- Company must not be guilty of misconduct in dealing with director
- If company later agrees to transaction and has full knowledge, then cannot sue.

It is possible for a company to obtain compensation for breach of statutory duties (S1317J allows this). Can obtain any profit made by the director or officer **where that profit resulted from the contravention of the civil penalty provision** or have the person compensate the company for any loss/damage it suffered as a result of the contravention **S1317H**.

Can the court forgive the director?	Can the company (members) ratify the breach of duty by the director?		
YES	Breaches of general law duties		Breaches of statutory duty
	Yes	No	NO
Requirements: <ul style="list-style-type: none"> • Officer acted honestly, and • Considering all circumstances, it would be fair to excuse the officer from liability Court is unlikely to grant relief if person received financial benefit or holds company property	Requirements: <ul style="list-style-type: none"> • Ordinary resolution of members in general meeting • Members must be given full information • Result is director or officer cannot be sued by the company 	It is <ul style="list-style-type: none"> • Oppressive • Company is virtually insolvent (Kinsella) • Breaches equitable limitation • Takes away a members personal right • Where the company property is being taken by directors or majority members • Where directors are acting for an improper purpose 	Company can seek for compensation remedy – S1317H <i>Miller v Miller</i>
Statutory breach: s1317S(2) (e.g. civil penalty provisions)	Company loses right to bring general law actions, but not statute: s1317h		
General law breach: s1318			

Members statutory remedies

- Oppression **S232**
- Court-ordered winding up **S461**
- Statutory Injunction **S1324**
- Variation of class rights **S246D**
- Procedural irregularity **S1322**
- Breach of constitution and thus breach of contract **S140**

Oppression

S234 outlines who can apply for an order

An oppression action can be brought by

(a) a member of the company, even if the oppression action relates to an act or omission that is against:

- (i) The member in a capacity other than a member, or
- (ii) Another member in their capacity as a member, or

(b) a person who has been removed from the register of members because of a selective reduction of capital

(c) a person who will cease to be a member if the oppression action relates to the circumstances in which they cease to be a member

S232 allows the court to provide a remedy to a member where the court finds that:

- (a) The conduct of the company's **affairs** (S53: affairs include control, transactions and dealings, finances and property of the company and internal management)
- (b) An actual or proposed act or omission by or on behalf of the company, or
- (c) A resolution, or proposed resolution, of members or a class of members, is either:
 - (d) Contrary to the interests of the members as a whole, or
 - (e) Oppressive to, unfairly prejudicial to, or unfairly discriminatory against a member or members whether in that capacity or in any other capacity

NOTE: if the member sold all their shares, they cannot apply for oppression!

Tests

There are two main tests for testing for oppressive conduct

- Was the directors' decision one that no board of directors acting reasonably would have made? If so, the directors have acted oppressively in breach of S232: *Wayde v New South Wales Rugby League Ltd.* (Removal of team from competition was not oppressive as they acted in the best interests of the league)
- It is necessary to look at the unfairness to the member (not enough to simply be 'prejudicial') *Thomas v HW Thomas* (policy of low dividends not oppressive). However, it could be oppressive if they pay low dividends and instead pay themselves a higher wage instead.

Examples of oppressive conduct

- ▶ Diversion of business opportunities. Divert business opportunities to themselves or other companies they control
- ▶ Improper exclusion from management. If the minority member has a reasonable expectation of continued participation in management, then the removal of the minority member will be oppressive. Depends whether the member has a 'reasonable expectation'
- ▶ Unfairly restricting dividends. Disagreement about the amount of dividends the company should pay to its members.
- ▶ Oppressive conduct of board meetings. For example, restricted speaking time, refused to provide board with proper budgets, made major decisions without reference to the board.

- ▶ Issuing shares to reduce a member's ownership in the company (share issue for an improper purpose *Kokotovich Constructions v Wallington*). Main purpose is to reduce the proportionate holdings of a particular member
- ▶ Failure of directors to act in the interests of the company *Re Spargos Mining NL*

S233(1) Allows the court to choose from a broad range of remedies where the court finds there has been oppression:

- (a) Court ordered winding up
- (b) Modify or repeal the company's constitution *Re Spargos Mining NL*
- (c) Regulating the company's affairs in the future *Re Spargos Mining NL*
- (d) Purchase of oppressed member's shares by a member or by the company
- (h) Appointment of a receiver
- (i) Restrain someone from doing something (injunctions)
- (j) Requiring someone to do something (injunctions)

Statutory injunction

Under **s1324**, a court has the power to grant an injunction to stop a person from engaging in conduct that contravenes the CA.

Must be a breach of a statutory law. A failure to comply with replaceable rules is not a contravention of the act: **S135(3) thus s1324 does not apply**

S1324 outlines who can apply for an injunction

- ASIC
- A person whose interests would have been affected by the conduct, which contravenes the CA.
 - Regarding breach of directors' duties, whether a member can bring a statutory injunction is of controversy. *Mesenberg v Cord Industrial Recruiters Pty Ltd* state that a member cannot apply for an injunction under s1324 as ss180-183 are civil penalty provisions and thus enforcement of a breach is done by ASIC. Contrarily, *Airpeak Pty Ltd v Jetstream Aircraft Ltd*, and *Emlen Pty Ltd v St Barbara Mines Ltd*, state that a member can apply for an injunction under s1324 (this is the better view).
- A creditor may be able to apply where their interests have been affected.
 - Contravention is automatically taken to affect the interests of the creditor if the insolvency of the company is an element of the contravention
 - E.g selling company assets at below market value *Allen v Atalay*
- **S1324(10)** allows the court, **where it has power to grant an injunction against a person, to order that person to pay damages in addition to**, or in substitution for the grant of an injunction.

Member's personal action

Personal rights in Contract	Personal rights under statute	Personal rights under general law
<p>From an express contract</p> <ul style="list-style-type: none"> Terms of issue of shares Statutory contract s140 Company's constitution and replaceable rules have effect as contract Can only be enforced in their capacity as a member <ul style="list-style-type: none"> E.g. Pre-emption S254D(1) is a members personal right to be offered shares. Can obtain a court order to enforce it. <p>From an express contract -Eg the terms of the issue of the shares - From the statutory contract -s 140 - company's constitution and the replaceable rules have effect of a contract Can only be enforced in their capacity as a member eg s RR 254D(1) pre-emption rights of members of Pty Ltd companies</p>	<ul style="list-style-type: none"> A member who holds at least 5% of the votes that may be cast at a general meeting may call a general meeting: S249F Request the director to hold a meeting 249D A member who holds at least 5% of the votes that may be cast on a resolution has a right to give a company notice of a resolution that the member proposes to move at a general meeting: S249N A member of a public company has a right to a proxy: S249X A member has the right to inspect the company's register of members free of charge: S173 Inspect minutes S251B 	<ul style="list-style-type: none"> The right to notices of meeting which provide adequate information about matters that will be discussed at the meetings: <i>Kaye v Croydon Tramways Co</i> The right to vote at meeting of members unless the constitution of the company takes away that right: <i>Pender v Lushington</i> The right to have voting rights protected against improper action of directors, such as a share issue which is undertaken for an improper purpose and which dilutes the member's shareholding in the company: <i>Residues Treatment & Trading Co Ltd v Southern Resources Ltd</i>

If directors or other members of the company attempt to take away any of these rights, the member can commence legal action to enforce the right.

Member's derivative action

Under **S236**, the court must permit someone to bring a statutory derivative action because due to it being owed to the company, the company is generally the one that enforces the duty. Only bring the SDA if the company is hurt – generally if diverting business opportunities, stealing corporate funds.

S236(1) A person may bring proceedings on behalf of a company, if:

(a) the person is

(i) a member, former member, or

(ii) an officer, or former officer

(b) the person is acting with leave granted under **s237**

S237(2): Criteria for leave

(a) it is probable that the company will not itself bring legal action, and

- (b) the applicant is acting in good faith, and
- (c) it is in the best interests of the company that the applicant be granted leave, and
- (d) there is a serious question to be tried (is it something that is likely to succeed? i.e. will it waste my time to allow them to bring it)

If the court grants leave, then the person may enforce the duty owed to the company, which opens up the remedies which are available to companies (civil remedies + s1317H).

Transacting by companies

Separate legal entity *

Contracting Directly

The authority for a company to enter a contract directly comes from resolution of the board.

This includes generally two resolutions:

- A resolution that the company will enter the contract. This gives 'substantive authority'.
- A resolution authorising the execution of the relevant documents. This gives 'formal authority'.

Executing with a common seal S127(2) – Seal is fixed and witnessed by:

- (a) Two directors,
- (b) One director and the company secretary, or
- (c) If the sole director is also the sole company secretary – that director.

Executing without a common seal S127(1) – needs to have the document signed by:

- i. Two directors,
- (b) One director and the company secretary, or
- (c) If the sole director is also the sole company secretary – that director.

Contracting through agents

There are 2 types of authority an agent may have:

- Actual authority – Express or Implied, or
- Apparent authority

Express Actual Authority: Generally arises in two ways

- A provision in the Corporation's Act or the company's constitution
 - E.g. s198A gives the board of director's power to manage, direct the company.
- By the board of directors delegating its powers (or another company agent with actual authority)
 - E.g. the company can appoint a CEO (managing director) under S198C

Implied Actual Authority: Generally arises by implication from the things the principal says and does. Included in "things the principal does" are:

- Appointing someone to a certain position
 - Implied actual authority of the CEO
 - IAA to "do all such things as fall within the usual scope of that officer" *Hely-Hutchinson v Brayhead Ltd*
 - The usual scope of a CEO's power will depend on what is customary or usual for a CEO in a similar company
 - Implied actual authority of other executive officer
 - May have some IAA depending on what is usual or within the scope of that position
 - Implied actual authority of a director acting alone
 - If the company has more than one director, a director acting alone has no IAA to bind the company. *Brick and Pipe Industries Ltd v Occidental Life Nominees Pty Ltd*. That is, unless the authority has been expressly granted by other directors.

- Implied actual authority of chairperson
 - Where the company has more than one director, the chairperson has no IAA: *Hely-Hutchinson v Brayhead Ltd*
 - Implied actual authority of company secretary
 - Only IAA on administrative matters
- Otherwise acting to give the person authority, including through “acquiescence”
 - If the board knows that someone is purporting to represent a company and does nothing to stop that, then the board has “acquiescence”. I.e. ratifying past exceeding of authority.