

Voting

- RR s250E: one vote/share for members
- Preference shareholders' right to vote depends on their defined class rights, they don't have control right to vote for change of directors and constitution, unless CA gives them right to vote (i.e. s246C(6) – variation of preference share)
- s249Y: voting by proxies
- s250J & s250K: voting by show of hands and poll
 - ✓ Poll takes into account your % of holding interest
 - ✓ Show of hands only consider by hands (not consider % share), this is a cheap and quick way
 - ✓ Member can immediately demand a poll after show of hands

Decision-making without a meeting

- s249B: for a single member company, resolution is passed by the member recording and signing it
- s249A: Proprietary companies may use 'circulation resolution' ('flying minute'), where all members entitled to vote must sign an agreement to resolution: 100% resolution

Members complain for Procedural Irregularities in Meetings– s1322 (p174)

- s1322: outcome of meeting may be valid (automatic validation) despite some 'procedural irregularity' (defined by s1322(1)(b): it includes a) absence of quorum or b) a defect, irregularity or deficiency of notice or time) unless court invalids it due to it has caused **substantial injustice that cannot be remedied** s1322(2). (can be applied to both director and members' meeting)
- Depending on the situation, if it's unanimously voting then it's unlikely for court to invalidate the outcome. Or if you own 5% share and didn't get notice, court won't invalidate, as 95% members vote to pass special resolution. But if you own 20% share, then you may ask court to invalidate outcome, as you can argue that if you show up in the meeting, there's high chance of you are able to get 25% vote to block resolution.
- s1322(6): court can valid an 'invalid' act, matter, thing or proceeding if:
 - ✓ it's procedural in nature
 - ✓ the person acted honestly
 - ✓ it's just and equitable to make the order
 - ✓ no substantial injustice
 - ✓ onus on the person asserting validity
 - ✓ *Weinstock v Beck* (p176)

Topic 3: Restriction on Member Decision Making

- Members are allowed to exercise voting rights in self-interest (even if they're directors)

The Equitable Limitation (p186)

Case 1: Involving constitutional amendments (GAMBOTTO established the two categories)

- Even where s136 is complied, there're limits placed with amendment due to Equitable Limitation
 - 1) **Category 1:** amendments to allow expropriation of share of minority or valuable proprietary rights attached (i.e. voting rights) to the shares
 - ✓ **Requirement 1:** Proper Purpose (DIFFERENT to proper purpose under s249Q) where the purpose of the amendment is to prevent significant detriment done to the co because of the minority, **such as:**
 - Minority SH is competitor
 - Removal of member is necessary to allow company to continue business operation
 - Company's commercial interest is NOT proper purpose (Gambotto)
 - ✓ **Requirement 2:** No oppression, need to be both
 - Procedural fairness: the way you do expropriation is appropriate, full disclosure of information, independent valuation
 - Substantive fairness: the outcome of expropriation is appropriate, price is fair but market value is not always the only indication of fair price
 - 2) **Category 2:** amendments giving rise to a conflict of interest
 - ✓ Only valid if it's done for company's purpose (more broadly defined than cat 1, it can include for the commercial interests of the co) AND no oppression of minority shareholders

- Gambotto doesn't apply where statutory reduction of capital: *Winpar Holdings v Goldfields Kalgoorlie*

Case 2: Not involving constitutional amendments

- E.g. majority unwilling to sue where they're alleged wrongdoers: *Blala v Mallina*; Taking co's property where the members vote not to sue outsider: *Menier v Hooper's Telegraph Works (p186)*

Consequence for Breach of Duty

Company Remedies – Breach of general law duties

- Injunction to stop further action (stop order)
- Compensation or damages: common for breach of care = negligence
- Account of Profits: company doesn't need to suffer any loss, it's where directors have gained profit then the director needs to give the profit back (*Regal (Hastings) p320*)
- Rescission of Contract: undoing a contract, if an innocent outsider is involved then contract can't undo
- Constructive trust: where the director is ordered to hold the property on trust for company, so he can't sell and need to return back to company upon request.

Members' Remedies

- Apply to both where there's a breach of officers' duty and where there's NO breach of officers' duty (e.g. harm by majority shareholders to minority)

Statutory remedies:

- Oppression s232
- Court-ordered winding up s461
- Statutory injunction s1324, different to the general law remedies for company
- Variation of class rights s246D
- Procedural Irregularity s1322

Oppression remedy – Pt 2F.1 – MEMBERS ONLY REMEDY

- **s232(a)-(c)** (very broad coverage of actions, you don't need a breach of an act but it will help): if
 - a) the conduct of the company's affair (very broad, this can apply to breach of act, replaceable rule and any other constitution of the company), or

- b) an actual or proposed act or omission (i.e. not sending S/H the content of the meeting) by or on behalf of the company, or
 - c) a resolution, or a proposed resolution, of members or a class of members (note: this overlaps with class variation s246D)
- where the conduct complained of is either s232(d) & (e):
 - ✓ Contrary to the interests of the members as a whole (i.e. depriving profit from company, breach of directors' duty), or
 - ✓ Oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members (note: the standard to prove for complain by single shareholder has a much higher standard than member as a whole)
- s234: s232 is available to
 - ✓ (a) a member, even if the oppression relates
 - The member in a capacity OTHER THAN a member
 - Another member in their capacity as a member
 - ✓ (b) a person removed from the register of members because of a selective capital reduction or oppressive behaviour
- Tests for Oppression remedy:
 - ✓ *Wayde v NSW Rugby League* (p333): was the decision made by the director a decision that no board of directors acting reasonably would have made? In this case, it wasn't unfairly prejudicial, as it was for the best interest of the club
 - ✓ *Thomas v HW Thomas* (P334): look at the unfairness to the member – not enough just to be 'prejudicial'. We are looking at how the decision is made not just the effect. In this case company with a consistent conservative dividend payout policy can maintain its policy, as majority of shareholders are happy with this, certain members who disagree can't say this is unfairly prejudicial.
- Examples of oppressive conduct (p334-338):
 - ✓ Diversion of business opportunity, can brought by ASIC, company and members
 - ✓ Improper exclusion from management (*Hoggy v Dymock* p335)
 - ✓ Unfairly restricting dividends (changing high dividend policy to low for an improper purpose)
 - ✓ Share issue for improper purpose (*Kokotovich Construction v Wallington* p336)
 - ✓ Breaches of directors' duties, this gives member rights to sue directors for breach (*Re Spargos Mining NL* p336)
- Orders Court can make 233: any order 'it thinks appropriate', for examples:
 - ✓ Winding up (a)
 - ✓ Regulating the company's affairs (c)
 - ✓ Purchase of oppressed member's shares (d)
 - ✓ Restraining someone from doing something (i)