

## General Statements:

- **Advice ASIC** - ASIC can take criminal and civil penalty action. The outcomes are specified under the Act - fines and imprisonment for crimes (see Sch 3) and disqualification, pecuniary penalty and compensation for a civil penalty breach.
- **Advice the company** - the co can seek compensation for a civil penalty breach (1317H, 1317J), can seek a statutory injunction for contraventions of the Act (1324) and can apply for general law remedies for general law duty breaches.

## What can members do if they are unhappy with board decisions:

- Talk about how directors are sovereign when making decisions in their respective scope, and hence is acting for the company
- Members cannot interfere with powers of the board (Automatic Self-Cleansing v cunninghame and John Shaw & Sons case)
- They have one of these 3 options:
  - o Vote the board out (S203C Proprietary) (S203D Public), requires only a ordinary resolution
  - o Sell their shares (Not realistic for small companies)
  - o Change S198A to limit board powers, requires a special resolution
- List all 3 options, then argue that it would be easier to kick the board out than change the resolution since the resolution threshold is lower
- **Removal of director always requires a meeting to be called, therefore elaborate on all the required conditions when calling for a meeting, S249H, S249L, S249Q**

## Amending Company's Constitution:

- Has a special resolution been approved? (136(2))
- Are there additional requirements (Entrenching rule) set out in the constitution to be complied with? (136(3))
- Is the attempt to amend the constitution being done by the majority shareholders in breach of the equitable limitation? If so, go to "bullying by majority shareholders on minority.
- Procedural Irregularity?
- Does the amendment result in any bullying on minority shareholders? If it does then throw in Gambotto

Constitution & RR operates a contract between S140: [cannot be enforced by outsiders]

- **Company and each member**
- **Company and each director and company secretary**
- **Member and each member**

Member is bound only in its capacity as a member. Example: If company's internal governance rules purported to impose some obligation on a person in their capacity as an employee and that person happen to be a member, the company cannot use the person's status as a member to enforce the internal governance rules against them in their capacity as employee. *Eley v Positive Govt Security Life*

### Procedural Irregularity:

- Procedural irregularity (S1322)(2) does not invalidate the proceeding unless the court is of the view that the procedural irregularity has caused substantial injustice that cannot be remedied by any court order
- It covers:
  - o Absence of quorum at meeting of directors
  - o Irregularity or deficiency of notice or time
- Onus is on the person wanting to invalidate the irregularity to bring it to the court
- Does it amount to substantial injustice?
  - o If it amounts to substantial injustice, then ask:
    - **Would there be a difference** to the outcome if there was no procedural irregularity?
    - The substantial irregularity must flow from the irregularity itself, not the ultimate outcome (*Powlaka v Heven* case – no substantial injustice)
    - Include things like “There was no indication that if not for the procedural irregularity, the person was able to obtain enough support to block the resolution”
- S1322(6) – Court will not invalidate as long as it is procedural, the person acted honestly, it is just and equitable and no substantial injustice
- Can be applied in (Automatic Validation):
  - o Calling of Member’s Meeting (Non-receipt of notice of meeting)
  - o Member participation
  - o Passing of resolutions
- Then look at S1322(4) for what orders the court can make

### Removing director:

- Directors cannot remove director in public company (203E)
- S203D – Members can by resolution remove director.
- S203D(2) – Notice of intention to move resolution for approval of director (2 month before meeting is held)
- S249C – Members have the power to call a meeting.
- S249H(3) – Need at least 21 days to remove director under S203D.
- S249J – Notice must be given to director and members individually.
- S249L – Contents of the notice

### Calling of member’s meeting:

- Was the agenda/resolution something that the members had no power to pass on in the first place? (*NRMA v Parker*)
- According to S249Q, the holding of a meeting must be for a proper purpose. (*NRMA v Scandrett*)
- If it was done to amend constitution, then it falls within scope of shareholders, elaborate on S136(2) giving members right to repeal its constitution
- Directors can call member’s meeting (S249C). Directors call a meeting when requested by members with 5% of the votes (S249D). Members with more than 50% votes can call a meeting if directors did not call (S249E). Members with 5% can call a meeting but pay for the expenses (S249F) Court order a meeting (S249G).
- Were the notice requirements being met?
  - o **Who** is to receive the notice? (S249J) says that notice must be given to every member and director.
  - o How far/**time** in advance? S249H(1) required 21 days. But S249H(2) - time period may be reduced, by agreement of member’s holding at least 95%

- S249T (1) – Min quorum is 2 members. S250K – Voting by poll
  - Does the scenario fall into any of the exceptions of S249H(3) – removing director or (4)?
- What must be included in the notice? Elaborate on what must be included in the notice. S249L contains the contents required. But there may be special cases:
  - Related party, info from S219
  - Share buy-back, info from S257C
- Was the information full and fair? (*Devereaux Holdings Pty Ltd v Pelsart Resources*)
- Members have a right to receive truly informative notice of meeting (*Kaye v Croydon*)
- Was the issue being considered set out in the notice? If was not, then cannot be discuss, but there are 4 exceptions (S250R):
  - Consideration of financial report
  - Election of directors
  - Appointing auditor
  - Fixing auditor's remuneration
- Any irregularities in the proceedings do not mean that it is invalid. S1322 says that unless it has caused **substantial injustice** that **cannot be remedied**. Therefore this is called automatic validation. Go to "Procedural Irregularity" section.

What can members do?	
136(2)	Changing of constitution
S173	Inspect company's register of members
198A(2)	Directors can exercise all power except those in constitution
201G	Appointing a director
202A	Deciding director remuneration
203C	Removing director in proprietary company (50%)
203D	Resolution to remove director in public company (50%)
246B	Varying of class rights
S249F	Call a general meeting
S249N	Member can give notice to propose to move at the next meeting
S249X	Attend and cast a vote at meeting
S251B	Inspect minute books of meeting
S208	Approve financial benefit
S260B	Approve financial Assistance
S224	Approve RPT

### Variation of Class Rights:

- If the variation is caused by issuing new shares, and company is proprietary, then see if pre-emption apply (S254D)
- The list in the table are types of variations section covered in S246C, go to the section and select the one you have identified
- Elaborate on which class is being *directly* varied and which class is being *indirectly* varied
- (S246C(5)) allows the issuing of new share not to be a variation of class rights if a special resolution was done to provide for the rights in the company's constitution or lodged with ASIC
- Is the procedure for variation set out in the constitution?
  - If yes, S246B(1) says that you have to follow those procedures
  - If no, S246B(2) says you have to obtain the necessary resolutions required on the right hand side of Table 7.1 (pg143)