

What are S.H.'s options? Members' **statutory** remedies

Individual member may commence legal action where the member believes he has been oppressed or unfairly discriminated against.

(D refuse to pay dividends, divert business opportunities, issue share to self with objective of becoming majority or reducing proportion of shares of members)

- Variation of class rights: set aside **S 246 D** **only use when all appropriate votes were taken but you were out voted and own >10%. If the co ignore the variation of class rights and did not have the votes, then it is "oppression"**

- Procedural irregularity **S 1322**

Tiny breach

- Oppression remedy **S 232**

Court provide remedy for

1. in respect of:
 - The conduct of the co's affair, or
 - An actual or proposed act or omission by or on behalf of the co. (can be D, or officer or S.H., co intends to do or not to do)
 - A resolution, or a proposed resolution, of members or a class of members

Where the conduct complained of is either:

- Contrary to the interest of the members as a whole, or
- Oppressive to, unfairly (case) prejudicial to, or unfairly discriminatory against, a member or members.

2. Who can apply: **S 234**

- **Only member can apply, even you're oppressed as a D, you are a member.**
- Person removed from the register of members because of a selective capital reduction or oppressive behavior.

3. Tests:

Not oppressive:

- *Wayde v NSW Rugby League*: was D's decision one that no board of directors acting reasonably would have made? Ds' decision is reasonable here. (members not happy does not mean it is unfairly prejudice, not enough being prejudice only)
- *Thomas v HW Thomas*: policy of low dividends not oppressive. Members have different expectations that court balance.

Oppressive:

- Diversion of business opportunity (D take co's opportunity)
- Improper exclusion from management: voting out is not oppressive, is the reason
- Unfairly restricting dividends: may not be oppressive. Case above.
- Oppressive conduct of board meetings (small co)
- *Kokotovich Constructions v Wallington*: Share issue for improper purpose
- *Re Spargos Mining NL*: breaches of Ds' duties.
- Sale of co assets undervalue

4. What orders can the court make **S 233**

- Wind up
- Regulating the co's affairs
- Purchase of oppressed member's shares
- Appointment of a receiver
- Restraining sb from doing sth, or requiring to do sth.

2 ways of winding up a co: oppression remedy S 233 or winding up remedy on basis of oppression S 461.

➤ Winding up

S 461(1)(e) (f) (g) (k): Court can order winding up under application of member or others (creditor, ASIC), co does not have to be insolvent where:

- (k) Just and equitable (fair): *Re Tivoli Freeholds*: failure of substratum 根基 the bases of why the co has been established has lost, majority S.H. through control of board lent >70% of its funds for corporate raising; *Ebrahimi v Westbourne Galleries*: breakdown in mutual trust, personal relationship; Deadlock **or**
- (e) D acting in own interest, **or**
- (f) (g) Oppressive, unfairly prejudicial or unfairly discriminatory conduct

➤ Statutory injunction S 1324

GL injunction is only about future.

S 1324 is about past, present and future. Only deals with contravention of Act (must do or must not). Court can grant injunction on the application of ASIC or other (member, creditor, public...) to stop doing or requiring to do...

who can apply?

- ASIC
- *Allen v Atalay*: by sb whose interest have been affected, in this case, creditor
- *Airpeak v Jetstream*: by member, the court agree
- *Mesenberg v Cord*: by member, the court disagree

Statutory duties are enforced by ASIC, but co can use it against D for compensation. GL enforces by Co, ASIC has no power.

Both co get remedies, not members.

Issuing share capital **book P 413, figure 19.4**

S 124 (1)(a): co has the legal power to issue and cancel shares in the co

S 254 A (1): power to issue share includes the power to issue bonus shares; preference shares; partly-paid shares.

S 198 A: Decision of board

S 254 B: Co can determine the terms, rights and restrictions attaching to the class rights

S 181: must issuing for proper purpose, "but for" test

Share issue restrictions for Pty Ltd

Only pub co can issue Product Disclosure Statement (PDS), unless **S 708** applies, PDS must be prepared and lodged with ASIC

S 706: an offer of securities for issue needs disclosure to investors under this part unless S 708 says otherwise.

S 254 X: after issuing new shares, D must notify ASIC according to this section.

S 708: public co can issue shares without PDS, prop can issue shares

- **(1)**: personal offers to <20 investors and <\$2 m in 12 months
- **(8)**: sophisticated investors \$500k
- **(11)**: rich investors, professional investor, or control > \$10m assets

Members' approval required if:

- Variation of class rights **S 246 B**
If co sets out procedure in constitution, then follow. If not, then **S 246B (2)**
- Related party transaction
- Change to constitution **S 136 (2)**
- Issuing preference shares **S 254 A (2)**: following matters either put in constitution or need special resolution of the co

Approving certain co actions affecting share capital

- Buy backs of existing shares
 - S 257 B: selective buy backs require a special resolution on which any person whose shares are being bought back may not vote
 - S 208: buy back by pub co and their controlled entities from related parties of the pub co, needs approval under S 208
 - Provision of financial assistance

By co for acquiring shares in the holding co: **S 206 A**: financial assistance does not materially prejudice the interests fo co or its S.H. of co' ability to pay its creditors, approved under **S 206 B**

Share issue restrictions on Prop:

RR S 254 D: Pre-emption, look to existing S.H. <50 of that class in portion

S 113(1): maximum 50 non-employee S.H.

S 113(3): Prop can only offer shares to existing S.H. or employees or subsidiary co.

(S 254 M: partly paid shares)

Situations allowed without maintenance of capital

Maintenance of capital: in general, co must maintain its paid up share capital: *Trevor v Whitworth* can't give back early.

Law permits transactions that may impact on its equity capital through:

- Payment of permitted dividends
- The giving of permitted financial assistance
- Permitted share buy-backs
- Permitted reduction of capital
- Self-acquisition

➤ Restriction on payment of dividends

RR S 254 U (1): D may determine that a dividend is payable and fix...

S 254 V: if dividend hasn't been declared then can revoke

S 254 T (1): co may not pay a dividend unless:

- (a) The co's asset > liability and the excess is sufficient to pay its dividend before it declared and the excess is sufficient for the payment of the dividend, **and**
- (b) The payment of dividend is fair and reasonable to member as a whole

Consequences of breach

S 588 G: liable under this section

(2): person contravenes act if D had reasonable grounds for suspecting that dividend would result in insolvency. Civil penalty provision.

S 588 J & K: court may order D who incurred a wholly or partly unsecured debt to pay loss

S 588 M: co's liquidator can seek compensation if insolvent

Criminal: **S 588 G (3)** if act dishonest

S 184 (1)(2)(3): contravene **S 181 S 182 S 183**

➤ Financial assistance **S 206 A**

Only allows a co to financially assist the acquisition of shares in the co or its holding co if:

- It does not materially prejudice (case) the interests of the co or its S.H. or its ability to pay its creditors, **or**
- It is approved by S.H. **S 260 B or**
- It is exempt **S 260 C**

S 260 B S.H.'s approval

- i) Special resolution at general meeting, with no votes being cast in favour of the resolution by the person acquiring the shares, **or**
- ii) A resolution at GM by all ordinary S.H.

S 260 D consequences of breach S 260 A

➤ Self-acquisition