

Topic Five - The Constitution and Replaceable Rules

Saturday, 10 June 2017

3:29 pm

- **Note Links with other topics**
 - Shareholders holding classes of shares are given specific protection in Part 2F.2 of the *Corporations Act*. These provisions are dealt with in Topic 7
 - An alteration to the Constitution that amounts of oppressive conduct may be addressed by a statutory remedy such as the oppression remedy in s232 - see topic 9 Members' Remedies
 - **Terminology**
 - Pre 1 July 1998
 - Memorandum of association and either
 - Articles of association or
 - Table A or B rules or
 - Combination
 - Post 1 July 1998 - *section 134*
 - Replaceable rules; or
 - Constitution; or
 - Combination
 - **The transition lenses -Section 135(1)**
 - *A section or subsection (exception s129(1), this section and 140, 141) whose heading contains the words:*
 - *Replaceable rules - applies as a replaceable rule to:*
 - *Each company registered after 1 July 1998; and*
 - *Any company registered before 1 July 1998 that repeals its constitution after that day; and*
 - *Replaceable rule for proprietary companies and **mandatory rule for public companies** -- applies:*
 - *As a replaceable rule to any proprietary company registered after 1 July 1998; and*
 - *As a replaceable rule to any company that is or was registered after 1 July 1998 and that changes or changed to a proprietary company (only while proprietary); and*
 - *As a replaceable rule to any proprietary company that is or was registered before 1 July 1998 and repeals its constitution after that day; and*
 - ***As an ordinary provision of this act to any public company whenever registered***
 - Does not apply to a proprietary company while the same person is sole director and sole shareholder.*
- **Replaceable Rules:**
 - Can be displaced or modified by the company's constitution - *Section 135(2)*
 - 39 Provisions
 - Do not apply to sole director/sole shareholder companies
- **Constitution:**
 - Replaceable rules apply unless displaced or modified by the company's constitution - *Section 135(2)*
 - When can a company adopt a constitution?
 - On registration - *Sections 117 & 136(1)(a)*
 - After registration - *Sections 136(1)(b), (3) and (4)*
 - If company does not have one - by special resolution

- If a company has an existing constitution and wants to repeal it and adopt a new one - by special resolution and any further requirements specified in the existing constitution
 - **Special resolution defined!!!! S9**
 - In relation to a company, a resolution:
 - i. Of which notice as set out in paragraph 249L(1)© has been given; and
 - ii. That has been passed by at least 75% of the votes of **members entitled to vote** on the resolution.
- Why constitution??
 - To supplement rules where provisions not made for it by the RR's
 - To replace RR's that are unsuitable
 - To enshrine current RR's (immunise against legislative changes)
 - To restrict the company's objects
 - Recall no liability companies - constitution must state that the sole objective is mining purposes - *Section 112(2)*
 - Satisfy the ASX listing rules (listed companies)
- **Object clauses in constitutions: - Section 125**
 - *If a company has a constitution, it may contain an **express restriction on, or a prohibition of, the company's exercise of any of its powers.** The exercise of such powers is not invalid simply because it is contrary to an express restriction or prohibition*
 - *If a company has a constitution, it may **set out the company's objects.** An act of the company is not merely invalid for being beyond or contrary to these.*
 - Ultra vires doctrine abolished
 - S124 - a company has legal capacity and powers of an individual in and outside this jurisdiction
 - Gives certainty to 3rd parties.
- **Consequences for failing to comply with RR's/constitution - Section 135(3)**
 - Failing to comply with RR's as they apply is not of itself a contravention of this Act.
 - RR's that apply **have effect as a contract** - *section 140*
 - i. *A company's constitution and RR's that apply to the company have effect as a contract*
 - a. *Between the company and each member; and*
 - b. *Between the company and each director and company secretary; and*
 - c. *Between a member and each other member;*

Under which each person agrees to observe and perform the constitution and rules so far as they apply to that person.

 - *Unless a member of a company agree in writing to be bound, they are not bound by a modification of the constitution made after they became a member so far as the modification:*
 - *Requires the member to take up additional shares; or*
 - *Increases the member's liability to contribute to the share capital of, or otherwise pay money to, the company; or*
 - *Imposes or increases restrictions on the right to transfer the shares already held by the member, unless the modification is made:*
 - *In connection with the company's change from public to proprietary; or*